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As reported earlier, under the Affordable Care Act, health plans will be assessed a fee used to research the clinical effectiveness of medical treatments, procedures and drugs (the “Research Fee”). Health plans will be assessed the Research Fee for plan years beginning on or after November 1, 2011 (for calendar year plans, this means the 2012 plan year). The Research Fee will no longer apply for plan years beginning on or after November 1, 2018.

Generally speaking, most group health plans will be required to pay the Research Fee. Although HSAs and Archer MSAs are not subject to the fee, there is no broad exclusion for HRAs or health FSAs. However, certain HRAs and FSAs may be able to escape this requirement if they are considered to be excepted benefits (discussed below). In general, most HRAs will be subject to the Research Fee, while FSAs will not. This may or may not influence employers when determining which type of plan to offer their employees.

### How Much is the Research Fee?

The fee is \$1 in the first year (and \$2 in the second year) multiplied by the average number of lives covered by the group health plan or policy. The fee will be adjusted for inflation in subsequent years. As we previously reported, there are several methods to determine the average number of lives: actual count, snapshot and Form 5500 methods.

### FSA vs. HRA

Since most FSAs won't have to pay the Fee, should employers switch their HRAs to FSAs because of the Research Fee requirement? The answer is not that simple and certainly should not hinge on a nominal fee imposed by this new requirement. Employers need to evaluate which plan type is better for them and take all things into consideration, including the differences between the two types of plans, as well as other requirements imposed under health reform, such as the new FSA limit for 2013. Below you will find a more detailed discussion concerning the requirement to pay the Fee for FSAs and HRAs.

### How does the Research Fee Apply to FSAs and HRAs?

As discussed above, FSAs and HRAs are not specifically excluded from the Research Fee requirement. However, if the health FSA or HRA is considered a HIPAA-excepted benefit, it would not have to pay the Fee. HIPAA-excepted group health plan benefits are certain limited-scope dental or vision benefits, coverage for on-site medical clinics, certain benefits for long-term care and certain accident benefit.

## Are FSAs Excepted Benefits?

In simple terms, benefits provided under a health FSA are HIPAA-excepted benefits to the extent that:

- the employer does not make a contribution towards the FSA;
- the employee has other coverage available under the employer's group health plan; and
- that other coverage is not limited to "excepted benefits."

In most instances, these conditions will be met and the health FSA will not be required to pay the Research Fee.

## Are HRAs Excepted Benefits?

HRAs, as the annual value typically exceeds \$500, generally will not be considered excepted benefits and will be subject to the Research Fee. When an HRA is offered with a fully insured medical plan, as discussed more fully below, when counting covered lives, the plan sponsor may treat each participant's HRA as covering a single covered life; the plan sponsor is not required to include as covered lives any spouse, dependent, or other beneficiary of the individual participant in the HRA, as applicable.

## HRAs Offered with Other Plans -- is the Research Fee Paid Twice on the Same Individuals?

Maybe, but if that other plan is also a self-insured plan, maybe not.

The Proposed Regulations provide that multiple self-insured arrangements established and maintained by the same plan sponsor and with the same plan year are subject to a single fee. Thus, an HRA that is integrated with a self-insured plan providing major medical coverage will not incur a separate fee specific to the HRA if the HRA and plan are established or maintained by the same plan sponsor.

However, it's not often that we see two self-insured plans together in that way. Typically we see most employers offer HRAs with a fully insured underlying health plan. An HRA that is integrated with a fully insured group health plan (even if maintained by the same plan sponsor) is treated as an applicable self-insured health plan and is subject to the Research Fee, payable by the plan sponsor. The insurer of the fully insured plan is subject to the fee for health insurers. In essence, in this situation the Research Fee is being paid twice on the same individuals, with the carrier paying for the

insured plan and the employer paying for the self-insured HRA plan. Although the carrier pays the Fee, we will likely see the cost passed along in premiums for the plan.

## How is the Research Fee Reported and Paid by Employers?

Insurance carriers will pay the Fee on behalf of fully insured plans, but we can expect them to simply pay the Fee and pass on the cost in premium. For self-insured plans, the plan sponsors (generally the employers) are required to pay the Fee. Plan sponsors of self-insured plans will file Form 720 "Quarterly Federal Excise Tax Return." The IRS is in the process of updating and adapting Form 720 to be used for this new annual reporting requirement. The return must be filed by July 31 of the calendar year immediately following the last day of the plan year (e.g., a return for the year ending on December 31, 2012 must be filed by July 31, 2013). Third-party administrators are not permitted to report or pay fees on behalf of plan sponsors.