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DEPARTMENT OF THE TREASURY

Treasury Decision 9457

Employer Comparable Contributions to Health Savings Accounts under Section 4980G,
and Requirement of Return for Filing of the Excise Tax under Section 4980B, 4980D,
4980E or 4980G

2009-2 C.B. 482; T.D. 9457; 2009 IRB LEXIS 444; 2009-41 I.R.B. 482

August 20, 2009

[*1]

APPLICABLE SECTIONS:

26 CFR Part 54

REFERENCE: RIN 1545-BG71**TEXT:****AGENCY:**

Internal Revenue Service (IRS), Treasury.

ACTION:

Final regulations.

SUMMARY:

This document contains final regulations providing guidance on employer comparable contributions to Health Savings Accounts (HSAs) under *section 4980G of the Internal Revenue Code* (Code) as amended by sections 302, 305 and 306 of the Tax Relief and Health Care Act of 2006 (the Act). The final regulations also provide guidance relating to the manner and method of reporting and paying the excise tax under *sections 4980B, 4980D, 4980E, and 4980G of the Code*. These final regulations would affect employers that contribute to employees' HSAs and Archer MSAs, employers or employee organizations that sponsor a group health plan, and certain third parties such as insurance companies or HMOs or third-party administrators who are responsible for providing benefits under the plan.

DATES:

Effective date. These regulations are effective on September 8, 2009.

Applicability date. The sections of these regulations that provide guidance on employer comparable contributions to HSAs under *section 4980G* apply to employer contributions made on or after January 1, 2010. The sections of these regulations [*2] that provide guidance relating to the excise tax under *sections 4980B, 4980D, 4980E and 4980G* apply to any Form 8928 that is due on or after January 1, 2010.

FOR FURTHER INFORMATION CONTACT:

Concerning the final regulations as they relate to *sections 4980E or 4980G*, Mireille Khoury at (202) 622-6080; and concerning the final regulations as they relate to *section 4980B or 4980D*, Russ Weinheimer at (202) 622-6080 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (*44 U.S.C. 3507 (d)*), under control number 1545-2146. The collection of information in these final regulations is in *§54.6011-2*. The collection of information results from the requirement to file a return for the payment of the excise tax under *section 4980B, 4980D, 4980E, or 4980G of the Code*. The likely respondents are employers that contribute to employees' HSAs and Archer MSAs, employers or employee organizations that sponsor a group health plan, and certain third parties such as insurance companies or HMOs or third-party [*3] administrators who are responsible for providing benefits under the plan.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents might become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by *26 U.S.C. 6103*.

Background

This document contains final amendments to the Excise Tax Regulations (26 CFR part 54) under *section 4980G of the Code*, as amended by Sections 302 and 305 of the Tax Relief and Health Care Act of 2006 (the Act), Pub. L. No. 109-432, under *paragraph (d) of section 4980G of the Code*, as enacted by section 306 of the Act, and under *Section 4980E of the Code*.

Under *section 4980G*, an excise tax is imposed on an employer that fails to make comparable contributions to the HSAs of its employees. On July 31, 2006, final regulations on comparability were published in the ***Federal Register***, *72 FR 30501 (2007-26 IRB 1495)*, *TD 9277*. In addition, on April [*4] 17, 2008, final regulations were published in the ***Federal Register***, *73 FR 20794 (2008-20 IRB 975)*, *TD 9393*, providing guidance on employer comparable contributions to HSAs in instances where an employee has not established an HSA by December 31st and in instances where an employer accelerates contributions for the calendar year for employees who have incurred qualified medical expenses. See *§601.601 (d) (2)*.

This document also contains final amendments to the Excise Tax Regulations (26 CFR part 54) under *sections 4980B and 4980D*. Under *section 4980B*, group health plans maintained by an employer with 20 or more employees must comply with continuation coverage requirements. If a plan does not satisfy these requirements, an excise tax is imposed of \$100 per day per affected beneficiary. Final regulations under *section 4980B* have been published, including provisions concerning the excise tax, but no return filing requirement has previously been imposed. See *§54.4980B-2, Q&A-9 and Q&A-10*. Moreover, under chapter 100 of the Code, group health plans must comply with various requirements, including limitations on preexisting condition exclusions, certification of creditable coverage, special [*5] enrollments, prohibitions against discrimination based on a health factor (including genetic information), parity between mental health benefits and medical/surgical benefits, minimum hospital lengths of stay in connection with childbirth, and continued coverage for post-secondary students with a serious medical condition. If a plan does not satisfy any of these requirements under chapter 100, *section 4980D* imposes an excise tax of \$100 per day per affected individual. Regulations interpreting the substantive requirements of chapter 100 have previously been published, but no regulations have been published concerning the excise tax under *section 4980D*.

On July 16, 2008, proposed regulations (*REG-120476-07*) were published in the ***Federal Register*** (*73 FR 40793*) addressing comparable contributions to nonhighly compensated employees. The proposed regulations also provided guidance for employers that offer qualified HSA distributions and for employers that make the maximum annual HSA contribution on behalf of all employees who are eligible individuals on the first day of the last month of the employees' taxable year. Finally, the proposed regulations provided guidance on the requirement of [*6] a return to accompany

payment of the excise taxes under *sections 4980B, 4980D, 4980E, and 4980G* and the time for filing that return. These final regulations adopt the provisions of the proposed regulations without substantive revision. The final regulations make certain minor clarifying changes to the rules of the proposed regulations.

Explanation of Provisions and Summary of Comments

Special Rule for Contributions to Nonhighly Compensated Employees

Paragraph (d) of section 4980G provides an exception to the comparability rules that allows, but does not require, employers to make larger contributions to the HSAs of nonhighly compensated employees than the employer makes to the HSAs of highly compensated employees. The final regulations address this exception to comparability in *§54.4980G-4* and provide that employer contributions to the HSAs of nonhighly compensated employees may be larger than employer contributions to the HSAs of highly compensated employees with comparable coverage during a period. Conversely, employer contributions to the HSAs of highly compensated employees may not exceed employer contributions to the HSAs of nonhighly compensated employees with comparable coverage [*7] during a period.

The comparability rules still apply with respect to contributions to the HSAs of all nonhighly compensated employees who are comparable participating employees (eligible individuals who are in the same category of employees with the same category of high deductible health plan (HDHP) coverage) and an employer must make comparable contributions to the HSA of each nonhighly compensated employee who is a comparable participating employee during the calendar year. Similarly, the comparability rules still apply with respect to contributions to the HSAs of all highly compensated employees who are comparable participating employees and an employer must make comparable contributions to the HSA of each highly compensated employee who is a comparable participating employee during the calendar year. Collectively bargained employees are disregarded for purposes of *section 4980G*, as are HSA contributions made through a cafeteria plan.

For purposes of *section 4980G (d)*, highly compensated employee is defined under *section 414 (q)* and includes any employee who was (1) a five-percent owner at any time during the year or the preceding year; or (2) for the preceding year, (A) had compensation [*8] from the employer in excess of \$110,000 (for 2009, indexed for inflation) and (B) if elected by the employer, was in the group consisting of the top 20 percent of employees when ranked based on compensation. Nonhighly compensated employees are employees that are not highly compensated employees.

Maximum HSA Contribution Permitted for Employees Who Become Eligible Individuals Mid-year

Section 305 of the Act provides that individuals who are eligible individuals on the first day of the last month of the employees' taxable year (December 1 for calendar year taxpayers) may make or have made on their behalf the maximum annual HSA contribution based on their HDHP coverage (self only or family) on that date. A portion of the contribution is included in income and subject to an additional 10 percent tax if the individual fails to remain an eligible individual for 12 months after the last month of the taxable year. See *section 223 (b) (8)*. *Section 54.4980G-6* of the final regulations provides that the employer can contribute up to this maximum contribution on behalf of all employees who are eligible individuals on the first day of the last month of the employees' taxable year (December 1 for calendar [*9] year taxpayers), including employees who became eligible individuals after January 1st of the calendar year and eligible individuals who were hired after January 1st of the calendar year (both such classes of individuals are hereinafter referred to as "mid-year eligible individuals"). An employer who makes the maximum calendar year HSA contribution, or who contributes more than a pro-rata amount, on behalf of employees who are mid-year eligible individuals will not fail to satisfy comparability merely because some employees will have received more contributions on a monthly basis than employees who worked the entire calendar year.

Employers are not required to make these greater than pro-rata contributions and may instead pro-rate contributions based on the number of months that an individual was both employed by the employer and an eligible individual. However, if an employer contributes more than the monthly pro-rata amount for the calendar year to the HSA of any employee who is a mid-year eligible individual, the employer must then contribute, on an equal and uniform basis, a greater than pro-rata amount to the HSAs of all comparable participating employees who are mid-year eligible [*10] individuals. Likewise, if the employer contributes the maximum annual contribution amount for the calendar year to the HSA of any employee who is a mid-year eligible individual, the employer must contribute that same amount to the HSAs of all comparable participating employees who are mid-year eligible individuals.

Special Comparability Rules For Qualified HSA Distributions

Section 302 (a) of the Act provides for qualified HSA distributions. See *section 106 (e)* and *Notice 2007-22 (2007-10 IRB 670)*. See §601.601 (d) (2). A qualified HSA distribution is a direct distribution of an amount from a health flexible spending arrangement (health FSA) or a health reimbursement arrangement (HRA) to an HSA. The distribution must not exceed the lesser of the balance in the health FSA or HRA on September 21, 2006, or as of the date of the distribution. *Section 54.4980G-7* of the final regulations provides that if an employer offers qualified HSA distributions to any employee who is an eligible individual covered under any HDHP, the employer must offer qualified HSA distributions to all employees who are eligible individuals covered under any HDHP. However, an employer that offers qualified HSA distributions [*11] only to employees who are eligible individuals covered under the employer's HDHP is not required to offer qualified HSA distributions to employees who are eligible individuals but are not covered under the employer's HDHP.

Reporting and payment of the excise tax under section 4980B, 4980D, 4980E or 4980G.

The regulations prescribe the manner and method of paying the excise taxes imposed under *section 4980B, 4980D, 4980E, or 4980G*. The final regulations, like the proposed regulations, provide that these excise taxes must be reported on Form 8928, "Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code." The excise tax under *section 4980B, 4980D, 4980E or 4980G* must be paid at the time prescribed for filing of the excise tax return (without extensions). With respect to the excise tax under *section 4980B or 4980D* for employers and third parties such as insurers or third party administrators, the return is due on or before the due date for filing the person's federal income tax return. An extension to file the person's income tax return does not extend the date for filing Form 8928. With respect to the excise tax under *section 4980B or 4980D* for multiemployer or specified [*12] multiple employer health plans, the return is due on or before the last day of the seventh month after the end of the plan year. Finally, with respect to the excise tax under *section 4980E or 4980G* for noncomparable contributions, the return is due on or before the 15th day of the fourth month following the calendar year in which the noncomparable contributions were made. The final regulations also provide guidance regarding the place for filing these excise tax returns, the signing of these excise returns, and the time and place for paying the tax shown on such returns.

Two comments were received regarding the reporting and filing of the excise taxes under *sections 4980B, 4980D, 4980E, and 4980G*. One commentator was concerned that the noncompliance period under *section 4980B or 4980D* could extend beyond the due date for filing the excise tax return and suggested that the due date be extended to 90 days after the end of the noncompliance period. It is true that the noncompliance period under *section 4980B*, for example, could extend over four or more taxable years of the person responsible for payment of the tax. Therefore, extending the due date until 90 days after the end of the noncompliance [*13] period would in some cases defer the obligation to pay the excise tax for over four years, which would not be in the interest of sound tax administration. As such, the final regulations do not adopt this change.

Another commentator noted that the excise tax might be due before the person responsible for paying it had even discovered that a failure under *section 4980B or 4980D* had occurred. However, this concern is mitigated by the fact that *sections 4980B and 4980D* provide that the excise tax does not apply for any period for which the responsible party did not know, or exercising reasonable diligence would not have known, that the failure existed. Also, under *sections 4980B and 4980D*, the excise tax does not apply if the failure is corrected (that is, the failure is retroactively undone to the extent possible and the affected beneficiary is placed in a financial position as good as the beneficiary would have been had the failure not occurred).

Finally, a commentator also stated that there are some uncertainties about the application of the excise tax rules to various situations that could arise under *section 4980B*. The commentator suggested that the filing and payment requirement for [*14] the excise tax under *section 4980B* should not apply until additional guidance was issued that addressed these uncertainties. The Treasury Department and the IRS believe that the statutory and regulatory provisions in this area provide appropriate guidance. Therefore, the final regulations do not adopt this comment.

The guidance in the proposed regulations relating to the excise taxes imposed under *section 4980B, 4980D, 4980E, or 4980G* was contained in Q & A-11 in §4980B-2, Q & A-1 in §4980D-1, Q & A-1 in §4980E-1, and Q & A-5 in §4980G-1. The final regulations provide additional clarifying information relating to the guidance previously provided in these Q & A's, and the final regulations also consolidate this guidance by including it under the following sections: §§54.6011-2, 54.6061-1, 54.6071-1, 54.6091-1 and 54.6151-1.

Effective/Applicability Date

The sections of these regulations that provide guidance on employer comparable contributions to HSAs under *section 4980G* apply to employer contributions made on or after January 1, 2010.

The sections of these regulations that provide guidance relating to the excise tax under *sections 4980B, 4980D, 4980E* and *4980G* apply to any Form 8928 that [*15] is due on or after January 1, 2010.

Special Analyses

It has been determined that this Treasury Decision is 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. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to *section 7805 (f) of the Code*, the notice of proposed rulemaking preceding this regulation was 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 final regulations are Mireille Khoury and Russ Weinheimer, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service. However, personnel from other offices of the IRS and Treasury Department participated [*16] in their development.

List of Subjects in 26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

Adoption of Amendment 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-6 also issued under 26 U.S.C. 4980G.

Section 54.4980G-7 also issued under 26 U.S.C. 4980G. * * *

Par. 2. *Section 54.4980B-0* is amended by adding a new Q-11 to §54.4980B-2 in the list of questions to read as follows:

§54.4980B-0 Table of contents.

* * *

List Of Questions

* * *

§ 54.4980B-2 Plans that must comply.

* * *

Q-11: If a person is liable for the excise tax under *section 4980B*, what form must the person file and what is the due date for the filing and payment of the excise tax?

* * *

Par. 3. *Section 54.4980B-2* is amended by adding a new *Q&A-11* to read as follows:

§54.4980B-2 Plans that must comply.

* * *

Q-11: If a person is liable for the excise tax under *section 4980B*, what form must the person file and what is the due date for the filing and payment of the excise tax?

A-11: (a) In [*17] general. See §§54.6011-2 and 54.6151-1.

(b) Due date for filing of return by employers or other persons responsible for benefits under a group health plan. See §54.6071-1 (a) (1).

(c) Due date for filing of return by multiemployer plans. See §54.6071-1 (a) (2).

(d) Effective/applicability date. In the case of an employer or other person mentioned in paragraph (b) of this Q & A-11, the rules in this Q & A-11 are effective for taxable years beginning on or after January 1, 2010. In the case of a plan mentioned in paragraph (c) of this Q & A-11, the rules in this Q & A-11 are effective for plan years beginning on or after January 1, 2010.

Par. 4. *Section 54.4980D-1* is added to read as follows:

§54.4980D-1 Requirement of Return and Time for Filing of the excise tax under *section 4980D*.

Q-1: If a person is liable for the excise tax under *section 4980D*, what form must the person file and what is the due date for the filing and payment of the excise tax?

A-1:

(a) In general. See §§54.6011-2 and 54.6151-1.

(b) Due date for filing of return by employers. See §54.6071-1 (b) (1).

(c) Due date for filing of return by multiemployer plans or multiple employer health plans. See §54.6071-1 (b) (2).

- (d) Effective/applicability [*18] date. In the case of an employer or other person mentioned in paragraph (b) of this Q & A-1, the rules in this Q & A-1 are effective for taxable years beginning on or after January 1, 2010. In the case of a plan mentioned in paragraph (c) of this Q & A-1, the rules in this Q & A-1 are effective for plan years beginning on or after January 1, 2010.

Par. 5. *Section 54.4980E-1* is added to read as follows:

§54.4980E-1 Requirement of Return and Time for Filing of the excise tax under *section 4980E*.

Q-1: If a person is liable for the excise tax under *section 4980E*, what form must the person file and what is the due date for the filing and payment of the excise tax?

A-1:

- (a) In general. See §§54.6011-2, 54.6151-1 and 54.6071-1 (c).
- (b) Effective/applicability date. The rules in this Q & A-1 are effective for plan years beginning on or after January 1, 2010.

Par. 6. *Section 54.4980G-1* is amended by:

1. Revising the last sentence in *A-1* and adding a new sentence at the end of *paragraph (a) in A-2*.
2. Adding a new *Q & A-5*.

The revisions and addition read as follows:

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

* * *

A-1: * * * But see Q & A-6 in § 54.4980G-3 for treatment [*19] of collectively bargained employees and Q & A-1 in § 54.4980G-6 for the rules allowing larger comparable contributions to nonhighly compensated employees.

* * *

A-2: (a) * * * See also §54.4980G-6 for the rules allowing larger comparable contributions to nonhighly compensated employees.

* * *

Q-5: If a person is liable for the excise tax under *section 4980G*, what form must the person file and what is the due date for the filing and payment of the excise tax?

A-5:

- (a) In general. §§54.6011-2, 54.6151-1 and 54.6071-1 (d).
- (b) Effective/applicability date. The rules in this Q & A-5 are effective for employer contributions made for calendar years beginning on or after January 1, 2010.

Par. 7. *Section 54.4980G-3* is amended by:

- 1. Revising the section heading.
- 2. Revising the introductory text in *paragraph (a)* of A-5.
- 3. Adding a new sentence at the end of *paragraph (c)* of A-5 and *paragraph (a)* of A-9.

The revision and additions read as follows:

§54.4980G-3 Failure of employer to make comparable health savings account contributions.

* * *

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 [*20] and Q & A-1 of §54.4980G-6 for a special rule for contributions made to the HSAs of nonhighly compensated employees)-

* * *

(c) * * * But see §54.4980G-6 for a special rule for contributions made to the HSAs of nonhighly compensated employees.

* * *

A-9: (a) * * * See §54.4980G-6 for a special rule for contributions made to the HSAs of nonhighly compensated employees.

* * *

Par. 8. *Section 54.4980G-4* is amended by:

1. Adding a new sentence at the end of *paragraph (a) of A-1*

2. Adding *paragraphs (h), (i) and (j) to A-2.*

The additions read as follows:

§54.4980G-4 Calculating comparable contributions.

* * *

A-1: (a) * * * But see Q & A-1 of §54.4980G-6 for a special rule for contributions made to the HSAs of nonhighly compensated employees.

* * *

A-2: * * *

* * *

(h) Maximum contribution permitted for all employees who are eligible individuals during the last month of the taxable year. An employer may contribute up to the maximum annual contribution amount for the calendar year (based on the employees' HDHP coverage) to the HSAs of all employees who are eligible individuals on the first day of the last month of the employees' taxable year, including employees who worked for the employer for less than the [*21] entire calendar year and employees who became eligible individuals after January 1st of the calendar year. For example, such contribution may be made on behalf of an eligible individual who is hired after January 1st or an employee who becomes an eligible individual after January 1st. Employers are not required to provide more than a pro-rata contribution based on the number of months that an individual was an eligible individual and employed by the employer during the year. However, if an employer contributes more than a pro-rata amount for the calendar year to the HSA of any eligible individual who is hired after January 1st of the calendar year or any employee who becomes an eligible individual any time after January 1st of the calendar year, the employer must contribute that same amount on an equal and uniform basis to the HSAs of all comparable participating employees (as defined in Q & A-1 in § 54.4980G-1) who are hired or become eligible individuals after January 1st of the calendar year. Likewise, if an employer contributes the maximum annual contribution amount for the calendar year to the HSA of any eligible individual who is hired after January 1st of the calendar year or [*22] any employee who becomes an eligible individual any time after January 1st of the calendar year, the employer must contribute the maximum annual contribution amount on an equal and uniform basis to the HSAs of all comparable participating employees (as defined in Q & A-1 in § 54.4980G-1) who are hired or become eligible individuals after January 1st of the calendar year. An employer who makes the maximum calendar year contribution or more than a pro-rata contribution to the HSAs of employees who become eligible individuals after the first day of the calendar year or eligible individuals who are hired after the first day of the calendar year will not fail to satisfy comparability merely because some employees will have received more contributions on a monthly basis than employees who worked the entire calendar year.

(i) Examples. The following examples illustrate the rules in paragraph (h) in this Q & A-2. In the following examples, no contributions are made through a section 125 cafeteria plan and none of the employees are covered by a collective bargaining agreement.

Example 1. On January 1, 2010, Employer Q contributes \$1,000 for the calendar year to the HSAs of employees who are eligible [*23] individuals with family HDHP coverage. In mid-March of the same year, Employer Q hires Employee A, an eligible individual with family HDHP coverage. On April 1, 2010, Employer Q contributes \$1,000 to the

HSA of Employee A. In September of the same year, Employee B becomes an eligible individual with family HDHP coverage. On October 1, 2010, Employer G contributes \$1,000 to the HSA of Employee B. Employer Q does not make any other contributions for the 2010 calendar year. Employer Q's contributions satisfy the comparability rules.

Example 2. For the 2010 calendar year, Employer R only has two employees, Employee C and Employee D. Employee C, an eligible individual with family HDHP coverage, works for Employer R for the entire calendar year. Employee D, an eligible individual with family HDHP coverage works for Employer R from July 1st through December 31st. Employer R contributes \$1,200 for the calendar year to the HSA of Employee C and \$600 to the HSA of Employee D. Employer R does not make any other contributions for the 2010 calendar year. Employer R's contributions satisfy the comparability rules.

(j) Effective/applicability date. The rules in paragraphs (h) and (i) of Q & A-2 are [*24] effective for employer contributions made for calendar years beginning on or after January 1, 2010.

* * *

Par. 9. *Section 54.4980G-6* is added to read as follows:

§54.4980G-6 Special rule for contributions made to the HSAs of nonhighly compensated employees.

Q-1: May an employer make larger contributions to the HSAs of nonhighly compensated employees than to the HSAs of highly compensated employees?

A-1: Yes. Employers may make larger HSA contributions for nonhighly compensated employees who are comparable participating employees than for highly compensated employees who are comparable participating employees. See Q & A-1 in §54.4980G-1 for the definition of comparable participating employee. For purposes of this section, highly compensated employee is defined under section 414 (q). Nonhighly compensated employees are employees that are not highly compensated employees. The comparability rules continue to apply with respect to contributions to the HSAs of all nonhighly compensated employees. Employers must make comparable contributions for the calendar year to the HSA of each nonhighly compensated employee who is a comparable participating employee.

Q-2: May an employer make larger contributions [*25] to the HSAs of highly compensated employees than to the HSAs of nonhighly compensated employees?

A-2: (a) In general. No. Employer contributions to HSAs for highly compensated employees who are comparable participating employees may not be larger than employer HSA contributions for nonhighly compensated employees who are comparable participating employees. The comparability rules continue to apply with respect to contributions to the HSAs of all highly compensated employees. Employers must make comparable contributions for the calendar year to the HSA of each highly compensated comparable participating employee. See Q & A-1 in §54.4980G-1 for the definition of comparable participating employee.

(b) Examples. The following examples illustrate the rules in Q & A-1 and Q & A-2 of this section. No contributions are made through a section 125 cafeteria plan and none of the employees in the following examples are covered by a collective bargaining agreement. All of the employees in the following examples have the same HDHP deductible for the same category of coverage.

Example 1. In 2010, Employer A contributes \$1,000 for the calendar year to the HSA of each full-time nonhighly compensated employee [*26] who is an eligible individual with self-only HDHP coverage. Employer A makes no contribution to the HSA of any full-time highly compensated employee who is an eligible individual with self-only HDHP coverage. Employer A's HSA contributions for calendar year 2010 satisfy the comparability rules.

Example 2. In 2010, Employer B contributes \$2,000 for the calendar year to the HSA of each full-time nonhighly compensated employee who is an eligible individual with self-only HDHP coverage. Employer B also contributes \$1,000 for the calendar year to the HSA of each full-time highly compensated employee who is an eligible individual with self-only HDHP coverage. Employer B's HSA contributions for calendar year 2010 satisfy the comparability rules.

Example 3. In 2010, Employer C contributes \$1,000 for the calendar year to the HSA of each full-time nonhighly compensated employee who is an eligible individual with self-only HDHP coverage. Employer C contributes \$2,000 for the calendar year to the HSA of each full-time highly compensated employee who is an eligible individual with self-only HDHP coverage. Employer C's HSA contributions for calendar year 2010 do not satisfy the comparability rules.

Example [*27] 4. In 2010, Employer D contributes \$1,000 for the calendar year to the HSA of each full-time nonhighly compensated employee who is an eligible individual with self-only HDHP coverage. Employer D also contributes \$1,000 to the HSA of each full-time highly compensated employee who is an eligible individual with self-only HDHP coverage. In addition, the employer contributes an additional \$500 to the HSA of each nonhighly compensated employee who participates in a wellness program. The nonhighly compensated employees did not receive comparable contributions, and, therefore, Employer D's HSA contributions for calendar year 2010 do not satisfy the comparability rules.

Example 5. In 2010, Employer E contributes \$1,000 for the calendar year to the HSA of each full-time non-management nonhighly compensated employee who is an eligible individual with family HDHP coverage. Employer E also contributes \$500 for the calendar year to the HSA of each full-time management nonhighly compensated employee who is an eligible individual with family HDHP coverage. The nonhighly compensated employees did not receive comparable contributions, and, therefore, Employer E's HSA contributions for calendar year [*28] 2010 do not satisfy the comparability rules.

Q-3: May an employer make larger HSA contributions for employees with self plus two HDHP coverage than employees with self plus one HDHP coverage even if the employees with self plus two are all highly compensated employees and the employees with self plus one are all nonhighly compensated employees?

A-3: (a) Yes. Q & A-1 in §54.4980G-4 provides that an employer's contribution with respect to the self plus two category of HDHP coverage 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. Therefore, the comparability rules are not violated if an employer makes a larger HSA contribution for the self plus two category of HDHP coverage than to self plus one coverage, even if the employees with self plus two coverage are all highly compensated employees and the employees with self plus one coverage are all nonhighly compensated employees. Likewise, the comparability rules are not violated if an employer makes a larger HSA contribution for the self plus three category [*29] of HDHP coverage than to self plus two coverage, even if the employees with self plus three coverage are all highly compensated employees and the employees with self plus two coverage are all nonhighly compensated employees.

(b) Example. The following example illustrates the rules in paragraph (a) of this Q & A-3. In the following example, no contributions are made through a section 125 cafeteria plan and none of the employees are covered by a collective bargaining agreement.

Example. In 2010, Employer F contributes \$1,000 for the calendar year to the HSA of each full-time employee who is an eligible individual with self plus one HDHP coverage. Employer F contributes \$1,500 for the calendar year to the HSA of each employee who is an eligible individual with self plus two HDHP coverage. The deductible for both the self plus one HDHP and the self plus two HDHP is \$2,000. Employee A, an eligible individual, is a nonhighly compensated employee with self plus one coverage. Employee B, an eligible individual, is a highly compensated employee with self plus two coverage. For the 2010 calendar year, Employer F contributes \$1,000 to Employee A's HSA and \$1,500 to Employee B's HSA. Employer F's [*30] HSA contributions satisfy the comparability rules.

Q-4: What is the effective date for the rules in this section?

A-4: The rules in this section are effective for employer contributions made for calendar years beginning on or after January 1, 2010.

Par. 10. *Section 54.4980G-7* is added to read as follows:

§54.4980G-7 Special comparability rules for qualified HSA distributions contributed to HSAs on or after December 20, 2006 and before January 1, 2012

Q-1: How do the comparability rules of *section 4980G* apply to qualified HSA distributions under section 106 (e) (2)?

A-1: The comparability rules of *section 4980G* do not apply to amounts contributed to employee HSAs through qualified HSA distributions. However, in order to satisfy the comparability rules, if an employer offers qualified HSA distributions, as defined in section 106 (e) (2), to any employee who is an eligible individual covered under any HDHP, the employer must offer qualified HSA distributions to all employees who are eligible individuals covered under any HDHP. However, if an employer offers qualified HSA distributions only to employees who are eligible individuals covered under the employer's HDHP, the employer is not required [*31] to offer qualified HSA distributions to employees who are eligible individuals but are not covered under the employer's HDHP.

Q-2: What is the effective date for the rules in this section?

A-2: The rules in this section are effective for employer contributions made for calendar years beginning on or after January 1, 2010.

Par. 11. *Section 54.6011-2* is added to read as follows:

§54.6011-2 General requirement of return, statement, or list

Effective for any Form 8928 that is due on or after January 1, 2010, any person liable for tax under *section 4980B, 4980D, 4980E, or 4980G of the Code* shall file a return with respect to the tax on Form 8928. The return must include the information required by Form 8928 and the instructions issued with respect to it.

Par. 12. *Section 54.6061-1* is added to read as follows:

§54.6061-1 Signing of returns and other documents

Effective for any Form 8928 that is due on or after January 1, 2010, any return, statement, or other document required to be made with respect to a tax imposed by *section 4980B, 4980D, 4980E, or 4980G of the Code* or the regulations under *section 4980B, 4980D, 4980E, or 4980G* must be signed by the person required to file the [*32] return, statement, or other document, or by the persons required or duly authorized to sign in accordance with the regulations, forms, or instructions prescribed with respect to such return, statement, or document. An individual's signature on such return, statement, or other document shall be prima facie evidence that the individual is authorized to sign the return, statement, or other document.

Par. 13. *Section 54.6071-1* is added to read as follows:

§54.6071-1 Time for filing returns

(a) Returns under *section 4980B*. (1) Due date for filing of return by employers or other persons responsible for benefits under a group health plan. If the person liable for the excise tax is an employer or other person responsible for providing or administering benefits under a group health plan (such as an insurer or a third party administrator), the return required by §54.6011-2 must be filed on or before the due date for filing the person's income tax return and must reflect the portion of the noncompliance period for each failure under *section 4980B* that falls during the person's taxable year. An extension to file the person's income tax return does not extend the date for filing Form 8928.

(2) Due [*33] date for filing of return by multiemployer plans. If the person liable for the excise tax is a multiemployer plan, the return required by §54.6011-2 must be filed on or before the last day of the seventh month following the end of the plan's plan year. The filing of Form 8928 by a plan must reflect the portion of the noncompliance period for each failure under *section 4980B* that falls during the plan's plan year.

(b) Returns under *section 4980D*. (1) Due date for filing of return by employers. If the person liable for the excise tax is an employer, the return required by §54.6011-2 must be filed on or before the due date for filing the employer's income tax return and must reflect the portion of the noncompliance period for each failure under chapter 100 that falls during the employer's taxable year. An extension to file the employer's income tax return does not extend the date for filing Form 8928.

(2) Due date for filing of return by multiemployer plans or multiple employer health plans. If the person liable for the excise tax is a multiemployer plan or a specified multiple employer health plan, the return required by §54.6011-2 must be filed on or before the last day of the seventh [*34] month following the end of the plan's plan year. The filing of Form 8928 by a plan must reflect the portion of the noncompliance period for each failure under chapter 100 that falls during the plan's plan year.

(c) Returns under *section 4980E*. Any employer who is liable for the excise tax under *section 4980E* must report this tax by filing the return required by §54.6011-2 on or before the 15th day of the fourth month following the calendar year in which the noncomparable contributions were made.

(d) Returns under *section 4980G*. Any employer who is liable for the excise tax under *section 4980E* must report this tax by filing the return required by §54.6011-2 on or be-

fore the 15th day of the fourth month following the calendar year in which the noncomparable contributions were made. See Q & A-4 of §54.4980G-1 for the rules on computation of the excise tax under *section 4980G*.

(e) Effective/applicability date: The rules in this section are effective for any Form 8928 that is due on or after January 1, 2010.

Par. 14. *Section 54.6091-1* is added to read as follows:

§54.6091-1 Place for filing excise tax returns under *section 4980B, 4980D, 4980E, or 4980G*

Effective for any Form 8928 that is due [*35] on or after January 1, 2010, the return required by §54.6011-2 must be filed at the place specified in the forms and instructions provided by the Internal Revenue Service.

Par. 15. *Section 54.6151-1* is added to read as follows:

§54.6151-1 Time and place for paying of tax shown on returns.

Effective for any Form 8928 that is due on or after January 1, 2010, the tax shown on any return which is imposed under *section 4980B, 4980D, 4980E or 4980G* shall, without assessment or notice and demand, be paid to the internal revenue officer with whom the return is filed at the time and place for filing such return (determined without regard to any extension of time for filing the return). For provisions relating to the time and place for filing such return, see §§54.6071-1 and 54.6091-1.

/s/ Linda E. Stiff

Deputy Commissioner for Services and Enforcement.

Approved: August 20, 2009

/s/ Michael Mundaca

Assistant Secretary of the Treasury (Tax Policy).