to A made in January is not wages for 2004 because the $150 cash-remuneration test is not met. However, if X pays additional remuneration to employees for agricultural labor in 2004 that equals or exceeds $2,360, the employer's-expenditures-for-agricultural-labor test will be met and the $140 paid by X to A in 2004 will be considered wages. It is immaterial that the work was performed in 2003.

* * * * *

(h) *Effective dates.* The provisions of this section apply to any payment for agricultural labor made on or after January 1, 1988. For rules applicable to any payment for agricultural labor made prior to January 1, 1988, see § 31.3121(a)(8)–1 in effect at such time (see 26 CFR part 31 revised as of April 1, 2005).

Par. 6. Section 31.3121(a)(10)–1 is revised to read as follows:

§ 31.3121(a)(10)–1 Payments to certain home workers.

(a) The term *wages* does not include remuneration paid by an employer in any calendar year to an employee for service performed as a home worker who is an employee by reason of the provisions of section 3121(d)(3)(C) (see § 31.3121(d)–1(d)), unless the cash remuneration paid in such calendar year by the employer to the employee for such services is $100 or more. The test relating to cash remuneration of $100 or more is based on remuneration paid in a calendar year rather than on remuneration earned during a calendar year. If cash remuneration of $100 or more is paid in a particular calendar year, it is immaterial whether such remuneration is in payment for services performed during the year of payment or during any other year.

(b) The application of paragraph (a) of this section may be illustrated by the following example:

Example. A, a home worker, performs services for X, a manufacturer, in 2003 and 2004. In the performance of the home work A is an employee by reason of section 3121(d)(3)(C). In March 2004, A returns to X articles made by A at home from materials received by A from X in 2003. X pays A cash remuneration of $100 for such work when the finished articles are delivered. The $100 includes $10 which represents remuneration for home work performed by A in 2003. The entire $100 is subject to the taxes. Any additional cash remuneration paid by X to A in 2004 for such services is also subject to the taxes.

(c) In the event an employee receives remuneration in any one calendar year from more than one employer for services performed as a home worker of the character described in paragraph (a) of this section, the regulations in this section are to be applied with respect to the remuneration received by the employee from each employer in such calendar year for such services. This exclusion from wages has no application to remuneration paid for services performed as a home worker who is an employee under section 3121(d)(2) (see § 31.3121(d)–1(c)) relating to common law employees.

(d) Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as clothing, car tokens, transportation passes or tickets, or other goods or commodities, is disregarded in determining whether the $100 cash-remuneration test is met. If the cash remuneration paid in any calendar year by an employer to an employee for services performed as a home worker of the character described in paragraph (a) of this section is $100 or more, then no remuneration, whether in cash or in any medium other than cash, paid by the employer to the employee in such calendar year for such services is excluded from wages under this exception.

(e)(1) For provisions relating to deductions of employee tax or amounts equivalent to the tax from cash payments for services performed as a home worker within the meaning of section 3121(d)(3)(C), see § 31.3102–1.

(2) For provisions relating to the time of payment of wages for services performed as a home worker within the meaning of section 3121(d)(3)(C), see § 31.3121(a)–2.

(3) For provisions relating to records to be kept with respect to payment of wages for services performed as a home worker within the meaning of section 3121(d)(3)(C), see § 31.6001–2.

(f) The provisions of this section apply to any payment for services performed as a home worker within the meaning of section 3121(d)(3)(C) made on or after January 1, 1978. For rules applicable to any payment for services performed as a home worker within the meaning of section 3121(d)(3)(C) made prior to January 1, 1978, see § 31.3121(a)(10)–1 in effect at such time (see 26 CFR part 31 revised as of April 1, 2005).

Par. 7. Section 31.3121(i)–1 is amended as follows:

1. Redesignating the undesignated text as paragraph (a).

2. Remove the language ''quarter'' each place it appears and add ''year'' in its place in newly designated paragraph (a).

3. Adding new paragraph (b).

The addition reads as follows:

§ 31.3121(i)–1 Computation to nearest dollar of cash remuneration for domestic service.

* * * * *

(b) The provisions of this section apply to any cash payment for domestic service in a private home of the employer made on or after January 1, 1994. For rules applicable to any cash payment for domestic service in a private home of the employer made prior to January 1, 1994, see § 31.3121(i)–1 in effect at such time (see 26 CFR part 31 revised as of April 1, 2005).

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 05–16944 Filed 8–25–05; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

[REG–138647–04]

RIN 1545–BE30

Employer Comparable Contributions to Health Savings Accounts Under Section 4980G

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

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

DATES: Written or electronic comments and requests for a public hearing must be received by November 25, 2005.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–138647–04), room 5203, Internal Revenue Service, 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–138647–04), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the IRS Internet site at *www.irs.gov/regs* or via the Federal eRulemaking Portal at *www.regulations.gov* (IRS–REG–138647–04).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations,

Barbara E. Pie at (202) 622–6080; concerning submissions of comments or a request for a public hearing, Kelly Banks at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed 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 I.R.B. 269), Q & A–32.

Explanation of Provisions

Overview

The proposed regulations clarify and expand on the guidance regarding the comparability rules published in Notice 2004–2 and in Notice 2004–50 (2004–33 I.R.B. 196), Q & A–46 through Q & A–54.

I. Comparable Contributions in General

An employer is not required to contribute to the HSAs of its employees. However, in general, 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 have the same category of high deductible health plan (HDHP) coverage. The categories of coverage are self-only HDHP coverage and family HDHP coverage.

These proposed regulations incorporate the rule in Notice 2004–2, Q & A–32 that contributions are comparable if they are either the same amount or the same percentage of the deductible for employees who are eligible individuals with the same category of coverage. An employer is not required to contribute the same amount or the same percentage of the deductible for employees who are eligible individuals with self-only HDHP coverage that it contributes for employees who are eligible individuals with family HDHP coverage. An employer that satisfies the comparability rules by contributing the same amount to the HSAs of all employees who are eligible individuals with self-only HDHP coverage is not required to contribute any amount to the HSAs of employees who are eligible individuals with family HDHP coverage, or to contribute the same percentage of the family HDHP deductible as the amount contributed with respect to self-only HDHP coverage. Similarly, 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.

II. Calculating Comparable Contributions

The proposed regulations clarify that contributions to the HSAs of certain individuals are not taken into account in determining whether an employer's contributions to the HSAs of its employees satisfy the comparability rules. Specifically, contributions to the HSAs of independent contractors, sole proprietors, and partners in a partnership are not taken into account under the comparability rules. In addition, the comparability rules do not apply to amounts rolled over from an employee's HSA or Archer MSA or to after-tax employee contributions.

The proposed regulations also clarify that the categories of employees for comparability testing are current full-time employees, current part-time employees, and 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)). The proposed regulations provide that the comparability rules apply separately to each of the categories of employees. If an employer contributes to the HSA of any employee in a category of employees, the employer must make comparable contributions to the HSAs of all comparable participating employees within that category. Therefore, the comparability rules apply to a category of employees only if an employer contributes to the HSA of any employee within the category. For example, an employer that makes comparable contributions to the HSAs of all full-time employees who are eligible individuals but does not contribute to the HSA of any employee who is not a full-time employee, satisfies the comparability rules.

The categories of employees set forth in these proposed regulations are the exclusive categories 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. Therefore, the comparability rules do not apply separately to groups of collectively bargained employees. While the comparability rules apply separately to part-time employees, there is no similar rule permitting separate application of the comparability rules to collectively bargained employees. Neither section 4980E nor section 4980G provides an exception to the comparability rules for collectively bargained employees. Accordingly, an employer must make comparable contributions to the HSAs of all comparable participating employees, both those who are covered under a collective bargaining agreement and those who are not covered. Similarly, the comparability rules do not apply separately to management and non-management employees.

The proposed regulations also provide that 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.

The proposed regulations incorporate the rule set forth in Q & A–53 of Notice 2004–50, which provides that if an employer limits HSA contributions to employees who are eligible individuals with coverage under an HDHP provided by the employer, the employer is not required to make comparable contributions to the HSAs of employees who are eligible individuals with coverage under an HDHP not provided by the employer. However, if an employer contributes to the HSAs of employees who are eligible individuals with coverage under any HDHP, in addition to the HDHPs provided by the employer, the employer is required to make comparable contributions to the HSAs of all comparable participating employees whether or not covered under employer's HDHP. The proposed regulations also provide that similar rules apply to employer contributions to the HSAs of former employees. For example, if an employer limits HSA contributions to former employees who are eligible individuals with coverage under an HDHP provided by the employer, the employer is not required make comparable contributions to the HSAs of former employees who are eligible individuals with coverage under an HDHP not provided by the employer. However, if an employer contributes to the HSAs of former employees who are eligible individuals with coverage under the employer's HDHP, the employer 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)).

The proposed regulations also incorporate the rule set forth in Q & A–46 of Notice 2004–50, which provides that the comparability rules will not be satisfied if an employer makes HSA contributions in an amount equal to an employee's HSA contribution or a percentage of the employee's HSA contribution (matching contributions) because if all comparable participating employees do not contribute the same amount to their HSAs, they will not receive comparable contributions to their HSAs. In addition, the comparability rules will not be satisfied if an employer conditions contributions to an employee's HSA on an employee's participation in health assessments, disease management programs or wellness programs because if all comparable participating employees do not elect to participate in all the programs, they will not receive comparable contributions to their HSAs. See Q & A–48 of Notice 2004–50. Similarly, the comparability rules will not be satisfied 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, because if all comparable participating employees do not meet the age or length of service requirement, they will not receive comparable contributions to their HSAs. See Q & A–50 of Notice 2004–50.

III. Procedures for Making Comparable Contributions

The proposed regulations provide that in determining whether the comparability rules are satisfied, an employer must take into account all full-time and part-time employees who were eligible individuals for any month during the calendar year. An employee is an eligible individual if as of the first day of the month the employee meets all of the requirements set forth in section 223(c). An employer may comply with the comparability rules by contributing amounts at one or more times for the calendar year to the HSAs of employees who are eligible individuals, if contributions are the same amount or the same percentage of the HDHP deductible for employees who are eligible individuals with the same category of coverage and are made at the same time (contributions on a pay-as-you-go 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 correct amount (a percentage of the HDHP deductible or a specified dollar amount for the same categories of coverage) to the employees' HSAs by April 15th of the following year (contributions on a look-back basis).

If an employer makes comparable HSA contributions on a pay-as-you-go basis, it must do so for each comparable participating employee who is an employee during the time period used to make contributions. For example, if an employer makes HSA contributions each pay period, it must do so for each comparable participating employee who is an employee during the pay period. 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.

In addition, an employer may make all of its contributions to the HSAs of employees who are eligible individuals at the beginning of the calendar year (contributions on a pre-funded basis). An employer that makes comparable HSA contributions on a pre-funded basis 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 HSA contributions on a monthly basis than employees who worked the entire 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. An employer that makes HSA contributions on a pre-funded basis must make comparable HSA contributions for all employees who are comparable participating employees for any month during the calendar year, including employees hired after the date of initial funding.

If an employee has not established an HSA at the time the employer funds its employee's HSAs, the employer complies with the comparability rules by contributing comparable amounts to the employee's HSA when the employee establishes the HSA, taking into account each month that the employee was a comparable participating employee. However, an employer is not required to make comparable contributions for a calendar year to an employee's HSA if the employee has not established an HSA by December 31st of the calendar year.

The proposed regulations provide that if an employer determines that the comparability rules are not satisfied for a calendar year, the employer may not recoup from an employee's HSA any portion of the employer's contribution to the employee's HSA because 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.

IV. Exception to the Comparability Rules for Cafeteria Plans

The legislative history of the Act states that the comparability rules do not apply to HSA contributions that an employer makes through a cafeteria plan. See Conf. Rep. No. 391, 108th Cong., 1st Sess. 843 (2003), 2004

U.S.C.C.A.N. 1808. See also Notice 2004–2, Q & A–32. The nondiscrimination rules in section 125 of the Code apply to HSA contributions (including matching contributions) made through a cafeteria plan. Generally, a cafeteria plan is a written plan under which all participants are employees and participants may choose among two or more benefits consisting of cash and qualified benefits. Unlike the cafeteria plan nondiscrimination rules, the comparability rules are not based upon discrimination in favor of highly compensated or key employees. Therefore, an employer that maintains an HDHP only for highly compensated or key employees and makes HSA contributions through a cafeteria plan only for those eligible employees, does not violate the comparability rules, but may violate the cafeteria plan nondiscrimination rules.

V. Waiver of Excise Tax

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).

Proposed Effective Date

It is proposed that these regulations apply to employer contributions made on or after the date the final regulations are published in the **Federal Register**. However, taxpayers may rely on these regulations for guidance pending the issuance of final regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking 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. This notice of proposed rulemaking does 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, these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for 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 Treasury Department and the IRS specifically request comments on the clarity of the proposed rules and how they can be made easier to understand. In addition, comments are requested on the application of the comparability rules to employees who are on leave pursuant to the Family and Medical Leave Act of 1993, Public Law 103–3, (107 Stat. 6, 1993, 29 U.S.C. 2601 *et seq.*). Comments are also requested concerning employer matching HSA contributions made through a cafeteria plan. Specifically, whether the ratio of an employer's matching HSA contributions to an employee's salary reduction HSA contributions should be limited, and whether employer matching contributions exceeding a specific limit should be subject to the section 4980G comparability rules. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments.

Drafting Information

The principal author of these proposed regulations is Barbara E. Pie, 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.

List of Subjects in 26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

Proposed Amendment 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 an entry 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. * * *

Par. 2. Sections 54.4980G–0 through 54.4980G–5 are added to read as follows:

§ 54.4980G–0 Table of contents.

This section contains the questions for § 54.4980G–1 through § 54.4980G–5.

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–12. 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 do the comparability rules apply to employer contributions to employees' HSAs if some employees work full-time during the entire calendar year, and other employees work full-time for less than the entire calendar year?

Q–3. How does an employer comply with the comparability rules when some employees who are eligible individuals do not work for the employer during the entire calendar year?

Q–4. May an employer make all of its contributions 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 who qualify for 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?

§ *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 an employer provides HDHP coverage through a cafeteria plan, but the employer's HSA contributions are not provided through the cafeteria plan, do the cafeteria plan nondiscrimination rules or the comparability rules apply to the HSA contributions?

Q–4. 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–5. 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 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 in this section for the categories of HDHP coverage.

Q–2. What are the categories of HDHP coverage for purposes of applying the comparability rules?

A–2. The categories of coverage are self-only HDHP coverage and family HDHP coverage. See sections 4980G(b) and 4980E(d)(3)(B).

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).

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. In this *Example*, assume that the HDHP provided by Employer A satisfies the definition of an HDHP for the 2007 calendar year. During the 2007 calendar year, Employer A has 8 employees who are eligible individuals with self-only coverage under an HDHP provided by Employer A. The deductible for the HDHP is $2,000. For the 2007 calendar year, Employer A 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 A's contributions do not satisfy the comparability rules. Therefore, Employer A is subject to an excise tax of $3,500 (*i.e.*, 35% x $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 Definition of employee for comparability testing.

Q–1. Do the comparability rules apply to contributions that an employer makes to the HSAs of independent contractors?

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 he or she makes to his or her own HSA. However, if a sole proprietor contributes to any employee's HSA, he or she 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 employees who are not partners, the comparability rules apply to those contributions.

(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—

(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.* 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.* The categories of employees in paragraph (a) of this Q & A–5 are the exclusive categories 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. Thus, the comparability rules do not apply separately to collectively bargained and non-collectively bargained employees. Similarly, the comparability rules do not apply separately to groups of collectively bargained employees.

Q–6. 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–6. (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. However, an employer that contributes to the HSA of any employee who is an eligible individual with coverage under any HDHP, in addition to the HDHPs 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.

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

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

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

Example 3. 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 to these employees' HSAs and also to the HSAs of full-time employees who are eligible individuals and who are not covered under Employer E's HDHP. Employee H, a full-time employee of Employer E and a comparable participating employee, is covered under an HDHP provided by H's spouse's employer and not under Employer E's HDHP. Employer E must make comparable contributions to H's HSA.

Q–7. 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–7. (a) *In general.* If the employer makes contributions only to the HSAs of employees who are eligible individuals covered under its 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 any HDHP, 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–7:

Example 1. In a calendar year, Employer F offers an HDHP to its full-time employees. Most full-time employees are covered under Employer F's HDHP and Employer F makes comparable contributions only to these employees' HSAs. Employee H, a full-time employee of Employer F and an eligible individual has family coverage under Employer F's HDHP for H and H's spouse, Employee W, who is also a full-time employee of Employer F and an eligible individual. Employer F is required to make comparable contributions to H's HSA, but is not required to make comparable contributions to W's HSA.

Example 2. 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 to the HSAs of full-time employees who are eligible individuals but are not covered under Employer G's HDHP. Employee W, a full-time employee of Employer G and an eligible individual, has family coverage under Employer G's HDHP for W and W's spouse, Employee H, who is also a full-time employee of Employer G and an eligible individual. Employer G must make comparable contributions to W's HSA and to H's HSA.

Q–8. Does an employer that makes HSA contributions only for non-management employees who are eligible individuals, but not for management employees who are eligible individuals or that makes HSA contributions only for management employees who are eligible individuals but not for non-management employees who are eligible individuals satisfy the requirement that the employer make comparable contributions?

A–8. (a) *Management* v. *non-management.* No. If management employees and non-management employees are comparable participating employees, the comparability rules are not satisfied. However, if non-management employees are comparable participating employees and management employees are not comparable participating employees, the comparability rules may be satisfied. 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–8:

Example 1. In a calendar year, Employer H maintains an HDHP covering all management and non-management employees. Employer H contributes $1,000 for the calendar year to the HSA of each non-management employee who is an eligible individual covered under its HDHP. Employer H does not contribute to the HSAs of any of its management employees who are eligible individuals covered under its HDHP. The comparability rules are not satisfied.

Example 2. In a calendar year, Employer J maintains an HDHP for non-management employees only. Employer J does not maintain an HDHP for its management employees. Employer J contributes $1,000 for the calendar year to the HSA of each non-management employee who is an eligible individual with coverage under its HDHP. Employer J does not contribute to the HSAs of any of its non-management employees not covered under its HDHP or to the HSAs of any of its management employees. The comparability rules are satisfied.

Example 3. In a calendar year, Employer K maintains an HDHP for management employees only. Employer K does not maintain an HDHP for its non-management employees. Employer K contributes $1,000 for the calendar year to the HSA of each management employee who is an eligible individual with coverage under its HDHP. Employer K does not contribute to the HSAs of any of its management employees not covered under its HDHP or to the HSAs of any of its non-management employees. The comparability rules are satisfied.

Q–9. If an employer contributes to the HSAs of former employees who are eligible individuals, do the comparability rules apply to these contributions?

A–9. (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–11 in this section. The comparability rules apply separately to former employees because they are a separate category of covered employee. See Q & A–5 in this section.

(b) *Examples.* The following examples illustrate the rules in paragraph (a) of this Q & A–9:

Example 1. In a calendar year, Employer L 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 L does not contribute to the HSA of any former employee who is an eligible individual. Employer L's contributions satisfy the comparability rules.

Example 2. In a calendar year, Employer M contributes to the HSAs of current employees and former employees who are eligible individuals covered under any HDHP. Employer M 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 M 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 M's contributions satisfy the comparability rules.

Q–10. 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–10. 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 any HDHP, even if that coverage is not the employer's HDHP, 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–11. 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–11. 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–12. How do the comparability rules apply if some employees have HSAs and other employees have Archer MSAs?

A–12. (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) *Examples.* The following examples illustrate the rules in paragraph (a) of this Q & A–12:

Example 1. In a calendar year, Employer N contributes $600 to the Archer MSA of each employee who is an eligible individual and who has an Archer MSA. Employer N 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 N contributes to the employee's Archer MSA and not to the employee's HSA. Employee X has an Archer MSA and an HSA. Employer N contributes $600 for the calendar year to X's Archer MSA but does not contribute to X's HSA. Employer N's contributions satisfy the comparability rules.

Example 2. Same facts as *Example 1,* except that if an employee has both an Archer MSA and an HSA, Employer N contributes to the employee's HSA and not to the employee's Archer MSA. Employer N contributes $500 for the calendar year to X's HSA but does not contribute to X's Archer MSA. Employer N'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 they 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. Employees with self-only HDHP coverage are tested separately from employees with family HDHP coverage. See Q & A–1 and 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 self-only HDHP coverage that it contributes for employees who are eligible individuals with family HDHP coverage. An employer that satisfies the comparability rules by contributing the same amount to the HSAs of all employees who are eligible individuals with self-only HDHP coverage is not required to contribute any amount to the HSAs of employees who are eligible individuals with family HDHP coverage, or to contribute the same percentage of the family HDHP deductible as the amount contributed with respect to self-only HDHP coverage. Similarly, 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.

(b) *Examples.* Assume that the HDHPs in *Example 1* through *Example 7* satisfy the definition of an HDHP for the 2007 calendar year. The following examples illustrate the rules in paragraph (a) of this Q & A–1:

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 a $2,500 deductible for self-only coverage, and the following family coverage options—

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

(B) A $3,500 deductible for self plus spouse;

(C) A $3,500 deductible for self plus two or more dependents;

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

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

(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) $1,000 for self plus two or more dependents;

(E) $1,000 for self plus spouse and one dependent; and

(F) $1,000 for self plus spouse and two or more dependents.

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

Example 7. (i) In the 2007 calendar year, Employer G maintains an HDHP. The HDHP has a $1,800 deductible for self-only coverage and the following family coverage options—

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

(B) A $3,800 deductible for self plus spouse;

(C) A $4,000 deductible for self plus two or more dependents;

(D) A $4,500 deductible for self plus spouse and one dependent; and

(E) A $5,000 deductible for self plus spouse and two or more dependents.

(ii) Employer G 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) $360 for self-only coverage;

(B) $875 for self plus one dependent;

(C) $950 for self plus spouse;

(D) $1,000 for self plus two or more dependents;

(E) $1,125 for self plus spouse and one dependent; and

(F) $1,250 for self plus spouse and two or more dependents.

(iii) Employer G's HSA contributions satisfy the comparability rules because Employer G has made contributions that are the same percentage of the deductible for eligible employees with the same category of coverage (20% of the deductible for eligible employees with self-only coverage and 25% of the deductible for eligible employees with family coverage). Employer G could also satisfy the comparability rules by contributing the same dollar amount for each category of coverage.

Example 8. In a calendar year, Employer H 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 H's employees have coverage under the HDHP and the health FSA. For the calendar year, Employer H contributes $500 to the HSA of each of employee who is an eligible individual, but does not contribute to the HSAs of employees who have coverage under the health FSA or under a spouse's health FSA. In addition, some of Employer H's employees have coverage under the HDHP and are enrolled in Medicare. Employer H does not contribute to the HSAs of employees who are enrolled in Medicare. 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 H's contributions satisfy the comparability rules.

Q–2. How do the comparability rules apply to employer contributions to employees' HSAs if some employees work full-time during the entire calendar year, and other employees work full-time for less than the entire calendar year?

A–2. 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 a full-time employee who works three months of the calendar year. The rules set forth 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 in this section. See sections 4980G(b) and 4980E(d)(2)(B).

Q–3. How does an employer comply with the comparability rules when some employees who are eligible individuals do not work for the employer during the entire calendar year?

A–3. (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 times for the calendar year to the HSAs of employees who are eligible individuals, 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–3:

Example 1. (i) Beginning on January 1st, Employer J contributes $50 per month on the first day of each month to the HSA of each employee who is an eligible individual. Employer J 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 J has contributed $150 to X's HSA. After X terminates employment, Employer J does not contribute additional amounts to X's HSA. In mid-April of the same year, Employer J 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 J 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 J hires Employee Z, an eligible individual. Employer J does not

contribute to Z's HSA. After Z is hired, Employer J does not hire additional employees. As of the end of the calendar year, Employer J has made the following HSA contributions to its employees' HSAs—

(A) Employer J contributed $150 to X's HSA;

(B) Employer J contributed $100 to Y's HSA;

(C) Employer J did not contribute to Z's HSA; and

(D) Employer J contributed $300 to the HSA of each employee who was an eligible individual and employed by Employer from January through June.

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

Example 2. In a calendar year, Employer K 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 K's HDHP. In the calendar year, Employer K 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 30th of the calendar year, Employee X is an eligible individual with self-only HDHP coverage. From April 1st through December 30th 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 K contributes $50 per month to X's HSA. For the remaining months of the calendar year, Employer K contributes $100 per month to X's HSA. Employer K'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 correct amount (a percentage of the HDHP deductible or a specified dollar amount for the same categories of coverage) to the employees' HSAs.

(e) *Example.* The following example illustrates the rules in paragraph (d) of this Q & A–3:

Example. In a calendar year, Employer L 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 L's HDHP. Employer L contributes $600 (*i.e.* $50 per month) for the calendar year to the HSA of each of employee with self-only HDHP coverage and $1,200 (*i.e.*, $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 L 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 L's contributions to Y's HSA satisfy the comparability rules.

Q–4. May an employer make all of its contributions 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?

A–4. (a) *Contributions on a pre-funded basis.* Yes. An employer may make all of its contributions 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 have worked the entire calendar year. See Q & A–12 in 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 M contributes $1,200 for the calendar year on a pre-funded basis to the HSA of each of employee who is an eligible individual. In mid-May, Employer M hires Employee B, an eligible individual. Therefore, Employer M is required to make comparable contributions to B's HSA beginning in June. Employer M 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–3 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 during the pay period. 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. An employer that contributes on a pre-funded basis 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 in 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.* 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 to the employee's HSA when the employee establishes the HSA, taking into account each month that the employee was a comparable participating employee. However, an employer is not required to make comparable contributions for a calendar year to an employee's HSA if the employee has not established an HSA by December 31st of the calendar year.

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

Example. Beginning on January 1st, Employer N 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 N must make up the missed HSA contributions 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 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 the 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 qualify for 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 do not qualify for 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).

§ 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. 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 under 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 Prop. Treas. Reg. § 1.125–1, Q & A–19, (49 FR 19321).

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?

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 in this section.

Q–3. If an employer provides HDHP coverage through a cafeteria plan, but the employer's HSA contributions are not provided through the cafeteria plan, do the cafeteria plan nondiscrimination rules or the comparability rules apply to the HSA contributions?

A–3. (a) *HDHP provided through cafeteria plan.* The comparability rules in section 4980G apply to the HSA contributions. The cafeteria plan nondiscrimination rules apply only to HSA contributions made through a cafeteria plan irrespective of whether the HDHP is provided through a cafeteria plan.

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

Example. Employer A provides HDHP coverage through its cafeteria plan. Employer A automatically contributes to the HSA of each employee who is an eligible individual with HDHP coverage through the cafeteria plan. Employees make no election with respect to Employer A's HSA contributions and have no right to receive cash or other taxable benefits in lieu of the HSA contributions. Employer A contributes only to the HSAs of employees who have elected HDHP coverage through the cafeteria plan. The comparability rules apply to Employer A's HSA contributions because the HSA contributions are not made through the cafeteria plan.

Q–4. 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?

A–4. No. The comparability rules do not apply to employer contributions to an HSA made through a cafeteria plan. See Q & A–1 in this section.

Q–5. May all or part of the excise tax imposed under section 4980G be waived?

A–5. 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).

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

[WV–106–FOR]

West Virginia Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We are announcing receipt of a proposed amendment to the West Virginia regulatory program (the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). West Virginia proposes revisions to the Code of West Virginia (W. Va. Code) and the Code of State Regulations (CSR) as authorized by several bills passed during the State's 2005 Legislative Session. West Virginia is also proposing an amendment that affects the State's regulations concerning erosion protection zones (EPZ) associated with durable rock fills. The State is revising its program to be consistent with certain corresponding Federal requirements, and to include other amendments at its own initiative. The amendments include, among other things, changes to the State's surface mining and blasting regulations as authorized by Committee Substitute for House Bill 2723; various statutory changes to the State's approved program as a result of the passage of Committee Substitute for House Bill 3033 and House Bills 2333 and 3236; the submission of a draft policy regarding the State's EPZ requirement and requesting that the Office of Surface Mining (OSM) reconsider its previous decision concerning EPZ; State water rights and replacement policy identifying the timing of water supply replacement; the revised Permittee's Request For Release form; and the submission of a Memorandum of Agreement (MOA) between the West Virginia Department of Environmental Protection (WVDEP), Division of Mining and Reclamation, and the West Virginia Division of Natural Resources, Wildlife Resources Section that is intended to partially resolve a required program amendment relating to planting arrangements for Homestead post-mining land use.

DATES: We will accept written comments on this amendment until 4 p.m. (local time), on September 26, 2005. If requested, we will hold a public hearing on the amendment on September 20, 2005. We will accept requests to speak at a hearing until 4 p.m. (local time), on September 12, 2005.

ADDRESSES: You may submit comments, identified by WV–106–FOR, by any of the following methods:

- E-mail: *chfo@osmre.gov.* Include WV–106–FOR in the subject line of the message;
- Mail/Hand Delivery: Mr. Roger W. Calhoun, Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street, East, Charleston, West Virginia 25301; or
- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading in the **SUPPLEMENTARY INFORMATION** section of this document. You may also request to speak at a public hearing by any of the methods listed above or by contacting the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Docket: You may review copies of the West Virginia program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may also receive one free copy of this amendment by contacting OSM's Charleston Field Office listed below.

Mr. Roger W. Calhoun, Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street, East, Charleston, West Virginia 25301, Telephone: (304) 347–7158. E-mail: *chfo@osmre.gov.*

West Virginia Department of Environmental Protection, 601 57th Street, SE, Charleston, West Virginia 25304, Telephone: (304) 926–0490.

In addition, you may review a copy of the amendment during regular business hours at the following locations:

Office of Surface Mining Reclamation and Enforcement, Morgantown Area Office, 75 High Street, Room 229, P.O. Box 886, Morgantown, West Virginia 26507, Telephone: (304) 291–4004. (By Appointment Only)

Office of Surface Mining Reclamation and Enforcement, Beckley Area Office, 323 Harper Park Drive, Suite 3, Beckley, West Virginia 25801, Telephone: (304) 255–5265.

FOR FURTHER INFORMATION CONTACT: Mr. Roger W. Calhoun, Director, Charleston Field Office, Telephone: (304) 347–7158. Internet: *chfo@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the West Virginia Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, ''* * * a