ALSTON&BIRD LLP

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424

404-881-7000
Fax:404-881-7777
www.alston.com

John R. Hickman **Direct Dial: 404-881-7885** **E-mail: john.hickman@alston.com**

August 30, 2010

VIA E-MAIL (e-ORI@dol.gov)

Office of Regulations and
Interpretations, Employee Benefits Security Administration
Room N–5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Attention: 408(b)(2) Interim Final Rule

Re: Comments Regarding Interim Final Rule under Section 408(b)(2) of ERISA and Application to Health Savings Accounts

Dear Sir or Madam:

Thank you for the opportunity to comment on the Department of Labor's interim final rule (the "Regulations") pertaining to reasonable contracts or arrangements under section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Specifically, we are writing to you on behalf of our client ("Client"), (i) to request that the Department specifically state in the Regulations and interim guidance that a personal health savings account ("HSA"), like an individual retirement account ("IRA") and similar arrangements, is not a "covered plan" under the Regulations and (ii) to set forth our Client's position as to why it believes that an HSA should not be subject to the Regulations.

Our Client's HSA Business

Our Client is a nationally chartered bank and, in conjunction with its affiliates, is a leading provider of services to HSAs. Our Client provides custodial services on behalf of an HSA, while an affiliate of the Client that is a registered broker-dealer provides brokerage services (the "Broker") on behalf of certain HSAs for which our Client is also the custodian. Pursuant to an agreement between the Broker and the owner of the HSA (the "Owner"), the Owner has the option to direct the Broker to invest some or all of the amounts held in his or her HSA in one of several mutual funds (the "Funds"). The Funds made available to the Owner pursuant to the agreement are selected by an independent investment adviser selected by our Client. One or more of the Funds may be sponsored,

distributed, or advised by an affiliate of the Client and the Broker. Amounts paid from the Funds, such as 12b-1 fees and shareholder servicing fees, may be paid to our Client, the Broker, another affiliate, or an independent third party recordkeeper.

While many HSAs are offered with no employer involvement at all, even HSAs for which employers make contributions are seldom, if ever, ERISA-covered plans. *See* DOL Field Assistance Bulletins 2004-1 and 2006-2. Nonetheless, there is some lack of clarity with respect to whether the Regulations apply with respect to HSAs due to the Regulations' reference to the Internal Revenue Code prohibited transaction provisions (i.e., Section 4975 of the Code). Thus, while the Regulations provide an express carve-out for individual retirement arrangements (IRAs), which are most analogous to HSAs, other portions of the Regulations provide that they apply to the prohibited transaction provisions (i.e., Section 4975 of the Code) that could apply to HSAs. Based upon this ambiguity, our Client believes that it could be considered a "covered service provider" under a literal application of the Regulations and, as such, would be required to meet the disclosure requirements. We believe that, as is the case with IRAs, an express carve out should be provided for HSAs as personal investment accounts under the Regulations.

Summary of Regulations and Other Applicable Law

Based upon our review of the language, it is not clear whether the Department intended to exclude HSAs under all circumstances. In the Regulations, the Department defines ''covered plan'' as an ''employee pension benefit plan'' or a ''pension plan'' within the meaning of section 3(2)(A) of ERISA, but specifically excludes (i) simplified employee pension plans as described in section 408(k) of the Internal Revenue Code of 1986, as amended (the "Code"), (ii) a simple retirement account as described in section 408(p) of the Code, (iii) an individual retirement account described in section 408(a) of the Code, and (iv) an individual retirement annuity described in section 408(b) of the Code.

Section 3(2)(A) of ERISA defines the terms "employee pension benefit plan" and "pension plan" to mean "any plan, fund, or program…established or maintained by an employer to the extent that such plan, fund, or program results in a deferral of income by employees for periods extending to the termination of covered employment or beyond…"

The Regulations specifically cross-references Section 4975(d)(2) of the Code, which contains provisions parallel to section 408(b)(2) of the Act, and states that, "All references herein to section 408(b)(2) of the Act and the regulations thereunder should be read to include reference to the parallel provisions of section 4975(d)(2) of the Code and regulations thereunder at 26 CFR 54.4975–6."

HSAs are specifically identified as "plans" for purposes of the prohibited transaction provisions in Section 4975 of the Code. *See* IRC § 4975(e)(1)(E). In Field Assistance Bulletin 2006-2, the Department confirmed that although an HSA is not typically an "ERISA-covered plan," it is subject to the prohibited transaction provisions of section 4975 of the Code.

Individual retirement accounts and annuities under Code sections 408(a) and 408(b) are specifically included as "plans" under Section 4975 of the Code. Furthermore, simplified employee pension plans under section 408(k) of the Code and simple retirement account as described in section 408(p) of the Code are subject to section 4975 of the Code by virtue of their being IRAs. These latter arrangements may also be subject to Title I of ERISA due to employer involvement in managing or administering the arrangements.

In the Preamble to the Regulations, the Department stated that the Regulations are designed with the intent of providing information to "fiduciaries of employee benefit plans" and concluded that IRAs should not be subject to the Regulations. The bases for this conclusion included the following:

(i) An IRA account-holder is responsible only for his or her own arrangement's security and asset accumulation and, as such, should not be held to that same standard as a plan fiduciary charged with "...protecting the retirement security of greater numbers of plan participant..."; and,

(ii) IRAs generally are marketed alongside other personal investment vehicles so that applying the Regulations to IRAs could increase the costs associated with IRAs relative to similar vehicles that are not covered by the Regulations.

Exclusion of a "Health Savings Account" from Definition of "Covered Plan"

Our Client requests that the Department issue additional guidance in which it specifically states that an HSA is not a "covered plan" under the Regulations or that HSAs are otherwise exempt from the disclosure requirements set forth in the Regulations. While it is possible that the intent of the Department was to exclude HSAs as well as IRAs, such intent is not clear on the face of the Regulations.

We believe that a service provider may conclude, by analogy, that the exclusion of IRAs (including IRAs to which employers make contributions) also extend to HSAs. In fact, practitioners and participants in the HSA market often look to prior Department and IRS guidance on the application of Section 4975 of the Code as a basis for determining how such provisions apply to HSAs. Furthermore, the case can be made that HSAs, at least in most circumstances, are not "employee pension benefit plans" and "pension plans" because funds can be withdrawn without penalty at any time for medical expenses.

Notwithstanding the potential for taking the position that Regulations as written do not apply to HSAs, our Client is concerned that one may also conclude that the Department intended the Regulations to apply to HSAs. The Department specifically referenced Section 4975 of the Code for purposes of applying the Regulations. Furthermore, the Department specifically excluded IRAs (including IRAs to which employers make contributions), but no other arrangements.

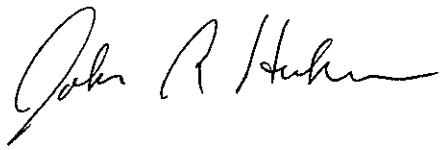
The incorporation by reference of section 4975 and the failure to specifically exclude HSAs could be interpreted to mean that the Department intended that the Regulations apply to HSAs in general or under certain circumstances. In light of the potential financial burden involved in complying with the Regulations and the potential consequences of failing to meet the Regulations' requirements, our Client requests that the Department issue additional guidance that provides for the specific exclusion of HSAs.

We believe that the same reasons for which the Department decided to exclude IRAs from the definition of "covered plan" support our Client's position with respect to HSAs. The Owner of the HSA, not his or her employer, is solely responsible for the accumulation and protection of the assets in his or her HSA. Furthermore, HSAs are generally made available to individuals with a wide array of retail investment options, in much the same way that IRAs are offered.

In conclusion, our Client believes that the current disclosure rules applicable under existing law adequately protects the interests of HSA Owners and that the extensive requirements outlined in the Regulations and the consequences for failing to meet such requirements should not apply to HSAs for the same reasons that the Department chose to exclude IRAs.

Thank you for the opportunity to express our Client's views with respect to the Regulations and we would be happy to answer any questions the Department may have.

Very truly yours,



John R. Hickman
Partner

David C. Kaleda
Partner

JRH:dk

LEGAL02/32145513v3