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# Employer HSA Contributions Proposed Comparability Regulations

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# Background

- MMA of 2003 created HSAs (similar in concept to Archer MSAs) by adding Code Section 223
- Employee owned (like a medical IRA)
- Requires participation in a HDHP
- Permits employer and employee contributions (with annual limits)
- Tax free contributions, earnings & distributions (when used for medical expenses)
- Rollover of unused balances
- 35% excise tax on all employer contributions if the contributions are not comparable

# Guidance

- Notice 2004-2
- Notice 2004-50
- Proposed Section 4980G regulations published August 26, 2005
  - effective when final, but can be relied on in the interim
  - comments and hearing requests due by November 25, 2005

# Proposed HSA Regulations

- Any employer contributions must be comparable for all comparable participating employees
- Cannot vary contributions between:
  - union and nonunion employees; or
  - management and nonmanagement employees

# Proposed HSA Regulations

- Further, employer contributions cannot:
  - take the form of matching contributions;
  - be based on wellness, disease management, or health assessment program participation;
  - reflect age or year of service factors; or
  - be predicated on eligibility for HSA catch-up contributions
- As a result, employer HSA contributions must be carefully structured—but note cafeteria plan exception (addressed later)

# Proposed HSA Regulations

- Employer HSA contributions are comparable if they are the same amount or the same % of the deductible for eligible employees in the same category of HDHP coverage
- Only categories:
  - Self-only HDHP coverage
  - Family HDHP coverage

# Proposed HSA Regulations

- Can make contributions (or varying contributions) to one category and not the other
- Can vary contributions between groups of employees:
  - full-time (30+ per week);
  - part-time; and
  - former employees (also a special COBRA rule)
- Can limit contributions to individuals participating in the employer's HDHP

# Proposed HSA Regulations

- Can ignore contributions to:
  - independent contractors;
  - sole proprietors; and
  - partners
- Can also ignore:
  - Rollovers from Archer MSAs or other HSAs;  
and
  - After-tax contributions

# Proposed HSA Regulations

- Comparability testing performed yearly, for employees eligible any month, and across the controlled group
- Employer contributions can be:
  - prefunded;
  - pay-as-you-go; or
  - look-back (with an April 15 deadline)

# Proposed HSA Regulations

- Special rules deal with employees who:
  - begin or terminate employment mid-year;
  - switch between categories of coverage;
  - fail to establish a HSA; or
  - participate in a FSA or Medicare
- The only remedy is to make additional employer contributions (plus reasonable interest) by the following April 15

# Proposed HSA Regulations

- Comparability rules do not apply to employer contributions made through a cafeteria plan
  - note that all section 125 rules apply
- Strong implication that employees must be able to receive the employer HSA contribution in cash for it to be treated as made through a cafeteria plan

# Contact Information



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