112TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
112–515

HEALTH FLEXIBLE SPENDING ARRANGEMENTS IMPROVEMENTS ACT OF 2012

JUNE 5, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CAMP, from the Committee on Ways and Means, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1004]

[Including cost estimate of the Congressional Budget Office]

The Committee on Ways and Means, to whom was referred the bill (H.R. 1004) to amend the Internal Revenue Code of 1986 to increase participation in medical flexible spending arrangements, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Health Flexible Spending Arrangements Improvements Act of 2012".

SEC. 2. TAXABLE DISTRIBUTIONS OF UNUSED BALANCES UNDER HEALTH FLEXIBLE SPENDING ARRANGEMENTS.

(a) IN GENERAL.—Section 125 of the Internal Revenue Code of 1986 is amended by redesignating subsections (k) and (l) as subsections (l) and (m), respectively, and by inserting after subsection (j) the following new subsection:

"(k) TAXABLE DISTRIBUTIONS OF UNUSED BALANCES UNDER HEALTH FLEXIBLE SPENDING ARRANGEMENTS.—

"(1) IN GENERAL.—For purposes of this section and sections 105(b) and 106, a plan or other arrangement which (but for any qualified distribution) would be a health flexible spending arrangement shall not fail to be treated as a cafeteria plan or health flexible spending arrangement (and shall not fail to be treated as an accident or health plan) merely because such arrangement provides for qualified distributions.

"(2) QUALIFIED DISTRIBUTIONS.—For purposes of this subsection, the term 'qualified distribution' means any distribution to an individual under the arrangement referred to in paragraph (1) with respect to any plan year if—

"(A) such distribution is made after the last date on which requests for reimbursement under such arrangement for such plan year may be made and not later than the end of the 7th month following the close of such plan year, and

"(B) such distribution does not exceed the lesser of—

"(i) $500, or

"(ii) the excess of—

"(I) the salary reduction contributions made under such arrangement for such plan year, over

"(II) the reimbursements for expenses incurred for medical care made under such arrangement for such plan year.

"(3) TAX TREATMENT OF QUALIFIED DISTRIBUTIONS.—Qualified distributions shall be includible in the gross income of the employee in the taxable year in which distributed and shall be taken into account as wages or compensation under the applicable provisions of subtitle C when so distributed.

"(4) COORDINATION WITH QUALIFIED RESERVIST DISTRIBUTIONS.—A qualified reservist distribution (as defined in subsection (h)(2)) shall not be treated as a qualified distribution and shall not be taken into account in applying the limitation of paragraph (2)(B)(i).".

(b) CONFORMING AMENDMENT.—Paragraph (1) of section 409A(d) of such Code is amended by striking "and" at the end of subparagraph (A), by striking the period at the end of subparagraph (B) and inserting ", and", and by adding at the end the following new subparagraph:

"(C) a health flexible spending arrangement to which subsection (h) or (k) of section 125 applies.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after December 31, 2012.

I. SUMMARY AND BACKGROUND

A. PURPOSE AND SUMMARY

The bill, H.R. 1004, as reported by the Committee on Ways and Means, modifies the so-called "use-it-or-lose-it" rule applicable to health flexible spending arrangements ("Health FSAs"), permitting participants to cash out up to $500 in Health FSA balances at the end of each year.

B. BACKGROUND AND NEED FOR LEGISLATION

Over 85 percent of large employers offer health flexible spending arrangements ("Health FSAs") but only 20–22 percent of eligible employees enroll in Health FSAs. One reason often cited for not enrolling, or for underfunding, is fear of the use-it-or-lose-it provision. Under current law, employees either must spend their Health FSA balances by the end of the year (or by March 15 of the next year if their employers adopt the two-and-one-half month grace period) or forfeit the money to their employers under the use-it-or-lose-it rule. Employers may not return employees' unused Health FSA

balances or allocate funds to them in a way that is directly or indirectly based on their unused Health FSA balances.

One-in-four Health FSA participants suffer forfeitures of their own compensation every year. Other employees may spend money on unnecessary items at the end of the year to avoid forfeiture (thus potentially contributing to overconsumption of health care). Legislation is needed to encourage more Americans to enroll in Health FSAs and give those already enrolled confidence to save more funds for potential health care expenditures. Further, enrollees should not be encouraged to spend their money frivolously for fear of losing their balances, and providing Health FSA participants an appropriate cash-out opportunity will help address that concern.

C. Legislative History

Background

H.R.1004 was introduced on March 10, 2011, and was referred to the Committee on Ways and Means.

Committee action

The Committee on Ways and Means marked up H.R. 1004 on May 31, 2012, and ordered the bill, as amended, favorably reported (with a quorum being present).

Committee hearings

The utility of Health FSAs—including the importance of expanding these arrangement to allow more flexibility and control costs—was discussed at four hearings during the 112th Congress.

- Full Committee Hearing on the Health Care Law's Impact on Jobs, Employers, and the Economy (January 26, 2011)
- Full Committee hearing on the President's FY 2013 Budget Proposal with U.S. Department of Health and Human Services Secretary Sebelius (February 28, 2012)
- Health Subcommittee hearing on the Individual and Employer Mandates in the Democrats' Health Care Law (March 29, 2012)
- Oversight Subcommittee hearing on the Impact of Limitations on the Use of Tax-Advantaged Accounts for the Purchase of Over-The-Counter Medication (April 25, 2012)

II. EXPLANATION OF PROVISION

A. Taxable Distributions of Unused Balances Under Health Flexible Spending Arrangements (sec. 2 of the bill and sec. 125 of the Code)

PRESENT LAW

Exclusion from income for employer-provided health coverage

Employees are not taxed on (that is, may exclude from gross income) the value of employer-provided health coverage under an accident or health plan.[1] In addition, any reimbursements under an employer-provided accident or health plan for medical care expenses for employees, their spouses, their dependents, and adult

[1] Sec 106.

children under age 27 generally are excluded from gross income.[2] The exclusion applies both to health coverage in the case in which an employer directly pays the cost of employees' medical expenses not covered by insurance (i.e., a self-insured plan) as well as in the case in which the employer purchases health insurance coverage for its employees. There generally is no limit on the amount of employer-provided health coverage that is excludible. A similar rule excludes employer-provided health insurance coverage from the employees' wages for employment tax purposes.[3]

Employers may also provide health coverage in the form of an agreement to reimburse medical expenses of their employees, their spouses, their dependents, and adult children under age 27, not reimbursed by a health insurance plan, through arrangements which allow reimbursement for medical care not in excess of a specified dollar amount (either elected by an employee under a cafeteria plan or otherwise specified by the employer). An employer may agree to reimburse expenses for medical care of its employees (and their spouses and dependents), not covered by a health insurance plan, through a flexible spending arrangement ("FSA") which allows reimbursement for medical expenses not in excess of a specified dollar amount. The amounts available for reimbursement must be exclusively for reimbursement for medical care because the exclusion does not apply to amounts which the employee would be entitled to irrespective of whether he or she incurs expenses for medical care.[4]

Such dollar amount is either elected by an employee under a cafeteria plan ("Health FSA") or otherwise specified by the employer under a health reimbursement arrangement ("HRA"). Reimbursements under these arrangements are also excludible from gross income as reimbursements for medical care under employer-provided health coverage.[5]

Cafeteria plan

General rules

A cafeteria plan is a separate written plan of an employer under which all participants are employees, and participants are permitted to choose among at least one permitted taxable benefit (for example, current cash compensation) and at least one qualified benefit (generally an employer-provided benefit excludible from gross income, such as employer-provided health coverage). If an employee receives a qualified benefit based on his or her election between the qualified benefit and a taxable benefit under a cafeteria plan, the qualified benefit generally is not includible in gross income.[6] However, in order to be excludible, any qualified benefit elected under a cafeteria plan must independently satisfy any requirements under the Code section that provides the exclusion. The amount of the cash compensation forgone pursuant to an election under a cafeteria plan is generally referred to as a salary reduction contribution. However, if a plan offering an employee an election between taxable benefits (including cash) and nontaxable qualified

[2] Sec. 105(b).
[3] Secs. 3121(a)(2), 3231(e)(1) and 3306(a)(2).
[4] Treas. Reg. sec. 1.105–2.
[5] Sec. 106.
[6] Sec. 125(a).

benefits does not meet the requirements for being a cafeteria plan, the election between taxable and nontaxable benefits generally results in gross income to the employee, regardless of what benefit is elected and when the election is made.[7] A cafeteria plan generally may not provide for deferral of compensation.

Health flexible spending arrangement under a cafeteria plan

A flexible spending arrangement for medical expenses under a cafeteria plan (commonly called a "Health FSA") is health coverage in the form of an arrangement under which employees are given the option to reduce their current cash compensation and instead have the amount of the salary reduction contributions made available for use in reimbursing the employee for his or her medical expenses.[8] For years before 2013, there is no statutory limit on the dollar amount of salary reduction contributions that an employer may permit to be contributed to a Health FSA under its cafeteria plan. Beginning with 2013, the maximum amount of salary reduction contributions for a year is limited to $2,500.[9]

Health FSAs are subject to the general requirements for cafeteria plans, including a requirement that amounts remaining under a Health FSA at the end of a plan year must be forfeited by the employee (referred to as the "use-it-or-lose-it rule").[10] A Health FSA is permitted to allow a grace period not to exceed two and one-half months immediately following the end of the plan year during which unused amounts may be used.[11] A Health FSA can also include employer flex-credits which are nonelective employer contributions that the employer makes for every employee eligible to participate in the employer's cafeteria plan, to be used only for one or more excludible qualified benefits (but not as cash or a taxable benefit).[12]

Health reimbursement arrangement

Rather than offering a Health FSA through a cafeteria plan, an employer may specify a dollar amount that is available for medical expense reimbursement. These flexible spending arrangements are commonly called health reimbursement arrangements ("HRAs"). Some of the rules applicable to HRAs and Health FSAs are similar (e.g., the amounts in the arrangements can only be used to reimburse medical expenses and not for other purposes), but the rules are not identical. In particular, HRAs cannot include salary reduction contributions and the use-it-or-lose-it rule does not apply. Thus, amounts remaining at the end of the year may be carried forward to be used to reimburse medical expenses in following years.[13]

REASONS FOR CHANGE

The Committee believes that the use-it-or-lose-it rule for Health FSAs discourages the use of FSAs and encourages unnecessary

[7] Prop. Treas. Reg. sec. 1.125–1(b).
[8] Sec. 125 and Prop. Treas. Reg. sec. 1.125–5.
[9] Sec. 125(i).
[10] Sec. 125(d)(2) and Prop. Treas. Reg. sec. 1.125–5(c).
[11] Notice 2005–42, 2005–1 C.B. 1204, and Prop. Treas. Reg. sec. 1.125–1(e).
[12] Prop. Treas. Reg. sec. 1–125–5(b).
[13] Guidance with respect to HRAs, including the interaction of FSAs and HRAs in the case of an individual covered under both, is provided in Notice 2002–45, 2002–2 C.B. 93.

medical expenditures to avoid loss of funds in health FSAs. The Committee believes it is therefore appropriate to allow a limited amount of funds to be distributed to the taxpayer after the end of the plan year, rather than be forfeited to the employer.

EXPLANATION OF PROVISION

Under the provision, a Health FSA under a cafeteria plan is permitted to provide for distributions of an amount remaining at the end of the plan year (or grace period if applicable) that is not used to reimburse medical expenses incurred during the plan year (plus the plan's grace period, if any). The amount of the distribution for any employee must be limited to the lesser of $500 or the amount of salary reduction contributions for the employee reduced by reimbursements for medical expenses for the plan year. Such a distribution is called a "qualified distribution" under the provision. In order to be a qualified distribution, the distribution also must be made after the deadline for reimbursement of claims for the plan year and no later than the end of the seventh month after the close of the plan year.

Under the provision, qualified distributions will not cause the cafeteria plan and Health FSA to violate the use-it-lose-it rule or the requirement that amounts available for reimbursement for medical expenses under a Health FSA not be available for any other purpose. The amount of a qualified distribution is includible in gross income for the year in which the distribution is made and is taken into account as wages for employment tax purposes.

EFFECTIVE DATE

The provision is effective for plan years beginning after December 31, 2012.

III. VOTES OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the following statement is made concerning the votes of the Committee on Ways and Means in its consideration of H.R. 1004.

MOTION TO REPORT RECOMMENDATION

The bill H.R. 1004, as amended, was ordered favorably reported by a roll call vote of 23 yeas to 6 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Camp	X			Mr. Levin			
Mr. Herger	X			Mr. Rangel			
Mr. Johnson				Mr. Stark		X	
Mr. Brady	X			Mr. McDermott		X	
Mr. Ryan	X			Mr. Lewis		X	
Mr. Nunes	X			Mr. Neal	X		
Mr. Tiberi	X			Mr. Becerra			
Mr. Davis	X			Mr. Doggett		X	
Mr. Reichert	X			Mr. Thompson		X	
Mr. Boustany	X			Mr. Larson	X		
Mr. Roskam				Mr. Blumenauer		X	
Mr. Gerlach	X			Mr. Kind	X		
Mr. Price	X			Mr. Pascrell			
Mr. Buchanan	X			Ms. Berkley	X		

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Smith	X			Mr. Crowley	X		
Mr. Schock	X						
Ms. Jenkins	X						
Mr. Paulsen	X						
Mr. Marchant							
Mr. Berg	X						
Ms. Black							
Mr. Reed	X						

IV. BUDGET EFFECTS OF THE PROVISION

A. Committee Estimate of Budgetary Effects

In compliance with clause 3(d) of rule XIII of the Rules of the House of Representatives, the following statement is made concerning the effects on the budget of the revenue provisions of the bill, H.R. 1004 as reported.

The bill, as reported, is estimated to have the following effects on budget receipts for fiscal years 2013–2022:

FISCAL YEARS

[Millions of dollars]

Item	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2013–17	2013–22
Permit $500 cash out of amounts under Health FSA not used to reimburse medical expenses incurred during plan year (plus any grace period) [1]	−261	−380	−383	−395	−407	−419	−432	−445	−459	−471	−1,826	−4,051

NOTE: Details do not add to totals due to rounding.

[1] Estimate includes the following off-budget effects:

2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2013–17	2013–22
−69	−94	−93	−95	−97	−99	−101	−104	−106	−108	−447	−965

B. Statement Regarding New Budget Authority and Tax Expenditures Budget Authority

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee states that the bill involves no new or increased budget authority. The Committee further states that the revenue-reducing tax provisions involve increased tax expenditures.

C. Cost Estimate Prepared by the Congressional Budget Office

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, requiring a cost estimate prepared by the CBO, the following statement by the CBO is provided.

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, DC, June 4, 2012.

Hon. DAVE CAMP,
Chairman, Committee on Ways and Means,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1004, the Health Flexible Spending Arrangements Improvements Act of 2012.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Pamela Greene.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 1004—Health Flexible Spending Arrangements Improvements Act of 2012

Summary: H.R. 1004 would amend the Internal Revenue Code to allow up to $500 of unused balances in health flexible spending arrangements (FSAs) to be distributed back to the account holder within seven months of the close of the plan year. The staff of the Joint Committee on Taxation (JCT) estimates that enacting H.R. 1004 would reduce revenues by about $4 billion over the 2012–2022 period. Of that reduction, about $3 billion would result from changes in on-budget revenues, and about $1 billion would result from changes in off-budget revenues (from Social Security payroll taxes, which are categorized as off-budget revenues). Pay-as-you-go procedures apply because enacting the legislation would affect on-budget revenues.

JCT has determined that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

Estimated cost to the Federal Ggovernment: The estimated budgetary impact of H.R. 1004 is shown in the following table.

	By fiscal year, in millions of dollars—												
	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2012–2017	2012–2022
CHANGES IN REVENUES													
Estimated Revenues	0	−261	−380	−383	−395	−407	−419	−432	−445	−459	−471	−1,826	−4,051
On-budget	0	−192	−286	−290	−300	−310	−320	−331	−341	−353	−363	−1,379	−3,086
Off-budget	0	−69	−94	−93	−95	−97	−99	−101	−104	−106	−108	−447	−965

Note: Components may not sum to totals because of rounding.
Source: Staff of the Joint Committee on Taxation.

Basis of estimate: H.R. 1004 would allow taxpayers to receive distributions of unused amounts from their health FSAs at the end of the plan year. The distribution would be the lesser of $500 or the amount of total contributions less reimbursements for medical expenses during the plan year. Under current law, unused balances in those FSAs at the end of the plan year are generally forfeited by the employee. Under this bill, distributions of unused balances would be included in gross income of the individual and would become a tax deductible compensation expense for the employer. By lowering the risk to the employee of losing contributed amounts, it is expected that the bill would result in increases in the amounts contributed to health FSAs, which provide tax-favored treatment for medical expenses. JCT estimates that enacting H.R. 1004 would reduce on-budget revenues by about $3 billion and reduce off-budget revenues by about $1 billion from 2013 through 2022, thereby increasing federal budget deficits by about $4 billion over that period.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in revenues that are subject to those pay-as-you-go procedures are shown in the following table. Only on-budget changes to outlays or revenues are subject to pay-as-you-go procedures.

CBO ESTIMATE OF PAY-AS-YOU-GO EFFECTS FOR H.R. 1004, AS ORDERED REPORTED BY THE HOUSE COMMITTEE ON WAYS AND MEANS ON MAY 31, 2012

	By fiscal year, in millions of dollars—												
	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2012–2017	2012–2022
	NET INCREASE IN THE ON-BUDGET DEFICIT												
Statutory Pay-As-You-Go Impact	0	192	286	290	300	310	320	331	341	353	363	1,379	3,086

Intergovernmental and private-sector impact: JCT has determined that the bill contains no intergovernmental or private-sector mandates as defined in UMRA.

Estimate prepared by: Pamela Greene.

Estimate approved by: Frank Sammartino, Assistant Director for Tax Analysis.

D. Macroeconomic Impact Analysis

In compliance with clause 3(h)(2) of rule XIII of the Rules of the House of Representatives, the following statement is made by the Joint Committee on Taxation with respect to the provisions of the bill amending the Internal Revenue Code of 1986: the effects of the bill on economic activity are so small as to be incalculable within the context of a model of the aggregate economy.

V. OTHER MATTERS TO BE DISCUSSED UNDER THE RULES OF THE HOUSE

A. Committee Oversight Findings and Recommendations

With respect to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives (relating to oversight findings), the Committee advises that it was as a result of the Committee's review of the provisions of H.R. 1004 that the Committee concluded that it is appropriate to report the bill, as amended, favorably to the House of Representatives with the recommendation that the bill do pass.

B. Statement of General Performance Goals and Objectives

With respect to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee advises that the bill contains no measure that authorizes funding, so no statement of general performance goals and objectives for any measure that authorizes funding is required.

C. Information Relating to Unfunded Mandates

This information is provided in accordance with section 423 of the Unfunded Mandates Reform Act of 1995 (Pub. L. No. 104–4).

The Committee has determined that the reported bill does not contain any Federal private sector mandates within the meaning of Public Law No. 104–4, the Unfunded Mandates Reform Act of 1995. The costs required to comply with each Federal private sector mandate generally are no greater than the aggregate estimated budget effects of the provision.

The Committee has determined that the bill does not impose a private sector mandate, and has determined that the bill does not impose a Federal intergovernmental mandate on State, local, or tribal governments.

D. Applicability of House Rule XXI 5(b)

Clause 5(b) of rule XXI of the Rules of the House of Representatives provides, in part, that "A bill or joint resolution, amendment, or conference report carrying a Federal income tax rate increase may not be considered as passed or agreed to unless so determined

by a vote of not less than three-fifths of the Members voting, a quorum being present." The Committee has carefully reviewed the provisions of the bill, and states that the provisions of the bill do not involve any Federal income tax rate increases within the meaning of the rule.

E. TAX COMPLEXITY ANALYSIS

Section 4022(b) of the Internal Revenue Service Reform and Restructuring Act of 1998 (the "IRS Reform Act") requires the staff of the Joint Committee on Taxation (in consultation with the Internal Revenue Service and the Treasury Department) to provide a tax complexity analysis. The complexity analysis is required for all legislation reported by the Senate Committee on Finance, the House Committee on Ways and Means, or any committee of conference if the legislation includes a provision that directly or indirectly amends the Internal Revenue Code and has widespread applicability to individuals or small businesses. Pursuant to clause 3(h)(1) of rule XIII of the Rules of the House of Representatives, for each such provision identified by the staff of the Joint Committee on Taxation, a summary description of the provision is provided along with a discussion regarding the relevant complexity and administrative issues. Below is a summary description of the provision and discussion regarding the relevant complexity and administrative issues provided by the Internal Revenue Service with which the staff of the Joint Committee on Taxation concurs.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

COMMISSIONER

June 4, 2012

Mr. Thomas A. Barthold
Chief of Staff
Joint Committee on Taxation
Washington, D.C. 20515

Dear Mr. Barthold:

I am responding to your letter dated May 31, 2012, in which you requested a complexity analysis related to H.R. 1004, Health Flexible Spending Arrangements Improvement Act of 2012.

Enclosed are the combined comments of the Internal Revenue Service and the Treasury Department for inclusion in the complexity analysis in the House Committee on Ways and Means Report on H.R. 1004.

Our comments are based on the description of the provision provided in your letter. The analysis does not include administrative cost estimates for the changes that would be required. Due to the short turnaround time, our comments are provisional and subject to change upon a more complete and in-depth analysis of the provision. The analysis does not cover any other provisions of the bill.

Sincerely,

Douglas H. Shulman

Enclosure

COMPLEXITY ANALYSIS OF THE COMMITTEE REPORT ON H.R. 1004, HEALTH FLEXIBLE SPENDING ARRANGEMENTS IMPROVEMENT ACT OF 2012

Under the provision, a cafeteria plan is permitted to provide that an amount not in excess of $500 of an employee's salary reduction contributions under a Health FSA that have not been used to reimburse medical expenses incurred during the plan year (plus the plan's grace period, if any) may be distributed to the employee rather than being forfeited. Such a distribution is called a "qualified distribution" under the proposal. In order to be a qualified distribution, the distribution also must be made after the deadline for reimbursement claims for the plan year and no later than the end of the seventh month after the close of the plan year. The amount of a qualified distribution is includable in gross income for the year in which the distribution is made and is taken into account as wages for employment tax purposes.

IRS and Treasury Comments:

- Development of a new form or forms is not necessary. Specifically, reimbursements of unused prior-year deferrals would be reflected in Boxes, 1, 3 and 5 of Form W-2 as taxable wages. No additional Form W-2 Reporting should be needed.
- IRS would need to revise publications and instructions to reflect the opportunity for refunds of unused FSA amounts. Specifically, the following publications and instructions would require revision: Publication 17, Your Federal Income Tax; Publication 969, Health Savings Accounts and Other Tax-Favored Health Plans; Publication 505, Tax Withholding and Estimated Tax; Publication 919, How Do I Adjust My Tax Withholding; Form W-2 instructions; Form 1040 instructions; Form 1040ES instructions; Form 1040ES/V instructions; Form 1040ES PR instructions; Form 8853 Archer MSAs and Long-Term Care Insurance Contracts instructions; Form 8889 Health Savings Accounts instructions.
- IRS would need to develop a comprehensive communication strategy to ensure that IRS employees and taxpayers understand the change.
- Employers would be required to keep records of Health FSA account balances, as of the end of the plan year; and then cash out those balances within the time allowed. They would be required to report the cash out, as taxable wages, subject to withholding and FICA.
- Employers who choose to adopt the voluntary cash outs would be required to amend their cafeteria plans.
- Individual taxpayer's W-2 should provide the individual with all of the information needed. (Gross income will include the distribution.)
- Proposed regulations under section 125 (2007) would need to be amended. Final regulations under sections 105 and 106 would also need to be amended. (sections 125, 105 and 106 guidance could be done on an interim basis using guidance in the IRB with reliance.)

F. CONGRESSIONAL EARMARKS, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

With respect to clause 9 of rule XXI of the Rules of the House of Representatives, the Committee has carefully reviewed the provisions of the bill, and states that the provisions of the bill do not contain any congressional earmarks, limited tax benefits, or limited tariff benefits within the meaning of the rule.

VI. CHANGES IN EXISTING LAW MADE BY BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

INTERNAL REVENUE CODE OF 1986

Subtitle A—Income Taxes

* * * * * * *

CHAPTER 1—NORMAL TAXES AND SURTAXES

* * * * * * *

Subchapter B—Computation of Taxable Income

* * * * * * *

PART III—ITEMS SPECIFICALLY EXCLUDED FROM GROSS INCOME

* * * * * * *

SEC. 125. CAFETERIA PLANS.

(a) * * *

* * * * * * *

(k) TAXABLE DISTRIBUTIONS OF UNUSED BALANCES UNDER HEALTH FLEXIBLE SPENDING ARRANGEMENTS.—

(1) IN GENERAL.—For purposes of this section and sections 105(b) and 106, a plan or other arrangement which (but for any qualified distribution) would be a health flexible spending arrangement shall not fail to be treated as a cafeteria plan or health flexible spending arrangement (and shall not fail to be treated as an accident or health plan) merely because such arrangement provides for qualified distributions.

(2) QUALIFIED DISTRIBUTIONS.—For purposes of this subsection, the term "qualified distribution" means any distribution to an individual under the arrangement referred to in paragraph (1) with respect to any plan year if—

(A) such distribution is made after the last date on which requests for reimbursement under such arrangement for

such plan year may be made and not later than the end of the 7th month following the close of such plan year, and

(B) such distribution does not exceed the lesser of—

(i) $500, or

(ii) the excess of—

(I) the salary reduction contributions made under such arrangement for such plan year, over

(II) the reimbursements for expenses incurred for medical care made under such arrangement for such plan year.

(3) TAX TREATMENT OF QUALIFIED DISTRIBUTIONS.—Qualified distributions shall be includible in the gross income of the employee in the taxable year in which distributed and shall be taken into account as wages or compensation under the applicable provisions of subtitle C when so distributed.

(4) COORDINATION WITH QUALIFIED RESERVIST DISTRIBUTIONS.—A qualified reservist distribution (as defined in subsection (h)(2)) shall not be treated as a qualified distribution and shall not be taken into account in applying the limitation of paragraph (2)(B)(i).

[(k)**]** *(l)* CROSS REFERENCE.—For reporting and recordkeeping requirements, see section 6039D.

[(l)**]** *(m)* REGULATIONS.—The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section.

* * * * * * *

Subchapter D—Deferred Compensation, Etc

* * * * * * *

PART I—PENSION, PROFIT-SHARING, STOCK BONUS PLANS, ETC

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Subpart A—General Rule

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SEC. 409A. INCLUSION IN GROSS INCOME OF DEFERRED COMPENSATION UNDER NONQUALIFIED DEFERRED COMPENSATION PLANS.

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(d) OTHER DEFINITIONS AND SPECIAL RULES.—For purposes of this section:

(1) NONQUALIFIED DEFERRED COMPENSATION PLAN.—The term "nonqualified deferred compensation plan" means any plan that provides for the deferral of compensation, other than—

(A) a qualified employer plan, **[**and**]**

(B) any bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefit plan**[**.**]**, *and*

(C) a health flexible spending arrangement to which subsection (h) or (k) of section 125 applies.

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VII. DISSENTING VIEWS

We voted against this bill because it costs $4 billion in lost tax revenues and this revenue loss is not offset. When combined with the three other health care measures under consideration at the Markup, the total cost for all bills is nearly $42 billion—and the Majority has not set forth any options to pay for this cost. Not one option was set forth at the Markup. It is simply unacceptable in this time of fiscal austerity to not pay the cost of these bills. It is irresponsible to add nearly $42 billion to the deficit.

This Markup continues the Majority's attempt to repeal the Affordable Care Act (ACA) without offering a replacement. In January of 2009, the Majority voted to repeal and replace the ACA. If their replacement solution is expanded access to Health Flexible Spending Accounts and Health Savings Accounts, then it falls far short of the needs of American families. Neither Health Flexible Spending Accounts nor Health Savings Accounts provide health coverage to participants. They only provide tax breaks for certain health costs. They are not real solutions to the problems facing our nation with respect to health care and insurance coverage.

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