DEPARTMENT OF THE TREASURY
Internal Revenue Service

26 CFR Part 54
[TD 9393]
RIN 1545–BF97

Employer Comparable Contributions to
Health Savings Accounts Under
Section 4980G

AGENCY: Internal Revenue Service (IRS), Treasury.
ACTION: Final regulations.

SUMMARY: This document contains final regulations providing guidance on
employer comparable contributions to Health Savings Accounts (HSAs) under
section 4980G 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. These final regulations affect employers that
contribute to employees’ HSAs and their
employees.

DATES: Effective Date: These regulations are effective on April 17, 2008.
Applicability Date: These regulations apply to employer contributions made
for calendar years beginning on or after January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Mireille Khoury at (202) 622–6080.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has
been reviewed and approved by the Office of Management and Budget in
accordance with the Paperwork Reduction Act of 1995 (44 U.S.C.
3507(d)) under control number 1545–2090. The collection of information in
these final regulations is in Q & A–14. This information is needed for purposes
of making HSA contributions to employees who establish an HSA after
the end of the calendar year but before the last day of February or who have not
previously notified their employer that they have established an HSA.
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

Background

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

On August 26, 2005, proposed
regulations (REG–138647–04) on the
comparability rules of section 4980G
were published in the Federal Register
(70 FR 50233). On July 31, 2006, final
regulations (REG–138647–04) on the
comparability rules were published in the
Federal Register (71 FR 43056). The
final regulations clarified and expanded
upon the guidance regarding the
comparability rules published in Notice
2004–2 (2004–2 IRB 296) and in Notice
through Q & A–54. See § 601.601(d)(2). Q & A–6(b) of the final regulations
reserved the issue of employees who
have not established an HSA by the end
of the calendar year.

On June 1, 2007, proposed regulations
(REG–143797–06), were published in
the Federal Register (72 FR 30501)
addressing the reserved issue and one
additional issue concerning the
acceleration of employer contributions.
One written public comment on the
proposed regulations was received,
which supported the proposed
regulations. These final regulations
adopt the provisions of the proposed
regulations without substantive
revision.

Explanation of Provisions and
Summary of Comments

Employee Has Not Established HSA by
December 31

The proposed and final regulations
provide a means for employers to
comply with the comparability
requirements with respect to employees
who have not established an HSA by
December 31, as well as with respect to
employees who may have established an
HSA but not notified the employer of
that fact. The proposed and final
regulations provide that, in order to
comply with the comparability rules for
a calendar year with respect to such
employees, the employer must comply
with a notice requirement and a
contribution requirement. In order to
comply with the notice requirement, the
employer must provide all such
employees, by January 15 of the
following calendar year, written notice
that each eligible employee who, by the last day of February, both establishes an HSA and notifies the employer that he or she has established the HSA will receive a comparable contribution to the HSA. For each such eligible employee who establishes an HSA and so notifies the employer by the end of February, the employer must contribute to the HSA by April 15 comparable amounts (taking into account each month that the employee was a comparable participating employee) plus reasonable interest. The notice may be delivered electronically. The proposed and final regulations provide sample language that employers may use as a basis in preparing their own notices. The only comment received was in support of this new rule and the model notice.

**Acceleration of Employer Contributions**

The proposed and final regulations also address a second issue relating to acceleration of contributions. They provide that, for any calendar year, an employer may accelerate part of or all of its contributions for the entire year to the HSAs of employees who have incurred during the calendar year qualified medical expenses exceeding the employer’s cumulative HSA contributions at that time. If an employer accelerates contributions for this reason, these contributions must be available on an equal and uniform basis to all eligible employees throughout the calendar year and employers must establish reasonable uniform methods and requirements for acceleration of contributions and the determination of medical expenses. An employer is not required to contribute reasonable interest on either accelerated or non-accelerated HSA contributions. But see Q & A–16 to read as follows:

**Drafting Information**

The principal author of these final regulations is Mireille Khoury, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). 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.

**Adoption of Amendment to the Regulations**

Accordingly, 26 CFR part 54 is amended as follows:

**PART 54—PENSION EXCISE TAXES**

**Paragraph 1.** The authority citation for part 54 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

§54.4980G–0 [Amended]

**Par. 2.** Section 54.4980G–0 is amended by adding entries for 54.4980G–4 Q & A–14, Q & A–15 and Q & A–16 to read as follows:

§54.4980G–0 Table of contents.

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§54.4980G–4 Calculating comparable contributions.

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Q–14: Does an employer fail to satisfy the comparability rules for a calendar year if the employer fails to make contributions with respect to eligible employees because the employee has not established an HSA or because the employer does not know that the employee has established an HSA?

A–14: (a) In general. An employer will not fail to satisfy the comparability rules for a calendar year (Year 1) merely because the employer fails to make contributions with respect to an eligible employee because the employee has not established an HSA or because the employer does not know that the employee has established an HSA, if—

(1) The employer provides timely written notice to all such eligible employees that it will make comparable contributions for Year 1 for eligible employees who, by the last day of February of the following calendar year (Year 2), both establish an HSA and notify the employer (in accordance with a procedure specified in the notice) that they have established an HSA; and

(2) For each such eligible employee who establishes an HSA and so notifies the employer on or before the last day of February of Year 2, the employer contributes to the HSA for Year 1 comparable amounts (taking into account each month that the employee was a comparable participating employee) plus reasonable interest by April 15th of Year 2.

(b) Notice. The notice described in paragraph (a) of this Q & A–14 must be provided to each eligible employee who has not established an HSA by December 31 of Year 1 or if the employer does not know if the employee established an HSA. The
employer may provide the notice to other employees as well. However, if an
employee has earlier notified the employer that he or she has established
an HSA, or if the employer has previously made contributions to that
employee’s HSA, the employer may not condition making comparable
contributions on receipt of any additional notice from that employee.
For each calendar year, a notice is
designed to be timely if the employer provides the notice no earlier than 90
days before the first HSA employer contribution for that calendar year and
no later than January 15 of the following calendar year.

(c) Model notice. Employers may use the
following sample language as a basis in
preparing their own notices.

Notice to Employees Regarding Employer Contributions to HSAs

This notice explains how you may be eligible to receive contributions from
[employer] if you are covered by a High Deductible Health Plan (HDHP). [Employer]
provides contributions to the Health Savings Account (HSA) of each employee who is
[insert employer’s eligibility requirements for HSA contributions] (“eligible employee”). If
you are an eligible employee, you must do the following in order to receive an employer
contribution:

(1) Establish an HSA on or before the last
day in February of [insert year after the year
for which the contribution is being made]
and;

(2) Notify [insert name and contact
information for appropriate person to be contacted]
of your HSA account information
on or before the last day in February of
[insert year after year for which the
contribution is being made]. [Specify the
HSA account information that the employee
must provide (e.g., account number, name and
address of trustee or custodian, etc.) and
the method by which the employee must
provide this information (e.g., in
writing, by e-mail, on a certain form, etc.).]

If you establish your HSA on or before the
last day of February in [insert year after year
for which the contribution is being made]
and notify [employer] of your HSA account
information, you will receive your HSA
contributions, plus reasonable interest, for
[insert year for which contribution is being made]
by April 15 of [insert year after year
for which contribution is being made]. If,
however, you do not establish your HSA or
you did not notify [your HSA account
information by the deadline], then we are not
required to make any contributions to your
HSA for [insert applicable year]. You may
notify us that you have established an HSA
by sending an [e-mail or a written notice to
[insert name, title and, if applicable, e-mail
address]. If you have any questions about
this notice, you can contact [insert name and
title] at [insert telephone number or other
contact information].

(e) Electronic delivery. An employer
may furnish the notice required under
this section electronically in accordance
with §1.401(a)-21 of this chapter.

(f) Examples. The following examples illustrate the rules in this Q & A–14:

Example 1. In a calendar year, Employer Q contributes to the HSAs of current employees who are eligible individuals covered under any HDHP. For the 2009 calendar year, Employer Q contributes $50 per month on the first day of each month, beginning January 1st, to the HSA of each employee who is an eligible employee on that date. For the 2009 calendar year, Employer Q provides written notice satisfying the content requirements of this Q & A–14 on October 16, 2008 to all employees regarding the availability of HSA contributions for eligible employees. For eligible employees who are hired after October 16, 2008 Employer Q provides such a notice no later than January 15, 2010. Employer Q’s notice satisfies the notice timing requirements in paragraph (a)(1) of this Q & A–14.

Example 2. Employer R’s written cafeteria plan permits employees to elect to make pre-tax salary reduction contributions to their HSAs. Employees making this election have the right to receive cash or other taxable benefits in lieu of their HSA pre-tax contribution. Employer R automatically contributes a non-elective matching contribution to the HSA of each employee who makes a pre-tax HSA contribution. Because Employer R’s HSA contributions are made through the cafeteria plan, the comparability requirements do not apply to the HSA contributions made by Employer R. Consequently, Employer R is not required to provide written notice to its employees regarding the availability of this matching HSA contribution. See Q & A–1 in §54.49806G–5 for treatment of HSA contributions made through a cafeteria plan.

Example 3. In a calendar year, Employer S maintains an HDHP and only contributes to the HSAs of eligible employees who elect coverage under its HDHP. For the 2009 calendar year, Employer S employs ten eligible employees and all employees have elected coverage under Employer S’s HDHP and have established HSAs. For the 2009 calendar year, Employer S makes comparable contributions to the HSAs of all ten employees. Employer S satisfies the comparability rules. Thus, Employer S is not required to provide written notice to its employees regarding the availability of HSA contributions for eligible employees.

Example 4. In a calendar year, Employer T contributes to the HSAs of current full-time employees with family coverage under any HDHP. For the 2009 calendar year, Employer T provides timely written notice satisfying the content requirements of this section to all employees regardless of HDHP coverage. Employer T makes identical monthly contributions to all eligible employees (meaning full-time employees with family HDHP coverage) that establish HSAs. Employer T’s contributions to comparable amounts (taking into account each month that the employee was a comparable participating employee) plus reasonable interest to the HSAs of the eligible employees that establish HSAs and provide the necessary information
after the end of the year but on or before the last day of February, 2010. Employer T makes no contribution to the HSAs of employees that do not establish an HSA or that do not provide the necessary information on or before the last day of February, 2010. Employer T satisfies the comparability requirements.

Example 5. For the 2009 calendar year, Employer V contributes to the HSAs of current full-time employees with family coverage under any HDHP. Employer V has 450 current full-time employees as of the date for Employer V’s first HSA contribution for the 2009 calendar year. 450 eligible employees have established HSAs. Employer V provides timely written notice satisfying the content requirements of this section only to those 50 eligible employees who have not established HSAs. Employer V makes identical quarterly contributions to the 450 eligible employees who established HSAs. By April 15, 2010, Employer V contributes comparable amounts to the other eligible employees who establish HSAs and provide the necessary information on or before the last day of February, 2010. Employer V makes no contribution to the HSAs of eligible employees that do not establish an HSA or that do not provide the necessary information on or before the last day of February, 2010. Employer V satisfies the comparability rules.

Q–15: For any calendar year, may an employer accelerate part or all of its contributions for the entire year to the HSAs of employees who have incurred, during the calendar year, qualified medical expenses exceeding the employer’s cumulative HSA contributions at that time? If an employer accelerates contributions to the HSA of any such eligible employee, all accelerated contributions must be available throughout the calendar year on an equal and uniform basis to all such eligible employees. Employers must establish reasonable uniform methods and requirements for accelerated contributions and the determination of medical expenses.

(b) Satisfying comparability. An
employer that accelerates contributions to the HSAs of its employees will not fail to satisfy the comparability rules because employees who incur qualifying medical expenses exceeding the employer’s cumulative HSA contributions at that time have received more contributions in a given period than comparable employees who do not incur such expenses, provided that all
comparable employees receive the same amount or the same percentage for the calendar year. Also, an employer that accelerates contributions to the HSAs of its employees will not fail to satisfy the comparability rules because an employee who terminates employment prior to the end of the calendar year has received more contributions on a monthly basis than employees who work the entire calendar year. An employer is not required to contribute reasonable interest on either accelerated or non-accelerated HSA contributions. But see Q & A–6 and Q & A–12 of this section for when reasonable interest must be paid.

Q–16: What is the effective date for the rules in Q & A–14 and Q & A–15 of this section?
A–16: These regulations apply to employer contributions made for calendar years beginning on or after January 1, 2009.

Approved: April 10, 2008.

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement.

Eric Solomon,
Assistant Secretary of the Treasury (Tax Policy).

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