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VIA FEDERAL EXPRESS

Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration, Room N-5653
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
Attention: RIN 1210-AB43

Office of Consumer Information and Insurance Oversight
Department of Health and Human Services
Attention: OCIIO-9994-IFC, Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

CC:PA:LPD:PR (REG-120399-10)
Courier's Desk
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Re: Comment with Regard to Annual and Lifetime Dollar Limits on Benefits

To Whom It May Concern:

This comment is being submitted with regard to the interim final regulations published in the Federal Register on June 28, 2010 under PPACA.

INTRODUCTION. This comment is submitted on behalf of two HRAs which are substantially impacted by the regulations, VEBA Trust for Public Employees in the State of Washington and VEBA Trust for Public Employees in the Northwest. Combined, the two HRAs provide benefits to the employees and retirees of more than 700 governmental entities (school districts, public service districts, cities, state agencies, etc.) located in the states of Washington, Oregon and Idaho. In excess of 71,000 employees and retirees receive benefits from the HRAs. Approximately 90% of the participants are covered as a result of collective bargaining. The

HRAs are designed and operated in accordance with pronouncements from the IRS regarding what constitutes an HRA. They are 100% funded, the depository for which is a trust, each of which is recognized by the IRS as qualified as a VEBA under IRC Section 501(c)(9). Each HRA is governed by a Board of Trustees composed of employees of participating governmental employers.

PROBLEM WITH REGULATION AS CURRENTLY WRITTEN. As currently written, the regulation provides, or at least strongly implies, that with several notable exceptions many typical HRAs are no longer viable. Admittedly the regulation provides exceptions in the case of HRAs that either (a) provide non-essential benefits, (b) "are integrated with other coverage as part of a group health plan and the other coverage alone would comply with the requirements of PHS Act section 2711," and (c) "a stand-alone HRA that is limited to retirees." The regulation currently appears to apply to typical standalone HRAs that are not limited to retirees and which may supplement group health plans, or supplement employee benefit packages, but which are not "integrated" with group health plans.

Though the regulation provides a means for HRAs to request a waiver from the prohibition, this is not a long-term solution as the waivers would expire in 2014.

There is no basis to believe that Congress intended to outlaw all supplemental HRAs. However, HRAs covered by the regulation would likely need to be terminated or substantially revised and reduced (such as by limiting benefits to retirees) in order to comply with the regulation as currently drafted and understood. Unless the regulation is either revised, or at least clarified to address several questions (discussed below), it would appear that employers would no longer be able to provide HRAs to employees to supplement their employee benefit package.

RECOMMENDATIONS: Set forth below are our recommendations regarding how to revise the regulation to interpret the statute and provide guidance.

1. PROVIDE GUIDANCE AS TO WHAT CONSTITUTES PROHIBITED ANNUAL AND LIFETIME LIMITS IN THE CONTEXT OF AN HRA. We request that in the context of an HRA, annual limit and lifetime limit should be defined as being limitations imposed by the plan rather than the account being totally exhausted. For example, if an HRA limits the dollar amount (or %) of the account which can be withdrawn in any year, or over the participant's lifetime, or for the payment of a particular type of benefit, or related to a particular illness, these limitations should be considered prohibited by PPACA. In contrast, if the HRA denies payment on the basis that the account has been drawn down to zero, this should not be considered an annual or lifetime limit. Rather, this is analogous to a typical group health plan running out of assets.

If you believe appropriate, we recommend that you limit this treatment to only those HRAs which treat all amounts in the account as being considered participant assets, meaning that any unused balances never revert to the employer. In this regard the protection would be even stronger than in the case of an FSA (which is exempt from the limitations imposed by the regulation) because the unused funds can never revert to the employer. I remind you that HRAs funded in a "welfare benefit fund" under IRC Section 419(e) (such as these two) are subject to IRC Section 4976, and therefore there would be a 100% excise tax imposed upon a reversion to the contributing employer. Therefore, employers have no incentive to impose limitations upon the use of the HRA, in which case any unused amounts would merely be allocated to other participant accounts.

Also if you believe appropriate, perhaps limit this treatment to only those HRAs in which all employees and former employees covered by the plan are also covered (or were covered prior to termination of employment or retirement) by an employer group health plan which complies with the requirements of PHS Act Section 2711. Therefore, the employer is already complying with the prohibition against annual and lifetime limits, and thus there should be no reason to prohibit the employer from providing its employees (and former employees/retirees) with supplemental benefits. From a policy standpoint, applying the limit prohibitions to such HRAs would only result in a reduction of benefits to employees.

We further wish to point out that even if you believe that PPACA's prohibition applies to all supplemental stand-alone HRAs (other than those limited to retirees), the statute does not prohibit annual limits in their entirety, just "unreasonable annual limits (within the meaning of section 223 of the Internal Revenue Code." Thus, if HRAs of a type described above are to be subject to the prohibition, please provide guidance as to which annual limits are and are not unreasonable. Perhaps it should be permitted for such HRAs to limit benefits to the account value if the maximum amount added to the account in any year subject to the prohibition does not exceed the limitations of IRC Section 223(b).

2. PROVIDE GUIDANCE AND EXPAND THE DEFINITION OF "INTEGRATED WITH OTHER COVERAGE." The Preamble states that when HRAs are "integrated with other coverage as part of a group health plan and the other coverage alone would comply with the requirements of PHS Act section 2711, the fact that benefits under the HRA by itself are limited does not violate PHS Act section 2711 because the combined benefit satisfies the requirements." But wouldn't the "combined benefit" satisfy the requirements irrespective of whether the HRA is "integrated" with the other coverage? If the employer provides the required coverage through the other plan, why is it necessary for the HRA to be "integrated" with that other coverage? Can't it merely "supplement" the other coverage?

Alternatively, if for some reason you determine that it is necessary for the HRA to actually be "integrated" with the other coverage, we request that you provide guidance as to what is and is not required for the HRA to be considered integrated. Hopefully you do not believe that it is necessary that the provisions of the HRA and the other coverage actually be legally tied to each other in the same formal "plan," or part of the same plan document. We request that you provide guidance that it is not necessary that they both be administered by the same administrator, and that it is sufficient for the HRA to be administered by independent trustees or others with fiduciary responsibilities to the participants.

3. PROVIDE GUIDANCE REGARDING THE DEFINITION OF EXEMPTION FOR "HEALTH FLEXIBLE SPENDING ARRANGEMENTS." The regulation provides an exemption from the annual limit prohibition in the case of a "health flexible spending arrangement (as defined in section 106(c)(2))." This exemption is commonly understood to apply in the case of plans that are described in IRC section 125 and commonly referred to as FSAs and also some HRAs. See, IRS Notice 2002-45.

Stand-alone HRAs would appear to always meet the requirement contained in IRC section 106(c)(2)(A), but there is uncertainty as to when they meet or do not meet the requirement contained in 106(c)(2)(B): "the maximum amount of reimbursement which is reasonably available to a participant for such coverage is less than 500% of the value of such coverage." On its face it would appear that HRAs would meet this requirement, but it is not known what the agencies' position is when the account balances vary over time. Guidance is requested with respect to this point especially in the case where unused amounts may accumulate to a point where, in exceptional cases, the account balance for some participants may exceed 500% of the Plan's COBRA rate. Perhaps you will feel it appropriate to limit the types of HRAs which will qualify for this exemption, such as only HRAs in which unused amounts are allocated to other participants in the plan (rather than reverting to the employer). We wish to point out that for purposes of other sections of PPACA the agencies appear to accept that HRAs, HSAs and FSAs are to be treated in a similar manner. (See, for example, the Joint Committee Summary of PPACA and the Reconciliation Act with respect to the elimination of over-the-counter drugs as reimbursable medical expenses.) We submit that HRAs and FSAs should be treated in a similar manner with respect to PPACA section 2711, especially if the HRA is a stand-alone HRA that (1) supplements the employer's compliant group medical plan, and (2) does not revert unused account balances to the employer.

4. PROVIDE GUIDANCE AND EXPAND THE DEFINITION OF EXEMPTION FOR BENEFITS OTHER THAN "ESSENTIAL HEALTH BENEFITS." The preamble to the regulation points out that the statute provides an exemption with respect to benefits that are not "essential health benefits" under PPACA Section 1302(b). This is commonly understood to apply in the case of mini-med plans, dental plans, vision plans, etc. We respectfully submit that stand-alone HRAs that supplement an employer's group health plan (presuming that plan meets the requirements of PHS ACT section 2711) should be similarly considered. PPACA section

2711(b) provides that the prohibition of 2711(a) against lifetime and annual limits "shall not be construed to prevent a group health plan or health insurance coverage that is not required to provide essential health benefits under [PPACA section] 1302 ...." We submit that a stand-alone HRAs which supplements a compliant group health plan is the type of plan which is "not required to provide essential health benefits," and as such should be covered by this exemption. If you agree, we request that this be stated in the regulation.

5. REQUEST FOR BLANKET WAIVER. In the event that you believe that the type of HRA described above is subject to the prohibition against annual limits and that none of the exceptions referred to above apply, we request that the Secretary of HHS consider granting a blanket waiver to all such HRAs rather than forcing them all to apply for individual waivers. It is understood that the waivers would only apply until the plan year which commences in 2014. The reason why such a blanket waiver would be appropriate is that it would be a waste of taxpayer (and government) resources to have to apply for and process all the requests when it appears almost certain that almost all (or all) would qualify for the waiver under the standard contained in the regulation. That standard, which is that compliance with the requirement would result in either significant decrease in access to benefits under the plan or would significantly increase premiums for the plan, would appear to be clearly met in the case of an HRA as it would be difficult to imagine a sponsor or employer who would not drastically reduce (or eliminate entirely) an HRA for which the benefits could not be limited to the value of the account.

A second reason why such waivers would be appropriate is that it would give noncompliant HRAs time to either come into compliance or terminate. In the absence of a waiver, some form of grandfathering, delayed effective date or other relief should be provided with respect to funds which have already been contributed into a funded HRA and which will need to be paid out or otherwise addressed.

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I would be happy to answer any questions you may have with regard to this comment.

Respectfully submitted,

By: Russell Greenblatt
Russell E. Greenblatt