wexinc.com
One Hancock Street
Portland, ME 04101

January 2, 2024

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N–5655
U.S. Department of Labor
200 Constitution Ave. NW, Washington, DC 20210
Attention: Definition of Fiduciary—RIN 1210–AC02

Re: Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 1210-AC02)

Dear Assistant Secretary Gomez:

Thank you for the opportunity to provide comments on the proposed amendments to the Department of Labor's (Department) investment advice regulation (Fiduciary Rule or Rule) and the related prohibited transaction exemptions referred herein (collectively, Fiduciary Proposal or Proposal).

WEX, Inc. ("WEX") is an IRS-designated nonbank custodian of Health Savings Accounts (HSAs) and also a leading independent recordkeeper for our HSAs for which other organizations are trustees. We are trustee for approximately 2.2 million HSAs and recordkeeper for more than 7.5 million, inclusive of those for which we are trustee.

The Proposal would expand the circumstances under which a person is considered a "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended (ERISA), or the Internal Revenue Code of 1986, as amended (Code).[1] The Fiduciary Proposal provides (i) a new regulatory definition of "fiduciary" when a person renders investment advice for a fee or other compensation for purposes of Title I and Title II of ERISA, and (ii) related proposed amendments to Prohibited Transaction Exemption 2020-02 (PTE 2020-02) and several other administrative exemptions from the prohibited transaction rules applicable to fiduciaries under ERISA.[2]

The Fiduciary Proposal's definition of Individual Retirement Account (IRA) expressly includes HSAs.[3] I am writing to you to request that the Department expressly exclude

---

[1] *See* 29 C.F.R. § 2510.3-21 (2023) (Definition of "Fiduciary"). Section 2510.3-21(c) covers the investment advice prong of the Fiduciary Rule's definition of fiduciary.
[2] *See* U.S. Department of Labor, Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 *Fed. Reg.* 75,890 (2023) (Fiduciary Rule); 88 *Fed. Reg.* 75,979 (PTE 2020-02); 88 *Fed. Reg.* 76,004 (PTE 84-24); 88 *Fed. Reg.* 76,032 (PTEs 75-1, 77-4, 80-83, 83-1, and 86-128).
[3] *See* 29 C.F.R. § 2510.3-21(f)(3) (proposed) ("The term 'IRA' means . . . an individual retirement account . . . and a health savings account"). Fiduciary Proposal, 88 *Fed. Reg.* at 75,978.

health savings accounts from coverage under the Fiduciary Rule because of the significant differences between IRAs and HSAs, and to set forth our position as to why we believe that HSAs should be so excluded from the Rule.

Devenir Research, in its 2022 Joint Demographic Study with the American Bankers Association's Health Savings Account Council, estimates that as many as 70 million Americans pay for routine healthcare expenses using approximately 35 million HSA accounts. Under Section 223(d) of the Code, HSAs are by definition individually owned accounts established exclusively to fund health care expenses. Unlike IRAs, HSAs are not established as retirement accounts with the primary purpose of funding retirement income needs.

Investments are merely an optional feature of HSA arrangements with fewer than 7% of accountholders employing this arrangement, meaning the vast majority of accountholders (93%) don't invest at all. Indeed, many HSA custodians do not even offer an investment feature. Rather, HSAs allow ready access to consumer funds in deposit-type accounts through the use of debit cards as a convenient way of paying for routine medical expenses like doctor's office visits.

More importantly, unlike IRAs, HSAs are precluded from accepting significant rollovers from ERISA-covered retirement plans. Although HSA account owners may roll over funds from an IRA to an HSA, they can only do so once in their lifetime and they can only do so if they are eligible to make a contribution to their HSA for the tax year. Further, the amount they roll over is limited to their HSA contribution limit for the tax year, which for 2023 is $4,850 for singles ($3,850 for individuals under age 55) and $9,750 for married couples ($7,750 if both spouses are under age 55).[4] Although this is referred to as a rollover because the funds originate from another tax favored account, it is basically just another way to make an HSA contribution, because it reduces/eliminates the HSA accountholder's ability to make an HSA contribution for the year.

Application of the Fiduciary Rule to HSAs would significantly and unnecessarily increase the cost of offering HSAs, meaning fewer custodians would enter or continue in this business, thereby restricting HSAs from achieving their congressionally mandated purpose, which is to provide Americans with a convenient source of funds for qualified health care expenses.

For the reasons set forth below, we believe that HSAs should be excluded from the Fiduciary Rule.

[4] The one-time HSA rollover feature is infinitesimal compared to the IRA rollover feature, which is unlimited in both frequency and dollar amount. The average IRA rollover is approximately $100,000 according to the Employee Benefits Research Institute.

HSAs are Distinguishable From IRAs and Other Retirement Investment Arrangements and Should Be Excluded from the Proposed Rule

After justifying the need to regulate IRAs under the proposed Rule due to their role as a pass through of ERISA-covered retirement funds, the Department summarily swept in other tax favored accounts (including HSAs). The Department has relegated to a mere footnote its solicitation of comments on whether it is appropriate to regulate HSAs as if they were IRAs.[5] WEX believes that the answer to this question is a resounding "No." HSAs should not be treated like IRAs under the Fiduciary Rule.

Under Section 223 of the Code, HSAs are individually owned trust or custodial arrangements established, "exclusively for the purpose of paying qualified medical expenses." Thus, unlike IRAs, which serve solely as investment-oriented retirement arrangements, HSAs serve as deposit-type arrangements maintained by accountholders for current health care expenses with funds that are readily accessible by online bill pay, check, or debit card access for current medical needs.

Congress, while incorporating some of the rules applicable to IRAs, recognized that HSAs were fundamentally different than IRAs, and thus subject to different rules. By way of example, while Congress incorporated certain prohibited transaction rules applicable to IRAs in Section 408(e)(4), HSAs are not permitted to be commingled with retirement assets as is allowed for IRAs under Section 408(e)(6). Likewise, in DOL Field Assistance Bulletin (FAB) 2006-02, the DOL acknowledged that even though HSAs were subject to the Code prohibited transaction rules, HSAs were significantly different from IRAs so as not to allow wholesale adoption of the IRA prohibited transaction exemptions (PTEs).[6] Courts have likewise differentiated HSAs from retirement investment accounts due to the ability to access funds freely and without penalty for current medical expenses.[7]

The Department notes that the primary justification for extending the reach of the statutory conflict of interest provisions beyond their reach is its concern that "as baby boomers retire, they are increasingly moving money from ERISA-covered plans, where their employer has both the incentive and fiduciary duty to facilitate sound investment choices to IRAs."[8]

This risk simply does not exist with respect to HSAs. HSAs are statutorily prohibited from accepting significant funds from IRAs or other ERISA-covered plans.[9] As a result, blanket

[5] See 80 Fed Reg. 21947

[6] *See* FAB 2006-02 (October 27, 2006).

[7] For example, courts have found that the ability to instantly access HSA funds without penalty distinguishes them from IRAs and other retirement plans for state bankruptcy law purposes. See *Roup v. Commercial Research, LLC, 2015 WL 3452615 (Colo. 2015). Available at* ***https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2014/14SC50.pdf***

[8] See 80 Fed Reg. 21932

[9] While Section 408(d)(9) of the Code allows for a limited once in a lifetime time opportunity to rollover IRA funds, the maximum rollover amount is reduced by any contribution made that year and is capped at that year's contribution limitation (currently $3,850 for an individual and $7,750 for a family). Our experience is that this provision is seldom (if ever) utilized. See also, footnote 5.

application of the investment rules applicable to deferred compensation plans (and for that matter even IRAs) is regulatory overreach and inappropriate. The Proposed Rule should specifically exclude HSAs since HSAs do not include ERISA-covered funds and HSAs operate more like retail bank and savings accounts than depositories of retirement plan funds.

Application of ERISA-Type Investment Rules is Inappropriate for HSA Deposit-Type Arrangements

The Department implicitly acknowledged that ERISA is ill-suited for application to HSAs when it adopted specific rules carving out the vast majority of HSAs from ERISA coverage in DOL FAB 2004-01 and DOL FAB 2006-02. Indeed, we are unaware of any HSA arrangements that are currently subject to ERISA regulation. This broad exception is warranted given that the vast majority of HSA account owners - 93 % - have no investments whatsoever.[10]

While HSA accountholders may be allowed an investment option if/when HSA assets exceed a certain threshold level, only a small minority of accountholders (less than 7%) utilize such options and any investment activity is ancillary to providing a ready source of funds for current medical expenses. Indeed, the average HSA balance is less than $3,230 with approximately 61% of accounts having less than $1,000.[11]

These amounts are just slightly more than the amount necessary to cover a single year's deductible since the average HSA-qualified HDHP deductible is $2518 for single coverage and significantly less than the $4674 deductible required for family coverage.[12] Moreover, more than 70% of annual contributions to HSAs are withdrawn each year to pay for current expenses.[13] These numbers underscore the true function of these accounts as deposit-type accounts for current health expenses -- far from the DOL's view that HSAs are savings accounts or investment vehicles warranting protection from loss of assets set aside solely for retirement. As deposit-type accounts, HSAs already are subject to numerous federal and state banking requirements and to the regulatory agencies. The imposition of an additional layer of regulation as set forth in the Proposed Rule will unnecessarily increase costs and reduce the effective rate of return.

Congress already concluded that the imposition of investment requirements is unnecessary for deposit-type arrangements (See Code Section 4975(d)(4)). Consequently, the option to deposit HSA funds in two or more interest bearing accounts shouldn't be considered "investments" or "investment advice" for purposes of these rules. Choosing such an account is no different than choosing which checking account to establish—an activity in

[10] https://www.devenir.com/wp-content/uploads/2023-Midyear-Devenir-HSA-Research-Report-Executive-Summary.pdf

[11] https://www.devenir.com/wp-content/uploads/2023-Midyear-Devenir-HSA-Research-Report-Executive-Summary.pdf

[12] The Kaiser Family Foundation and HRET Employer Health Benefits 2023 Annual Survey, Section 8.

[13] According to the Devenir Research report "2023 Midyear HAS Market Statistics and Trends, during the five years of 2018-2022, $203.4 billion was contributed to HSAs and $149.6 billion (73.5%) was withdrawn.

which most if not all HSA accountholders have sufficient experience. Therefore, the purported investment protections of the Proposed Rule need not be extended to such actions and language should be added to clarify that the Proposed Rule does not apply to funds held in an HSA since any investment activity is at most incidental to its function. At a minimum, the Department should exclude funds held in a deposit type arrangement with an HSA custodian or trustee.[14]

If HSAs Are Not Excluded From the Proposed Rule, the Platform Provider Exception Should Apply

As noted above, the Department acknowledged that it was blazing new ground when it included HSAs within the definition of IRA and solicited comments on application of the Proposed Rule through such incorporation. As outlined above, we believe such an approach is overly broad given the nature of HSAs, the ancillary nature of any investment activity, and the immaterial relationship between HSAs and ERISA plans. However, if the Proposal is ultimately made applicable to HSAs, WEX believes that HSAs should be eligible for the platform provider exception. In most cases the HSA trustee or custodian is selected by an employer or exchange provider.

As noted above, the transactional nature of HSAs makes them distinguishable from IRAs. Moreover, unlike IRAs, HSAs do not receive funds from arrangements previously subject to ERISA's conflict of interest requirements. Health insurance exchanges (both private and public) have selected HSA custodians and trustees as business partners. As a result, HSA accountholders are not without a third party looking out for their interests. DOL carefully considered and recognized the scope of employer involvement in HSA arrangements in FAB 2004-01 and FAB 2006-02 and, while it concluded that ERISA was not applicable, DOL acknowledged the important role employers play in selecting HSA service providers.

Based on this carefully considered DOL guidance it is common for employers to take an active role in selecting an HSA custodian and to facilitate the establishment of employee-owned HSAs. Consistent with the DOL FAB guidance employers routinely engage in one or more of the following on behalf of their HSA account holders:

- Select an HSA custodian or trustee for employer sponsored arrangements;
- Open an HSA account on behalf of consenting employees to receive employer contributions;
- Fund the HSA with employer contributions;
- Limit payroll deductions and employer contributions to a selected HSA custodian/trustee;
- Pay a portion of the HSA administration fees assessed by the custodian or trustee;
- Decide whether to offer their own 401(k) menu of investment options or select an HSA custodian or trustee that offers its own "menu" of self-directed HSA investment options.

[14] We note that even though structured as deposit type accounts, HSAs qualify as a bona fide trust/custodial account for purposes of certain bank regulatory requirements.

wex™

Notwithstanding this significant employer involvement, which might be considered "endorsement" (e.g., for purposes of determining whether ERISA applied under the voluntary safe harbor provisions of 29 C.F.R. § 2510.3-1(j)), the Department concluded that ERISA did not apply. In this unique role, employers (and organizers of public and private exchanges) wield sophisticated bargaining power in selecting an HSA service provider more analogous to a commercial transaction between two informed companies. This is in stark contrast to the typical IRA arrangement where the employer has no involvement at all (indeed employer contributions to IRAs are generally prohibited).

It is also important to note that HSA custodian/trustees must make available a slate of investment options that is acceptable to all of their employer sponsored HSA arrangements. This same menu of investment options is generally made available by the trustee "enterprise-wide" to individuals who set up an HSA outside of the employer context as well as those who establish an HSA through an employer, similar to "platform providers who merely identify investment alternatives using objective third-party criteria . . . without additional screening or recommendations based on the interests of the plan or IRA investors."[15] Thus, the exception for HSAs from the Proposed Rule should apply across the board. The same rule can apply to HSAs generally.

Most significantly, in the FAB guidance, the Department concluded that the interests of HSA account holders were adequately protected in part because HSA assets could be readily withdrawn or transferred to another HSA. This continues to be the case for all HSAs regardless of their origin, as HSA account funds can be withdrawn at any time and used for qualified medical expenses (or any other purpose) or rolled over to another HSA arrangement.

In light of the foregoing, we believe that the platform provider exception should be clarified to specifically apply to HSAs.

If HSAs Are Not Excluded From the Proposed Rule, DOL should revise PTE 2020-02 and define "financial institution" for purposes of PTE 2020-02 to include IRS-approved nonbank custodians.

As noted above, the Department's Proposal expands the definition of an Investment Advice Fiduciary in the Proposed Rule and includes HSAs in its scope. If HSAs are not excluded from the Proposed Rule, HSA providers may be deemed an investment advice fiduciary whenever compensation is received in connection with an HSA-related investment arrangement. As such, certain HSA service providers, like other investment advice fiduciaries, may need to avail themselves of PTE 2020-02 (the "Proposed Exemption") to receive reasonable compensation in connection with their HSA services.

However, IRS-approved nonbank custodians were not expressly included in the definition of a "Financial Institution" eligible for the relief provided by the Proposed Exemption.

[15] Proposal, 88 *Fed. Reg.* at 75,908.

Given that nonbank custodians are expressly authorized by Congress and approved by the IRS to administer HSAs, we believe that this may have been a simple oversight, and we note that the Department has specifically requested comment on the definition of "Financial Institution" and whether any other type of entity should be included.

Congress has provided the IRS with authority to approve nonbank custodians to administer HSAs. To be approved, nonbank custodians must meet the requirements of the Internal Revenue Code, Treasury Regulations and IRS guidance. They also must file an application with the IRS and satisfy the IRS that they can meet the same standards as similar financial institutions for the administration of HSAs. They are also subject to regular IRS audits to help ensure their compliance. And, IRS-approved nonbank custodians are currently responsible for administering a significant portion of existing HSAs.

Without including IRS-approved nonbank custodians within the definition of "Financial Institution," the nonbank custodians would no longer be able to receive reasonable compensation for their services and may, therefore, no longer be able to provide them, which contemplates their potential exit from the market. The result would be disruption for the many employers and their employees who currently utilize IRS-approved nonbank custodians for HSA administration, as they would need to find new HSA providers and transfer account balances to new custodians. Transfers like this imply accompanying costs, liquidation of investments and blackout periods, none of which benefit the consumer.

Another result would be further consolidation of the HSA service provider market, leading to less competition amongst providers, less choice for employers and, potentially, less innovation and fewer helpful services for HSA account holders.

Accordingly, we believe that since IRS-approved nonbank custodians play an important role as HSA custodians, they should be included in the definition of "Financial Institution" and thus eligible for the relief provided by the Proposed Exemption.

The Proposed Rule Should Clarify That HSA Trustees/Custodians Do Not Provide Individualized Investment Advice by Merely Providing a Menu of Pre-selected HSA Investment Options

As noted above, the vast majority of HSAs are deposit-type accounts and should not be subject to the investment related requirements of the Fiduciary Proposal. Nonetheless, even if the Proposal is ultimately considered to apply to HSAs, HSA trustees/custodians that provide a menu of investment options for employer groups are not providing such options based on the particular needs or individual circumstances of the HSA accountholder.[16]

Rather, HSA custodians and trustees generally make available a reasonable menu of investment options (typically, mutual funds regulated under the Investment Company Act). In some cases, the "menu" may be open-ended (i.e., a so-called self-directed brokerage

[16] *See* 29 C.F.R. § 2510.3-21(c)((1)(ii) (proposed), 88 *Fed. Reg.* at 75,977.

account) or may be pre-selected (e.g., by an RIA selected by the HSA custodian or trustee), although not with an eye to the particular needs or individual circumstances of any HSA accountholder.

Employers are then free to evaluate the HSA custodian or trustee (including the suitability of investment options) and choose to select or not select the services of that custodian or trustee. Given the intervening role of the employer (or exchange), no individualized advice is provided when an HSA trustee or custodian makes a menu of investment options available through an employer group.

Instead, HSA custodians take significant steps to make it clear to employers and HSA accountholders that the particular needs or individual circumstances of any accountholder is not considered. The role of an HSA custodian/trustee does not change this result.

Instructive in this regard is DOL's prior guidance under FAB 2006-02. In that guidance, DOL carefully considered the role of selecting a "menu" of HSA investment options and determined that an employer would not be "influencing or making an investment decision" when it selected an HSA trustee or custodian that offered the trustee/custodian's own proprietary menu of investment options. This FAQ is reproduced below:

> **Would an employer be viewed as "making or influencing" the HSA investment decisions of employees, within the meaning of the FAB, merely because the employer selects an HSA provider that offers some or all of the investment options made available to the employees in their 401(k) plan?**
>
> No. The mere fact that an employer selects an HSA provider to which it will forward contributions that offers a limited selection of investment options or investment
>
> options that replicate the investment options available to employees under their 401(k) plan ***would not, in the view of the Department, constitute the making or influencing of an employee's investment decisions*** giving rise to an ERISA-covered plan, so long as employees are afforded a reasonable choice of investment options and employees are not limited in moving their funds to another HSA. The selection of a single HSA provider that offers a single investment option would not, in the view the Department, afford employees a reasonable choice of investment options.[17]

As noted above, providing a menu of HSA investment options does not rise to "making or influencing an [individual] investment decision" as long as employees are afforded a reasonable choice of investment options and can move HSA funds to another HSA (which is always the case).

In conclusion, for the reasons stated above, WEX believes that HSAs should be excluded from coverage under the Fiduciary Proposal. At a minimum, the Department should

[17] FAB 2006-02, *supra*.

exclude funds held in a deposit type arrangement with an HSA custodian or trustee and/or should clarify that the platform provider exception should apply to HSAs.

Finally, the Department should expand the definition of "Financial Institution" to include IRS-approved nonbank custodians so that they may be eligible for relief under PTE 2020-02 and continue to provide services, as Congress intended.

Thank you for the opportunity to express WEX's views with respect to the Fiduciary Proposal. We would be happy to answer any questions the Department may have.

Sincerely,

Christopher M. Byrd
Senior Vice President, Government Affairs