



# Employer Responsibilities for HSAs Under the New DOL Fiduciary Standards



In the wake of the issuance of the new Department of Labor (DOL) regulations concerning fiduciary responsibilities, many employers were left confused as to their new duties under the rules. The regulations cast a wide net applicable on all retirement and investment products, and included not only investment advisors and vendors, but also employers that sponsor retirement plans subject to Title I of the Employee Retirement Income Security Act of 1974 (ERISA). The April 2016 rules established new measures that, for the first time, employers must undertake in the planning and delivery of their employee retirement plans. The regulations also apply to a broader list of products; they apply not only to traditional retirement products such as 401(k)s, but also now include Health Savings Accounts (HSAs), which has contributed to the confusion and concerns of employers who make HSAs available to their employees. While HSAs aren't normally thought of as a retirement vehicle, the DOL broadened the scope of the rules to include these plans due to their long term savings and investment aspects.

The new DOL regulations have raised a lot of questions that still need answers. This lack of clear determination leaves much open to interpretation and our top recommendation is that employers carefully analyze their retirement and benefit programs with qualified counsel. As it pertains to an employer's HSA program, the general consensus within the industry is that the new regulations do not automatically require employers offering HSA plans to be considered fiduciaries, but this is one of the first questions an employer will need to answer for their HSA plan. However, while there may be no technical or legal responsibility of an employer to act as a fiduciary for their HSA plan, we strongly recommend that employers evaluate certain features of their plans as a best practice to mitigate risk for themselves and their employees.

While ultimately the steps taken to ensure compliance with the rules will be unique to each employer group, there are some foundational components of the rules that hold true in many cases. Additionally, there are some requirements that apply to all employers, regardless of whether they are a fiduciary or not. This paper will attempt to highlight some of these components, especially as it pertains to employers offering HSAs within their benefit structures. For a background and overview on the regulations, please see our previous white paper entitled, "DOL Fiduciary Standards: Potential Impact on HSAs," which can be accessed at [www.hsabank.com/DOL-Fiduciary-Standards](http://www.hsabank.com/DOL-Fiduciary-Standards).

Finally, employers will want to pay close attention to the regulatory environment in the coming months as the administration continues to assess the rule prior to the January 1, 2018 full implementation date.



## New Responsibilities for Employers

At the core of the new regulations is the requirement that advisors, product providers, and (potentially) employers all act in a fiduciary capacity on behalf of participants, and as such, must ensure that they are acting in the best interest of the customer. Whether or not an employer has a fiduciary responsibility depends on the individual circumstances of their retirement and benefit structure and their involvement with it, but for many plan sponsors of retirement plans, their relationship with both providers and participants may fundamentally change under the new regulations. These plan sponsors are going to have new responsibilities that they have not previously had, and will require higher levels of oversight. They may have to:

- Know and understand the structures of fees within their plans, and specifically the flow of money with regard to what and how their providers get paid within their programs.
- Take appropriate measures to ensure that the fees charged to participants within their program are appropriate and fully disclosed.
- Review their education and communication materials and practices to ensure that they are appropriate and do not constitute investment advice or recommendations.
- Potentially make changes to the investment (or vendor) options within their plans.
- Potentially initiate new contracts or addendums with their vendors as a result of the above impacts.

The four main areas of concern are: account structures, appropriate fees and disclosures, investments, and communication and educational materials. Again, even if an employer is not a fiduciary, we encourage all groups to understand these same concerns and take them under advisement in the evaluation and delivery of their own plans.

### 1. HSA Custodial Structures

HSAs are individually owned trust accounts, and are the sole property of the account owner. The decision to open and use an HSA is the employee's (account owner). However, it is very common for employers to act on the behalf of their employees in the administration of their benefit structure; for example, processing pre-tax employee contributions via a salary reduction agreement. To simplify the impact and cost on both the employee and employer, most employers select an HSA custodian to offer to their employees. While most undoubtedly go through some type of selection process to pick the custodian to offer to their employees, there are a few issues that should be considered in the process.

*Employers will want to know the answers to these questions: Where are the funds located, and how are they being protected? Are they FDIC insured? What criteria is the vendor using to vet the banks or insurance companies that hold cash, and how often are they being evaluated? What safeguards are in place to ensure the record keeping and the assets balance for each participant? What notice is provided when funds are moved among banks or annuity contracts? All of these questions are examples of information that the employer will want to ask, understand, and document with omnibus structures.*

*At first glance, this list of questions may appear to be too detailed, but even if an employer is not a fiduciary under the rule, most will want to perform due diligence on their vendors, and arrive at a determination that their vendors are acting in the best interest of their employees. Knowing where those employees' assets are being held, and how they are being safeguarded is a necessary part of this oversight. While these questions are fundamentally the same for both DDA and omnibus-based structures, the reality is that the 1:1 nature of DDAs is easier to vet than omnibus because of the added complexity of vetting the recordkeeping practices as well as the individual depositories. There may be functional limitations of omnibus structures as well (inability to direct deposit/ACH into accounts, inability to write checks, etc.), but the stewardship of the employee assets is the primary concern on behalf of the employer.*

One such important consideration is their understanding of the account structure.

HSA custodians fall into two different categories: bank custodians and non-bank custodians. The assets of the HSAs are kept in trust by both types of custodians; however, where and how the actual assets are held differs. Banks are typically going to structure their HSAs into Demand Deposit Accounts (DDAs) whereby each account owner's assets are held in a separate and unique account within the custodian bank. Since non-bank custodians don't actually hold the assets of the HSAs, they are effectively record keepers only, and in turn, often place the assets of the HSAs

into one omnibus account held at a separate bank. While this is a common occurrence, the issue for employers is one of knowing and understanding these structures.

Omnibus structures are nothing new, nor unique to non-bank HSA custodians. However, there are a few inherent risks associated with omnibus structures that employers should take steps to mitigate. Non-bank custodians often use several different banks and insurance companies for the placement of these assets, and may even move the funds around to different banks at their discretion. Under the new guidelines, full disclosure of these structures may be required. It is important that employers are provided with all the necessary documentation so that they can be made comfortable in the use of omnibus structures.



## 2. Fees and Disclosures

Closely connected to account structure oversight are fees and disclosures. All custodians are going to have fees or features related to various components of their products, but employers should make sure they understand these and feel they are appropriate. To comply with federal regulations, HSA custodians are already required to properly disclose these elements (such as fees and interest rates) to the account owner, but will now start providing this information on a clearer basis to the employer groups as well. Employers conducting due diligence will want to make appropriate determinations and document their decisions. This does not mean that they need to pick the lowest cost alternative, but they should make sure that the fees and components are at least in line with similar vendors, and that the vendor is taking the appropriate steps to disclose this information to participants. This will be especially true as it pertains to interest rates and investment offerings.

## 3. Investments

Investment offering is likely where employers will feel the most confusion. Since the start of the HSA industry, most custodians' investment offerings have either been structured as a "menu" of mutual funds arranged across a broad mix of asset classes, similar to a 401(k) offering, or a self-directed investment portal. There is nothing wrong with either of these structures, however one of the responsibilities for fiduciary employers that is highlighted by the new rules is to know and understand what investments are being offered, how their fee structures work, and how the investment options offered were selected. Although employers are not generally fiduciaries with respect to HSA arrangements, they will still want to evaluate whether the

investments are structured with the best interests of their employees in mind.

*Employers will want to make sure that their selected vendors provide all disclosures necessary to comply with the fiduciary rule. Best practices dictate that they document that they have asked for and received this information, as well as document the reasons that they ultimately made the decision of one vendor versus another. HSA vendors will have heightened disclosure obligations, and employers should take advantage of that information for the benefit of their employees. This information should be reviewed on the beginning of a service contract, as well as on a regular frequency.*

For example, an employer will want to know the following: How did the custodian arrive at the fund list? Assuming that they used a Registered Investment Advisor (RIA) to build the list, how and why were those funds selected? What are the fees and are they in line with fair expectations? Who is earning revenue on the investments, and how much? How does this compare with other custodians in the space?

## 4. Communication and Education

This area actually applies to ALL employers, regardless of whether they are fiduciaries; however, it is possibly the easiest area for an employer to comply. As a part of the regulations, guidance was established outlining key concepts around "investment advice" and "recommendations." Employers will be subject to the fiduciary rule if they provide investment advice or recommendations for a fee or other compensation, directly or indirectly. While most employers would not receive compensation in connection with an HSA arrangement, the reference to indirect compensation is important. If an HSA vendor offers a discount on other products and services, for example, prior guidance from the DOL suggests that fiduciary and prohibited transaction rules may arise. To mitigate these risks, employers will want to review the communication and educational resources that they deploy for their plans to ensure that nothing they are delivering can be construed as "investment advice" or making a "recommendation" as defined under the new guidance. For instance, it is perfectly acceptable (i.e., does not impose any fiduciary duties or restrictions) to provide general investing educational resources to employees, however if the message of that education directs employees to pick (or favor) certain investments or take certain actions

as it relates to their individual investment choices, that is inappropriate (i.e., must be done in a way that's consistent with fiduciary duties and restrictions). Additionally, this review extends to not only the employer's own resources, but any of the employer's vendor's communication and educational resources as well, unless the vendor acknowledges its fiduciary status and complies with an exemption under the rule. This review should be done on an initial and an ongoing basis, and a record of the review should be documented.

## Help for Employers

*At first glance, this may sound a bit daunting for employers. However, it really isn't a far stretch from the current processes that most employers undertake in the planning, selection, and delivery of their retirement and benefit programs. The fiduciary rule will require new disclosures. Employers should take full advantage of that information in the vendor selection process. HSA custodians, or any vendor for that matter, should be providing the necessary information to the employer so that they can effectively manage their vendor selections and program delivery. As stated previously, we do highly recommend that employers engage their own counsel to help with the overview and compliance of their entire retirement and benefit plans, but there should be plenty of support made available from reputable vendors.*

*Vendors should have systems to provide the necessary information, including full disclosure of account structure, fees, investments, and all elements of their product offering. From there, the employer should be able to quickly and accurately make determinations on the compliance of their plans. Additionally, employers may want to review their formal agreements with their vendors – these requirements may necessitate either new contracts or addendums with their vendors. With all of this in mind, employer oversight of HSA plans should be an easily accomplished task.*

**For information on how HSA Bank can help you adhere to the DOL's new regulations, please visit [hsabank.com](http://hsabank.com) or contact Business Relations at 866-357-5232.**

## About the Author

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As SVP, Chief Revenue Officer, Kevin is responsible for leading the growth strategy and sales operations for the organization. Kevin has over 20 years of experience in banking, insurance and financial services, covering a diverse spectrum of employee benefits and insurance products and services. In addition to his years of experience in managing sales operations, he has a diverse background in operations, as well as legislative and regulatory affairs. Kevin has served as president of a number of industry and private organizations on a local and national level. He serves on the Healthcare Trends Institute's Editorial Advisory Board and is a board member and Compliance Committee Chairman of the American Bankers Association HSA Council. He earned his Bachelor's degree from Marquette University.

## About HSA Bank

HSA Bank is a trusted leader in consumer-directed healthcare (CDH), focusing on Health Savings Accounts (HSAs) for over two decades and serving as both the bank and administrator. Discover how we can support your benefits strategy with our comprehensive account-based health benefit solutions that include HSAs, Flexible Spending Accounts (FSAs), Health Reimbursement Arrangements (HRAs), and Commuter Benefits. With a reputation for outstanding service and thought leadership in the CDH space, we offer one platform and one portal for all of our members. HSA Bank inspires over 2 million members and more than 35,000 employer groups to own their health by making it easy to access, understand, and afford healthcare. HSA Bank has over \$5 billion in total assets, and is a division of Webster Bank, N.A., Member FDIC. [www.hsabank.com](http://www.hsabank.com)

