

Memorandum

To: HSA Council Board Members

Date: July 21, 2011

SUBJECT: Federal Reserve's Regulation II on Interchange Fees and Network Exclusivity and Routing

The American Bankers Association HSA Council has concluded that HSAs are exempt from the entire scope of the Federal Reserve's Regulation II (REG II) on interchange fees and network exclusivity and routing because *bona fide* trust accounts (including all HSA accounts) are not included in the definitions of the types of accounts governed by the regulation.

Discussion

The Federal Reserve's regulation on interchange fees excluded *bona fide* trust accounts from the definition of the types of accounts governed by the regulation. The Council recommended that *bona fide* trust accounts be excluded from the definition, and the Fed accepted our recommendation.

In addition, the Fed also exempted Direct Deposit Accounts (DDAs) that operate as *bona fide* trusts if they were established as trust or custodial accounts under the IRS code. This should include every HSA account regardless of whether they are considered *bona fide* trust accounts.^{1 2}

§ 235.2 Definitions

(a) Account

- (1) Means a transaction, savings, or other asset account (other than an occasional or incidental credit balance in a credit plan) established for any purpose and that is located in the United States; and
- (2) Does not include an account held under a *bona fide* trust agreement that is excluded by section 903(2) of the Electronic Fund Transfer Act and rules prescribed there under.

¹ Preamble (p. 42), "The final rule's definition of "account" excludes accounts established pursuant to *bona fide* trust arrangements."

² Preamble (p. 45-46), "The Board agrees with the commenters that a trust is a type of account structure rather than a purpose (such as a business purpose or personal purpose) for which the account is held. Therefore, the Board has revised its proposed definition of "account" to exclude *bona fide* trusts, consistent with EFTA Section 903(2). For purposes of Regulation E, the Board has stated that whether an agreement is a *bona fide* trust agreement is a question of state or other applicable law. The Board believes a similar approach is warranted under this rule. In general, *bona fide* agreements or arrangements are those done in good faith and not merely a device to evade a law. Accordingly, the Board has revised the definition of "account" to exclude accounts held under *bona fide* trust agreements that are excluded from the definition of "account" under EFTA Section 903(2) and rules prescribed thereunder. The Board has added comment 2(a)-2 to clarify that whether a trust arrangement is *bona fide* is a matter of state or other applicable law and that accounts held under custodial agreements that qualify as trusts under the Internal Revenue Code are considered to be held in trust arrangements."

The Fed also accepted the Council's recommendation regarding the definition of "electronic debit transactions." The preamble to the regulation states that although

the Board does not believe that the statute exempts debit cards that access HSAs and other similar accounts solely because such accounts are established for health care-related purposes . . . [s]uch cards and accounts, however, may be otherwise exempt from the Board's interchange fee standards if they qualify for another exemption. For example, as commenters noted, some HSAs and other similar accounts are structured as bona fide trust arrangements. Cards that access these HSAs would be exempt from the requirements of this part because they do not access "accounts," as the term is defined in § 235.2(a). In addition, some cards that access HSAs and other similar accounts are structured like prepaid cards where funds are held in an omnibus account (which is considered an "account" under § 235.2(a)) and the employee may access the funds using a prepaid card. Provided these cards are structured in such a way that qualifies them for the reloadable, general-use prepaid card exemption in the statute, these cards used to access HSAs and similar accounts will be exempt from the rule's interchange fee standards. *See* discussion of § 235.5(c). These cards, however, will be subject to the rule's network exclusivity and routing provisions. *See* discussion of delayed effective date related to § 235.7.³

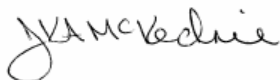
§ 235.2 Definitions

2(a) Account

2. *Bona fide* trusts. This part does not define the term *bona fide* trust agreement; therefore, institutions must look to state or other applicable law for interpretation. An account held under a custodial agreement that qualifies as a trust under the Internal Revenue Code, such as an individual retirement account, is considered to be held under a trust agreement for purposes of this part.

Please let us know if you have any questions or concerns with our conclusions.

Sincerely,



Kevin McKechnie
Executive Director

³ Preamble, p. 47