

**CHOOSING A NEW HEALTH PLAN DESIGN?
DIFFERENCES AMONG HRAs, HSAs AND FSAs
BEYOND THE BASICS**

ABA Joint Committee on Employee Benefits

ERISA Basics National Institute

May 10-12, 2006

By:

**Greta E. Cowart, Esq.
Haynes and Boone, LLP
901 Main Street, Suite 3100
Dallas, TX 75202
214-651-5000**

and

**T. David Cowart, Esq.
Jenkins & Gilchrist, A Professional Corporation
1445 Ross Avenue, Suite 3200
Dallas, TX 75202
214-855-4500**

Prepared March 17, 2006

Caveat: This chart summarizes some of the differences between (1) a health reimbursement account under Revenue Ruling 2002-41, 2002-2 C.B. 75, and Notice 2002-45, 2002-2 C.B. 93 ("HRA"), (2) a health savings account under section 223 of the Internal Revenue Code of 1986, as amended ("Code"), and principally, Notice 2004-2, 2004-1 C.B. 269 and Notice 2004-50, 2004-33 I.R.B. 196 (August 16, 2004) ("HSA") and (3) a health plan that is a flexible spending arrangement under sections 105 and 106 of the Code and Proposed Treasury Regulation section 1.125-2, Q&A-7. The chart also summarizes the impact of the amendment to Regulation E issued by the Federal Reserve Board¹ governing electronic fund transfers on debit cards on each type of account and includes Field Assistance Bulletin 2004-1 (April 17, 2004) and Advisory Opinion 2004-09A (December 22, 2004) issued by the Department of Labor. No one should rely on this chart as legal advice. In every situation, the application of the rules requires careful analysis by a counsel who is familiar with your particular situation.

This chart summarizes some of the guidance issued through February 28, 2005 and related issues. It is not intended to cover all issues, but only to consider how other laws may interact with the various arrangements.

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
1. Is a High Deductible Health Plan ("HDHP") ² required?	No	Yes, and the coverage must be the only coverage on the first day of the month for the individual to be eligible to make a contribution for that month.	No

¹ 69 Fed. Reg. 55996 (September 17, 2004).

² HDHP Rules. The HDHP must have a deductible of at least \$1,000 single and \$2,000 family, but the out-of-pocket maximum cannot exceed \$5,000 single and \$10,000 family. No coverage is allowed before the deductible other than preventive care.

Family HDHP coverage is coverage other than HDHP coverage for only one person; it must cover one eligible individual and at least one other individual. Only one family member must be an eligible individual covered only by HDHP coverage for the family to be eligible to contribute to an HSA.

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
2. Is the arrangement an employer-sponsored plan subject to ERISA?	Yes	The determination of whether the arrangement is an employer-sponsored plan subject to ERISA will dictate the answer to many later questions. Under Field Assistance Bulletin 2004-1, ³ an HSA can avoid being an employee welfare plan	Yes

The HDHP may impose a reasonable (\$1,000,000 is reasonable) lifetime limit, and amounts above the lifetime limits are not treated as amounts above the annual out-of-pocket maximum. The HDHP may also provide annual or lifetime limits on specific benefits, and amounts above such limits are not subject to the out-of-pocket maximum limit, if significant other benefits remain after the benefit limit is met.

A plan without limits on out-of-pocket expenses expressly in its terms cannot be a HDHP. A “usual and customary expense” limit is permitted. If the plan includes embedded deductibles, the plan must limit the out-of-pocket expenses in order for it to be a HDHP, so if each individual must satisfy a \$1,000 deductible before the family deductible is met, the plan does not pay 100% once the \$10,000 out-of-pocket maximum is satisfied, and one person incurs \$10,000 of expenses, the plan must begin to pay at 100% even if the other family members had not satisfied their individual deductibles. The out-of-pocket maximum for a HDHP must include amounts paid toward the deductibles, co-payments and other amounts, but does not include premiums, amounts for non-covered expenses, amounts in excess of usual and customary fees, and penalties. Penalties for failure to pre-certify in the form of dollar penalties or increased coinsurance do not count toward satisfaction of the out-of-pocket maximum.

For months before January 1, 2005, a health plan that would be a HDHP, but for its lack of an express maximum on payments above the deductible will be treated as complying with the out-of-pocket maximum limit and as a HDHP. For months before January 1, 2006, health plans that would be HDHPs but for the fact its deductible is not computed on a 12 month basis will be treated as a HDHP if the plan was in effect or submitted for approval to state insurance regulators as of August 16, 2004.

If an employer changes health plans mid-year, it may credit amounts expended under the prior plan without preventing the new plan from qualifying as a HDHP. This includes changes from single to family coverage under a HDHP and crediting amounts from earlier in the year. A state high risk pool can qualify as a HDHP if it meets the requirements.

³ April 7, 2004.

Feature	<p align="center">HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>	<p align="center">HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>	<p align="center">FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>
		<p>under ERISA if there is no employer involved, or if there is an employer involved, the employer does not contribute to it, employee participation is voluntary, no employer endorsement is made and the employer is paid only for reasonable payroll deduction expenses.</p> <p>An HSA with employer contributions may avoid being an ERISA plan so long as the employee's establishment of the HSA is completely voluntary, and the employer does not (1) limit the ability of the eligible employees to move funds to another HSA other than as restricted by the Code, (2) impose conditions on using HSA funds beyond those imposed by the Code, (3) make or influence the investment decisions with respect to funds contributed to the HSA, (4) represent the HSA is an employee</p>	

⁴ Field Assistance Bulletin 2004-1. Field Assistance Bulletin 2004-1 makes it clear, however, that the HSA's status as an employee welfare benefit plan under ERISA does not affect whether the accompanying high deductible health plan, if sponsored by the employer, is an employee welfare benefit plan as a group health plan.

Feature	<p align="center">HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>	<p align="center">HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>	<p align="center">FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>
		<p>welfare benefit plan established or maintained by the employer, or (5) receive any payment or compensation in connection with the HSA.</p> <p>Conditions on contributions that are required to satisfy the Code's requirements are okay. The employer may limit its activity to forwarding of contributions through its payroll to one HSA provider (or a limited number of providers), as long as the employer does not restrict the employee's ability to move funds to another HSA beyond the Code's restrictions.⁴</p> <p>Imposing plan design type restrictions (e.g., limiting reimbursements to co-pays, deductibles and co-insurance for items covered by the HDHP) on uses of HSA funds may take the HSA outside of the parameters of Field Assistance Bulletin 2004-1.</p>	

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
3. Is it a group health plan under the Code?	Yes. It also must be an accident or health plan under sections 105 and 106 of the Code.	It depends – are there contributions by an employer or an employee organization? If not, it is not a group health plan under Code section 5000(b)(1). It is not required to be an accident or health plan under Code sections 105 and 106. Taxation of reimbursements from an HSA are governed by Code section 223 and not Code sections 105 or 106, and do not rely on the Code section 105(b) exclusion.	Yes. It also must be an accident or health plan under sections 105 and 106 of the Code.
4. Is employer involvement required?	Yes	No	Yes
5. May employees be given the choice between a HDHP and a non-HDHP and still be eligible?	Yes	Yes, if the employee is otherwise an eligible individual, the choice between a HDHP and a non-HDHP alone will not change his eligibility, as long as his only actual, selected coverage is the HDHP. A cafeteria plan that offers HSAs may use the Section 125 negative election rules with respect to the choice of the HSA.	Yes

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
6. Is there a stated dollar contribution limit?	No	Yes. Employer contributions to HSAs, if any, must be "comparable." Employers must determine if the employee is covered by a HDHP, the amount of the deductible and the employee's age before the employer contributes to the HSA on behalf of the employee.	No, unless the FSA imposes one.
7. What is that contribution limit?	No limit (except employer's budget).	1/12 th x lesser of deductible or \$2,600 individual or \$5,150 family. See Notice 2004-50, Q/A 28-35 regarding special rules on the calculation of the limit. See Notice 2005-8 regarding contributions by a partnership to a partner's HSA and regarding contributions by an S corporation to a 2% or greater shareholder employee's HSA.	None, unless the FSA imposes one.
8. Are "comparable contributions" required?	No, but Code section 105(h) nondiscrimination requirements apply to self-funded HRAs.	Yes, except, per Notice 2004-2, when the contributions are made through a cafeteria plan. Code section 4980G provides requirements. The comparable contribution rules as interpreted in	No, but Code sections 105(h) and 125 nondiscrimination requirements apply.

Feature	<p align="center">HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>	<p align="center">HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>	<p align="center">FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>
		<p>Notice 2004-2 impose both a minimum coverage standard and a minimum nondiscriminatory amount standard on employer-funding to HSAs. Comparability is determined on a month by month basis, for each month's contributions for individuals who do not work full-time for a full year, but on a calendar year basis for all others. Comparable contributions must be made only for employees covered by the employer's HDHP. However, if the employer extends HSA contributions to individuals not covered by the employer's HDHP, it must make comparable contributions to all eligible employees. Contributions conditioned on participation in a wellness or disease management program would not satisfy comparability requirements unless all persons participated.</p> <p>Proposed regulation comparable contribution under Code section 4980G were issued at 70 F.R. 50233 (August 26, 2005). However, a</p>	

Feature	<p align="center">HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>	<p align="center">HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>	<p align="center">FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>
		<p>discussion of the proposed regulations is beyond the scope of this chart.</p> <p>Matching employer contributions directly to an HSA do not qualify as comparable contributions unless all eligible employees contribute the same amount to their HSA. If an employer makes matching (or other) HSA contributions through a cafeteria plan, however, those contributions are not subject to the comparability requirements, but under a cafeteria plan are subject to the Code section 125 nondiscrimination rules.</p>	
<p>9. May an employee make pre-tax, salary reduction contributions?</p>	<p>No, it must be funded by employer contributions only.</p>	<p>Yes, plus an above the line deduction is permitted on the individual's Form 1040 if the contribution is made by an individual, is <u>not</u> otherwise pre-tax and is otherwise deductible. A cafeteria plan need not be involved for an employee to make a pre-tax contribution, since the employee is allowed an above the line deduction</p>	<p>Yes, although a cafeteria plan must be involved.</p>

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
		for his contributions. A pre-tax contribution through a 125 plan as a salary deferral contribution may add the benefit of only reduced FICA taxes for the contributing employee (assuming the income tax difference between salary reduction and an above the line deduction for the employee, if any, is minimal).	
10. Is a deduction allowed for individual contributions?	No, individual contributions are not permitted.	Yes, subject to limits.	No, only salary reduction contributions are allowed from participants.
11. Does HIPAA privacy apply?	Yes, it is a group health plan under ERISA, and thus it is a health plan under HIPAA privacy.	For the HSA, the answer depends on if it is a group health plan under ERISA, a health plan under 45 C.F.R. § 160.103 ⁵ or another form of health plan described in the HIPAA privacy regulations and whether the HSA receives protected health information.	Yes, for the same reasons explained for an HRA.

⁵ HIPAA's health plan definition includes an "individual or group plan . . . (viii) An employee welfare benefit plan or any other arrangement that is established or maintained for the purpose of offering or providing health benefits to the employees of two or more employers . . . (xvii) Any other individual or group plan, or combination of individual or group plans, that provides or pays for the cost of medical care . . ." 45 C.F.R. § 160.103 (health plan definition).

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
12. Can an employee eligible for Medicare but not enrolled in Medicare Part A or B be eligible?	Yes, but see Question 43 regarding Medicare secondary payer implications.	Yes, as long as the individual is not enrolled in Medicare and entitled to benefits, his HSA eligibility continues.	Yes, but see Question 43 regarding Medicare secondary payer implications.
13. Does HIPAA security apply?	Yes	It depends on if it is a group health plan for ERISA or a health plan as defined under the HIPAA privacy regulations. ⁶	Yes
14. Does HIPAA EDI (the standard electronic transaction requirement) apply?	Not if the HRA meets the requirements to be a flexible spending account ("FSA") under Code section 106. The Center for Medicare and Medicaid Services stated in a Q&A on its website that an FSA is not subject to electronic standard transaction requirement.	It depends on whether the HSA is a group health plan or a health plan for purposes of the electronic standard transaction regulations.	No, if it satisfies the definition under Code section 106.
15. Does COBRA apply?	Yes	No, per Notice 2004-2, because there is a statutory language providing an exception from Code section 4980B. ⁷ There is no such statutory exception from ERISA's	Maybe, depending on whether the FSA qualifies for the exception in § 54.4980B-2, Q&A-8(b).

⁶ *Id.*

⁷ Code section 106(d)(2) by cross referencing similar rules to those in Code section 106(b)(5) as applicable to the HSAs is where the exception is found. Code section 106(b)(5) is the exception from COBRA for Archer MSAs.

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
		COBRA requirements or the similar requirements in the Public Health Service Act that would exempt an employer-funded HSA from being a group health plan. The application of ERISA's COBRA provisions will depend upon whether the HSA is an "employee welfare benefit plan" providing health benefits under section 213(d) of the Code. ⁸ See question 2 regarding whether an employer-funded HSA is an employee welfare benefit plan subject to ERISA.	
16. Are employer plan design limits permitted (e.g., use is allowed only for items not covered by plan by virtue of deductible or copayment)?	Yes, by drafting the plan document and plan design.	No, the amounts in the HSA must be available to be withdrawn without proof of how the funds are to be used.	Yes
17. Is a prescription Rx drug card benefit permitted before the HDHP deductible is met?	Yes	No. A separate prescription drug plan or rider cannot provide benefits until the minimum annual deductible in the HDHP is met. Rev. Rul. 2004-38, 2004-1 C.B. 717.	Yes

⁸ ERISA § 607(i).

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
		Transitional relief was provided for months prior to January 1, 2006, so that individuals covered by a separate plan or a rider to the HDHP that allowed prescription drug benefits before the minimum deductible of the HDHP is met are eligible individuals and may make HSA contributions for months prior to January 1, 2006. Rev. Proc. 2004-22, 2004-1 C.B. 727.	
18. Does the "use it or lose it" rule apply?	No	No	Yes
19. Is the account nonforfeitable?	Maybe	Yes	No
20. Can an employee rollover the account?	No	Yes, to an Archer MSA or separate HSA. Only one rollover is permitted in a one-year period. Direct trustee to trustee transfers are not subject to the rollover rules.	No

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
21. Can the HDHP plan design continue cost containment design beyond the out-of-pocket maximum, such as requiring payment of (i) a copay per emergency room visit or specialist visit for in-network service visits or (ii) a copay per visit or per prescription for out-of-network services?	Yes	No. For in-network services, once the out-of-pocket maximum for the high deductible health plan is satisfied, the individual must have no further out-of-pocket payments for in-network care. Payments of amounts above usual and customary for non-covered services and in excess of reasonable plan annual or lifetime limits are not treated as violating the out-of-pocket maximum rules. Cost containment may continue for out-of-network services, because there is no required limit on the out-of-pocket maximum in that case.	Yes
22. Can other permitted insurance benefits such as coverage for specific diseases or illness be provided?	Yes.	Yes, provided the “permitted insurance” is provided pursuant to an insurance contract on a fully insured basis. However, where the coverage is provided to fulfill a statutory requirement such as workers’ compensation and any medical benefits that result from the coverage are incidental to the main coverage, the coverage will be treated as insured even if it is self-	Yes

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
		insured. This addresses workers' compensation provided on a self-insured basis under state laws.	
23. What preventative care benefits may the health care coverage provide?	There are no limits on the amount or types of preventative care coverage that can be provided by a group health plan covering the individual at the same time as the HRA.	The preventative care items listed in IRS Notice 2004-23, 2004-1 C.B. 725, may be covered by a HDHP without a qualifying deductible. Notice 2004-23 lists the following as acceptable preventative care within the safe harbor: <ul style="list-style-type: none"> ▪ periodic health evaluations, including tests and diagnostic procedures ordered in connection with routine examinations, such as annual physicals; ▪ routine prenatal and well-child care; ▪ child and adult immunizations; ▪ tobacco cessation programs; ▪ obesity weight-loss programs; and ▪ screening services.⁹ 	There are no limits on the amount or types of preventative care coverage that can be provided by a group health plan covering the individual at the same time as the FSA.

⁹ Preventive Care screenings include: cancer screening for breast cancer (e.g., mammograms), cervical cancer (e.g., pap smear); colorectal cancer, prostate cancer (e.g., PSA test), skin cancer, oral cancer, ovarian cancer, testicular cancer, thyroid cancer; heart and vascular disease screenings for abdominal aortic aneurysm, carotid artery stenosis, coronary heart disease, hemoglobinopathies, hypertension, lipid disorders; infectious disease screenings for bacteriuria, chlamydial infection, gonorrhea, Hepatitis B virus infection, Hepatitis C, Human Immunodeficiency Virus (HIV) infection, Syphilis, Tuberculosis infection; mental health conditions and substance abuse

Feature	<p align="center">HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>	<p align="center">HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>	<p align="center">FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>
		<p>Preventive care does not include any service or benefit intended to treat an existing illness, injury or condition.</p> <p>Notice 2004-50 expanded the definition of allowable preventive care to include (1) treatment of a condition related to a service or screening (e.g., removal of a polyp during colonoscopy done for colon cancer screening) where it would be unreasonable or impracticable to perform another procedure to treat the condition and (2) any treatment is incidental or ancillary to a preventive care screening or service described in Notice 2004-23. Notice 2004-50 also included drugs or medications as preventive care when</p>	

screening for dementia, depression, drug abuse, problem drinking, suicide risk and family violence; metabolic, nutritional and endocrine conditions screening for anemia, iron deficiency, dental and periodontal disease, diabetes mellitus, obesity in adults, thyroid disease; Musculoskeletal disorders screening for osteoporosis; obstetric and gynecological condition screening for bacterial vaginosis in pregnancy, gestational diabetes mellitus, home uterine activity monitoring, neural tube defects, pre-eclampsia, Rh incompatibility, Rubella, Ultrasonography in pregnancy; pediatric conditions screening for child developmental delay, congenital hypothyroidism, lead levels in childhood and pregnancy, phenylketonuria, scoliosis, adolescent idiopathic; and vision and hearing disorders screening for glaucoma, hearing impairment in older adults and newborn hearing.

Feature	<p align="center">HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>	<p align="center">HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>	<p align="center">FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>
		<p>they are taken by a person who has developed risk factors for a disease that has not yet manifested itself or has not yet become clinically apparent (<i>i.e.</i>, it is asymptomatic) or if the drugs are to prevent a recurrence of a disease from which the person has recovered (e.g., cholesterol lowering medications to treat high cholesterol or statins to prevent heart disease or stroke). Drugs or medications that are used as part of procedures providing preventive care are also covered, e.g., drugs used in weight loss or tobacco cessation programs.</p> <p>If a state insurance law requires coverage of a certain benefit without meeting a deductible, the determination of whether that benefit is preventative care for purposes of the preventative care exception for a HDHP is to be based on the standards in Notice 2004-23 and not the state's definition.</p>	

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004-50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
24. Can vision/dental coverage be provided?	Yes, without limit.	Yes	Yes
25. May an Employee Assistance Plan be provided with more services than just referrals only?	Yes, without limit.	Yes, provided it does not provide significant benefits and is not considered a health plan for purposes of Code section 223(c)(1). For purposes of determining whether significant benefits are provided, screening and preventive care discussed in Notices 2004-23 and 2004-50 will be disregarded. Short-term counseling was permitted in the example.	Yes, without limit.

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
26. Is preventive care coverage allowed?	Yes, without limit.	The HSA may reimburse preventive care. The HDHP may cover only preventive care permitted by statute, or by guidance issued by the Secretary of Treasury. The Secretary of Treasury issued guidance in Notice 2004-23 and expanded it further in Notice 2004-50. ¹⁰ See Question 23 above. The statutory reference is to the wrong section of the Social Security Act.	Yes, without limit.
27. May the insured health plan cover state mandated benefits without violating the HDHP requirements?	Yes, without limit.	State mandated benefits that must be provided before the deductible is made and then were required by a state law in effect on January 1, 2004, may be continued without disqualifying the insured policy from being a HDHP for months beginning before January 1, 2006. ¹¹	Yes, without limit.

¹⁰ 2004-1 C.B. 725.

¹¹ Notice 2004-43, 2004-__ C.B. 10.

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
28. Can the participant carryover and accumulate the account balance from year to year?	Yes, if any amount is left.	Yes, if any amount is left.	No
29. Does the arrangement have an exception to the Code section 125 prohibition on deferred compensation?	No	Yes	No
30. Does the "uniform coverage" rule apply?	No	No	Yes
31. Is a summary plan description required?	Yes	Only if it is an employer-sponsored plan subject to ERISA.	Yes
32. Is a Form 5500 required?	Yes, if the exceptions to filing a Form 5500 do not apply.	Only if (1) it is an employer-sponsored plan and (2) no exceptions apply.	Yes, if the exceptions to filing a Form 5500 do not apply.
33. May a health FSA be offered with the option?	Yes, however, the HRA plan document needs to prescribe the ordering of payment in the document; otherwise the HRA pays first and FSA second.	Only in the limited circumstances allowed by Rev. Rul. 2004-45, 2004-1 C.B. 971. Rev. Rul. 2004-45 allows an HSA to be combined with a <i>limited-purpose health FSA</i> that pays or reimburses benefits only for permitted coverage, that is not through insurance and is not for	N/A

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
		long-term care services, and preventative care. A <i>post-deductible health FSA</i> that does not pay or reimburse any medical expense incurred before the HDHP's minimum annual deductible is satisfied may also be offered with an HSA.	
34. May a HRA be offered with the option?	N/A	Only in the limited circumstances allowed under Rev. Rul. 2004-45. In other words, a <i>limited-purpose HRA</i> that pays or reimburses benefits for permitted insurance, permitted coverage or preventive care may be combined with an HSA. A <i>suspended HRA</i> that does not pay or reimburse, ever, any medical expense incurred during the suspension period (other than preventive care, permitted insurance or permitted coverage) is also okay with an HSA, if additional requirements are met. A <i>post-deductible HRA</i> is also allowed with an HSA if it pays or reimburses medical expenses incurred after the HDHP deductible is satisfied. A	Yes, however, the HRA plan document needs to prescribe the ordering of payment in the document; otherwise the HRA pays first and FSA second.

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
		<i>retirement HRA</i> that pays or reimburses only post-retirement medical expenses is the last allowed combination. Rev. Rul. 2004-45.	
35. May all three options be offered together?	Yes, so long as the ordering rules of Rev. Rul. 2004-45 and Notice 2002-45 are followed.	Yes, so long as the ordering rules of Rev. Rul. 2004-45 and Notice 2002-45 are followed, and if HSA contribution eligibility is desired, the allowed combinations described in Rev. Rul. 2004-45 are respected.	Yes, so long as the ordering rules of Rev. Rul. 2004-45 and Notice 2002-45 are followed.
36. Does a custodian/trustee have to be involved to establish the arrangement?	No	Yes	No
37. Is this arrangement funded?	Not required to be funded, but some employers do fund (more frequently seen in union plans).	Yes	Not required to be funded, but some employers do fund (usually using a VEBA).
38. Is the arrangement portable?	No. Employee can only use the account after a COBRA qualifying event, such as employment termination, by paying for COBRA to continue coverage.	Employee can take his HSA and can rollover the account to another HSA or an Archer MSA. The rollover can occur while the employee is still employed.	No

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
39. May the account be used to pay for long-term care insurance?	Yes	Yes (and also the employee share of Part B of Medicare or Medicare HMO premiums and employer-sponsored retiree medical plan premiums), although only eligible long term care premiums up to a limit that is annually adjusted may be paid and excluded from the individual's income. The HSA may pay long-term care premiums even if the HSA is offered through a cafeteria plan, because it is the HSA, not the long term care insurance, that is offered under the cafeteria plan.	Not on a pre-tax basis.
40. May it be used to pay for COBRA coverage?	Yes, if plan design permits.	Yes, and also for health continuation while receiving unemployment compensation.	No
41. May it be used to pay for health insurance premiums?	Yes	Only in limited situations. Notice 2004-50.	No. Proposed Treas. Reg. § 1.125-4T, Q&A 7(b)(4) prohibits using FSA funds to purchase other coverage.
42. Must the arrangement be opened before any expense is incurred?	Yes, it is a group health plan, and as such it must be established before the expense to be reimbursed is	Yes. Notice 2004-2. However, transitional relief was provided for 2004 permitting the establishment of	Yes, for the same reasons explained for an HRA.

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
	incurred (Rev. Rul. 2002-58, 2002-1 C.B. 541).	an HSA for an eligible individual on or before April 15, 2005, for calendar year 2004 to reimburse qualified medical expenses incurred on or after the later of: (1) January 1, 2004, or (2) the first day of the month the individual became eligible to establish an HSA. Notice 2004-25, 2004-1 C.B. 727.	
43. Do the Medicare Secondary Payer ("MSP") rules apply?	Probably yes. HHS's prior letter ruling position ¹² that if the arrangement was within a Code section 125 plan, it would not be subject to MSP, probably would not apply in the context of an HRA, because an HRA cannot be funded with employee funds through a Code section 125 plan. This means you need to explain to participants who are protected by the MSP rules that Medicare may be able to seek payment from the HRA or the individual for claims actually paid by Medicare as the primary plan when Medicare should have been	If the HSA is individually funded and created, no. If it is a group health plan under Code section 5000(b), then yes, unless it is funded by employee contributions through a 125 plan and can successfully argue, based on HHS's prior letter ruling position, that it should not be subject to MSP. However, if employer funded the HSA, it probably is subject to MSP. If the HSA is subject to MSP, this means you need to explain to participants who are protected by the MSP rules that Medicare may be able to seek payment from the HSA or the	No, based on HHS's prior letter ruling position so long as the FSA is not funded with true employer contributions. If the employer funds the FSA, it is probably subject to MSP.

¹² Note the prior letter ruling was only applicable to the entity who received the letter ruling.

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
	secondary to the HRA and the HRA should have paid primary.	individual for claims paid by Medicare as the primary plan when Medicare should have been secondary to the HSA.	
44. Do HIPAA's creditable coverage, special enrollment and nondiscrimination (Code sections 9801-9802) rules apply?	Yes, it is a group health plan.	The answer depends on if the arrangement is a group health plan.	Yes, unless the exception in ERISA Technical Release No. 97-01 at 62 Fed. Reg. 67687 applies.
45. Is an extra contribution during ages 55-65 permitted?	No, unless the employer decides to make the contribution, and the contribution passes the Code section 105(h) nondiscrimination rules.	Permitted, up to \$500/year. However, the employer cannot make the extra contribution for only the age 55-65 employees and satisfy the comparability requirement under Code section 4980G.	No, unless the employer decides to allow it, and both the feature and the contribution pass the applicable Code nondiscrimination rules.
46. Do ERISA's claims procedures applicable to group health plans apply?	Yes	Only if it is an employer-sponsored plan subject to ERISA.	Yes
47. Are over-the-counter medical expenses reimbursable?	Yes, if the HRA plan is drafted to define reimbursable medical expenses as those defined under Code section 213(d). <i>See</i> Rev. Rul. 2003-102, 2003-2 C.B. 559.	Yes, if the HSA custodian agreement or trust is drafted to define reimbursable medical expenses as those defined under Code section 213(d). <i>See</i> Rev. Rul.	Yes, if the FSA is drafted to satisfy Rev. Rul. 2003-102, 2003-2 C.B. 559.

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
		2003-102, 2003-2 C.B. 559. This will depend upon the custodian or vendor selected and the adoption agreement available from such custodian/trustee.	
48. What are the consequences of reimbursement of an improper expense?	Risk entire plan's tax status.	The answer depends on whether the HSA is an individual contract or group plan. In either case, there is a 10% additional tax on the amount withdrawn for the improper expense imposed on the employee.	Risk entire plan's tax status.
49. Are employer contributions subject to FICA or FUTA?	Not subject to FICA or FUTA.	Not subject to FICA or FUTA.	Not subject to FICA or FUTA.
50. Can family members contribute?	No	Yes	No
51. Are earnings/income on amounts in the account exempt from tax?	The earnings are exempt from tax only if the funds for the HRA are held in a voluntary employee beneficiary association trust qualified under Code section 501(c)(9) ("VEBA") and are not UBTI. However, no earnings are required to be credited on the account balance, and in many	Yes, no earnings are taxed. Notice 2004-2 provides amounts are held in IRA-like account. Earnings may be subject to UBIT Code section 223(e)(1).	Only if the funds for the FSA are held in a VEBA and are not UBTI. As is the case with HRAs, however, no earnings must be credited on accumulations, and in most situations, FSAs are only an accounting entry with no earnings to tax.

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
	situations HRAs are only an account balance in accounting records and are not funded, and thus there are no earnings to tax.		
52. Do the VEBA contribution and qualified asset account accumulations limits (Code sections 419-419A) apply?	Only if a VEBA is used.	No	Only if a VEBA is used.
53. What are the consequences of excess contributions?	There are no excess contributions, because no contribution limit applies as long as it is funded solely by employer contributions. Rev. Rul. 2002-41. Only the VEBA limits on contributions may apply if the HRA is funded and not just a bookkeeping entry. If the HRA is unfunded, there is no limit and thus no excess contributions.	A 6% excise tax applies under Code section 4973.	If the FSA provides a contribution limit, an excess contribution can threaten the entire plan's tax status.
54. When is a distribution not taxed?	If it is used for qualified medical expenses incurred after the HRA is established (Code section 213(d)).	If it is used for qualified medical expenses incurred after establishment of HSA (Code section 213(d)) or it is rolled over to another HSA or an Archer MSA. If used for non-qualified expenses, a 10% tax applies under Code section 223(f)(4)	If it is used for qualified medical expenses incurred after the FSA is established (Code section 213(d)).

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
		in addition to the income tax. The qualified medical expense can be for the account beneficiary or the beneficiary's spouse, or dependent children.	
55. Must someone (other than the individual) substantiate whether the funds distributed are used for qualified expenses?	Yes. Plan administrator or its subcontractor must determine in connection with reimbursing the expense.	No, the trustee or custodian is not required to make the determination of whether the use is for a qualified medical expense, but the trustee or custodian may decide by plan design to make such determinations.	Yes. Plan administrator or its subcontractor must determine in connection with reimbursing the expense.
56. What happens to the account on the account beneficiary's death?	COBRA must be offered to qualified beneficiaries. The right to reimbursement from the remaining amount in the account is lost unless the plan design extends coverage or unless the qualified beneficiary elects COBRA.	The account is still an HSA for the surviving spouse; however, for the other descendants the account is no longer an HSA after the account pays the expenses of the decedent's last illness. The fair market value of the account is included in decedent's estate.	Same as the answer for HRAs.
57. Are contributions reported on Form W-2?	No	Yes	Yes

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
58. Are distributions reported on Form 1099?	No. Code section 6041(f).	To be determined. The rules will be similar to those for Archer MSAs.	Yes, for payments made after 2002 through credit cards, debit cards and stored value cards, Rev. Rul. 2003-43, unless prohibited by Code section 6041(f). Notice 2004-16, 2004-9 I.R.B. 527.
59. Is reporting required by the covered individual?	No	Yes	No
60. May debit cards/stored value or credit cards be used?	Yes, provided the requirements of Rev. Rul. 2003-43, 2003-1 C.B. 935, are satisfied. On September 17, 2004, ¹³ the Federal Reserve System issued proposed regulations which include a "payroll card account" directly or indirectly established by an employer on behalf of a consumer to which electronic fund transfers of the consumer's wages, salary or other employee compensation are made on a recurring basis in the definition of an account subject to regulation	Yes, provided the requirements of Rev. Rul. 2003-43, 2003-1 C.B. 935, are met and HSAs are considered analogous to HRAs or FSAs. However, if the restrictions in the custodial or trust agreements prohibit the issuance of debit cards on such accounts, debit cards may not be available. Rev. Rul. 2003-43 by its express terms applies only to health reimbursement accounts and health flexible spending accounts. On September 17, 2004, ¹⁴ the Federal Reserve System issued	Yes, provided the requirements of Rev. Rul. 2003-43, 2003-1 C.B. 935, are satisfied. On September 17, 2004, ¹⁵ the Federal Reserve System issued proposed regulations which include a "payroll card account" directly or indirectly established by an employer on behalf of a consumer to which electronic fund transfers of the consumer's wages, salary or other employee compensation are made on a recurring basis in the definition of an account subject to regulation

¹³ 69 Fed. Reg. 55996 (2004).

¹⁴ 69 Fed. Reg. 55996 (2004).

¹⁵ 69 Fed. Reg. 55996 (2004).

Feature	<p align="center">HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>	<p align="center">HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004-50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>	<p align="center">FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)</p>
	<p>under Regulation E. Regulation E requires issuance of periodic (monthly) account statements, initial notices, error resolution procedures and other consumer protections. This proposed change to Regulation E, however, did not change the exemptions or exceptions to Regulation E's application, which should be reviewed when the arrangement is structured for exemptions from the monthly debit card statement and other requirements.</p>	<p>proposed regulations which include a "payroll card account" directly or indirectly established by an employer on behalf of a consumer to which electronic fund transfers of the consumer's wages, salary or other employee compensation are made on a recurring basis in the definition of an account subject to regulation under Regulation E. Regulation E requires issuance of periodic (monthly) account statements, initial notices, error resolution procedures and other consumer protections. This proposed change to Regulation E, however, did not change the exemptions or exceptions to Regulation E's application, which should be reviewed when the arrangement is structured for exemptions from the monthly debit card statement and other requirements.</p> <p>Some of the persons involved in issuing the guidance on HSAs have orally indicated that it is their</p>	<p>under Regulation E. Regulation E requires issuance of periodic (monthly) account statements, initial notices, error resolution procedures and other consumer protections. This proposed change to Regulation E, however, did not change the exemptions or exceptions to Regulation E's application, which should be reviewed when the arrangement is structured for exemptions from the monthly debit card statement and other requirements.</p>

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
		personal position, not the official agency position, that the HSA funds cannot be solely accessible by using a debit card.	
61. Is the account divisible upon divorce?	This is a plan design and drafting issue.	Yes	This is a plan design and drafting issue.
62. Does the arrangement provide any incentive for employee retention?	Yes	No, because the account is the employee's and the employee may withdraw the amounts as soon as they are deposited, like a SEP, or take the account when she leaves.	Yes
63. Can plan design provide for accruals by pay period or monthly instead of annually?	Yes	Yes, it must, because the deduction for the contribution is permissible only if the only coverage the individual has <i>for the month</i> is a high deductible health plan.	Yes
64. Can the individual have a balance in an alternative plan that carries over from a prior year?	Yes	No, that would be coverage beyond the HDHP, unless the guidelines in Question 31 above are satisfied.	Yes

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
65. Can the individual be entitled to Medicare?	Yes	No, once entitled or actually enrolled, the individual is no longer eligible. Once an individual applies for Social Security benefits, Medicare Part A benefits are automatic, and eligibility for an HSA terminates.	Yes
66. Can the individual have long-term care insurance?	Yes	Yes	Yes, outside of the FSA.
67. Can the individual have prescription drug coverage?	Yes	No, unless there is no coverage until the high deductible is met.	Yes
68. Can the individual maintain separate, specific disease or illness policies such as cancer insurance policies or hospitalization policies that pay a set dollar amount per day hospitalized?	Yes	Yes, as long as it is fully insured. See also Question 22 above.	Yes, although the premiums for such policies may not be reimbursed out of the FSA.

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
69. Can the individual have other coverages available from the employer, e.g., both a HDHP and a low deductible plan are offered?	Yes	Yes. The individual's eligibility depends on which coverage he actually elects.	Yes
70. Is an individual who is eligible for Medicare, but not enrolled and entitled to Medicare eligible to make catch-up contributions?	Yes	Yes, as long as the individual has not enrolled in Medicare Part A or B and is otherwise eligible to contribute, he is eligible to make catch up contributions.	Yes
71. Is a government employee who is enrolled in Medicare Part B but not Part A (hospital services) eligible?	Yes	No	Yes
72. Is an individual who is eligible for VA medical benefits, but who has not actually received any benefits in the preceding three months eligible to participate in an HSA?	Yes	Yes, however if the individual receives VA benefits at any time in the preceding three months, he is not eligible to make contributions to the HSA for that month.	Yes

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
73. Can an individual who is eligible for TRICARE (health care program for active duty and retired military) benefits and is also covered by a HDHP participate in an HSA?	Yes	No, because TRICARE coverage exceeds the limits on HDHP coverage.	Yes
74. Is an individual whose only coverage is a HDHP, but who also has a discount card (including a pharmacy discount card) enabling the individual to access network services or products at the managed care discount eligible for an HSA?	Yes	Yes, as long as no benefits are provided or paid prior to satisfying the deductible.	Yes
75. Can a disease management or wellness program be provided?	Yes	Yes, as long as the disease management or wellness program does not provide significant benefits in the nature of medical care or treatment, other than preventive care services or diagnostic screening. Permitted benefits included monitoring lab results, case monitoring, coordination of care and treatment, telephone contacts and web-based reminders of health care schedules and providing information	Yes

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
		to minimize risks. A wellness program that provides education and fitness, services, recreation activities, stress management and health screenings was also acceptable.	
76. Who may make contributions to the arrangement?	Only employer contributions may fund an HRA.	Any person may make contributions to the HSA for an eligible individual. A state government may contribute to an HSA for an eligible individual covered under the state's high risk health plan.	An employer or an employee may contribute to a FSA.
77. Can a distribution as the result of a mistake of fact for reasonable cause be reversed?	No provision currently addresses this.	If the account beneficiary repays the mistaken distribution to the HSA and there is convincing evidence the distribution was due to a mistake of fact for reasonable cause and the amount is repaid prior to April 15 following the first year the account beneficiary knew or should have known, then the account beneficiary is not taxed on the distribution and it is not subject to the 10% additional tax.	No provision currently addresses this.

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
78. If both spouses have accounts, can one spouse's account pay the Section 213(d) medical expenses of the other?	Yes, it may reimburse the spouse's expenses if the plan design so permits.	Yes, as long as the medical expense is not reimbursed by the spouse's HSA.	Yes, if the plan design permits.
79. If the medical expense is incurred in the current year, when must a distribution be requested?	This depends on the HRA plan design.	The distribution can be deferred to later taxable years as long as the expenses were incurred after the HSA was established.	Only medical expenses incurred in the current plan year can be reimbursed.
80. Can distributions be used to pay for long term care services under Section 106(c)?	Yes, if the plan design permits.	Yes, because although Code section 106(c) applies to benefits provided by a flexible spending account, it does not apply to HSA distributions. The long term care services must be for the account beneficiary, his spouse or dependents.	No. Code section 106(c). Also, Prop. Treas. Reg. § 1.125-4T Q&A 7(b)(4) prohibits a health flexible spending account from reimbursing other health coverage.
81. May the funds be used by a retiree age 65 or older to pay the retiree's premium for employer-provided retiree medical coverage?	Yes, if the plan design permits the usage and continuation of the account into retirement.	Yes. Although medical insurance coverage is not generally a qualified medical expense under Code section 223(d)(2)(B). Code section 223(d)(2)(C)(iv) permits paying for health insurance after the account beneficiary attains age 65.	No. FSAs are only available to employees, and Prop. Treas. Reg. § 1.125-4T Q&A 7(b)(4) prohibits a health flexible spending account from reimbursing other health coverage.

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
82. May an individual with ESRD or who is disabled pay for health insurance with distributions?	It depends on the plan design.	No	No. Prop. Treas. Reg. § 1.125-4T Q&A 7(b)(4) prohibits a health flexible spending account from reimbursing other health coverage.
83. May distributions be obtained to reimburse Medicare premiums paid by a retiree?	It depends on whether retirees can continue HRA coverage after retirement.	Yes	No, it is only available to employees, not retirees, and insurance premiums are not reimbursable under Prop. Treas. Reg. § 1.125-4T Q&A 7(b)(4), which prohibits a health FSA from reimbursing other coverage.
84. Do the cafeteria plan's rules regarding a mandatory 12-month period of coverage apply?	Yes, if the HRA is offered in conjunction with a health plan offered only through a cafeteria plan.	No, but if the employee contributes to the HSA on a pre-tax basis through a cafeteria plan, all election changes as to the HSA contribution must be made prospectively on a month by month basis. This is consistent with the determination of the individual's eligibility to contribute to an HSA.	Yes
85. Can the option be offered mid-year as a new benefit under the employer's cafeteria plan?	Yes. It still must be funded with only employer contributions.	Yes	Yes

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004-50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
<p>86. If the employee requests reimbursements beyond the employee's contributions or current account balance, must the request be reimbursed in full?</p>	<p>No, only to the account limit, unless plan design permits advances.</p>	<p>No, but Notice 2004-50 allows an employer who offers the HSA through its cafeteria plan to offer an accelerated employer contribution as an advance, so long as the plan document provides for this advance, the advance meets the applicable prohibited transaction exemption under ERISA and the Code, and the employer obeys the strict limits on its recoupment rights.</p>	<p>Yes, up to annual coverage limit, reduced by prior reimbursements for the same plan year.</p>
<p>87. Is the account, or an advance to the account, subject to prohibited transaction rules?</p>	<p>Yes, under ERISA, like any other ERISA welfare plan. The Code's prohibited transaction rules do not apply.</p>	<p>Yes. HSAs are subject to prohibited transaction rules similar to the rules in Code sections 408(e)(2) and (4). An example of how the Code's prohibited transaction rules might apply is illustrated in Advisory Opinion 2004-09A, which held that incentives offered to establish HSAs would not be prohibited transactions, if the specified conditions were met.</p>	<p>Not the Code's prohibited transaction rules, because the Code rules only apply to retirement plans. If ERISA applies to the FSA, ERISA's prohibited transaction rules can apply, depending in part on whether the FSA's assets are plan assets under ERISA Technical Release 92-01.</p>

Feature	HRA (Rev. Rul. 2002-41, Notice 2002-45 and Proposed Amendment to Regulation E by the Federal Reserve Board)	HSA (Code § 223, Notice 2004-2, Rev. Rul. 2004-38, Rev. Rul. 2004-45, Rev. Proc. 2004-22, Notice 2004-23, Notice 2004-25, Field Assistance Bulletin 2004-1, Notice 2004-43, Notice 2004- 50, Advisory Opinion 2004-09A and Proposed Amendment to Regulation E by the Federal Reserve Board)	FSA (Code §§ 105, 106, Proposed Treasury Regulation § 1.125-2 and Proposed Amendment to Regulation E by the Federal Reserve Board)
88. Can the frequency or the amount of the distributions be restricted?	Yes, by plan design and they must be restricted to Code section 213(d) medical expenses.	Yes, but they cannot be restricted to use for medical expenses or by requiring substantiation of the use.	Yes, by plan design. They must be restricted to use for Code section 213(d) medical expenses.

INDEX TO QUESTIONS

Requirements

1. Is a High Deductible Health Plan required?
4. Is employer involvement required?
12. Can an employee eligible for Medicare but not enrolled in Medicare Part A or B be eligible?
18. Does the "use it or lose it" rule apply?
19. Is the account nonforfeitable?
20. Can an employee rollover the account?
22. Can other permitted insurance benefits such as coverage for specific diseases or illness be provided?
25. May an Employee Assistance Plan be provided with more services than just referrals only?
33. May a health FSA be offered with the option?
34. May a HRA be offered with the option?
35. May all three options be offered together?
36. Does a custodian/trustee have to be involved to establish the arrangement?
37. Is this arrangement funded?
42. Must the arrangement be opened before any expense is incurred?
43. Do the Medicare Secondary Payer ("MSP") rules apply?
65. Can the individual be entitled to Medicare?
66. Can the individual have long-term care insurance?
67. Can the individual have prescription drug coverage?
68. Can the individual maintain separate, specific disease or illness policies such as cancer insurance policies or hospitalization policies that pay a set dollar amount per day hospitalized?
69. Can the individual have other coverages available from the employer, e.g., both a HDHP and a low deductible plan are offered?
70. Is an individual who is eligible for Medicare, but not enrolled and entitled to Medicare eligible to make catch-up contributions?
71. Is a government employee who is enrolled in Medicare Part B but not Part A (hospital services) eligible?

72. Is an individual who is eligible for VA medical benefits, but who has not actually received any benefits in the preceding three months eligible to participate in an HSA?
73. Can an individual who is eligible for TRICARE (health care program for active duty and retired military) benefits and is also covered by a HDHP participate in an HSA?
74. Is an individual whose only coverage is a HDHP, but who also has a discount card (including a pharmacy discount card) enabling the individual to access network services or products at the managed care discount eligible for an HSA?

High Deductible Health Plan Requirements

16. Are employer plan design limits permitted (e.g., use is allowed only for items not covered by plan by virtue of deductible or copayment)?
17. Is a prescription Rx drug card benefit permitted before the HDHP deductible is met?
21. Can the HDHP plan design continue cost containment design beyond the out-of-pocket maximum, such as requiring payment of (i) a copay per emergency room visit or specialist visit for in-network service visits or (ii) a copay per visit or per prescription for out-of-network services?
23. What preventative care benefits may the health care coverage provide?
24. Can vision/dental coverage be provided?
26. Is preventive care coverage allowed?
27. May the insured health plan cover state mandated benefits without violating the HDHP requirements?
75. Can a disease management or wellness program be provided?

Nature of an Arrangement

- 29. Does the arrangement have an exception to the Code section 125 prohibition on deferred compensation?
- 30. Does the "uniform coverage" rule apply?
- 37. Is this arrangement funded?
- 38. Is the arrangement portable?
- 62. Does the arrangement provide any incentive for employee retention?

Contributions

6. Is there a stated dollar contribution limit?
7. What is that contribution limit?
8. Are "comparable contributions" required?
9. May an employee make pre-tax, salary reduction contributions?
45. Is an extra contribution during ages 55-65 permitted?
49. Are employer contributions subject to FICA or FUTA?
50. Can family members contribute?
52. Do the VEBA contribution and qualified asset account accumulations limits (Code sections 419-419A) apply?
53. What are the consequences of excess contributions?
76. Who may make contributions to the arrangement?

Deductions

10. Is a deduction allowed for individual contributions?

Use of Funds

39. May the account be used to pay for long-term care insurance?
40. May it be used to pay for COBRA coverage?
41. May it be used to pay for health insurance premiums?
47. Are over-the-counter medical expenses reimbursable?
48. What are the consequences of reimbursement of an improper expense?
54. When is a distribution not taxed?
55. Must someone (other than the individual) substantiate whether the funds distributed are used for qualified expenses?
77. Can a distribution as the result of a mistake of fact for reasonable cause be reversed?
78. If both spouses have accounts, can one spouse's account pay the Section 213(d) medical expenses of the other?
79. If the medical expense is incurred in the current year, when must a distribution be requested?
80. Can distributions be used to pay for long term care services under Section 106(c)?
81. May the funds be used by a retiree age 65 or older to pay the retiree's premium for employer-provided retiree medical coverage?
82. May an individual with ESRD or who is disabled pay for health insurance with distributions?
83. May distributions be obtained to reimburse Medicare premiums paid by a retiree?
86. If the employee requests reimbursements beyond the employee's contributions or current account balance, must the request be reimbursed in full?
87. Is the account, or an advance to the account, subject to prohibited transaction rules?
88. Can the frequency or the amount of the distributions be restricted?

Reporting Requirements

2. Is the arrangement an employer-sponsored plan subject to ERISA?
31. Is a summary plan description required?
32. Is a Form 5500 required?
57. Are contributions reported on Form W-2?
58. Are distributions reported on Form 1099?
59. Is reporting required by the covered individual?

Operational Requirements

2. Is the arrangement an employer-sponsored plan subject to ERISA?
3. Is it a group health plan under the Code?
5. May employees be given the choice between a HDHP and a non-HDHP and still be eligible?
11. Does HIPAA privacy apply?
13. Does HIPAA security apply?
14. Does HIPAA EDI (the standard electronic transaction requirement) apply?
15. Does COBRA apply?
33. May a health FSA be offered with the option?
34. May a HRA be offered with the option?
35. May all three options be offered together?
36. Does a custodian/trustee have to be involved to establish the arrangement?
42. Must the arrangement be opened before any expense is incurred?
43. Do the Medicare Secondary Payer ("MSP") rules apply?
44. Do HIPAA's creditable coverage, special enrollment and nondiscrimination (Code sections 9801-9802) rules apply?
46. Do ERISA's claims procedures applicable to group health plans apply?
48. What are the consequences of reimbursement of an improper expense?
49. Are employer contributions subject to FICA or FUTA?
51. Are earnings/income on amounts in the account exempt from tax?
56. What happens to the account on the account beneficiary's death?
60. May debit cards/stored value or credit cards be used?
61. Is the account divisible upon divorce?
63. Can plan design provide for accruals by pay period or monthly instead of annually?
64. Can the individual have a balance in an alternative plan that carries over from a prior year?
84. Do the cafeteria plan's rules regarding a mandatory 12-month period of coverage apply?

85. Can the option be offered mid-year as a new benefit under the employer's cafeteria plan?
86. If the employee requests reimbursements beyond the employee's contributions or current account balance, must the request be reimbursed in full?
87. Is the account, or an advance to the account, subject to prohibited transaction rules?
88. Can the frequency or the amount of the distributions be restricted?

D-1332656.3