

need services are not precluded from receiving them based on an inability to obtain a replacement SSN card.

For the reasons discussed above, we have not changed the interim final rules based on the public comments. Therefore, except for the clarifying language changes made to § 422.103 and § 422.110, the interim final rules are adopted as final without change.

Dated: May 16, 2006.

**Jo Anne B. Barnhart,**

*Commissioner of Social Security.*

■ Accordingly, the interim final rules amending 20 CFR part 422 published at 70 FR 74649 on December 16, 2005, are adopted as final with only minor clarifying language changes.

## PART 422—ORGANIZATION AND PROCEDURES

### Subpart B—[Amended]

■ 1. The authority citation for subpart B of part 422 is revised to read as follows:

**Authority:** Secs. 205, 232, 702(a)(5), 1131, 1143 of the Social Security Act (42 U.S.C. 405, 432, 902(a)(5), 1320b-1, and 1320b-13), and sec. 7213(a)(1)(A) of Pub. L. 108-458.

■ 2. Section 422.103 is amended by revising paragraph (e) to read as follows and by amending paragraph (c)(1) by removing the word “duplicate” and adding in its place the word “replacement” in the last sentence of the paragraph.

#### § 422.103 Social security numbers.

\* \* \* \* \*

(e) *Replacement of social security number card.* (1) *When we may issue you a replacement card.* We may issue you a replacement social security number card, subject to the limitations in paragraph (e)(2) of this section. In all cases, you must complete a Form SS-5 to receive a replacement social security number card. You may obtain a Form SS-5 from any Social Security office or from one of the sources noted in paragraph (b) of this section. For evidence requirements, see § 422.107.

(2) *Limits on the number of replacement cards.* There are limits on the number of replacement social security number cards we will issue to you. You may receive no more than three replacement social security number cards in a year and ten replacement social security number cards per lifetime. We may allow for reasonable exceptions to these limits on a case-by-case basis in compelling circumstances. We also will consider name changes (i.e., verified legal changes to the first name and/or surname) and changes in alien status

which result in a necessary change to a restrictive legend on the SSN card (see paragraph (e)(3) of this section) to be compelling circumstances, and will not include either of these changes when determining the yearly or lifetime limits. We may grant an exception if you provide evidence establishing that you would experience significant hardship if the card were not issued. An example of significant hardship includes, but is not limited to, providing SSA with a referral letter from a governmental social services agency indicating that the social security number card must be shown in order to obtain benefits or services.

(3) *Restrictive legend change defined.* Based on a person's immigration status, a restrictive legend may appear on the face of an SSN card to indicate that work is either not authorized or that work may be performed only with Department of Homeland Security (DHS) authorization. This restrictive legend appears on the card above the individual's name and SSN. Individuals without work authorization in the U.S. receive SSN cards showing the restrictive legend, “Not Valid for Employment;” and SSN cards for those individuals who have temporary work authorization in the U.S. show the restrictive legend, “Valid For Work Only With DHS Authorization.” U.S. citizens and individuals who are permanent residents receive SSN cards without a restrictive legend. For the purpose of determining a change in restrictive legend, the individual must have a change in immigration status or citizenship which results in a change to or the removal of a restrictive legend when compared to the prior SSN card data. An SSN card request based upon a change in immigration status or citizenship which does not affect the restrictive legend will count toward the yearly and lifetime limits, as in the case of Permanent Resident Aliens who attain U.S. citizenship.

■ 3. Section 422.110 is revised to read as follows:

#### § 422.110 Individual's request for change in record.

(a) *Form SS-5.* If you wish to change the name or other personal identifying information you previously submitted in connection with an application for a social security number card, you must complete and sign a Form SS-5 except as provided in paragraph (b) of this section. You must prove your identity, and you may be required to provide other evidence. (See § 422.107 for evidence requirements.) You may obtain a Form SS-5 from any local Social Security office or from one of the

sources noted in § 422.103(b). You may submit a completed request for change in records to any Social Security office, or, if you are outside the U.S., to the Department of Veterans Affairs Regional Office, Manila, Philippines, or to any U.S. Foreign Service post or U.S. military post. If your request is for a change of name on the card (i.e., verified legal changes to the first name and/or surname), we may issue you a replacement card bearing the same number and the new name. We will grant an exception from the limitations specified in § 422.103(e)(2) for replacement social security number cards representing a change in name or, if you are an alien, a change to a restrictive legend shown on the card. (See § 422.103(e)(3) for the definition of a change to a restrictive legend.)

(b) *Assisting in enumeration.* We may enter into an agreement with officials of the Department of State and the Department of Homeland Security to assist us by collecting, as part of the immigration process, information to change the name or other personal identifying information you previously submitted in connection with an application or request for a social security number card. If your request is to change a name on the card (i.e., verified legal changes to the first name and/or surname) or to correct the restrictive legend on the card to reflect a change in alien status, we may issue you a replacement card bearing the same number and the new name or legend. We will grant an exception from the limitations specified in § 422.103(e)(2) for replacement social security number cards representing a change of name or, if you are an alien, a change to a restrictive legend shown on the card. (See § 422.103(e)(3) for the definition of a change to a restrictive legend.)

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 54

[TD 9277]

RIN 1545-BE30

#### Employer Comparable Contributions to Health Savings Accounts Under Section 4980G

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations that provide guidance regarding employer comparable contributions to Health Savings Accounts (HSAs) under section 4980G. In general, these final regulations affect employers that contribute to employees' HSAs.

**DATES:** *Effective Date:* These regulations are effective on July 31, 2006.

*Applicability Date:* These regulations apply to employer contributions to HSAs made on or after January 1, 2007.

**FOR FURTHER INFORMATION CONTACT:** Mireille T. Khoury (202) 622-6080 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Background**

This document contains final Pension Excise Tax Regulations (26 CFR part 54) under section 4980G of the Internal Revenue Code (Code). Under section 4980G of the Code, an excise tax is imposed on an employer that fails to make comparable contributions to the HSAs of its employees.

Section 1201 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Act), Public Law 108-173, (117 Stat. 2066, 2003) added section 223 to the Code to permit eligible individuals to establish HSAs for taxable years beginning after December 31, 2003. Section 4980G was also added to the Code by the Act. Section 4980G(a) imposes an excise tax on the failure of an employer to make comparable contributions to the HSAs of its employees for a calendar year. Section 4980G(b) provides that rules and requirements similar to section 4980E (the comparability rules for Archer Medical Savings Accounts (Archer MSAs)) apply for purposes of section 4980G. Section 4980E(b) imposes an excise tax equal to 35% of the aggregate amount contributed by the employer to the Archer MSAs of employees during the calendar year if an employer fails to make comparable contributions to the Archer MSAs of its employees in a calendar year. Therefore, if an employer fails to make comparable contributions to the HSAs of its employees during a calendar year, an excise tax equal to 35% of the aggregate amount contributed by the employer to the HSAs of its employees during that calendar year is imposed on the employer. See Sections 4980G(a) and (b) and 4980E(b). See also Notice 2004-2 (2004-2 IRB 269), Q & A-32. See § 601.601(d)(2).

On August 26, 2005, proposed regulations (REG-138647-04) were published in the **Federal Register** (70 FR 50233). The proposed regulations

clarified and expanded upon the guidance regarding the comparability rules published in Notice 2004-2 and in Notice 2004-50 (2004-33 IRB 196), Q & A-46 through Q & A-54. See § 601.601(d)(2) of this chapter. Written public comments on the proposed regulations were received and a public hearing was requested. The hearing was held on February 23, 2006. After consideration of all the comments, these final regulations adopt the provisions of the proposed regulations with certain modifications, the most significant of which are highlighted in this preamble.

**Explanation of Provisions and Summary of Comments**

Several commentators requested that the effective date should be at least one year from the date the regulations are finalized to give employers sufficient time to implement changes required to comply with the final regulations. The final regulations will apply to employer contributions to HSAs made on or after January 1, 2007.

An employer is not required to contribute to the HSAs of its employees. In general, however, if an employer makes contributions to any employee's HSA, the employer must make comparable contributions to the HSAs of all comparable participating employees. Comparable participating employees are eligible individuals (as defined in section 223(c)(1)) who are in the same category of employees and who have the same category of high deductible health plan (HDHP) coverage. Under the proposed regulations, the categories of coverage were self-only HDHP coverage and family HDHP coverage. Several commentators recommended that the final regulations should recognize additional categories of coverage other than self-only and family HDHP. The final regulations adopt this recommendation and allow family HDHP coverage to be subdivided into the following additional categories of HDHP coverage: self plus one, self plus two and self plus three or more. In addition, the final regulations provide that an employer's contribution with respect to the self plus two category may not be less than the employer's contribution with respect to the self plus one category and the employer's contribution with respect to the self plus three or more category may not be less than the employer's contribution with respect to the self plus two category.

In addition, several commentators requested separate treatment for groups of collectively bargained employees, such that employers' HSA contributions

to collectively bargained employees would not be subject to the comparability rules. In response to these comments, the final regulations provide that employees who are included in a unit of employees covered by a bona fide collective bargaining agreement between employee representatives and one or more employers are not comparable participating employees, if health benefits were the subject of good faith bargaining between such employee representatives and such employer or employers. Collectively bargained employees are, therefore, disregarded for purposes of section 4980G.

Numerous commentators requested guidance on the exception to the comparability rules for employer contributions made through a section 125 cafeteria plan. In response to these comments, the final regulations provide additional guidance on how employer HSA contributions are made through a cafeteria plan. Specifically, the final regulations provide that employer contributions to employees' HSAs are made through the cafeteria plan if under the written cafeteria plan, the employees have the right to elect to receive cash or other taxable benefits in lieu of all or a portion of an HSA contribution (i.e., all or a portion of the HSA contributions are available as pre-tax salary reduction amounts), regardless of whether an employee actually elects to contribute any amount to the HSA by salary reduction. The final regulations also provide several examples that illustrate the application of the cafeteria plan exception to the comparability rules.

One commentator requested guidance on what actions an employer must take to locate any missing comparable participating former employees for purposes of contributions to eligible former employees. The final regulations provide guidance on this issue and explain that an employer making comparable contributions to former employees must take reasonable actions to locate any missing comparable participating former employees. In general, such reasonable actions include the use of certified mail, the Internal Revenue Service Letter Forwarding Program, see Rev. Proc. 94-22 (1994-1 CB 608), or the Social Security Administration's Letter Forwarding Service. See § 601.601(d)(2).

Several commentators requested that testing for comparability purposes be permitted on a plan year, rather than calendar year, basis. Section 4980G mandates the use of a calendar year for testing purposes. Accordingly, the final regulations do not adopt the suggestion for plan year testing. Also, the final

regulations have removed and reserved the provision dealing with instances where an employee has not established an HSA by the end of the calendar year.

Finally, one commentator requested clarification on what would constitute reasonable interest for purposes of section 4980G. In response to this comment, the final regulations provide that the determination of whether a rate of interest used by an employer is reasonable will be based on all of the facts and circumstances. However, if an employer calculates interest using the Federal short-term rate as determined by the Secretary in accordance with Code section 1274(d), the employer is deemed to use a reasonable interest rate.

### Special Analyses

It has been determined that these regulations are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. These regulations do not impose a collection of information on small entities, thus the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### Drafting Information

The principal authors of these regulations are Barbara E. Pie and Mireille T. Khoury, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities).

### List of Subjects in 26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

### Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 54 is amended as follows:

## PART 54—PENSION EXCISE TAXES

■ **Paragraph 1.** The authority citation for part 54 is amended by adding entries in numerical order to read, in part, as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*  
Section 54.4980G-1 also issued under 26 U.S.C. 4980G. Section 54.4980G-2 also issued under 26 U.S.C. 4980G. Section 54.4980G-3 also issued under 26 U.S.C. 4980G. Section 54.4980G-4 also issued under 26 U.S.C. 4980G. Section 54.4980G-5 also issued under 26 U.S.C. 4980G. \* \* \*

■ **Par. 2.** Sections 54.4980G-0, 54.4980G-1, 54.4980G-2, 54.4980G-3, 54.4980G-4, and 54.4980G-5 are added to read as follows:

### § 54.4980G-0 Table of contents.

This section contains the questions for §§ 54.4980G-1, 54.4980G-2, 54.4980G-3, 54.4980G-4, and 54.4980G-5.

### § 54.4980G-1 Failure of employer to make comparable health savings account contributions.

Q-1: What are the comparability rules that apply to employer contributions to Health Savings Accounts (HSAs)?

Q-2: What are the categories of HDHP coverage for purposes of applying the comparability rules?

Q-3: What is the testing period for making comparable contributions to employees' HSAs?

Q-4: How is the excise tax computed if employer contributions do not satisfy the comparability rules for a calendar year?

### § 54.4980G-2 Employer contribution defined.

Q-1: Do the comparability rules apply to amounts rolled over from an employee's HSA or Archer Medical Savings Account (Archer MSA)?

Q-2: If an employee requests that his or her employer deduct after-tax amounts from the employee's compensation and forward these amounts as employee contributions to the employee's HSA, do the comparability rules apply to these amounts?

### § 54.4980G-3 Employee for comparability testing.

Q-1: Do the comparability rules apply to contributions that an employer makes to the HSAs of independent contractors or self-employed individuals?

Q-2: May a sole proprietor who is an eligible individual contribute to his or her own HSA without contributing to the HSAs of his or her employees who are eligible individuals?

Q-3: Do the comparability rules apply to contributions by a partnership to a partner's HSA?

Q-4: How are members of controlled groups treated when applying the comparability rules?

Q-5: What are the categories of employees for comparability testing?

Q-6: Are employees who are included in a unit of employees covered by a collective bargaining agreement comparable participating employees?

Q-7: Is an employer permitted to make comparable contributions only to the HSAs of comparable participating employees who have coverage under the employer's HDHP?

Q-8: If an employee and his or her spouse are eligible individuals who work for the same employer and one employee-spouse has family coverage for both employees under the employer's HDHP, must the employer make comparable contributions to the HSAs of both employees?

Q-9: Does an employer that makes HSA contributions only for one class of non-collectively bargained employees who are

eligible individuals, but not for another class of non-collectively bargained employees who are eligible individuals (for example, management v. non-management) satisfy the requirement that the employer make comparable contributions?

Q-10: If an employer contributes to the HSAs of former employees who are eligible individuals, do the comparability rules apply to these contributions?

Q-11: Is an employer permitted to make comparable contributions only to the HSAs of comparable participating former employees who have coverage under the employer's HDHP?

Q-12: If an employer contributes only to the HSAs of former employees who are eligible individuals with coverage under the employer's HDHP, must the employer make comparable contributions to the HSAs of former employees who are eligible individuals with coverage under the employer's HDHP because of an election under a COBRA continuation provision (as defined in section 9832(d)(1))?

Q-13: How do the comparability rules apply if some employees have HSAs and other employees have Archer MSAs?

### § 54.4980G-4 Calculating comparable contributions.

Q-1: What are comparable contributions?

Q-2: How does an employer comply with the comparability rules when some non-collectively bargained employees who are eligible individuals do not work for the employer during the entire calendar year?

Q-3: How do the comparability rules apply to employer contributions to employees' HSAs if some non-collectively bargained employees work full-time during the entire calendar year, and other non-collectively bargained employees work full-time for less than the entire calendar year?

Q-4: May an employer make contributions for the entire year to the HSAs of its employees who are eligible individuals at the beginning of the calendar year (i.e., on a pre-funded basis) instead of contributing on a pay-as-you-go or on a look-back basis?

Q-5: Must an employer use the same contribution method as described in Q & A-3 and Q & A-4 of this section for all employees who were comparable participating employees for any month during the calendar year?

Q-6: How does an employer comply with the comparability rules if an employee has not established an HSA at the time the employer contributes to its employees' HSAs?

Q-7: If an employer bases its contributions on a percentage of the HDHP deductible, how is the correct percentage or dollar amount computed?

Q-8: Does an employer that contributes to the HSA of each comparable participating employee in an amount equal to the employee's HSA contribution or a percentage of the employee's HSA contribution (matching contributions) satisfy the rule that all comparable participating employees receive comparable contributions?

Q-9: If an employer conditions contributions by the employer to an employee's HSA on an employee's participation in health assessments, disease

management programs or wellness programs and makes the same contributions available to all employees who participate in the programs, do the contributions satisfy the comparability rules?

Q-10: If an employer makes additional contributions to the HSAs of all comparable participating employees who have attained a specified age or who have worked for the employer for a specified number of years, do the contributions satisfy the comparability rules?

Q-11: If an employer makes additional contributions to the HSAs of all comparable participating employees are eligible to make the additional contributions (HSA catch-up contributions) under section 223(b)(3), do the contributions satisfy the comparability rules?

Q-12: If an employer's contributions to an employee's HSA result in non-comparable contributions, may the employer recoup the excess amount from the employee's HSA?

Q-13: What constitutes a reasonable interest rate for purposes of making comparable contributions?

#### **§ 54.4980G-5 HSA comparability rules and cafeteria plans and waiver of excise tax.**

Q-1: If an employer makes contributions through a section 125 cafeteria plan to the HSA of each employee who is an eligible individual, are the contributions subject to the comparability rules?

Q-2: If an employer makes contributions through a cafeteria plan to the HSA of each employee who is an eligible individual in an amount equal to the amount of the employee's HSA contribution or a percentage of the amount of the employee's HSA contribution (i.e., matching contributions), are the contributions subject to the section 4980G comparability rules?

Q-3: If under the employer's cafeteria plan, employees who are eligible individuals and who participate in health assessments, disease management programs or wellness programs receive an employer contribution to an HSA, unless the employees elect cash, are the contributions subject to the comparability rules?

Q-4: May all or part of the excise tax imposed under section 4980G be waived?

#### **§ 54.4980G-1 Failure of employer to make comparable health savings account contributions.**

Q-1: What are the comparability rules that apply to employer contributions to Health Savings Accounts (HSAs)?

A-1: If an employer makes contributions to any employee's HSA, the employer must make comparable contributions to the HSAs of all comparable participating employees. See Q & A-1 in § 54.4980G-4 for the definition of comparable contributions. Comparable participating employees are eligible individuals (as defined in section 223(c)(1)) who are in the same category of employees and who have the same category of high deductible health plan (HDHP) coverage. See sections 4980G(b) and 4980E(d)(3). See section 223(c)(2) and (g) for the definition of an HDHP. See also Q & A-5 in § 54.4980G-

3 for the categories of employees and Q & A-2 of this section for the categories of HDHP coverage. But see Q & A-6 in § 54.4980G-3 for treatment of collectively bargained employees.

Q-2: What are the categories of HDHP coverage for purposes of applying the comparability rules?

A-2: (a) *In general.* Generally, the categories of coverage are self-only HDHP coverage and family HDHP coverage. Family HDHP coverage means any coverage other than self-only HDHP coverage. The comparability rules apply separately to self-only HDHP coverage and family HDHP coverage. In addition, if an HDHP has family coverage options meeting the descriptions listed in paragraph (b) of this Q & A-2, each such coverage option may be treated as a separate category of coverage and the comparability rules may be applied separately to each category. However, if the HDHP has more than one category that provides coverage for the same number of individuals, all such categories are treated as a single category for purposes of the comparability rules. Thus, the categories of "employee plus spouse" and "employee plus dependent," each providing coverage for two individuals, are treated as the single category "self plus one" for comparability purposes. See, however, the final sentence of paragraph (a) of Q & A-1 of § 54.4980G-4 for a special rule that applies if different amounts are contributed for different categories of family coverage.

(b) *HDHP Family coverage categories.* The coverage categories are—

- (1) Self plus one;
- (2) Self plus two; and
- (3) Self plus three or more.

(c) *Examples.* The rules of this Q & A-2 are illustrated by the following examples:

*Example 1.* Employer A maintains an HDHP and contributes to the HSAs of eligible employees who elect coverage under the HDHP. The HDHP has self-only coverage and family coverage. Thus, the categories of coverage are self-only and family coverage. Employer A contributes \$750 to the HSA of each eligible employee with self-only HDHP coverage and \$1,000 to the HSA of each eligible employee with family HDHP coverage. Employer A's contributions satisfy the comparability rules.

*Example 2.* (i) Employer B maintains an HDHP and contributes to the HSAs of eligible employees who elect coverage under the HDHP. The HDHP has the following coverage options:

- (A) Self-only;
- (B) Self plus spouse;
- (C) Self plus dependent;
- (D) Self plus spouse plus one dependent;
- (E) Self plus two dependents; and
- (F) Self plus spouse and two or more dependents.

(ii) The self plus spouse category and the self plus dependent category constitute the same category of HDHP coverage (self plus one) and Employer B must make the same comparable contributions to the HSAs of all eligible individuals who are in either the self plus spouse category of HDHP coverage or the self plus dependent category of HDHP coverage. Likewise, the self plus spouse plus one dependent category and the self plus two dependents category constitute the same category of HDHP coverage (self plus two) and Employer B must make the same comparable contributions to the HSAs of all eligible individuals who are in either the self plus spouse plus one dependent category of HDHP coverage or the self plus two dependents category of HDHP coverage.

*Example 3.* (i) Employer C maintains an HDHP and contributes to the HSAs of eligible employees who elect coverage under the HDHP. The HDHP has the following coverage options:

- (A) Self-only;
- (B) Self plus one;
- (C) Self plus two; and
- (D) Self plus three or more.

(ii) Employer C contributes \$500 to the HSA of each eligible employee with self-only HDHP coverage, \$750 to the HSA of each eligible employee with self plus one HDHP coverage, \$900 to the HSA of each eligible employee with self plus two HDHP coverage and \$1,000 to the HSA of each eligible employee with self plus three or more HDHP coverage. Employer C's contributions satisfy the comparability rules.

Q-3: What is the testing period for making comparable contributions to employees' HSAs?

A-3: To satisfy the comparability rules, an employer must make comparable contributions for the calendar year to the HSAs of employees who are comparable participating employees. See section 4980G(a). See Q & A-3 and Q & A-4 in § 54.4980G-4 for a discussion of HSA contribution methods.

Q-4: How is the excise tax computed if employer contributions do not satisfy the comparability rules for a calendar year?

A-4: (a) *Computation of tax.* If employer contributions do not satisfy the comparability rules for a calendar year, the employer is subject to an excise tax equal to 35% of the aggregate amount contributed by the employer to HSAs for that period.

(b) *Example.* The following example illustrates the rules in paragraph (a) of this Q & A-4:

*Example.* During the 2007 calendar year, Employer D has 8 employees who are eligible individuals with self-only coverage under an HDHP provided by Employer D. The deductible for the HDHP is \$2,000. For the 2007 calendar year, Employer D contributes \$2,000 each to the HSAs of two employees and \$1,000 each to the HSAs of the other six employees, for total HSA contributions of

\$10,000. Employer D's contributions do not satisfy the comparability rules. Therefore, Employer D is subject to an excise tax of \$3,500 (35% of \$10,000) for its failure to make comparable contributions to its employees' HSAs.

**§ 54.4980G-2 Employer contribution defined.**

Q-1: Do the comparability rules apply to amounts rolled over from an employee's HSA or Archer Medical Savings Account (Archer MSA)?

A-1: No. The comparability rules do not apply to amounts rolled over from an employee's HSA or Archer MSA.

Q-2: If an employee requests that his or her employer deduct after-tax amounts from the employee's compensation and forward these amounts as employee contributions to the employee's HSA, do the comparability rules apply to these amounts?

A-2: No. Section 106(d) provides that amounts contributed by an employer to an eligible employee's HSA shall be treated as employer-provided coverage for medical expenses and are excludible from the employee's gross income up to the limit in section 223(b). After-tax employee contributions to an HSA are not subject to the comparability rules because they are not employer contributions under section 106(d).

**§ 54.4980G-3 Employee for comparability testing.**

Q-1: Do the comparability rules apply to contributions that an employer makes to the HSAs of independent contractors or self-employed individuals?

A-1: No. The comparability rules apply only to contributions that an employer makes to the HSAs of employees.

Q-2: May a sole proprietor who is an eligible individual contribute to his or her own HSA without contributing to the HSAs of his or her employees who are eligible individuals?

A-2: (a) *Sole proprietor not an employee.* Yes. The comparability rules apply only to contributions made by an employer to the HSAs of employees. Because a sole proprietor is not an employee, the comparability rules do not apply to contributions the sole proprietor makes to his or her own HSA. However, if a sole proprietor contributes to any employee's HSA, the sole proprietor must make comparable contributions to the HSAs of all comparable participating employees. In determining whether the comparability rules are satisfied, contributions that a sole proprietor makes to his or her own HSA are not taken into account.

(b) *Example.* The following example illustrates the rules in paragraph (a) of this Q & A-2:

*Example.* In a calendar year, B, a sole proprietor is an eligible individual and contributes \$1,000 to B's own HSA. B also contributes \$500 for the same calendar year to the HSA of each employee who is an eligible individual. The comparability rules are not violated by B's \$1,000 contribution to B's own HSA.

Q-3: Do the comparability rules apply to contributions by a partnership to a partner's HSA?

A-3: (a) *Partner not an employee.* No. Contributions by a partnership to a bona fide partner's HSA are not subject to the comparability rules because the contributions are not contributions by an employer to the HSA of an employee. The contributions are treated as either guaranteed payments under section 707(c) or distributions under section 731. However, if a partnership contributes to the HSAs of any employee who is not a partner, the partnership must make comparable contributions to the HSAs of all comparable participating employees.

(b) *Example.* The following example illustrates the rules in paragraph (a) of this Q & A-3:

*Example.* (i) Partnership X is a limited partnership with three equal individual partners, A (a general partner), B (a limited partner), and C (a limited partner). C is to be paid \$300 annually for services rendered to Partnership X in her capacity as a partner without regard to partnership income (a section 707(c) guaranteed payment). D and E are the only employees of Partnership X and are not partners in Partnership X. A, B, C, D, and E are eligible individuals and each has an HSA. During Partnership X's Year 1 taxable year, which is also a calendar year, Partnership X makes the following contributions—

(A) A \$300 contribution to each of A's and B's HSAs which are treated as section 731 distributions to A and B;

(B) A \$300 contribution to C's HSA in lieu of paying C the guaranteed payment directly; and

(C) A \$200 contribution to each of D's and E's HSAs, who are comparable participating employees.

(ii) Partnership X's contributions to A's and B's HSAs are section 731 distributions, which are treated as cash distributions. Partnership X's contribution to C's HSA is treated as a guaranteed payment under section 707(c). The contribution is not excludible from C's gross income under section 106(d) because the contribution is treated as a distributive share of partnership income for purposes of all Code sections other than sections 61(a) and 162(a), and a guaranteed payment to a partner is not treated as compensation to an employee. Thus, Partnership X's contributions to the HSAs of A, B, and C are not subject to the comparability rules. Partnership X's

contributions to D's and E's HSAs are subject to the comparability rules because D and E are employees of Partnership X and are not partners in Partnership X. Partnership X's contributions satisfy the comparability rules.

Q-4: How are members of controlled groups treated when applying the comparability rules?

A-4: All persons or entities treated as a single employer under section 414 (b), (c), (m), or (o) are treated as one employer. See sections 4980G(b) and 4980E(e).

Q-5: What are the categories of employees for comparability testing?

A-5: (a) *Categories.* The categories of employees for comparability testing are as follows (but see Q & A-6 of this section for the treatment of collectively bargained employees)—

- (1) Current full-time employees;
- (2) Current part-time employees; and
- (3) Former employees (except for

former employees with coverage under the employer's HDHP because of an election under a COBRA continuation provision (as defined in section 9832(d)(1)).

(b) *Part-time and full-time employees.* For purposes of section 4980G, part-time employees are customarily employed for fewer than 30 hours per week and full-time employees are customarily employed for 30 or more hours per week. See sections 4980G(b) and 4980E(d)(4)(A) and (B).

(c) *In general.* Except as provided in Q & A-6 of this section, the categories of employees in paragraph (a) of this Q & A-5 are the exclusive categories of employees for comparability testing. An employer must make comparable contributions to the HSAs of all comparable participating employees (eligible individuals who are in the same category of employees with the same category of HDHP coverage) during the calendar year without regard to any classification other than these categories. For example, full-time eligible employees with self-only HDHP coverage and part-time eligible employees with self-only HDHP coverage are separate categories of employees and different amounts can be contributed to the HSAs for each of these categories.

Q-6: Are employees who are included in a unit of employees covered by a collective bargaining agreement comparable participating employees?

A-6: (a) *In general.* No. Collectively bargained employees who are covered by a bona fide collective bargaining agreement between employee representatives and one or more employers are not comparable participating employees, if health benefits were the subject of good faith

bargaining between such employee representatives and such employer or employers. Former employees covered by a collective bargaining agreement also are not comparable participating employees.

(b) *Examples.* The following examples illustrate the rules in paragraph (a) of this Q & A-6. The examples read as follows:

*Example 1.* Employer A offers its employees an HDHP with a \$1,500 deductible for self-only coverage. Employer A has collectively bargained and non-collectively bargained employees. The collectively bargained employees are covered by a collective bargaining agreement under which health benefits were bargained in good faith. In the 2007 calendar year, Employer A contributes \$500 to the HSAs of all eligible non-collectively bargained employees with self-only coverage under Employer A's HDHP. Employer A does not contribute to the HSAs of the collectively bargained employees. Employer A's contributions to the HSAs of non-collectively bargained employees satisfy the comparability rules. The comparability rules do not apply to collectively bargained employees.

*Example 2.* Employer B offers its employees an HDHP with a \$1,500 deductible for self-only coverage. Employer B has collectively bargained and non-collectively bargained employees. The collectively bargained employees are covered by a collective bargaining agreement under which health benefits were bargained in good faith. In the 2007 calendar year and in accordance with the terms of the collective bargaining agreement, Employer B contributes to the HSAs of all eligible collectively bargained employees. Employer B does not contribute to the HSAs of the non-collectively bargained employees. Employer B's contributions to the HSAs of collectively bargained employees are not subject to the comparability rules because the comparability rules do not apply to collectively bargained employees. Accordingly, Employer B's failure to contribute to the HSAs of the non-collectively bargained employees does not violate the comparability rules.

*Example 3.* Employer C has two units of collectively bargained employees—unit Q and unit R—each covered by a collective bargaining agreement under which health benefits were bargained in good faith. In the 2007 calendar year and in accordance with the terms of the collective bargaining agreement, Employer C contributes to the HSAs of all eligible collectively bargained employees in unit Q. In accordance with the terms of the collective bargaining agreement, Employer C makes no HSA contributions for collectively bargained employees in unit R. Employer C's contributions to the HSAs of collectively bargained employees are not subject to the comparability rules because the comparability rules do not apply to collectively bargained employees.

*Example 4.* Employer D has a unit of collectively bargained employees that are covered by a collective bargaining agreement under which health benefits were bargained

in good faith. In accordance with the terms of the collective bargaining agreement, Employer D contributes an amount equal to a specified number of cents per hour for each hour worked to the HSAs of all eligible collectively bargained employees. Employer D's contributions to the HSAs of collectively bargained employees are not subject to the comparability rules because the comparability rules do not apply to collectively bargained employees.

Q-7: Is an employer permitted to make comparable contributions only to the HSAs of comparable participating employees who have coverage under the employer's HDHP?

A-7: (a) *Employer-provided HDHP coverage.* If during a calendar year, an employer contributes to the HSA of any employee who is an eligible individual covered under an HDHP provided by the employer, the employer is required to make comparable contributions to the HSAs of all comparable participating employees with coverage under any HDHP provided by the employer. An employer that contributes only to the HSAs of employees who are eligible individuals with coverage under the employer's HDHP is not required to make comparable contributions to HSAs of employees who are eligible individuals but are not covered under the employer's HDHP.

(b) *Non-employer provided HDHP coverage.* An employer that contributes to the HSA of any employee who is an eligible individual with coverage under any HDHP that is not an HDHP provided by the employer, must make comparable contributions to the HSAs of all comparable participating employees whether or not covered under the employer's HDHP. An employer that makes a reasonable good faith effort to identify all comparable participating employees with non-employer provided HDHP coverage and makes comparable contributions to the HSAs of such employees satisfies the requirements in paragraph (b) of this Q & A-7.

(c) *Examples.* The following examples illustrate the rules in this Q & A-7. None of the employees in the following examples are covered by a collective bargaining agreement. The examples read as follows:

*Example 1.* In a calendar year, Employer E offers an HDHP to its full-time employees. Most full-time employees are covered under Employer E's HDHP and Employer E makes comparable contributions only to these employees' HSAs. Employee W, a full-time employee of Employer E and an eligible individual, is covered under an HDHP provided by the employer of W's spouse and not under Employer E's HDHP. Employer E is not required to make comparable contributions to W's HSA.

*Example 2.* In a calendar year, Employer F does not offer an HDHP. Several full-time employees of Employer F, who are eligible individuals, have HSAs. Employer F contributes to these employees' HSAs. Employer F must make comparable contributions to the HSAs of all full-time employees who are eligible individuals.

*Example 3.* In a calendar year, Employer G offers an HDHP to its full-time employees. Most full-time employees are covered under Employer G's HDHP and Employer G makes comparable contributions to these employees' HSAs and also to the HSAs of full-time employees who are eligible individuals and who are not covered under Employer G's HDHP. Employee S, a full-time employee of Employer G and a comparable participating employee, is covered under an HDHP provided by the employer of S's spouse and not under Employer G's HDHP. Employer G must make comparable contributions to S's HSA.

Q-8: If an employee and his or her spouse are eligible individuals who work for the same employer and one employee-spouse has family coverage for both employees under the employer's HDHP, must the employer make comparable contributions to the HSAs of both employees?

A-8: (a) *In general.* If the employer makes contributions only to the HSAs of employees who are eligible individuals covered under its HDHP where only one employee-spouse has family coverage for both employees under the employer's HDHP, the employer is not required to contribute to the HSAs of both employee-spouses. The employer is required to contribute to the HSA of the employee-spouse with coverage under the employer's HDHP, but is not required to contribute to the HSA of the employee-spouse covered under the employer's HDHP by virtue of his or her spouse's coverage. However, if the employer contributes to the HSA of any employee who is an eligible individual with coverage under an HDHP that is not an HDHP provided by the employer, the employer must make comparable contributions to the HSAs of both employee-spouses if they are both eligible individuals. If an employer is required to contribute to the HSAs of both employee-spouses, the employer is not required to contribute amounts in excess of the annual contribution limits in section 223(b).

(b) *Examples.* The following examples illustrate the rules in paragraph (a) of this Q & A-8. None of the employees in the following examples are covered by a collective bargaining agreement. The examples read as follows:

*Example 1.* In a calendar year, Employer H offers an HDHP to its full-time employees. Most full-time employees are covered under Employer H's HDHP and Employer H makes

comparable contributions only to these employees' HSAs. T and U are a married couple. Employee T, who is a full-time employee of Employer H and an eligible individual, has family coverage under Employer H's HDHP for T and T's spouse. Employee U, who is also a full-time employee of Employer H and an eligible individual, does not have coverage under Employer H's HDHP except as the spouse of Employee T. Employer H is required to make comparable contributions to T's HSA, but is not required to make comparable contributions to U's HSA.

*Example 2.* In a calendar year, Employer J offers an HDHP to its full-time employees. Most full-time employees are covered under Employer J's HDHP and Employer J makes comparable contributions to these employees' HSAs and to the HSAs of full-time employees who are eligible individuals but are not covered under Employer J's HDHP. R and S are a married couple. Employee S, who is a full-time employee of Employer J and an eligible individual, has family coverage under Employer J's HDHP for S and S's spouse. Employee R, who is also a full-time employee of Employer J and an eligible individual, does not have coverage under Employer J's HDHP except as the spouse of Employee S. Employer J must make comparable contributions to S's HSA and to R's HSA.

**Q-9:** Does an employer that makes HSA contributions only for one class of non-collectively bargained employees who are eligible individuals, but not for another class of non-collectively bargained employees who are eligible individuals (for example, management v. non-management) satisfy the requirement that the employer make comparable contributions?

**A-9:** (a) *Different classes of employees.*

No. If the two classes of employees are comparable participating employees, the comparability rules are not satisfied. The only categories of employees for comparability purposes are current full-time employees, current part-time employees, and former employees. Collectively bargained employees are not comparable participating employees. But see Q & A-1 in 54.4980G-5 on contributions made through a cafeteria plan.

(b) *Examples.* The following examples illustrate the rules in paragraph (a) of this Q & A-9. None of the employees in the following examples are covered by a collective bargaining agreement. The examples read as follows:

*Example 1.* In a calendar year, Employer K maintains an HDHP covering all management and non-management employees. Employer K contributes to the HSAs of non-management employees who are eligible individuals covered under its HDHP. Employer K does not contribute to the HSAs of its management employees who are

eligible individuals covered under its HDHP. The comparability rules are not satisfied.

*Example 2.* All of Employer L's employees are located in city X and city Y. In a calendar year, Employer L maintains an HDHP for all employees working in city X only. Employer L does not maintain an HDHP for its employees working in city Y. Employer L contributes \$500 to the HSAs of city X employees who are eligible individuals with coverage under its HDHP. Employer L does not contribute to the HSAs of any of its city Y employees. The comparability rules are satisfied because none of the employees in city Y are covered under an HDHP of Employer L. (However, if any employees in city Y were covered by an HDHP of Employer L, Employer L could not fail to contribute to their HSAs merely because they work in a different city.)

*Example 3.* Employer M has two divisions—division N and division O. In a calendar year, Employer M maintains an HDHP for employees working in division N and division O. Employer M contributes to the HSAs of division N employees who are eligible individuals with coverage under its HDHP. Employer M does not contribute to the HSAs of division O employees who are eligible individuals covered under its HDHP. The comparability rules are not satisfied.

**Q-10:** If an employer contributes to the HSAs of former employees who are eligible individuals, do the comparability rules apply to these contributions?

**A-10:** (a) *Former employees.* Yes. The comparability rules apply to contributions an employer makes to former employees' HSAs. Therefore, if an employer contributes to any former employee's HSA, it must make comparable contributions to the HSAs of all comparable participating former employees (former employees who are eligible individuals with the same category of HDHP coverage). However, an employer is not required to make comparable contributions to the HSAs of former employees with coverage under the employer's HDHP because of an election under a COBRA continuation provision (as defined in section 9832(d)(1)). See Q & A-5 and Q & A-12 of this section. The comparability rules apply separately to former employees because they are a separate category of covered employee. See Q & A-5 of this section. Also, former employees who were covered by a collective bargaining agreement immediately before termination of employment are not comparable participating employees. See Q & A-6 of this section.

(b) *Locating former employees.* An employer making comparable contributions to former employees must take reasonable actions to locate any missing comparable participating former employees. In general, such actions include the use of certified mail, the

Internal Revenue Service Letter Forwarding Program or the Social Security Administration's Letter Forwarding Service.

(c) *Examples.* The following examples illustrate the rules in paragraph (a) of this Q & A-10. None of the employees in the following examples are covered by a collective bargaining agreement. The examples read as follows:

*Example 1.* In a calendar year, Employer N contributes \$1,000 for the calendar year to the HSA of each current employee who is an eligible individual with coverage under any HDHP. Employer N does not contribute to the HSA of any former employee who is an eligible individual. Employer N's contributions satisfy the comparability rules.

*Example 2.* In a calendar year, Employer O contributes to the HSAs of current employees and former employees who are eligible individuals covered under any HDHP. Employer O contributes \$750 to the HSA of each current employee with self-only HDHP coverage and \$1,000 to the HSA of each current employee with family HDHP coverage. Employer O also contributes \$300 to the HSA of each former employee with self-only HDHP coverage and \$400 to the HSA of each former employee with family HDHP coverage. Employer O's contributions satisfy the comparability rules.

**Q-11:** Is an employer permitted to make comparable contributions only to the HSAs of comparable participating former employees who have coverage under the employer's HDHP?

**A-11:** If during a calendar year, an employer contributes to the HSA of any former employee who is an eligible individual covered under an HDHP provided by the employer, the employer is required to make comparable contributions to the HSAs of all former employees who are comparable participating former employees with coverage under any HDHP provided by the employer. An employer that contributes only to the HSAs of former employees who are eligible individuals with coverage under the employer's HDHP is not required to make comparable contributions to the HSAs of former employees who are eligible individuals and who are not covered under the employer's HDHP. However, an employer that contributes to the HSA of any former employee who is an eligible individual with coverage under an HDHP that is not an HDHP of the employer, must make comparable contributions to the HSAs of all former employees who are eligible individuals whether or not covered under an HDHP of the employer.

**Q-12:** If an employer contributes only to the HSAs of former employees who are eligible individuals with coverage under the employer's HDHP, must the employer make comparable

contributions to the HSAs of former employees who are eligible individuals with coverage under the employer's HDHP because of an election under a COBRA continuation provision (as defined in section 9832(d)(1))?

A-12: No. An employer that contributes only to the HSAs of former employees who are eligible individuals with coverage under the employer's HDHP is not required to make comparable contributions to the HSAs of former employees who are eligible individuals with coverage under the employer's HDHP because of an election under a COBRA continuation provision (as defined in section 9832(d)(1)).

Q-13: How do the comparability rules apply if some employees have HSAs and other employees have Archer MSAs?

A-13: (a) *HSAs and Archer MSAs.* The comparability rules apply separately to employees who have HSAs and employees who have Archer MSAs. However, if an employee has both an HSA and an Archer MSA, the employer may contribute to either the HSA or the Archer MSA, but not to both.

(b) *Example.* The following example illustrates the rules in paragraph (a) of this Q & A-13:

*Example.* In a calendar year, Employer P contributes \$600 to the Archer MSA of each employee who is an eligible individual and who has an Archer MSA. Employer P contributes \$500 for the calendar year to the HSA of each employee who is an eligible individual and who has an HSA. If an employee has both an Archer MSA and an HSA, Employer P contributes to the employee's Archer MSA and not to the employee's HSA. Employee X has an Archer MSA and an HSA. Employer P contributes \$600 for the calendar year to X's Archer MSA but does not contribute to X's HSA. Employer P's contributions satisfy the comparability rules.

#### **§ 54.4980G-4 Calculating comparable contributions.**

Q-1: What are comparable contributions?

A-1: (a) *Definition.* Contributions are comparable if, for each month in a calendar year, the contributions are either the same amount or the same percentage of the deductible under the HDHP for employees who are eligible individuals with the same category of coverage on the first day of that month. Employees with self-only HDHP coverage are tested separately from employees with family HDHP coverage. Similarly, employees with different categories of family HDHP coverage may be tested separately. See Q & A-2 in § 54.4980G-1. An employer is not required to contribute the same amount or the same percentage of the deductible

for employees who are eligible individuals with one category of HDHP coverage that it contributes for employees who are eligible individuals with a different category of HDHP coverage. For example, an employer that satisfies the comparability rules by contributing the same amount to the HSAs of all employees who are eligible individuals with family HDHP coverage is not required to contribute any amount to the HSAs of employees who are eligible individuals with self-only HDHP coverage, or to contribute the same percentage of the self-only HDHP deductible as the amount contributed with respect to family HDHP coverage. However, the contribution with respect to the self plus two category may not be less than the contribution with respect to the self plus one category and the contribution with respect to the self plus three or more category may not be less than the contribution with respect to the self plus two category.

(b) *Examples.* The following examples illustrate the rules in paragraph (a) of this Q & A-1. None of the employees in the following examples are covered by a collective bargaining agreement. The examples read as follows:

*Example 1.* In the 2007 calendar year, Employer A offers its full-time employees three health plans, including an HDHP with self-only coverage and a \$2,000 deductible. Employer A contributes \$1,000 for the calendar year to the HSA of each employee who is an eligible individual electing the self-only HDHP coverage. Employer A makes no HSA contributions for employees with family HDHP coverage or for employees who do not elect the employer's self-only HDHP. Employer A's HSA contributions satisfy the comparability rules.

*Example 2.* In the 2007 calendar year, Employer B offers its employees an HDHP with a \$3,000 deductible for self-only coverage and a \$4,000 deductible for family coverage. Employer B contributes \$1,000 for the calendar year to the HSA of each employee who is an eligible individual electing the self-only HDHP coverage. Employer B contributes \$2,000 for the calendar year to the HSA of each employee who is an eligible individual electing the family HDHP coverage. Employer B's HSA contributions satisfy the comparability rules.

*Example 3.* In the 2007 calendar year, Employer C offers its employees an HDHP with a \$1,500 deductible for self-only coverage and a \$3,000 deductible for family coverage. Employer C contributes \$1,000 for the calendar year to the HSA of each employee who is an eligible individual electing the self-only HDHP coverage. Employer C contributes \$1,000 for the calendar year to the HSA of each employee who is an eligible individual electing the family HDHP coverage. Employer C's HSA contributions satisfy the comparability rules.

*Example 4.* In the 2007 calendar year, Employer D offers its employees an HDHP

with a \$1,500 deductible for self-only coverage and a \$3,000 deductible for family coverage. Employer D contributes \$1,500 for the calendar year to the HSA of each employee who is an eligible individual electing the self-only HDHP coverage. Employer D contributes \$1,000 for the calendar year to the HSA of each employee who is an eligible individual electing the family HDHP coverage. Employer D's HSA contributions satisfy the comparability rules.

*Example 5.* (i) In the 2007 calendar year, Employer E maintains two HDHPs. Plan A has a \$2,000 deductible for self-only coverage and a \$4,000 deductible for family coverage. Plan B has a \$2,500 deductible for self-only coverage and a \$4,500 deductible for family coverage. For the calendar year, Employer E makes contributions to the HSA of each full-time employee who is an eligible individual covered under Plan A of \$600 for self-only coverage and \$1,000 for family coverage. Employer E satisfies the comparability rules, if it makes either of the following contributions for the 2007 calendar year to the HSA of each full-time employee who is an eligible individual covered under Plan B—

(A) \$600 for each full-time employee with self-only coverage and \$1,000 for each full-time employee with family coverage; or

(B) \$750 for each employee with self-only coverage and \$1,125 for each employee with family coverage (the same percentage of the deductible Employer E contributes for full-time employees covered under Plan A, 30% of the deductible for self-only coverage and 25% of the deductible for family coverage).

(ii) Employer E also makes contributions to the HSA of each part-time employee who is an eligible individual covered under Plan A of \$300 for self-only coverage and \$500 for family coverage. Employer E satisfies the comparability rules, if it makes either of the following contributions for the 2007 calendar year to the HSA of each part-time employee who is an eligible individual covered under Plan B—

(A) \$300 for each part-time employee with self-only coverage and \$500 for each part-time employee with family coverage; or

(B) \$375 for each part-time employee with self-only coverage and \$563 for each part-time employee with family coverage (the same percentage of the deductible Employer E contributes for part-time employees covered under Plan A, 15% of the deductible for self-only coverage and 12.5% of the deductible for family coverage).

*Example 6.* (i) In the 2007 calendar year, Employer F maintains an HDHP. The HDHP has the following coverage options—

(A) A \$2,500 deductible for self-only coverage;

(B) A \$3,500 deductible for self plus one dependent (self plus one);

(C) A \$3,500 deductible for self plus spouse (self plus one);

(D) A \$3,500 deductible for self plus spouse and one dependent (self plus two); and

(E) A \$3,500 deductible for self plus spouse and two or more dependents (self plus three or more).

(ii) Employer F makes the following contributions for the calendar year to the

HSA of each full-time employee who is an eligible individual covered under the HDHP—

- (A) \$750 for self-only coverage;
- (B) \$1,000 for self plus one dependent;
- (C) \$1,000 for self plus spouse;
- (D) \$1,500 for self plus spouse and one dependent; and
- (E) \$2,000 for self plus spouse and two or more dependents.

(iii) Employer F's HSA contributions satisfy the comparability rules.

*Example 7.* (i) In a calendar year, Employer G offers its employees an HDHP and a health flexible spending arrangement (health FSA). The health FSA reimburses employees for medical expenses as defined in section 213(d). Some of Employer G's employees have coverage under the HDHP and the health FSA, some have coverage under the HDHP and their spouse's FSA, and some have coverage under the HDHP and are enrolled in Medicare. For the calendar year, Employer G contributes \$500 to the HSA of each employee who is an eligible individual. No contributions are made to the HSAs of employees who have coverage under Employer G's health FSA or under a spouse's health FSA or who are enrolled in Medicare.

(ii) The employees who have coverage under a health FSA (whether Employer H's or their spouse's FSA) or who are covered under Medicare are not eligible individuals. Specifically, the employees who have coverage under the health FSA or under a spouse's health FSA are not comparable participating employees because they are not eligible individuals under section 223(c)(1). Similarly, the employees who are enrolled in Medicare are not comparable participating employees because they are not eligible individuals under section 223(b)(7) and (c)(1). Therefore, employees who have coverage under the health FSA or under a spouse's health FSA and employees who are enrolled in Medicare are excluded from comparability testing. See sections 4980G(b) and 4980E. Employer G's contributions satisfy the comparability rules.

Q-2: How does an employer comply with the comparability rules when some non-collectively bargained employees who are eligible individuals do not work for the employer during the entire calendar year?

A-2: (a) *In general.* In determining whether the comparability rules are satisfied, an employer must take into account all full-time and part-time employees who were employees and eligible individuals for any month during the calendar year. (Full-time and part-time employees are tested separately. See Q & A-5 in § 54.4980G-3.) There are two methods to comply with the comparability rules when some employees who are eligible individuals do not work for the employer during the entire calendar year; contributions may be made on a pay-as-you-go basis or on a look-back basis. See Q & A-9 through Q & A-11 in § 54.4980G-3 for the rules regarding comparable contributions to the HSAs of former employees.

(b) *Contributions on a pay-as-you-go basis.* An employer may comply with the comparability rules by contributing amounts at one or more dates during the calendar year to the HSAs of employees who are eligible individuals as of the first day of the month, if contributions are the same amount or the same percentage of the HDHP deductible for employees who are eligible individuals as of the first day of the month with the same category of coverage and are made at the same time. Contributions made at the employer's usual payroll interval for different groups of employees are considered to be made at the same time. For example, if salaried employees are paid monthly and hourly employees are paid bi-weekly, an employer may contribute to the HSAs of hourly employees on a bi-weekly basis and to the HSAs of salaried employees on a monthly basis. An employer may change the amount that it contributes to the HSAs of employees at any point. However, the changed contribution amounts must satisfy the comparability rules.

(c) *Examples.* The following examples illustrate the rules in paragraph (b) of this Q & A-2: The examples read as follows:

*Example 1.* (i) Beginning on January 1st, Employer H contributes \$50 per month on the first day of each month to the HSA of each employee who is an eligible individual on that date. Employer H does not contribute to the HSAs of former employees. In mid-March of the same year, Employee X, an eligible individual, terminates employment after Employer H has contributed \$150 to X's HSA. After X terminates employment, Employer H does not contribute additional amounts to X's HSA. In mid-April of the same year, Employer H hires Employee Y, an eligible individual, and contributes \$50 to Y's HSA in May and \$50 in June. Effective in July of the same year, Employer H stops contributing to the HSAs of all employees and makes no contributions to the HSA of any employee for the months of July through December. In August, Employer H hires Employee Z, an eligible individual. Employer H does not contribute to Z's HSA. After Z is hired, Employer H does not hire additional employees. As of the end of the calendar year, Employer H has made the following HSA contributions to its employees' HSAs—

- (A) Employer H contributed \$150 to X's HSA;
- (B) Employer H contributed \$100 to Y's HSA;
- (C) Employer H did not contribute to Z's HSA; and
- (D) Employer H contributed \$300 to the HSA of each employee who was an eligible individual and employed by Employer J from January through June.

(ii) Employer H's contributions satisfy the comparability rules.

*Example 2.* In a calendar year, Employer J offers its employees an HDHP and

contributes on a monthly pay-as-you-go basis to the HSAs of employees who are eligible individuals with coverage under Employer J's HDHP. In the calendar year, Employer J contributes \$50 per month to the HSA of each of employee with self-only HDHP coverage and \$100 per month to the HSA of each employee with family HDHP coverage. From January 1st through March 31st of the calendar year, Employee X is an eligible individual with self-only HDHP coverage. From April 1st through December 31st of the calendar year, X is an eligible individual with family HDHP coverage. For the months of January, February and March of the calendar year, Employer J contributes \$50 per month to X's HSA. For the remaining months of the calendar year, Employer J contributes \$100 per month to X's HSA. Employer J's contributions to X's HSA satisfy the comparability rules.

(d) *Contributions on a look-back basis.* An employer may also satisfy the comparability rules by determining comparable contributions for the calendar year at the end of the calendar year, taking into account all employees who were eligible individuals for any month during the calendar year and contributing the same percentage of the HDHP deductible or the same dollar amount to the HSAs of all employees with the same category of coverage for that month.

(e) *Examples.* The following examples illustrate the rules in paragraph (d) of this Q & A-2. The examples read as follows:

*Example 1.* In a calendar year, Employer K offers its employees an HDHP and contributes on a look-back basis to the HSAs of employees who are eligible individuals with coverage under Employer K's HDHP. Employer K contributes \$600 (\$50 per month) for the calendar year to the HSA of each of employee with self-only HDHP coverage and \$1,200 (\$100 per month) for the calendar year to the HSA of each employee with family HDHP coverage. From January 1st through June 30th of the calendar year, Employee Y is an eligible individual with family HDHP coverage. From July 1st through December 31, Y is an eligible individual with self-only HDHP coverage. Employer K contributes \$900 on a look-back basis for the calendar year to Y's HSA (\$100 per month for the months of January through June and \$50 per month for the months of July through December). Employer K's contributions to Y's HSA satisfy the comparability rules.

*Example 2.* On December 31st, Employer L contributes \$50 per month on a look-back basis to each employee's HSA for each month in the calendar year that the employee was an eligible individual. In mid-March of the same year, Employee T, an eligible individual, terminated employment. In mid-April of the same year, Employer L hired Employee U, who becomes an eligible individual as of May 1st and works for Employer L through December 31st. On December 31st, Employer L contributes \$150 to Employee T's HSA and \$400 to Employee

U's HSA. Employer L's contributions satisfy the comparability rules.

(f) *Periods and dates for making contributions.* With both the pay-as-you-go method and the look-back method, an employer may establish, on a reasonable and consistent basis, periods for which contributions will be made (for example, a quarterly period covering three consecutive months in a calendar year) and the dates on which such contributions will be made for that designated period (for example, the first day of the quarter or the last day of the quarter in the case of an employer who has established a quarterly period for making contributions). An employer that makes contributions on a pay-as-you-go basis for a period covering more than one month will not fail to satisfy the comparability rules because an employee who terminates employment prior to the end of the period for which contributions were made has received more contributions on a monthly basis than employees who have worked the entire period. In addition, an employer that makes contributions on a pay-as-you-go basis for a period covering more than one month must make HSA contributions for any comparable participating employees hired after the date of initial funding for that period.

(g) *Example.* The following example illustrates the rules in paragraph (f) of this Q & A-2:

*Example.* Employer M has established, on a reasonable and consistent basis, a quarterly period for making contributions to the HSAs of eligible employees on a pay-as-you-go basis. Beginning on January 1st, Employer M contributes \$150 for the first three months of the calendar year to the HSA of each employee who is an eligible individual on that date. On January 15th, Employee V, an eligible individual, terminated employment after Employer M has contributed \$150 to V's HSA. On January 15th, Employer M hired Employee W, who becomes an eligible individual as of February 1st. On April 1st, Employer M has contributed \$100 to W's HSA for the two months (February and March) in the quarter period that Employee W was an eligible employee. Employer M's contributions satisfy the comparability rules.

Q-3: How do the comparability rules apply to employer contributions to employees' HSAs if some non-collectively bargained employees work full-time during the entire calendar year, and other non-collectively bargained employees work full-time for less than the entire calendar year?

A-3: Employer contributions to the HSAs of employees who work full-time for less than twelve months satisfy the comparability rules if the contribution amount is comparable when determined on a month-to-month basis. For example, if the employer contributes

\$240 to the HSA of each full-time employee who works the entire calendar year, the employer must contribute \$60 to the HSA of each full-time employee who works on the first day of each three months of the calendar year. The rules set forth in this Q & A-2 apply to employer contributions made on a pay-as-you-go basis or on a look-back basis as described in Q & A-3 of this section. See sections 4980G(b) and 4980E(d)(2)(B).

Q-4: May an employer make contributions for the entire year to the HSAs of its employees who are eligible individuals at the beginning of the calendar year (on a pre-funded basis) instead of contributing on a pay-as-you-go or on a look-back basis?

A-4: (a) *Contributions on a pre-funded basis.* Yes. An employer may make contributions for the entire year to the HSAs of its employees who are eligible individuals at the beginning of the calendar year. An employer that pre-funds the HSAs of its employees will not fail to satisfy the comparability rules because an employee who terminates employment prior to the end of the calendar year has received more contributions on a monthly basis than employees who work the entire calendar year. See Q & A-12 of this section. Under section 223(d)(1)(E), an account beneficiary's interest in an HSA is nonforfeitable. An employer must make comparable contributions for all employees who are comparable participating employees for any month during the calendar year, including employees who are eligible individuals hired after the date of initial funding. An employer that makes HSA contributions on a pre-funded basis may also contribute on a pre-funded basis to the HSAs of employees who are eligible individuals hired after the date of initial funding. Alternatively, an employer that has pre-funded the HSAs of comparable participating employees may contribute to the HSAs of employees who are eligible individuals hired after the date of initial funding on a pay-as-you-go basis or on a look-back basis. An employer that makes HSA contributions on a pre-funded basis must use the same contribution method for all employees who are eligible individuals hired after the date of initial funding.

(b) *Example.* The following example illustrates the rules in paragraph (a) of this Q & A-4:

*Example.* (i) On January 1, Employer N contributes \$1,200 for the calendar year on a pre-funded basis to the HSA of each employee who is an eligible individual. In mid-May, Employer N hires Employee B, who becomes an eligible individual as of June 1st. Therefore, Employer N is required

to make comparable contributions to B's HSA beginning in June. Employer N satisfies the comparability rules with respect to contributions to B's HSA if it makes HSA contributions in any one of the following ways—

(A) Pre-funding B's HSA by contributing \$700 to B's HSA;

(B) Contributing \$100 per month on a pay-as-you-go basis to B's HSA; or

(C) Contributing to B's HSA at the end of the calendar year taking into account each month that B was an eligible individual and employed by Employer M.

(ii) If Employer M hires additional employees who are eligible individuals after initial funding, it must use the same contribution method for these employees that it used to contribute to B's HSA.

Q-5: Must an employer use the same contribution method as described in Q & A-2 and Q & A-4 of this section for all employees who were comparable participating employees for any month during the calendar year?

A-5: Yes. If an employer makes comparable HSA contributions on a pay-as-you-go basis, it must do so for each employee who is a comparable participating employee as of the first day of the month. If an employer makes comparable contributions on a look-back basis, it must do so for each employee who was a comparable participating employee for any month during the calendar year. If an employer makes HSA contributions on a pre-funded basis, it must do so for all employees who are comparable participating employees at the beginning of the calendar year and must make comparable HSA contributions for all employees who are comparable participating employees for any month during the calendar year, including employees who are eligible individuals hired after the date of initial funding. See Q & A-4 of this section for rules regarding contributions for employees hired after initial funding.

Q-6: How does an employer comply with the comparability rules if an employee has not established an HSA at the time the employer contributes to its employees' HSAs?

A-6: (a) *Employee has not established an HSA at the time the employer funds its employees' HSAs.* If an employee has not established an HSA at the time the employer funds its employees' HSAs, the employer complies with the comparability rules by contributing comparable amounts plus reasonable interest to the employee's HSA when the employee establishes the HSA, taking into account each month that the employee was a comparable participating employee. See Q & A-13 of this section for rules regarding reasonable interest.

(b) *Employee has not established an HSA by the end of the calendar year.* [Reserved].

(c) *Example.* The following example illustrates the rules in paragraph (a) of this Q & A–6:

*Example.* Beginning on January 1st, Employer O contributes \$500 per calendar year on a pay-as-you-go basis to the HSA of each employee who is an eligible individual. Employee C is an eligible individual during the entire calendar year but does not establish an HSA until March. Notwithstanding C's delay in establishing an HSA, Employer O must make up the missed HSA contributions plus reasonable interest for January and February by April 15th of the following calendar year.

Q–7: If an employer bases its contributions on a percentage of the HDHP deductible, how is the correct percentage or dollar amount computed?

A–7: (a) *Computing HSA contributions.* The correct percentage is determined by rounding to the nearest 1/100th of a percentage point and the dollar amount is determined by rounding to the nearest whole dollar.

(b) *Example.* The following example illustrates the rules in paragraph (a) of this Q & A–7:

*Example.* In this *Example*, assume that each HDHP provided by Employer P satisfies the definition of an HDHP for the 2007 calendar year. In the 2007 calendar year, Employer P maintains two HDHPs. Plan A has a deductible of \$3,000 for self-only coverage. Employer P contributes \$1,000 for the calendar year to the HSA of each employee covered under Plan A. Plan B has a deductible of \$3,500 for self-only coverage. Employer P satisfies the comparability rules if it makes either of the following contributions for the 2007 calendar year to the HSA of each employee who is an eligible individual with self-only coverage under Plan B—

- (i) \$1,000; or
- (ii) \$1,167 (33.33% of the deductible rounded to the nearest whole dollar amount).

Q–8: Does an employer that contributes to the HSA of each comparable participating employee in an amount equal to the employee's HSA contribution or a percentage of the employee's HSA contribution (matching contributions) satisfy the rule that all comparable participating employees receive comparable contributions?

A–8: No. If all comparable participating employees do not contribute the same amount to their HSAs and, consequently, do not receive comparable contributions to their HSAs, the comparability rules are not satisfied, notwithstanding that the employer offers to make available the same contribution amount to each comparable participating employee. But see Q & A–1 in § 54.4980G–5 on

contributions to HSAs made through a cafeteria plan.

Q–9: If an employer conditions contributions by the employer to an employee's HSA on an employee's participation in health assessments, disease management programs or wellness programs and makes the same contributions available to all employees who participate in the programs, do the contributions satisfy the comparability rules?

A–9: No. If all comparable participating employees do not elect to participate in all the programs and consequently, all comparable participating employees do not receive comparable contributions to their HSAs, the employer contributions fail to satisfy the comparability rules. But see Q & A–1 in § 54.4980G–5 on contributions made to HSAs through a cafeteria plan.

Q–10: If an employer makes additional contributions to the HSAs of all comparable participating employees who have attained a specified age or who have worked for the employer for a specified number of years, do the contributions satisfy the comparability rules?

A–10: No. If all comparable participating employees do not meet the age or length of service requirement, all comparable participating employees do not receive comparable contributions to their HSAs and the employer contributions fail to satisfy the comparability rules.

Q–11: If an employer makes additional contributions to the HSAs of all comparable participating employees who are eligible to make the additional contributions (HSA catch-up contributions) under section 223(b)(3), do the contributions satisfy the comparability rules?

A–11: No. If all comparable participating employees are not eligible to make the additional HSA contributions under section 223(b)(3), all comparable participating employees do not receive comparable contributions to their HSAs, and the employer contributions fail to satisfy the comparability rules.

Q–12: If an employer's contributions to an employee's HSA result in non-comparable contributions, may the employer recoup the excess amount from the employee's HSA?

A–12: No. An employer may not recoup from an employee's HSA any portion of the employer's contribution to the employee's HSA. Under section 223(d)(1)(E), an account beneficiary's interest in an HSA is nonforfeitable. However, an employer may make additional HSA contributions to satisfy

the comparability rules. An employer may contribute up until April 15th following the calendar year in which the non-comparable contributions were made. An employer that makes additional HSA contributions to correct non-comparable contributions must also contribute reasonable interest. However, an employer is not required to contribute amounts in excess of the annual contribution limits in section 223(b). See Q & A–13 of this section for rules regarding reasonable interest.

Q–13: What constitutes a reasonable interest rate for purposes of making comparable contributions?

A–13: The determination of whether a rate of interest used by an employer is reasonable will be based on all of the facts and circumstances. If an employer calculates interest using the Federal short-term rate as determined by the Secretary in accordance with section 1274(d), the employer is deemed to use a reasonable interest rate.

#### **§ 54.4980G–5 HSA comparability rules and cafeteria plans and waiver of excise tax.**

Q–1: If an employer makes contributions through a section 125 cafeteria plan to the HSA of each employee who is an eligible individual, are the contributions subject to the comparability rules?

A–1: (a) *In general.* No. The comparability rules do not apply to HSA contributions that an employer makes through a section 125 cafeteria plan. However, contributions to an HSA made through a cafeteria plan are subject to the section 125 nondiscrimination rules (eligibility rules, contributions and benefits tests and key employee concentration tests). See section 125(b), (c) and (g) and the regulations thereunder.

(b) *Contributions made through a section 125 cafeteria plan.* Employer contributions to employees' HSAs are made through a section 125 cafeteria plan and are subject to the section 125 cafeteria plan nondiscrimination rules and not the comparability rules if under the written cafeteria plan, the employees have the right to elect to receive cash or other taxable benefits in lieu of all or a portion of an HSA contribution (meaning that all or a portion of the HSA contributions are available as pre-tax salary reduction amounts), regardless of whether an employee actually elects to contribute any amount to the HSA by salary reduction.

Q–2: If an employer makes contributions through a cafeteria plan to the HSA of each employee who is an eligible individual in an amount equal to the amount of the employee's HSA

contribution or a percentage of the amount of the employee's HSA contribution (matching contributions), are the contributions subject to the section 4980G comparability rules?

A-2: No. The comparability rules do not apply to HSA contributions that an employer makes through a section 125 cafeteria plan. Thus, where matching contributions are made by an employer through a cafeteria plan, the contributions are not subject to the comparability rules of section 4980G. However, contributions, including matching contributions, to an HSA made under a cafeteria plan are subject to the section 125 nondiscrimination rules (eligibility rules, contributions and benefits tests and key employee concentration tests). See Q & A-1 of this section.

Q-3: If under the employer's cafeteria plan, employees who are eligible individuals and who participate in health assessments, disease management programs or wellness programs receive an employer contribution to an HSA and the employees have the right to elect to make pre-tax salary reduction contributions to their HSAs, are the contributions subject to the comparability rules?

A-3: (a) *In general.* No. The comparability rules do not apply to employer contributions to an HSA made through a cafeteria plan. See Q & A-1 of this section.

(b) *Examples.* The following examples illustrate the rules in this § 54.4980G-5. The examples read as follows:

*Example 1.* Employer A's written cafeteria plan permits employees to elect to make pre-tax salary reduction contributions to their HSAs. Employees making this election have the right to receive cash or other taxable benefits in lieu of their HSA pre-tax contribution. The section 125 cafeteria plan nondiscrimination rules and not the comparability rules apply because the HSA contributions are made through the cafeteria plan.

*Example 2.* Employer B's written cafeteria plan permits employees to elect to make pre-tax salary reduction contributions to their HSAs. Employees making this election have the right to receive cash or other taxable benefits in lieu of their HSA pre-tax contribution. Employer B automatically contributes a non-elective matching contribution or seed money to the HSA of each employee who makes a pre-tax HSA contribution. The section 125 cafeteria plan nondiscrimination rules and not the comparability rules apply to Employer B's HSA contributions because the HSA contributions are made through the cafeteria plan.

*Example 3.* Employer C's written cafeteria plan permits employees to elect to make pre-tax salary reduction contributions to their

HSAs. Employees making this election have the right to receive cash or other taxable benefits in lieu of their HSA pre-tax contribution. Employer C makes a non-elective contribution to the HSAs of all employees who complete a health risk assessment and participate in Employer C's wellness program. Employees do not have the right to receive cash or other taxable benefits in lieu of Employer C's non-elective contribution. The section 125 cafeteria plan nondiscrimination rules and not the comparability rules apply to Employer C's HSA contributions because the HSA contributions are made through the cafeteria plan.

*Example 4.* Employer D's written cafeteria plan permits employees to elect to make pre-tax salary reduction contributions to their HSAs. Employees making this election have the right to receive cash or other taxable benefits in lieu of their HSA pre-tax contribution. Employees participating in the plan who are eligible individuals receive automatic employer contributions to their HSAs. Employees make no election with respect to Employer D's contribution and do not have the right to receive cash or other taxable benefits in lieu of Employer D's contribution but are permitted to make their own pre-tax salary reduction contributions to fund their HSAs. The section 125 cafeteria plan nondiscrimination rules and not the comparability rules apply to Employer D's HSA contributions because the HSA contributions are made through the cafeteria plan.

Q-4: May all or part of the excise tax imposed under section 4980G be waived?

A-4: In the case of a failure which is due to reasonable cause and not to willful neglect, all or a portion of the excise tax imposed under section 4980G may be waived to the extent that the payment of the tax would be excessive relative to the failure involved. See sections 4980G(b) and 4980E(c).

Approved: July 14, 2006.

**Mark E. Matthews,**

*Deputy Commissioner for Services and Enforcement.*

**Eric Solomon,**

*Acting Deputy Assistant Secretary (Tax Policy).*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 261

[FRL-8204-4]

### Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Final Exclusion

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** EPA is taking direct final action to codify a longstanding generator-specific delisting determination for brine purification muds (K071) generated by Olin Corporation (Olin) at its facility in Charleston, Tennessee. This rule will amend the Code of Federal Regulations to reflect the delisting, which was granted by EPA in December 1981 and by the Tennessee Department of Environment and Conservation in June 1983 after full notice and comment. The rule will not impose any new requirements on Olin or any other member of the regulated community.

**DATES:** This rule is effective on September 29, 2006 without further notice unless we receive adverse comment by August 30, 2006. If we receive adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

**ADDRESSES:** Submit comments, identified by docket number EPA-R04-RCRA-2006-0478, by one of the following methods:

- *Federal eRulemaking Portal:* [www.regulations.gov](http://www.regulations.gov). Follow the on-line instructions.

- *E-mail:* [lippert.kristin@epa.gov](mailto:lippert.kristin@epa.gov).
- *Mail or deliver:* Kristin Lippert, North Enforcement and Compliance Section, Mail Code 4WD-RCRA, RCRA Enforcement and Compliance Branch, U.S. Environmental Protection Agency, Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303.

*Instructions:* All comments will be included in the public docket without change and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through [www.regulations.gov](http://www.regulations.gov) or e-mail.

[www.regulations.gov](http://www.regulations.gov) is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

*Docket:* The index to the docket for this action is available electronically at