

THE “RESPONSIBLE ADDITIONS AND INCREASES TO
SUSTAIN EMPLOYEE HEALTH BENEFITS ACT OF 2018”

—————
JULY 19, 2018.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

—————
Mr. BRADY of Texas, from the Committee on Ways and Means,
submitted the following

R E P O R T

[To accompany H.R. 6313]

The Committee on Ways and Means, to whom was referred the bill (H.R. 6313) to amend the Internal Revenue Code of 1986 to provide that a plan shall not fail to be treated as a health flexible spending account merely because such arrangement’s account balance (or any portion thereof) determined as of the end of any plan year may be carried forward to the succeeding plan year, report favorably thereon with an amendment and recommend that the bill as amended do pass.

115TH CONGRESS } <i>2d Session</i>	HOUSE OF REPRESENTATIVES	{ REPORT 115-853
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EMPLOYEE HEALTH BENEFITS ACT OF 2018

JULY 19, 2018.—Committed to the Committee of the Whole House on the State of
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Mr. BRADY of Texas, from the Committee on Ways and Means,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 6313]

The Committee on Ways and Means, to whom was referred the bill (H.R. 6313) to amend the Internal Revenue Code of 1986 to allow the carryforward of health flexible spending arrangement account balances, 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 “Responsible Additions and Increases to Sustain Employee Health Benefits Act of 2018”.

SEC. 2. CARRYFORWARD OF HEALTH FLEXIBLE SPENDING ARRANGEMENT ACCOUNT BALANCES.

(a) IN GENERAL.—Section 106 of the Internal Revenue Code of 1986 is amended by adding at the end the following new subsection:

“(h) CARRYFORWARD OF HEALTH FLEXIBLE SPENDING ARRANGEMENT ACCOUNT BALANCES.—A plan shall not fail to be treated as a health flexible spending arrangement under this section or section 105 merely because such arrangement’s account balance (or any portion thereof) determined as of the end of any plan year may be carried forward to the succeeding plan year.”.

(b) COORDINATION WITH LIMITATION ON SALARY REDUCTION CONTRIBUTIONS.—

(1) IN GENERAL.—Section 125(i) of such Code is amended by redesignating paragraph (2) as paragraph (3) and by inserting after paragraph (1) the following new paragraph:

“(2) COORDINATION WITH CARRYFORWARD OF ACCOUNT BALANCES.—The dollar amount otherwise in effect under paragraph (1) for any plan year shall be reduced by the excess (if any) of—

“(A) the amount of any account balance which is carried forward to such plan year from the preceding plan year, over

“(B) \$500.”.

(2) CONFORMING AMENDMENTS.—Section 125(i) of such Code is amended by striking “taxable year” each place it appears in paragraphs (1) and (3) (as redesignated by paragraph (1) of this subsection) and inserting “plan year”.

(c) COORDINATION WITH CAFETERIA PLAN LIMITATION ON DEFERRED COMPENSATION.—Section 125(d)(2) of such Code is amended by adding at the end the following new subparagraph:

“(E) EXCEPTION FOR HEALTH FLEXIBLE SPENDING ARRANGEMENTS.—Subparagraph (A) shall not apply to a plan to the extent of amounts in a health flexible spending arrangement which may be carried forward as described in section 106(h).”.

(d) EFFECTIVE DATE.—The amendment made by this section shall apply to plan years beginning after December 31, 2018.

I. SUMMARY AND BACKGROUND

A. PURPOSE AND SUMMARY

The bill H.R. 6313, as reported by the Committee on Ways and Means, allows balances in Flexible Spending Arrangements (FSA) to be carried forward each year.

B. BACKGROUND AND NEED FOR LEGISLATION

FSAs are employer-established accounts to reimburse employees for qualified medical expenses. They are usually funded through voluntary salary reduction agreements with the employer, but employers can also contribute. Contributions are not subject to payroll or federal income taxes. Contributions to FSAs are capped at \$2,650 in 2018. FSAs are “use-it-or-lose-it” arrangements, with the exception that employers may allow up to \$500 to be carried over to the next year or allow a grace-period to use leftover funds during the first quarter of the next year.

According to the Employee Benefits Survey conducted by the Department of Labor, 44 percent of all civilian workers had access to a health FSA offered under a cafeteria plan in 2017.

The use-it-or-lose-it nature of FSAs can lead to unnecessary health care expenditures at the end of the year or underfunding of such accounts. If consumers are able to roll-over their unused funds, they are more likely to become more economically efficient as this incentivizes consumers to only purchase what is needed. Additionally, the reduced spending of excess funds could have a positive effect on overall spending, including keeping premiums low through utilizing less services through the plan.

C. LEGISLATIVE HISTORY

Background

H.R. 6313 was introduced on July 6, 2018, and was referred to the Committee on Ways and Means.

Committee action

The Committee on Ways and Means marked up H.R. 6313, the “Responsible Additions and Increases to Sustain Employee Health Benefits Act of 2018,” on July 12, 2018, and ordered the bill, as amended, favorably reported (with a quorum being present).

Committee hearings

The policy issues associated with Flexible Spending Accounts (FSAs) and need for legislative response were discussed at the following Ways and Means hearings during the 114th and 115th Congress:

- Full Committee Hearing on the Tax Treatment of Health Care (April 14, 2016)
- Subcommittee on Health Member Day Hearing on Tax-Related Proposals to Improve Health Care (May 17, 2016)
- Subcommittee on Health Hearing on Rising Health Insurance Premiums Under the Affordable Care Act (July 12, 2016)
- Subcommittee on Health Hearing on Lowering Costs and Expanding Access to Health Care through Consumer-Directed Health Plans (June 6, 2018)

II. EXPLANATION OF THE BILL

A. CARRYFORWARD OF HEALTH FLEXIBLE SPENDING ARRANGEMENT ACCOUNT BALANCES

PRESENT LAW

Exclusion from income for employer-provided health coverage

Employees are not taxed on (*i.e.*, 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 children under age 27 generally are excluded from gross income.² The exclu-

¹Sec. 106.

²Sec. 105(b).

sion 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) and an employer purchased health insurance coverage for its employees. There generally is no limit on the amount of employer-provided health coverage that is excludable. 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.⁴

Reimbursements may be either elected by an employee under a cafeteria plan or otherwise specified by the employer under a health reimbursement arrangement ("HRA"). Reimbursements under these arrangements are excludable 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 (*e.g.*, current cash compensation) and at least one qualified benefit (generally an employer-provided benefit excludable 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 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 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

³Secs. 3121(a)(2), 3231(e)(1), and 3306(a)(2).

⁴Treas. Reg. sec. 1.105-2.

⁵Sec. 106.

⁶Sec. 125(a). To be excludable, however, any qualified benefit elected under a cafeteria plan must independently satisfy any requirements under the Code section that provides the exclusion, such as section 105(b) or 106.

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 2018, the maximum amount of salary reduction contributions for a year is limited to \$2,650.⁹

Health FSAs are subject to the general requirements for cafeteria plans, including a requirement that such plans may not be plans of deferred compensation. This generally means 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 However, guidance provides a grace period of two and one-half months after the end of the plan year for the carryover of excess benefits or contributions in a health FSA.¹¹ As an alternative to a grace period, an employer may amend the cafeteria plan document to provide for \$500 of any unused amounts in a health FSA to be continuously rolled over.¹² If an employee leaves employment during a year and has a balance in a health FSA (but no eligible unreimbursed medical expenses), that amount will be forfeited.

REASONS FOR CHANGE

The Committee believes that health FSAs are an important tool in managing health care costs because amounts contributed to a health FSA are available in their entirety on the first day of the plan year, rather than needing to be accumulated in a fund before becoming available to pay for medical care costs. However, health FSAs are constrained by the use-it-or-lose-it rule because, at the end of a year, if an individual has a balance in his or her health FSA that he or she believes may be lost, the individual is more likely to spend those amounts on medical care that they might not otherwise have chosen to do (or need to do) leading to inefficient consumer health spending.

The Committee believes that if an individual is permitted to carry forward those amounts to future years, they will more likely purchase medical care only when there is a need for such care, leading to better containment of health costs.

EXPLANATION OF PROVISION

Under the provision, a plan shall not fail to be treated as a health flexible spending arrangement merely because such arrangement’s account balance (or any portion thereof) determined as of the end of any plan year may be carried forward to the succeeding plan year. The dollar amount that may be contributed to

⁷ Prop. Treas. Reg. sec. 1.125-1(b).

⁸ Sec. 125 and Prop. Treas. Reg. sec. 1.125-5.

⁹ Rev. Proc. 2017-58, 2017-45 I.R.B. 489 (Nov. 6, 2017).

¹⁰ See sec. 125(d)(2).

¹¹ See, e.g., Notice 2005-42, 2005-23 I.R.B. 1204 (June 6, 2005).

¹² See Notice 2013-71, 2013-47, I.R.B. 532 (November 18, 2013).

an FSA in any plan year in which the amount of any balance (or any portion of the balance) from the preceding plan year is carried forward to such plan year will be reduced by the excess, if any, of the amount of the account balance that is carried forward to such plan year from the preceding plan year over \$500. To the extent that amounts in a health flexible spending arrangement may be carried forward as of the end of any plan year to the succeeding plan year, the carryover of such amounts will not cause the cafeteria plan to be treated as a plan which provides deferred compensation.

EFFECTIVE DATE

The provision is effective for plan years beginning after December 31, 2018.

III. VOTES OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the House of Representatives, the following statement is made concerning the vote of the Committee on Ways and Means during the markup consideration of H.R. 6313, the “Responsible Additions and Increases to Sustain Employee Health Benefits Act of 2018,” on July 12, 2018.

H.R. 6313 was ordered favorably reported to the House of Representatives as amended by an amendment in the nature of a substitute offered by Chairman Brady by a roll call vote of 22 yeas to 14 nays. The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Brady	X	.....	.....	Mr. Neal .....	.....	X	.....
Mr. Johnson	X	.....	.....	Mr. Levin .....	.....	X	.....
Mr. Nunes .....	.....	.....	.....	Mr. Lewis .....	.....	X	.....
Mr. Reichert	X	.....	.....	Mr. Doggett .....	.....	X	.....
Mr. Roskam	X	.....	.....	Mr. Thompson .....	.....	X	.....
Mr. Buchanan	X	.....	.....	Mr. Larson .....	.....	X	.....
Mr. Smith (NE)	X	.....	.....	Mr. Blumenauer .....	.....	X	.....
Ms. Jenkins	X	.....	.....	Mr. Kind	X	.....	.....
Mr. Paulsen	X	.....	.....	Mr. Pascrell .....	.....	.....	.....
Mr. Marchant	X	.....	.....	Mr. Crowley .....	.....	X	.....
Ms. Black .....	.....	.....	.....	Mr. Davis .....	.....	X	.....
Mr. Reed	X	.....	.....	Ms. Sanchez .....	.....	X	.....
Mr. Kelly	X	.....	.....	Mr. Higgins .....	.....	X	.....
Mr. Renacci .....	.....	.....	.....	Ms. Sewell .....	.....	X	.....
Ms. Noem	X	.....	.....	Ms. DelBene .....	.....	X	.....
Mr. Holding	X	.....	.....	Ms. Chu .....	.....	X	.....
Mr. Smith (MO)	X	.....	.....		
Mr. Rice	X	.....	.....		
Mr. Schweikert	X	.....	.....		
Ms. Walorski	X	.....	.....		
Mr. Curbelo	X	.....	.....		
Mr. Bishop	X	.....	.....		
Mr. LaHood	X	.....	.....		
Mr. Wenstrup	X	.....	.....		

IV. BUDGET EFFECTS OF THE BILL

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 bill, H.R. 6313, as reported.

The bill, as reported, is estimated to have the following effect on Federal fiscal year budget receipts for the period 2019–2028:

Item	Fiscal Years (Millions of Dollars)											
	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2019-23	2019-28
Permit Rollovers of Health Flexible Spending Arrangement Account Balances †	-33	-51	-60	-64	-66	-67	-68	-74	-75	-75	-274	-634
NOTE: Details do not add to totals due to rounding.												
† Estimate includes the following off-budget effects	-11	-17	-20	-21	-22	-22	-22	-23	-23	-23	-91	-204

Pursuant to clause 8 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 gross budgetary effect (before incorporating macroeconomic effects) in any fiscal year is less than 0.25 percent of the current projected gross domestic product of the United States for that fiscal year; therefore, the bill is not “major legislation” for purposes of requiring that the estimate include the budgetary effects of changes in economic output, employment, capital stock and other macroeconomic variables.

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 provision involves no new tax expenditure.

C. COST ESTIMATE PREPARED BY THE CONGRESSIONAL BUDGET OFFICE

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 bill, H.R. 6138, as reported. As of the filing of this report, the Committee had not received an estimate prepared by the Congressional Budget Office (CBO).

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

A. COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated into the description portions of this report.

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 which any measure 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 bill does not contain Federal mandates on the private sector. The Committee 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)

Rule XXI 5(b) 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 bill and states that the bill does 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 Restructuring and Reform Act of 1998 (“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 of 1986 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, the staff of the Joint Committee on Taxation has determined that a complexity analysis is not required under section 4022(b) of the IRS Reform Act because the bill contains no provisions that amend the Internal Revenue Code of 1986 and that have “widespread applicability” to individuals or small businesses, within the meaning of the rule.

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.

G. DUPLICATION OF FEDERAL PROGRAMS

In compliance with Sec. 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of the bill establishes or reauthorizes: (1) a program of the Federal Government known to be duplicative of another Federal program, (2) a program included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or (3) a program related to a program identified in the most recent Catalog of Federal Domestic Assistance, published pursuant to section 6104 of title 31, United States Code.

H. DISCLOSURE OF DIRECTED RULE MAKINGS

In compliance with Sec. 3(i) of H. Res. 5 (115th Congress), the following statement is made concerning directed rule makings: The Committee advises that the bill requires no directed rule makings within the meaning of such section.

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

B. CHANGES IN EXISTING LAW PROPOSED BY THE BILL, AS REPORTED

In compliance with clause 3(e)(1)(B) of rule XIII of the Rules of the House of Representatives, changes in existing law proposed 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):

CHANGES IN EXISTING LAW MADE BY THE 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, and 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. 106. CONTRIBUTIONS BY EMPLOYER TO ACCIDENT AND HEALTH PLANS.

(a) **GENERAL RULE.**—Except as otherwise provided in this section, gross income of an employee does not include employer-provided coverage under an accident or health plan.

(b) **CONTRIBUTIONS TO ARCHER MSAs.**—

(1) **IN GENERAL.**—In the case of an employee who is an eligible individual, amounts contributed by such employee's employer to any Archer MSA of such employee shall be treated as employer-provided coverage for medical expenses under an accident or health plan to the extent such amounts do not exceed the limitation under section 220(b)(1) (determined without regard to this subsection) which is applicable to such employee for such taxable year.

(2) NO CONSTRUCTIVE RECEIPT.—No amount shall be included in the gross income of any employee solely because the employee may choose between the contributions referred to in paragraph (1) and employer contributions to another health plan of the employer.

(3) SPECIAL RULE FOR DEDUCTION OF EMPLOYER CONTRIBUTIONS.—Any employer contribution to an Archer MSA, if otherwise allowable as a deduction under this chapter, shall be allowed only for the taxable year in which paid.

(4) EMPLOYER MSA CONTRIBUTIONS REQUIRED TO BE SHOWN ON RETURN.—Every individual required to file a return under section 6012 for the taxable year shall include on such return the aggregate amount contributed by employers to the Archer MSAs of such individual or such individual's spouse for such taxable year.

(5) MSA CONTRIBUTIONS NOT PART OF COBRA COVERAGE.—Paragraph (1) shall not apply for purposes of section 4980B.

(6) DEFINITIONS.—For purposes of this subsection, the terms “eligible individual” and “Archer MSA” have the respective meanings given to such terms by section 220.

(7) CROSS REFERENCE.—For penalty on failure by employer to make comparable contributions to the Archer MSAs of comparable employees, see section 4980E.

(c) INCLUSION OF LONG-TERM CARE BENEFITS PROVIDED THROUGH FLEXIBLE SPENDING ARRANGEMENTS.—

(1) IN GENERAL.—Gross income of an employee shall include employer-provided coverage for qualified long-term care services (as defined in section 7702B(c)) to the extent that such coverage is provided through a flexible spending or similar arrangement.

(2) FLEXIBLE SPENDING ARRANGEMENT.—For purposes of this subsection, a flexible spending arrangement is a benefit program which provides employees with coverage under which—

(A) specified incurred expenses may be reimbursed (subject to reimbursement maximums and other reasonable conditions), and

(B) the maximum amount of reimbursement which is reasonably available to a participant for such coverage is less than 500 percent of the value of such coverage.

In the case of an insured plan, the maximum amount reasonably available shall be determined on the basis of the underlying coverage.

(d) CONTRIBUTIONS TO HEALTH SAVINGS ACCOUNTS.—

(1) IN GENERAL.—In the case of an employee who is an eligible individual (as defined in section 223(c)(1)), amounts contributed by such employee's employer to any health savings account (as defined in section 223(d)) of such employee shall be treated as employer-provided coverage for medical expenses under an accident or health plan to the extent such amounts do not exceed the limitation under section 223(b) (determined without regard to this subsection) which is applicable to such employee for such taxable year.

(2) SPECIAL RULES.—Rules similar to the rules of paragraphs (2), (3), (4), and (5) of subsection (b) shall apply for purposes of this subsection.

(3) CROSS REFERENCE.—For penalty on failure by employer to make comparable contributions to the health savings accounts of comparable employees, see section 4980G.

(e) FSA AND HRA TERMINATIONS TO FUND HSAs.—

(1) IN GENERAL.—A plan shall not fail to be treated as a health flexible spending arrangement or health reimbursement arrangement under this section or section 105 merely because such plan provides for a qualified HSA distribution.

(2) QUALIFIED HSA DISTRIBUTION.—The term “qualified HSA distribution” means a distribution from a health flexible spending arrangement or health reimbursement arrangement to the extent that such distribution—

(A) does not exceed the lesser of the balance in such arrangement on September 21, 2006, or as of the date of such distribution, and

(B) is contributed by the employer directly to the health savings account of the employee before January 1, 2012.

Such term shall not include more than 1 distribution with respect to any arrangement.

(3) ADDITIONAL TAX FOR FAILURE TO MAINTAIN HIGH DEDUCTIBLE HEALTH PLAN COVERAGE.—

(A) IN GENERAL.—If, at any time during the testing period, the employee is not an eligible individual, then the amount of the qualified HSA distribution—

(i) shall be includible in the gross income of the employee for the taxable year in which occurs the first month in the testing period for which such employee is not an eligible individual, and

(ii) the tax imposed by this chapter for such taxable year on the employee shall be increased by 10 percent of the amount which is so includible.

(B) EXCEPTION FOR DISABILITY OR DEATH.—Clauses (i) and (ii) of subparagraph (A) shall not apply if the employee ceases to be an eligible individual by reason of the death of the employee or the employee becoming disabled (within the meaning of section 72(m)(7)).

(4) DEFINITIONS AND SPECIAL RULES.—For purposes of this subsection—

(A) TESTING PERIOD.—The term “testing period” means the period beginning with the month in which the qualified HSA distribution is contributed to the health savings account and ending on the last day of the 12th month following such month.

(B) ELIGIBLE INDIVIDUAL.—The term “eligible individual” has the meaning given such term by section 223(c)(1).

(C) TREATMENT AS ROLLOVER CONTRIBUTION.—A qualified HSA distribution shall be treated as a rollover contribution described in section 223(f)(5).

(5) TAX TREATMENT RELATING TO DISTRIBUTIONS.—For purposes of this title—

(A) IN GENERAL.—A qualified HSA distribution shall be treated as a payment described in subsection (d).

(B) COMPARABILITY EXCISE TAX.—

(i) IN GENERAL.—Except as provided in clause (ii), section 4980G shall not apply to qualified HSA distributions.

(ii) FAILURE TO OFFER TO ALL EMPLOYEES.—In the case of a qualified HSA distribution to any employee, the failure to offer such distribution to any eligible individual covered under a high deductible health plan of the employer shall (notwithstanding section 4980G(d)) be treated for purposes of section 4980G as a failure to meet the requirements of section 4980G(b).

(f) REIMBURSEMENTS FOR MEDICINE RESTRICTED TO PRESCRIBED DRUGS AND INSULIN.—For purposes of this section and section 105, reimbursement for expenses incurred for a medicine or a drug shall be treated as a reimbursement for medical expenses only if such medicine or drug is a prescribed drug (determined without regard to whether such drug is available without a prescription) or is insulin.

(g) QUALIFIED SMALL EMPLOYER HEALTH REIMBURSEMENT ARRANGEMENT.—For purposes of this section and section 105, payments or reimbursements from a qualified small employer health reimbursement arrangement (as defined in section 9831(d)) of an individual for medical care (as defined in section 213(d)) shall not be treated as paid or reimbursed under employer-provided coverage for medical expenses under an accident or health plan if for the month in which such medical care is provided the individual does not have minimum essential coverage (within the meaning of section 5000A(f)).

(h) CARRYFORWARD OF HEALTH FLEXIBLE SPENDING ARRANGEMENT ACCOUNT BALANCES.—A plan shall not fail to be treated as a health flexible spending arrangement under this section or section 105 merely because such arrangement's account balance (or any portion thereof) determined as of the end of any plan year may be carried forward to the succeeding plan year.

* * * * *

SEC. 125. CAFETERIA PLANS.

(a) GENERAL RULE.—Except as provided in subsection (b), no amount shall be included in the gross income of a participant in a cafeteria plan solely because, under the plan, the participant may choose among the benefits of the plan.

(b) EXCEPTION FOR HIGHLY COMPENSATED PARTICIPANTS AND KEY EMPLOYEES.—

(1) HIGHLY COMPENSATED PARTICIPANTS.—In the case of a highly compensated participant, subsection (a) shall not apply to any benefit attributable to a plan year for which the plan discriminates in favor of—

(A) highly compensated individuals as to eligibility to participate, or

(B) highly compensated participants as to contributions and benefits.

(2) KEY EMPLOYEES.—In the case of a key employee (within the meaning of section 416(i)(1)), subsection (a) shall not apply to any benefit attributable to a plan for which the qualified benefits provided to key employees exceed 25 percent of the aggregate of such benefits provided for all employees under the

plan. For purposes of the preceding sentence, qualified benefits shall be determined without regard to the second sentence of subsection (f).

(3) YEAR OF INCLUSION.—For purposes of determining the taxable year of inclusion, any benefit described in paragraph (1) or (2) shall be treated as received or accrued in the taxable year of the participant or key employee in which the plan year ends.

(c) DISCRIMINATION AS TO BENEFITS OR CONTRIBUTIONS.—For purposes of subparagraph (B) of subsection (b)(1), a cafeteria plan does not discriminate where qualified benefits and total benefits (or employer contributions allocable to qualified benefits and employer contributions for total benefits) do not discriminate in favor of highly compensated participants.

(d) CAFETERIA PLAN DEFINED.—For purposes of this section—

(1) IN GENERAL.—The term “cafeteria plan” means a written plan under which—

(A) all participants are employees, and

(B) the participants may choose among 2 or more benefits consisting of cash and qualified benefits.

(2) DEFERRED COMPENSATION PLANS EXCLUDED.—

(A) IN GENERAL.—The term “cafeteria plan” does not include any plan which provides for deferred compensation.

(B) EXCEPTION FOR CASH AND DEFERRED ARRANGEMENTS.—Subparagraph (A) shall not apply to a profit-sharing or stock bonus plan or rural cooperative plan (within the meaning of section 401(k)(7)) which includes a qualified cash or deferred arrangement (as defined in section 401(k)(2)) to the extent of amounts which a covered employee may elect to have the employer pay as contributions to a trust under such plan on behalf of the employee.

(C) EXCEPTION FOR CERTAIN PLANS MAINTAINED BY EDUCATIONAL INSTITUTIONS.—Subparagraph (A) shall not apply to a plan maintained by an educational organization described in section 170(b)(1)(A)(ii) to the extent of amounts which a covered employee may elect to have the employer pay as contributions for post-retirement group life insurance if—

(i) all contributions for such insurance must be made before retirement, and

(ii) such life insurance does not have a cash surrender value at any time.

For purposes of section 79, any life insurance described in the preceding sentence shall be treated as group-term life insurance.

(D) EXCEPTION FOR HEALTH SAVINGS ACCOUNTS.—Subparagraph (A) shall not apply to a plan to the extent of amounts which a covered employee may elect to have the employer pay as contributions to a health savings account established on behalf of the employee.

(E) EXCEPTION FOR HEALTH FLEXIBLE SPENDING ARRANGEMENTS.—Subparagraph (A) shall not apply to a plan to the extent of amounts in a health flexible spending arrangement which may be carried forward as described in section 106(h).

(e) **HIGHLY COMPENSATED PARTICIPANT AND INDIVIDUAL DEFINED.**—For purposes of this section—

(1) **HIGHLY COMPENSATED PARTICIPANT.**—The term “highly compensated participant” means a participant who is—

(A) an officer,

(B) a shareholder owning more than 5 percent of the voting power or value of all classes of stock of the employer,

(C) highly compensated, or

(D) a spouse or dependent (within the meaning of section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof) of an individual described in subparagraph (A), (B), or (C).

(2) **HIGHLY COMPENSATED INDIVIDUAL.**—The term “highly compensated individual” means an individual who is described in subparagraph (A), (B), (C), or (D) of paragraph (1).

(f) **QUALIFIED BENEFITS DEFINED.**—For purposes of this section—

(1) **IN GENERAL.**—The term “qualified benefit” means any benefit which, with the application of subsection (a), is not includible in the gross income of the employee by reason of an express provision of this chapter (other than section 106(b), 117, 127, or 132). Such term includes any group term life insurance which is includible in gross income only because it exceeds the dollar limitation of section 79 and such term includes any other benefit permitted under regulations.

(2) **LONG-TERM CARE INSURANCE NOT QUALIFIED.**—The term “qualified benefit” shall not include any product which is advertised, marketed, or offered as long-term care insurance.

(3) **CERTAIN EXCHANGE-PARTICIPATING QUALIFIED HEALTH PLANS NOT QUALIFIED.**—

(A) **IN GENERAL.**—The term “qualified benefit” shall not include any qualified health plan (as defined in section 1301(a) of the Patient Protection and Affordable Care Act) offered through an Exchange established under section 1311 of such Act.

(B) **EXCEPTION FOR EXCHANGE-ELIGIBLE EMPLOYERS.**—Subparagraph (A) shall not apply with respect to any employee if such employee’s employer is a qualified employer (as defined in section 1312(f)(2) of the Patient Protection and Affordable Care Act) offering the employee the opportunity to enroll through such an Exchange in a qualified health plan in a group market.

(g) **SPECIAL RULES.**—

(1) **COLLECTIVELY BARGAINED PLAN NOT CONSIDERED DISCRIMINATORY.**—For purposes of this section, a plan shall not be treated as discriminatory if the plan is maintained under an agreement which the Secretary finds to be a collective bargaining agreement between employee representatives and one or more employers.

(2) **HEALTH BENEFITS.**—For purposes of subparagraph (B) of subsection (b)(1), a cafeteria plan which provides health benefits shall not be treated as discriminatory if—

(A) contributions under the plan on behalf of each participant include an amount which—

(i) equals 100 percent of the cost of the health benefit coverage under the plan of the majority of the highly compensated participants similarly situated, or
 (ii) equals or exceeds 75 percent of the cost of the health benefit coverage of the participant (similarly situated) having the highest cost health benefit coverage under the plan, and

(B) contributions or benefits under the plan in excess of those described in subparagraph (A) bear a uniform relationship to compensation.

(3) CERTAIN PARTICIPATION ELIGIBILITY RULES NOT TREATED AS DISCRIMINATORY.—For purposes of subparagraph (A) of subsection (b)(1), a classification shall not be treated as discriminatory if the plan—

(A) benefits a group of employees described in section 410(b)(2)(A)(i), and

(B) meets the requirements of clauses (i) and (ii):

(i) No employee is required to complete more than 3 years of employment with the employer or employers maintaining the plan as a condition of participation in the plan, and the employment requirement for each employee is the same.

(ii) Any employee who has satisfied the employment requirement of clause (i) and who is otherwise entitled to participate in the plan commences participation no later than the first day of the first plan year beginning after the date the employment requirement was satisfied unless the employee was separated from service before the first day of that plan year.

(4) CERTAIN CONTROLLED GROUPS, ETC.—All employees who are treated as employed by a single employer under subsection (b), (c), or (m) of section 414 shall be treated as employed by a single employer for purposes of this section.

(h) SPECIAL RULE FOR UNUSED BENEFITS IN HEALTH FLEXIBLE SPENDING ARRANGEMENTS OF INDIVIDUALS CALLED TO ACTIVE DUTY.—

(1) IN GENERAL.—For purposes of this title, a plan or other 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 reservist distributions.

(2) QUALIFIED RESERVIST DISTRIBUTION.—For purposes of this subsection, the term “qualified reservist distribution” means any distribution to an individual of all or a portion of the balance in the employee’s account under such arrangement if—

(A) such individual was (by reason of being a member of a reserve component (as defined in section 101 of title 37, United States Code)) ordered or called to active duty for a period in excess of 179 days or for an indefinite period, and

(B) such distribution is made during the period beginning on the date of such order or call and ending on the last date that reimbursements could otherwise be made under such arrangement for the plan year which includes the date of such order or call.

(i) LIMITATION ON HEALTH FLEXIBLE SPENDING ARRANGEMENTS.—

(1) IN GENERAL.—For purposes of this section, if a benefit is provided under a cafeteria plan through employer contributions to a health flexible spending arrangement, such benefit shall not be treated as a qualified benefit unless the cafeteria plan provides that an employee may not elect for any **taxable year** *plan year* to have salary reduction contributions in excess of \$2,500 made to such arrangement.

(2) COORDINATION WITH CARRYFORWARD OF ACCOUNT BALANCES.—*The dollar amount otherwise in effect under paragraph (1) for any plan year shall be reduced by the excess (if any) of—*

(A) *the amount of any account balance which is carried forward to such plan year from the preceding plan year, over*

(B) *\$500.*

[(2)] (3) ADJUSTMENT FOR INFLATION.—In the case of any **taxable year** *plan year* beginning after December 31, 2013, the dollar amount in paragraph (1) shall be increased by an amount equal to—

(A) such amount, multiplied by

(B) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which such **taxable year** *plan year* begins by substituting “calendar year 2012” for “calendar year 2016” in subparagraph (A)(ii) thereof.

If any increase determined under this paragraph is not a multiple of \$50, such increase shall be rounded to the next lowest multiple of \$50.

(j) SIMPLE CAFETERIA PLANS FOR SMALL BUSINESSES.—

(1) IN GENERAL.—An eligible employer maintaining a simple cafeteria plan with respect to which the requirements of this subsection are met for any year shall be treated as meeting any applicable nondiscrimination requirement during such year.

(2) SIMPLE CAFETERIA PLAN.—For purposes of this subsection, the term “simple cafeteria plan” means a cafeteria plan—

(A) which is established and maintained by an eligible employer, and

(B) with respect to which the contribution requirements of paragraph (3), and the eligibility and participation requirements of paragraph (4), are met.

(3) CONTRIBUTION REQUIREMENTS.—

(A) IN GENERAL.—The requirements of this paragraph are met if, under the plan the employer is required, without regard to whether a qualified employee makes any salary reduction contribution, to make a contribution to provide qualified benefits under the plan on behalf of each qualified employee in an amount equal to—

(i) a uniform percentage (not less than 2 percent) of the employee’s compensation for the plan year, or

(ii) an amount which is not less than the lesser of—
(I) 6 percent of the employee’s compensation for the plan year, or

(II) twice the amount of the salary reduction contributions of each qualified employee.

(B) MATCHING CONTRIBUTIONS ON BEHALF OF HIGHLY COMPENSATED AND KEY EMPLOYEES.—The requirements of subparagraph (A)(ii) shall not be treated as met if, under the plan, the rate of contributions with respect to any salary reduction contribution of a highly compensated or key employee at any rate of contribution is greater than that with respect to an employee who is not a highly compensated or key employee.

(C) ADDITIONAL CONTRIBUTIONS.—Subject to subparagraph (B), nothing in this paragraph shall be treated as prohibiting an employer from making contributions to provide qualified benefits under the plan in addition to contributions required under subparagraph (A).

(D) DEFINITIONS.—For purposes of this paragraph—

(i) SALARY REDUCTION CONTRIBUTION.—The term “salary reduction contribution” means, with respect to a cafeteria plan, any amount which is contributed to the plan at the election of the employee and which is not includible in gross income by reason of this section.

(ii) QUALIFIED EMPLOYEE.—The term “qualified employee” means, with respect to a cafeteria plan, any employee who is not a highly compensated or key employee and who is eligible to participate in the plan.

(iii) HIGHLY COMPENSATED EMPLOYEE.—The term “highly compensated employee” has the meaning given such term by section 414(q).

(iv) KEY EMPLOYEE.—The term “key employee” has the meaning given such term by section 416(i).

(4) MINIMUM ELIGIBILITY AND PARTICIPATION REQUIREMENTS.—

(A) IN GENERAL.—The requirements of this paragraph shall be treated as met with respect to any year if, under the plan—

(i) all employees who had at least 1,000 hours of service for the preceding plan year are eligible to participate, and

(ii) each employee eligible to participate in the plan may, subject to terms and conditions applicable to all participants, elect any benefit available under the plan.

(B) CERTAIN EMPLOYEES MAY BE EXCLUDED.—For purposes of subparagraph (A)(i), an employer may elect to exclude under the plan employees—

(i) who have not attained the age of 21 before the close of a plan year,

(ii) who have less than 1 year of service with the employer as of any day during the plan year,

(iii) who are covered under an agreement which the Secretary of Labor finds to be a collective bargaining agreement if there is evidence that the benefits covered under the cafeteria plan were the subject of good

faith bargaining between employee representatives and the employer, or

(iv) who are described in section 410(b)(3)(C) (relating to nonresident aliens working outside the United States).

A plan may provide a shorter period of service or younger age for purposes of clause (i) or (ii).

(5) **ELIGIBLE EMPLOYER.**—For purposes of this subsection—

(A) **IN GENERAL.**—The term “eligible employer” means, with respect to any year, any employer if such employer employed an average of 100 or fewer employees on business days during either of the 2 preceding years. For purposes of this subparagraph, a year may only be taken into account if the employer was in existence throughout the year.

(B) **EMPLOYERS NOT IN EXISTENCE DURING PRECEDING YEAR.**—If an employer was not in existence throughout the preceding year, the determination under subparagraph (A) shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current year.

(C) **GROWING EMPLOYERS RETAIN TREATMENT AS SMALL EMPLOYER.**—

(i) **IN GENERAL.**—If—

(I) an employer was an eligible employer for any year (a “qualified year”), and

(II) such employer establishes a simple cafeteria plan for its employees for such year,

then, notwithstanding the fact the employer fails to meet the requirements of subparagraph (A) for any subsequent year, such employer shall be treated as an eligible employer for such subsequent year with respect to employees (whether or not employees during a qualified year) of any trade or business which was covered by the plan during any qualified year.

(ii) **EXCEPTION.**—This subparagraph shall cease to apply if the employer employs an average of 200 or more employees on business days during any year preceding any such subsequent year.

(D) **SPECIAL RULES.**—

(i) **PREDECESSORS.**—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(ii) **AGGREGATION RULES.**—All persons treated as a single employer under subsection (a) or (b) of section 52, or subsection (n) or (o) of section 414, shall be treated as one person.

(6) **APPLICABLE NONDISCRIMINATION REQUIREMENT.**—For purposes of this subsection, the term “applicable nondiscrimination requirement” means any requirement under subsection (b) of this section, section 79(d), section 105(h), or paragraph (2), (3), (4), or (8) of section 129(d).

(7) **COMPENSATION.**—The term “compensation” has the meaning given such term by section 414(s).

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

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

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DISSENTING VIEWS

H.R. 6313 Responsible Additions and Increases to Sustain Employee Health Benefits Act of 2018

H.R. 6313 (Stivers, R-OH) allows individuals to rollover Flexible Spending Account (FSA) contributions.

H.R. 6313 does not undo sabotage, premium hikes, and benefit cuts Republicans have caused over the past 18 months. This bill was one in a series of 11 bills the Committee marked up that Republicans claim will help lower health care costs for consumers. This legislation does not undo the disruption and sabotage the Republicans have continued to inflict on the American health care system. Instead of focusing on expansion of tax-preferred accounts, Democrats encourage the Committee to redirect its attention to legislation that could actually ensure that uninsured, low-income, and vulnerable people have real access to care. For example H.R. 5155, sponsored by Reps. Pallone, Neal, and Scott would protect people with pre-existing conditions, help lower premiums for Americans, and improve affordability of health coverage.

The Joint Committee on Taxation (JCT) estimates the cost of this bill to be \$634 million over 10 years. Altogether the 11 bills the Committee marked up would add another \$92 billion in unoffset tax cuts to the deficit. With these bills, Republicans are adding more tax cuts and increasing the deficit. Republicans are using the deficit, which they keep making larger with cuts for the wealthy, to justify the deep cuts they plan to make to Medicare and Medicaid. Republicans already are proposing to cut Medicare and Medicaid by nearly a trillion dollars to try to pay for the tax cuts they have already enacted. This bill will only increase Republicans' call for further cuts to these critical programs.

RICHARD E. NEAL,
Ranking Member.

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