

Advisory Opinion

December 22, 2004

2004-09A

Code Sec. 4975(c)

Thomas G. Schendt, Esq.
Alston & Bird LLP
601 Pennsylvania Avenue, N.W.
North Building, 10th Floor
Washington, DC 20004-2601

Dear Mr. Schendt:

This is in response to your request for an advisory opinion from the U.S. Department of Labor (the Department) concerning the application of the prohibited transaction provisions under section 4975(c) of the Internal Revenue Code of 1986, as amended (the Code), to certain contributions to health savings accounts (HSAs), as described below.⁽¹⁾

You represent that your client, an insurer (the Company) and its affiliates, offers various health benefit plans in the individual market, including high deductible health plans (HDHPs), as that term is defined in section 223(c)(2) of the Code. In addition, the Company either offers HSAs, as defined in section 223(d) of the Code, to individuals covered by HDHPs issued by the Company, or enters into a contractual arrangement with a specified bank that will offer HSAs to such individuals, as described below.

Your letter contains the following facts and representations.

Factual Scenario I

Under Factual Scenario I, only persons insured under HDHPs issued by the Company in the individual market are able to establish HSAs with the Company. However, a person does not have to establish an HSA with the Company to participate in an individual HDHP with the Company. If a person establishes an HSA with the Company, the Company will serve as both the trustee or custodian and the record-keeper of the HSA. The Company does not provide HSA custodial services in the employer group market.

To encourage participation in the Company's HSA program, the Company will offer an incentive to a person who establishes an HSA with the Company when he or she first enters into an individual HDHP with the Company. This incentive will be in the form of a \$100 cash credit by the Company, as trustee or custodian, directly to the individual's HSA. This credit to the HSA will be automatic. The account holder will not be required to make any contribution to his or her HSA to receive the credit to his or her HSA. The credit is dependent on the establishment of an HSA with the Company. The account holder will not be able to divert the money to himself or herself before it is credited to the HSA.

If the person does not establish an HSA with the Company, he or she will not receive any incentive from the Company under this incentive program. Thus, for example, the individual will not receive any incentive from the Company in the form of a credit to an HSA not provided by the Company or in the form of money paid to him or her outside of the HSA. The credit to the account holder's HSA with the Company will be subject to the statutory requirements for HSAs set forth in section 223 of the Code, and the tax treatment of any distributions from the HSA attributable to this credit will be governed by the provisions of section 223(f) of the Code.

With respect to each HSA established with the Company pursuant to this incentive program, the Company represents that any arrangement for services by the Company to the HSA (e.g., as trustee or custodian and/or record-keeper of the HSA) will meet the requirements of section 4975(d)(2) of the Code and the Treasury's regulations at 26 CFR §54.4975-6.

The Company represents that the premiums payable under the HDHP will not vary based on the individual's choice of HSA custodian or trustee. Thus, the individual's insurance premiums will not be higher or lower as a result of his or her decision to establish an HSA either with the Company or with some other custodian or trustee. The Company also represents that any administrative fees the Company may charge the account holder with respect to his or her HSA will not change (i.e., will not increase or decrease) as a result of the credit to his or her HSA.

The Company states that although the duration of this incentive program has not been determined, it envisions that the incentive program could be used at various times for specified periods of time. The Company also anticipates

that the amount of the incentive could change from time to time. However, for purposes of this request, the Company represents that the amount of the incentive will not exceed \$100 per person.

Factual Scenario II

Under Factual Scenario II, the Company and its affiliates offer various health benefit plans in the group market, including HDHPs as defined under the Code.

The Company enters into a contractual relationship with a specified bank (the Bank) to provide HSAs for individuals covered by HDHPs issued by the Company. However, an individual does not have to establish an HSA with the Bank to participate in a group HDHP issued by the Company. The Bank serves as the trustee or custodian and the record-keeper of those HSAs and receives remuneration from the Company for its services in that regard. The Company also enters into a contractual relationship with a specified entity (the Vendor) to provide various services in relation to these HSAs, for which the Company compensates the Vendor. Neither the Bank nor the Vendor is a member of the Company's controlled group under sections 414(b), (c) and (m) of the Code.

To encourage the establishment of HSAs with the Bank in connection with group HDHPs issued by the Company, the Bank will offer an incentive to a person who establishes an HSA with the Bank when the Company first covers such person under a group HDHP. This incentive will be in the form of a \$100 cash credit from the Bank directly to the individual's HSA. This credit to the HSA will be automatic. The account holder will not be required to make any contribution to his or her HSA to receive the credit to his or her HSA. The credit will be dependent on the establishment of an HSA with the Bank. The account holder will not be able to divert the money to himself or herself before it is credited to the HSA.

If the person does not establish an HSA with the Bank, he or she will not receive any incentive from the Bank under this incentive program. For example, the individual will not receive any incentive from the Company or the Bank in the form of a credit to an HSA not provided by the Bank or in the form of money paid to him or her outside of his or her HSA. The credit to the account holder's HSA with the Bank will be subject to the statutory requirements for HSAs set forth in section 223 of the Code, and the tax treatment of any distributions from the HSA attributable to this credit will be governed by the provisions of section 223(f) of the Code.

With respect to the HSAs established with the Bank pursuant to this incentive program, the Company, the Bank and the Vendor intend that any arrangements for services by the Bank or the Vendor to the HSA (e.g., as the trustee or custodian and/or record-keeper of the HSA) will meet the requirements of section 4975(d)(2) of the Code and the Treasury's regulations at 26 CFR §54.4975-6.⁽²⁾

The Company represents that the premiums charged for the individual's coverage under the group HDHP will not vary based on the individual's choice of HSA custodian or trustee. Thus, the premiums charged by the Company for the individual's coverage under the group HDHP will not be higher or lower as a result of his or her decision to establish an HSA either with the Bank or with some other custodian or trustee. In addition, any administrative fees the Bank or the Vendor may charge the account holder with respect to his or her HSA will not change (i.e., will not increase or decrease) as a result of this credit to his or her HSA.

The Company states that although the duration of this incentive program has not been determined, it envisions that the incentive program could be used at various times for specified periods of time. The Company also anticipates that the amount of the incentive could change from time to time. However, for purposes of this request, the Company represents that the amount of the incentive will not exceed \$100 per person.

Advisory Opinions Requested

With respect to Factual Scenario I, you have requested an advisory opinion that the credit to an account holder's HSA will not constitute a prohibited transaction under section 4975(c) of the Code for either the account holder or the Company.

In addition, with respect to Factual Scenario II, you have requested an advisory opinion that the credit to an account holder's HSA will not constitute a prohibited transaction under section 4975(c) of the Code or section 406 of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

Prohibited Transactions under the Internal Revenue Code

Section 4975(e)(1)(E) of the Code defines the term "plan" to include "...a health savings account described in section 223(d)" of the Code.

A "prohibited transaction" under section 4975(c)(1) of the Code includes, among other things, any direct or indirect:

- (A) sale or exchange, or leasing, of any property between a plan and a disqualified person;
- (C) furnishing of goods, services, or facilities between a plan and a disqualified person;
- (D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;
- (E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account; or
- (F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

A "disqualified person" is defined under section 4975(e)(2) of the Code, in pertinent part, to include a person who is a fiduciary or a person providing services to the plan.

Analysis of Factual Scenarios I and II

Under Factual Scenario I, the Company will be a trustee or custodian of the HSA. As such, the Company would be a disqualified person with respect to the HSA.

Under Factual Scenario II, the Bank will be a trustee or custodian of the HSA. As such, the Bank is a disqualified person with respect to the HSA. However, as we understand the facts, the Company would not be a disqualified person with respect to the HSA. In both scenarios, the account holder is a fiduciary and disqualified person with respect to the HSA.

Under both Factual Scenarios, the \$100 credit proposed by either the Company or the Bank, respectively, would be a cash contribution to the account holder's HSA. The Department notes that in accordance with IRS Notice 2004-50, Q&A 28, wherein it states that "any person . . . may make contributions to an HSA on behalf of an eligible individual," Code section 223 does not prohibit the Company or the Bank from making such contributions to its customers' HSAs. A cash contribution to a plan is not generally a sale or exchange of property prohibited by section 4975(c)(1)(A) of the Code. Additionally, the cash contribution would not be a transfer of an asset of a plan for the benefit of a disqualified person or an act of self-dealing by either the Company or the Bank under section 4975(c)(1) (D) or (E) of the Code involving the assets of a plan. Therefore, neither the Company's nor the Bank's contribution of a cash credit to the account holder's HSA, as described herein, would be a prohibited transaction under section 4975 (c)(1) of the Code.⁽³⁾

Similarly, the HSA's receipt of the Company's or the Bank's contribution of a cash credit, under the facts described above, would not be an act of self-dealing on the part of the account holder nor a receipt by the account holder in his or her individual capacity of any consideration from a party dealing with the HSA in connection with a transaction involving assets of the HSA. Even though the Company or the Bank, respectively, would make the contribution as an incentive to encourage the account holder's participation in the Company's or the Bank's HSA program, the contribution goes to the HSA and not to the account holder.⁽⁴⁾ Therefore, the receipt by the HSA of such cash contributions would not be a prohibited transaction under section 4975(c)(1) of the Code.⁽⁵⁾

Since the Company is not a disqualified person with respect to the HSA under Factual Scenario II, the Bank's contribution of the credit to the account holder's HSA would not be a prohibited transaction under section 4975(c) of the Code with respect to the Company.

Finally, with respect to the contribution of any cash credits by the Bank to an account holder's HSA under the facts described above, the same analysis and conclusions would apply, for purposes of the prohibited transaction provisions contained in section 406(a) and (b) of ERISA, to an HSA that would be an "employee benefit plan" covered under Title I of ERISA⁽⁶⁾ under the principles discussed in the Department's Field Assistance Bulletin (FAB) 2004-01 (April 7, 2004). Further, in such instances, the fiduciary responsibility provisions of Title I would apply to the selection of service providers to the HSA.

In discussing whether, and under what circumstances, HSAs established in connection with employment-based group health plans would be subject to the provisions of Title I of ERISA, FAB 2004-01 states that generally such HSAs would not constitute an "employee welfare benefit plan" as defined under section 3(1) of ERISA, if employer involvement with the HSA is limited. Specifically, HSAs meeting the conditions of the safe harbor for group or group-type insurance programs at 29 CFR §2510.3-1(j)(1)-(4) are not considered employee welfare benefit plans within

the meaning of section 3(1) of ERISA. However, a finding that an HSA established by an employee is not covered by ERISA does not affect whether an HDHP sponsored by the employer is itself a group health plan subject to Title I. In fact, FAB 2004-01 states that unless otherwise exempt from Title I (e.g., governmental plans, church plans), employer-sponsored HDHPs will be "employee welfare benefit plans" within the meaning of section 3(1) of ERISA and, thus, subject to the fiduciary responsibility provisions of Title I.

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 Fed. Reg. 36281 (Aug. 27, 1976). The letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,
Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations



Footnotes

1. Under Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978), the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. See 5 USC App. at 214 (2000 ed.).
2. The Company is not requesting, and the Department is not providing, an opinion as to whether any arrangement for services by the Company, the Bank or the Vendor to an HSA will satisfy the requirements necessary for relief under section 4975(d)(2) of the Code and the regulations relating thereto. In this regard, the Department ordinarily does not issue advisory opinions on questions that are inherently factual in nature.
3. With respect to contributions or transfers of property to a plan that are considered to be an "exchange," see Adv. Op. 81-69A (July 28, 1981) and the Department's Interpretative Bulletin at 29 CFR 2509.94-3, relating to in-kind contributions to employee benefit plans.
4. This distinguishes the arrangement from others that have been found to involve prohibited transactions. See Adv. Op. 89-12A (July 14, 1989)(personal receipt of "free checking" account services by a **customer** from a bank in connection with the investment of assets of the customer's individual retirement account (IRA) in the bank's financial products would constitute a violation of section 4975(c)(1) of the Code.) See also PTE 93-33, 58 Fed. Reg. 31053 (May 28, 1993) (exempting certain arrangements benefiting an IRA account holder).
5. This advisory opinion does not address payments to the individual account of any person who is a disqualified person for reasons other than as the account holder of an HSA.
6. Section 3(3) of ERISA defines the term "employee benefit plan" or "plan" as an employee welfare benefit plan (see section 3(1) of ERISA) or an employee pension benefit plan (see section 3(2) of ERISA) or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.