

## Benefits Alert 2005-5

To	All Clients & Friends of FBMC	Date	8/30/2005
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Re	IRS Issues Guidance on HSA Comparability		

On August 25, 2005, the IRS and Treasury issued proposed regulations providing further guidance on employer comparable contributions to Health Savings Accounts (HSAs) under §4980G of the Code. The proposed regulations are 45 pages in length: pages 13 – 45 are in Q&A format. The principal author was Barbara Pie; comments or inquiries from the public will be accepted until 11/2005.

As you may recall, the 2003 Medicare Modernization Act (MMA) added §§223 and 4980G to the Code, whereby §223 permits eligible individuals to establish HSAs and §4980G addresses comparability of employer contributions. An employer is not required to contribute but to the extent that the employer chooses to do so, the contributions must be comparable. Comparability is satisfied by contributing the same dollar amount to categories of employees or the same percentage of the deductible of employees with the same category of coverage.

**The proposed regulations confirm** for us that the comparability rule applies to current active employees as well as former employees (retirees); however, it does not apply to former employees on COBRA. For purposes of comparability testing, each “category” is tested separately, as well as each type of coverage: self-only or family coverage.

Thus an employer may provide a different contribution to full-time employees vs. part-time employees or retirees.

An employer may provide a different contribution to full-time employees with self-only coverage vs. full-time employees with family coverage; or to part-time employees with self-only vs. family coverage.

An employer may provide a contribution to full-time and no contribution to part-time or retirees, or any similar variation.

The key is to treat similarly situated employees the same.

**The proposed regulations state** that the comparability rules do **NOT** apply separately to groups of collectively bargained employees, or management or non-management employees. Again, the categories are:

Full-time employees  
Part-time employees  
Former employees

The categories are **NOT**: bargaining unit A, bargaining unit B, or bargaining unit C.

**The proposed regulations confirm** that comparability is not satisfied with a matching contribution or a percentage of the employee contribution.

**The proposed regulations confirm** that an employer may not condition contributions on participation in disease management, wellness, or health assessments.

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**The proposed regulations confirm** that comparability won't be met if contributions are based on age or years of service.

**The proposed regulations provide guidance** and proper application regarding how contributions can be made. Employers may pre-fund the HSA, make one or two contributions throughout the year, make monthly contributions, or make contributions by 4/15 of the following year (look back).

**The proposed regulations confirm** that contributions do not have to be made for any employee that fails to open an HSA before the end of the calendar year. However, as long as the employee does open the account by 12/31, **ALL** contributions for the months in which the employee was eligible **MUST** be made. (In other words, no penalty for dilly-dallying!)

**The proposed regulations provide guidance** regarding contributions where the employee has HDHP through the employer or through another source. As long as the employer conditions the contribution upon enrollment in the employer's HDHP, then an employee who acquires HDHP coverage elsewhere is not required to receive a comparable employer contribution. However, if the employer conditions the contribution only upon HDHP coverage, then comparability does apply.

**The proposed regulations confirm** that contributions to an HSA made under a §125 Cafeteria Plan are not subject to comparability; however they are subject to non-discrimination testing rules, including: the eligibility rules, contributions & benefits tests, and key employee concentration tests.

The regulations imply that employers who offer wellness incentives or credits to their HSAs through the cafeteria plan must also make those incentives available as cash to continue to be permissible. Since this may limit plan designs, this is likely to be questioned by employers and the industry over the next few months.

**Finally, the proposed regulations provide** for a waiver of the Excise Tax where the failure is due to reasonable cause and not willful neglect. They are trying to fit the punishment to the crime. If the tax would be excessive relative to the failure consideration will be given to waiving all or a portion of the tax imposed under §4980G.

A copy of the guidance can be found at the following address:  
[http://www.ustreas.gov/press/releases/reports/reg\\_13864704 .pdf](http://www.ustreas.gov/press/releases/reports/reg_13864704.pdf)

For additional questions or inquiries, please contact your Account Manager or the undersigned.