Part IV. Items of General Interest

Notice of Proposed Rulemaking and Notice of Public Hearing

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

REG–120476–07

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed 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 proposed regulations also provide guidance relating to the requirement of a return to accompany payment of the excise tax under section 4980B, 4980D, 4980E, or 4980G of the Code and the time for filing that return. These proposed 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. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by October 14, 2008. Outlines of topics to be discussed at the public hearing scheduled for October 30, 2008, at 10:00 am, must be received by October 13, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–120476–07), Internal Revenue Service, room 5203, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–120476–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–120476–07). The public hearing will be held in room 2116, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations as they relate to section 4980E or 4980G, Mireille Khoury at (202) 622–6080; concerning the proposed regulations as they relate to section 4980B or 4980D, Russ Weinheimer at (202) 622–6080; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Richard Hurst at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by September 15, 2008.

Comments are specifically requested concerning:

Whether the proposed collections of information are necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collections of information in these proposed regulations are 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. These collections of information result 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 administrators who are responsible for providing benefits under the plan.

Estimated total annual reporting burden: 2,500 hours.

The estimated annual burden per respondent is 30 minutes.

Estimated number of respondents: 5,000.

The estimated frequency of responses per respondent is occasional, less than once per year.

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 may 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 proposed Pension 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), under paragraph (d) of section 4980G of the Code, as enacted by section 306 of the Act, and under section 4980E of the Code.

Section 1201 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Modernization 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 Modernization 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 an 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 the 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, 2004–1 C.B. 269, Q&A–32. On July 31, 2006, final regulations on comparability were published in the **Federal Register**, 71 FR 43056 (T.D. 9277, 2006–2 C.B. 226). In addition, on April 17, 2008, final regulations were published in the **Federal Register**, 73 FR 20794 (T.D. 9393, 2008–20 I.R.B. 975), 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 proposed Pension Excise Tax Regulations (26 CFR part 54) under sections 4980B and 4980D of the Code. Under section 4980B of the Code, 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 enrollments, prohibitions against discrimination based on a health factor, parity in the annual and lifetime dollar limits placed on mental health benefits with those placed on medical/surgical benefits, and minimum hospital lengths of stay in connection with childbirth. 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.

Explanation of Provisions

Special Rule for Contributions to Nonhighly Compensated Employees

New 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. These proposed regulations interpret that requirement. Specifically, the proposed regulations, in §54.4980G–4, 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 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 §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 from the employer in excess of $105,000 (for 2008, 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 during the last month of the taxable year (that is, who, in the case of calendar year taxpayers, are eligible individuals on Decem-

ber 1 of the year) 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 proposed regulations provides that the employer can contribute up to this maximum contribution on behalf of all employees who are eligible individuals during the last month of the taxable year, including employees who become eligible individuals after January 1st of the calendar year and eligible individuals who are 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 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 I.R.B. 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 proposed regulations would provide 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 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.

Requirement of Return and Time for Filing of the excise tax under section 4980B, 4980D, 4980E or 4980G.

The regulations provide that persons who are liable for the excise tax under section 4980B, 4980D, 4980E, or 4980G are required to file a return 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 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.

Proposed Effective/Applicability Date

The sections of these regulations that provide guidance on employer comparable contributions to HSAs under section 4980G are proposed to apply to employer contributions made on or after the first day of the first calendar year after the final regulations are published in the **Federal Register**. However, taxpayers may rely on these regulations for guidance with respect to employer contributions made on or after January 1, 2007, and before the effective date of final regulations.

The sections of these regulations that provide guidance relating to the excise tax under section 4980B, 4980D, 4980E and 4980G are proposed to be effective for calendar years (or plan years, where applicable) beginning after the date the final regulations are published in the **Federal Register**.

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. 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. This certification is based on the fact, as previously noted, the estimated burden associated with the information collection averages thirty minutes per respondent and the estimated number of respondents is 5000. Moreover, the burden imposed under the collection of information in these regulations arises only if there has been a failure that triggers liability for the excise tax under section 4980B, 4980D, 4980E, or 4980G of the Code. 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, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department request comments on the clarity of the proposed regulations and how they can be made easier to understand. All comments will be available for public inspection and copying.

The public hearing has been scheduled for October 30, 2008, beginning at 10 a.m. in room 2116, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by October 14, 2008, and submit an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by October 13, 2008. A period of 10 minutes will be allocated to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving comments has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is Mireille Khoury, 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 in their development.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 54 is proposed to be amended as follows:

PART 54—PENSION EXCISE TAXES

Paragraph 1. The authority citation for part 54 is amended by adding entries to the table 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 general*. Any person who is liable for the excise tax under section 4980B must report this tax by filing Form 8928, "*Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code*", and the tax must be paid at the time prescribed for filing such return (without extensions). The return must include the information required by Form 8928 and the instructions issued with respect to it.

(b) *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 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.

(c) *Due date for filing of return by multiemployer plans*. If the person liable for the excise tax is a multiemployer plan, the return 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.

(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 after the date the final regulations are published in the **Federal Register**. 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 after the date the final regulations are published in the **Federal Register**.

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*. Any person who is liable for the excise tax under section 4980D must report this tax by filing Form 8928, "*Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code*", and the tax must be paid at the time prescribed for filing such return (without extensions). The return must include the information required by Form 8928 and the instructions issued with respect to it.

(b) *Due date for filing of return by employers*. If the person liable for the excise tax is an employer, the return 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.

(c) *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 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 chapter 100 that falls during the plan's plan year.

(d) *Effective/applicability 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 after the date the final regulations are published in the **Federal Register**. 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 after the date the final regulations are published in the **Federal Register**.

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*. Any employer who is liable for the excise tax under section 4980E must report this tax by filing Form 8928, "*Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code*", on or before the 15th day of the fourth month following the calendar year in which the noncomparable contributions were made. The tax must be paid at the time prescribed for filing such return (without extensions), and the return must include the information required by Form 8928 and the instructions issued with respect to it.

(b) *Effective/applicability date*. The rules in this Q&A–1 are effective for plan years beginning after the date the final regulations are published in the **Federal Register**.

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 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.

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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*. Any employer who is liable for the excise tax under section 4980E must report this tax by filing Form 8928, "*Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code*", on or before the 15th day of the fourth month following the calendar year in which the noncomparable contributions were made. The tax must be paid at the time prescribed for filing such return (without extensions), and the return must include the information required by Form 8928 and the instructions issued with respect to it. See Q&A–4 of §54.4980G–1 for the rules on computation of the excise tax under section 4980G.

(b) *Effective/applicabilty date*. The rules in this Q&A–5 are effective for plan years beginning after the date the final regulations are published in the **Federal Register**.

Par. 7. Section 54.4980G–3 is amended by:

1. Revising the introductory text in paragraph (a) of A–5.

2. 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.

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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 and Q&A–1 of §54.4980G–6 for a special rule for contributions made to the HSAs of nonhighly compensated employees)—

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(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.

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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) and (i) 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 during the last month of the taxable year, including employees who worked for the employer for less than the 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 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, 2009, Employer Q contributes $1,000 for the calendar year to the HSAs of employees who are eligible 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, 2009, 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, 2009, Employer G contributes $1,000 to the HSA of Employee B. Employer Q does not make any other contributions for the 2009 calendar year. Employer Q's contributions satisfy the comparability rules.

Example 2. For the 2009 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 2009 calendar year. Employer R's contributions satisfy the comparability rules.

* * * * *

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 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 2009, Employer A 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 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 2009 satisfy the comparability rules.

Example 2. In 2009, 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 2009 satisfy the comparability rules.

Example 3. In 2009, 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 2009 do not satisfy the comparability rules.

Example 4. In 2009, 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 2009 do not satisfy the comparability rules.

Example 5. In 2009, 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 2009 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 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 examples, no contributions are made through a section 125 cafeteria plan and none of the employees are covered by a collective bargaining agreement.

Example. In 2009, 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 2009 calendar year, Employer F contributes $1,000 to Employee A's HSA and $1,500 to Employee B's HSA. Employer F's HSA contributions satisfy the comparability rules.

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 to offer qualified HSA distributions to employees who are eligible individuals but are not covered under the employer's HDHP.

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