DOL Fiduciary Standards: Potential Impact on HSAs

After months of anticipation about the Department of Labor's (DOL) proposed regulatory fiduciary standards guidance, the final DOL regulations were issued on April 6, 2016. More than five years in the making, this guidance impacts many different aspects of retirement plans and some aspects of health benefits, such as Health Savings Accounts (HSAs). These changes entail wide-sweeping impacts to a number of different plans and products that an employer may utilize within their retirement and benefit offerings. While the 600 pages of new regulations were not specifically targeting HSAs, these health accounts were explicitly identified as subject to the new rules. As they pertain to HSAs, this white paper provides a simplified explanation of the regulations and their impact on HSA administrators, advisors, and employers/plan sponsors.

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Background

The genesis of these rules was designed to target specific circumstances of what could best be described as "questionable" business practices – such as encouraging individuals to roll over retirement savings into IRAs and invest in high cost annuities in situations that benefit the person giving the advice.

While the DOL originally sought to address these types of situations, at some point the scope of their efforts broadened to essentially revamp the fundamental responsibilities of advisors, and treat more persons providing investment products and services as fiduciaries.

The ultimate goal was to afford a greater level of protection to consumers when being offered (and when purchasing) investments held within these plan structures. The rules now extend to a host of plans including:

- pension plans and 401(k) plans
- tax-favored accounts that are subject to the "prohibited transaction" provisions in the Tax Code:
  - Individual Retirement Accounts (IRAs)
  - Health Savings Accounts (HSAs)
  - Archer Medical Savings Accounts (MSAs)
  - Coverdell Education Savings Accounts (ESAs)

Pension and 401(k) plans are subject to the fiduciary and the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA). The remaining accounts described above are not generally subject to ERISA, and were created under the Internal Revenue Code (IRC). As such, they fall within the jurisdiction of the Department of the Treasury, and are enforced by the Internal Revenue Service. However, authority over certain issues related to "prohibited transactions" under Section 4975 of the IRC was transferred to the Labor Department under Executive Order 12108 in 1978. Accordingly, the DOL has the authority to implement and administer the fiduciary and prohibited transaction rules in the Code. Under this latest guidance, the DOL has asserted that its authority now extends to not only retirement plans, but also other non-ERISA plans (such as HSAs) and captures these plans in the scope of the final rules.

One such component is making sure that communication and education resources do not cross over to where a participant might view them as a suggestion or advice.

Overview of the Regulations

At the core of the regulations is the establishment or clarification around several key definitions. The most significant are the concepts of "fiduciary" and "investment advice." The rule broadly identifies any person or entity that provides "investment advice" for a fee or other compensation (direct or indirect) related to any aspect of these plans as a "fiduciary." Much of the guidance focuses on the definition of "investment advice," and in doing so, potentially encompasses many activities that frequently occur within pension and other plans subject to the rule not previously considered "investment advice." The rules also provide guidance surrounding what constitutes a "recommendation" with respect to plans and individual participants. One such component is making sure that communication and education resources do not cross over to where a participant might view them as a suggestion or advice.

Potential Impact on HSA Administrators and Advisors

HSA Bank is working diligently to identify the key steps that they and their customers must take to comply with the new rules. Like all regulations such as this, the rules say that "you must comply," but don't necessarily identify "how to comply." Additionally, keep in mind that these rules are much broader in impact than just HSAs and will take time to ensure that the correct steps to comply are identified and taken.

Many HSA administrators are banks and, by nature, are used to acting in a fiduciary capacity, but it does take time to implement full compliance across an entire enterprise. Arguably, banks will have a much easier time complying with the new rules than non-bank administrators who will now have to institute additional oversight measures on all of the depositories and vendors that they use.

Regardless of structure, there are some likely impacts that are going to be necessary. These include:

- Ensuring that the fees charged to participants within their program are appropriate and fully disclosed.
- Reviewing their education and communication materials and practices to make sure they are appropriate and do not constitute advice and recommendations.
- Potentially changing the investment options within their products.

- Potentially needing new contracts or addendums with employers as a result of the above impacts.

While this is not meant to be an exhaustive list, it points to the range of impacts that should be addressed. The specific changes are still being worked out, but these types of efforts are undoubtedly going to occur. The process will take several months to work through, especially when considering that this will want to be applied to an entire enterprise operation. Webster Bank (HSA Bank's parent company) is working diligently on this right now to ensure we fully comply with the rules. Our partners are also working in tandem with us to ensure compliance with the new rules and with communication to employer groups regarding the issue.

Additionally, as it pertains to advisers, the rules expand the requirements on how fiduciaries are required to act in the best interest of plan participants and beneficiaries. This "best interest standard" not only requires fiduciaries to act in the best interest of HSA accountholders, but also that they provide much higher levels of disclosure and transparency. Failing to adhere to the rules puts advisors at risk of penalties and lawsuits.

Potential Impact on Employers

Employers whose employees have HSAs were not the main targets of the regulations, and in most cases these rules will not increase potential risk or liability to employers. Employers may be impacted by the rule if they provide information to their employees about HSAs which crosses the line from general investment education to investment advice, or if they benefit in some way from the advice being given. Examples of the latter might include the employer receiving revenue sharing in connection with specific HSA investments suggested by financial planning tools it provides, or an employer receiving bonuses for steering employees towards particular HSA vendors. Most employers in those situations are likely to want to scale back those activities and/or revise their compensation arrangements. Information from other parties like HSA vendors and their own carrier partners, which the employer merely makes available or passes along without endorsement, and investment lineups assembled by platform providers over which the employer has no say, should not have to be taken into account.

Employers that are plan sponsors of retirement plans subject to ERISA may be directly affected by the rules, and should engage their counsel to begin the work of identifying steps (and ultimately complying with the steps) to meet the new guidelines.

> ***Failing to adhere to the rules puts advisors (and providers), as well as the employers that hire them, at risk of penalties and lawsuits.***

Timing and Potential for Delay

There are several key dates to be aware of for the adoption of the regulations. The first date is June 9, 2017 (originally April 10, 2017), which is the date that advisors must comply with the new conduct and disclosure requirements contained within the rules. The second key date is January 1, 2018, which is the date that full compliance with the rules (including best interest contract standards) takes effect. Undoubtedly, there will need to be evaluation of all plans and potential for necessary changes to be made before January 2018; however, there are some issues to monitor.

While this regulation is subject to key dates, there are several potential sources for changes and/or delays that need to be watched in the coming months – both from Congress and from federal courts. This issue has had many opponents in Congress long before it became a final rule. Within weeks of its introduction, resolutions of disapproval were passed in both the House of Representatives and the Senate. Due to the political reality of a strongly-polarized Congress, along with the President's commitment to veto any bill that would change the rule, any potential change or delay from a legislative arena is not likely to occur until after the new president takes office in January. There is no way to know if there will be changes at all, but this issue has significant opposition and strong lobbying on both sides, so it's likely there will be changes.

Even more likely is a potential for delay due to litigation in federal court. There have already been lawsuits filed against the DOL by several prominent (and well-funded) organizations, such as the United States Chamber of Commerce, challenging both the rules and the DOL's authority to implement these changes, and several more are being prepared. A potential scenario may see injunctive delay while the lawsuit proceeds through the courts. While efforts to prepare for the implementation of the rules should not be postponed, it is still important to be mindful of the highly-politicized issue and any potential for delay or changes in the coming months.

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

For information on how HSA Bank can help you prepare for the upcoming DOL regulations, please visit hsabank.com or contact Business Relations at 866-357-5232.

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