

The logo for Fi360, featuring the text "Fi360" in a white, sans-serif font. The "Fi" is bold and the "360" is regular weight. The logo is centered within a white square frame.

Fi360

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Advisor Considerations for HSAs and ERISA

Moderator:

Ann Brisk, Senior Vice President, HSA Bank

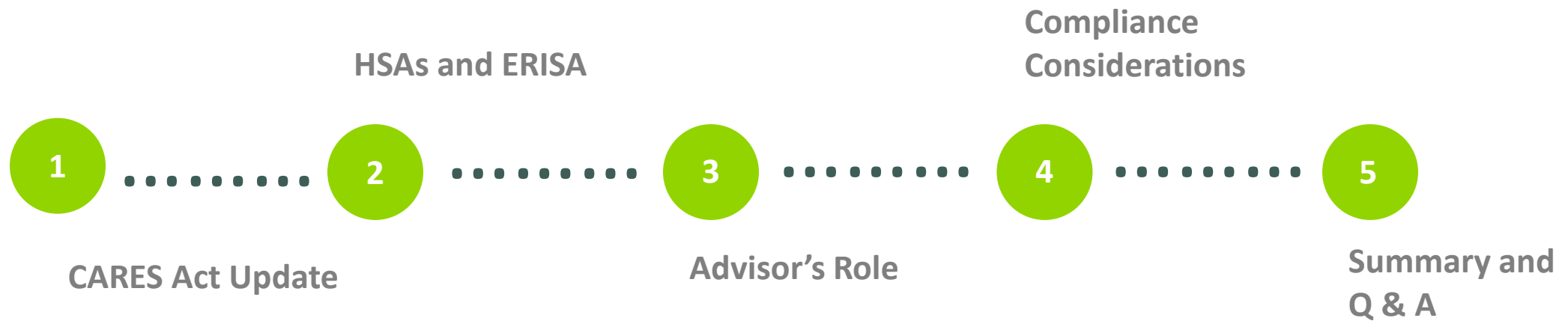
Presenters:

Shelby George, JD, CEBS; CEO, Perspective Partners

Roberta Casper Watson, Head of Welfare Benefits
Department, The Wagner Law Group

Michael Wieber, Partner, Quarles & Brady LLP

Agenda



CARES Act updates



Ann Brisk, Senior Vice President, HSA Bank

CARES Act updates

- HDHPs and telehealth services: The act includes temporary safe harbor for relief in the wake of COVID-19. Per the Act, HSA-qualified HDHPs may now cover telehealth services before reaching the deductible, or an individual can choose to use telehealth services outside of their HDHP, without impacting their eligibility for an HSA. This exemption is valid until December 31, 2021.
- You can also use your HSA to pay for qualified medical expenses accrued using telehealth services. These instances are valid for all visits, not only COVID-19-related testing or treatment.

HSA and ERISA



Roberta Casper Watson, Head of Welfare Benefits
Department, The Wagner Law Group

ERISA exemption for voluntary benefits – regulation limitations

- No contributions made by employer;
- Participation completely voluntary;
- Sole functions of the employer:
 - permit insurer to publicize program to employees, and
 - collect premiums through payroll deductions and remit them to the insurer; and
- Employer receives no consideration in connection with program, other than reimbursement for expenses actually incurred in connection with payroll deductions.

ERISA regulation exemption for voluntary benefits – safe harbor

- Employer cannot endorse program.
 - Employer cannot negotiate premiums.
 - Employer cannot investigate reputation of insurer and report same to employees.
- Employer cannot limit eligibility for program.
 - Waiting period could be a problem.
- Employer cannot restrict benefits offered.
- Employer cannot select exclusive insurer.

ERISA exemption for most HSAs

Under the DOL's FAB 2004-1, most HSAs are exempt from ERISA if the establishment of the HSA is completely voluntary on the part of the employees.

However, as with other exemptions, there are conditions in order for an employer's HSA program to be exempt, and the employer (and its advisors) must not violate these conditions.



Conditions for ERISA exemption of HSAs

- Under FAB 2004-1, the HSAs must belong to the employees. To be exempt from ERISA, the employer must not:
 - limit the ability of eligible individuals to move their funds to another HSA beyond restrictions imposed by the Code,
 - impose conditions on utilization of HSA funds beyond those permitted under the Code, or
 - make or influence the investment decisions with respect to funds contributed to an HSA.

Further conditions for exemption

- Under FAB 2004-1, the employer sponsoring an ERISA-exempt HSA program cannot assume ERISA responsibilities or benefit financially from the HSAs. The employer must not:
 - represent that the HSAs are an employee welfare benefit plan established or maintained by the employer, or
 - receive any payment or compensation in connection with an HSA.

Maintaining ERISA exemption for employer-sponsored HSA programs

- Most HSAs are not in danger of becoming covered by ERISA. The ERISA exemption is broad, and exempts HSAs the way most are created and operated.
- However, there are limits on the leeway afforded. Crossing those limits can lead to loss of the ERISA exemption.
- FAB 2006-2 addresses impact of special circumstances on ERISA-exempt status.

May an employer establish an HSA for an employee?

- Yes, and even without the employee's express consent, provided:
 - the conditions for exemption (from FAB 2004-1) are met; and
 - the employee must be able to “move the funds to another HSA or otherwise withdraw the funds.” Any restriction designed to inhibit an employee's free movement to another HSA would jeopardize the ERISA exemption for the HSA.

May an employer limit the HSA providers?

- Yes, an employer may limit the HSA providers to which it will make or transfer contributions.
 - Under one approach to ERISA exemption, however, it is important that the employer not “endorse” the HSA provider or the employer will (or may) have violated this rule.
 - There may even be only one provider as long as the employer refrains from “endorsing” that provider.
- Somewhat akin to rules for ERISA exempt 403(b) plans.

Employer limiting HSA providers

- Too much pushing towards a single HSA provider could cross the line into the employer having endorsed the program or the provider, and thus jeopardize the ERISA exemption.
- Also, an employer cannot “make or influence” the employees’ investment choices if the employer wants the HSAs to be exempt from ERISA.

Coordinating HSAs with 401(k) plan investment options

- An employer may offer the same or similar investments through its HSA program (even an ERISA-exempt program) as those it offers to its 401(k) plan, but only if (per FAB 2004-6):
 - employees are “afforded a reasonable choice of investment options”; and
 - employees “are not limited in moving their funds to another HSA.”

May an HSA vendor offer its own products to its own employees?

- Yes, FAB 2006-2 allows an HSA vendor to offer its own HSA products to its own employees, so long as it does so “in the regular course of business.”
 - And an employer, including an employer that is an HSA vendor, may pay expenses associated with an HSA that the employee would normally have to bear.

Traps for HSA vendor using its own products for its own employees

- Presumably, affirmative incentives for the vendor's employees to use the vendor's own HSA products (such as payment of the fees only if the employee uses the vendor's products) could cross the line into an ERISA-covered (and possibly even an ERISA-noncompliant) HSA program.

HSA vendor discounts and incentives

- An HSA vendor cannot discount other products as an incentive to the employer.
 - FAB 2006-2 makes clear that such a discount will constitute a prohibited “payment” or “compensation” to the employer, making the HSAs subject to ERISA.
- But, the vendor can offer a cash incentive to the individual establishing the HSA if the cash is deposited directly to the HSA.

Vendor line of credit

- In general, it would be a prohibited transaction for an HSA owner to:
 - borrow from the HSA,
 - pledge its assets as security for a loan, or
 - receive a benefit outside the HSA for opening the account.
- But, under FAB 2006-2, it is not necessarily prohibited for a credit card vendor to be reimbursed for medical expenses paid with the card.

Prohibited transactions rules apply, per FAB 2006-2

- Even an ERISA-exempt HSA will be subject to the Code's prohibited transaction rules.
- As with other benefit programs, employee contributions must be transmitted promptly.
 - “Employers who fail to transmit participants’ HSA contributions promptly may violate the prohibited transaction provisions of Section 4975 of the Code.”

Prohibited transactions

- An investment advisor (for the 401(k) plan, for example), introducing HSAs into an existing fiduciary relationship must be extremely careful. Cross-subsidization of the various products could create:
 - a prohibited transaction for the employer (using one plan's assets to benefit the other);
or
 - a self-dealing issue for the employer, if the fiduciary benefits itself with plan assets.

ERISA's investment rules if ERISA applies to an HSA program

- If ERISA applies, investments must be:
 - prudent,
 - diversified unless clearly prudent not to do so, and
 - protected from prohibited transactions.
- An employer would likely be a fiduciary of its ERISA-covered HSA program.
- Advisors providing or recommending investments under an ERISA-covered HSA program would be ERISA fiduciaries.

Possible practical consequences if HSA programs are subject to ERISA

- Liability risk for fiduciaries (including de facto fiduciaries) if investments are not viewed as prudent.
 - Co-fiduciary liability is a possibility.
- Service provider compensation must be reasonable.
 - Compensation structures may be difficult to defend if unreasonable fees could result.
 - Proper fee disclosures would be necessary.

Other arrangements are subject to ERISA

- Flexible Spending Accounts
 - Usually just employee money, but “legal fiction” causes employees to reduce their salaries in exchange for employer’s promise to contribute an equivalent amount to FSA.
- Health Reimbursement Accounts
 - Consist solely of employer money.
 - Employer must establish program and operate it appropriately.

Advisor's role



Michael Wieber, Partner, Quarles & Brady LLP

Advisor's role

Selecting Investments

- 1 Use ERISA as the “Gold Standard” -- usually meets all state-law fiduciary requirements
- 2 Have a broad range of investment alternatives -- Why?
- 3 Some want to use HSAs for short-term
 - Money in – money out
- 4 More want to invest for the long-term
 - But even they have different time horizons
 - Especially when viewed as a supplemental retirement vehicle in connection with “shoeboxing” approach

Advisor's role

Advisor
compensation -
You are a
fiduciary



Again, use the
“Gold
Standards”



Securities
Advisor
Regulation



ERISA
Prohibited
Transaction
Rules

Advisor's role

With the Employer

- 1 Advisor could charge employer for non-investment-related services, but might not want to
- 2 How HSAs can function as an asset accumulation vehicle -- How the math works
- 3 How these can fit in with high-deductible health plan and benefits program -- both as healthcare and retirement

Advisor's role

With the Employees

- 1 Think investment education -- always okay
- 2 Versus investment advice -- be careful:
 - Shouldn't counsel in a way that increases advisor's compensation
 - Through revenue sharing payments, for example
- 3 Watch out, even in cases where the client consents and acknowledges that you are getting paid
 - This is still a conflict of interest

Advisor's role

Fiduciary Role

- 1 As a fiduciary, you must act in the client's best interest
- 2 Put them ahead of yourself and your interests
- 3 Do what's right by the client and disclose all fees -- it's good business

Compliance considerations – advocating for HSA services



Shelby George, JD, CEBS; CEO, Perspective Partners

Polling question:

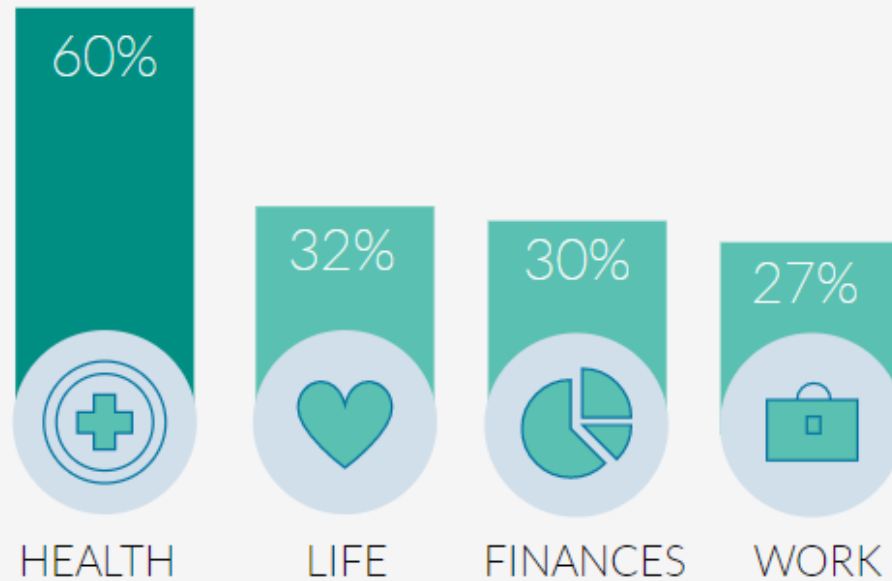
Where do HSAs fall on your Broker Dealer's priority list?

- a They already provided a solution.
- b They are actively working to provide a solution.
- c They have talked about providing a solution but are not actively working on it.
- d It's not on their radar.
- e I don't know.

ERISA Fiduciary
Advice
DOL Guidance
Share Class
Commission
Monitor
Education
Best Interest
Legal Fee
Investment Suitability
IRS Guidance
Conflicts
Disclose

Compliance resistance is weakening

Paying for healthcare is the #1 financial concern among investors, including millionaires.



% of millionaires who have worries in each category of well-being

Source: Fidelity 2019 Millionaire Outlook Study.

Compliance factor #1



Education



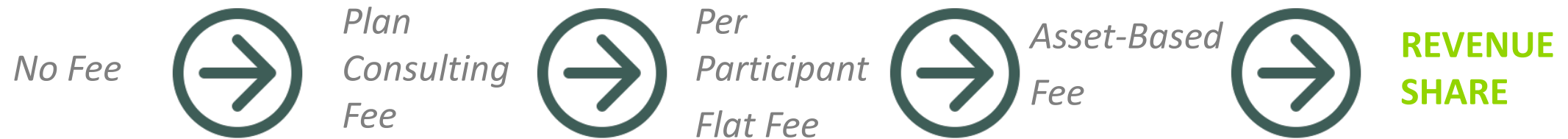
Advice

Polling question:

What types of HSA services does your Broker Dealer allow (select all that apply)?

- ☐ a None
- ☐ b Participant education
- ☐ c Plan level consulting (design review, vendor RFPs)
- ☐ d Plan level investment guidance (designing line-ups, monitoring)
- ☐ e Individual HSA savings and investment guidance

Compliance factor #2



Polling question:

What fee arrangements does your Broker Dealer allow for HSA-related services (select all that apply)?

- ☐ a None
- ☐ b Plan fees
- ☐ c Per participant fees
- ☐ d Asset-based fees

Speaking compliance's language



Closing comments and Q&A



What do you think is the future for HSAs?



Contact us

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Q&A

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Additional questions can also be sent to support@fi360.com

THANK
YOU
