

**SAMPLE FLEXIBLE BENEFITS PLAN AMENDMENT
AND SUMMARY OF MATERIAL MODIFICATIONS
ADOPTING CARRYOVER AS PERMITTED BY IRS NOTICE 2013—71
(Plans That Currently Have Grace Period)**

Caution: The attached sample amendment and Summary of Material Modifications provides sample language to allow, in accordance with IRS Notice 2013-71, a limited carryover of up to \$500 of unused Health FSA funds.

The amendment package is provided solely for illustrative purposes and may not apply to your particular factual situation. Consult with your legal advisor to adapt this approach to your specific plan and factual situation. This sample document shall not be construed as legal or tax advice.

Because the plan currently has a grace period, the amendment must be adopted prior to the end of the Plan Year in order to eliminate the grace period and allow for a carryover for the Plan Year. Employers should carefully weigh whether elimination of the grace period will adversely impact employee expectations (e.g., because the carryover amount is limited to \$500 whereas the grace period is limited in duration to 2 ½ months but unlimited as to amount). Employers should consult with their legal advisors to determine whether there are any non-Code limitations on their elimination of any existing grace period.

CAUTION: Certain aspects of how Notice 2013-71 impacts plan administration are currently unclear and subject to interpretation. For example, it is unclear how the carryover will impact COBRA administration. Also, it is unclear whether employers can allow employees who may otherwise be HSA eligible to waive or redirect carryover amounts into a limited purpose Health FSA (in order to preserve HSA eligibility). Employers and plan administrators should consult with their legal advisors with respect to these (and other) plan design issues.

**ACTIONS TAKEN AND RESOLUTIONS ADOPTED BY CONSENT
OF THE BOARD OF DIRECTORS OF
[Employer's Name]**

The undersigned, being all of the members of the Board of Directors of [Employer's Name] (the "Employer"), hereby adopt the following Resolution by unanimous consent and direct that this Consent Resolution be entered in the minute books of the Employer.

WHEREAS, the Employer previously adopted a Code Section 125 Cafeteria Plan and a Code Section 105 Health Care Spending Account ("HCSA"), collectively referred to as the Flexible Benefits Plan (the "Plan");

WHEREAS, Article 9.02 of the Plan allows the Employer to amend the Plan;

WHEREAS, in accordance with IRS Notice 2005-42, the Employer previously amended the Plan to add a "grace period" not to exceed two (2) and ½ months following the end of a plan year during which amounts unused from the prior plan year could be used to reimburse expenses incurred during the grace period;

WHEREAS, the Employer desires to amend the Plan to (i) terminate the grace period and (ii) in lieu of the grace period, allow a carryover consistent with the terms of IRS Notice 2013-71, as set forth in the attached Amendment and Summary of Material Modifications;

NOW, THEREFORE, BE IT RESOLVED that the Board of Directors has hereby reviewed the attached amendments and Summary of Material Modifications and does hereby approve the adoption of the amendment as set forth therein;

BE IT FURTHER RESOLVED, that the officers of the Employer are authorized and directed to take any and all action as may be necessary to effectuate this Resolution.

By _____ Date _____

By _____ Date _____

By _____ Date _____

**AMENDMENT TO THE
CAFETERIA PLAN**

This Amendment to the Plan is adopted by the Employer, effective as of the date set forth herein.

NOW, THEREFORE, effective for the first Plan Year commencing on or after **January 1, 2013**, the Plan is amended as follows:

Notwithstanding anything to the contrary herein, the Plan is hereby amended as follows:

- A. The grace period (as described in IRS Notice 2005-42) that was previously adopted by the Plan is hereby terminated for the **2013** Plan year for the Health Flexible Spending Account. All references to the term “grace period” are hereby deleted as applied to the Health Flexible Spending Account effective immediately; and
- B. Notwithstanding anything to the contrary herein, unused Health Flexible Spending Account balances may be used to reimburse expenses in the following plan year consistent with Internal Revenue Service Notice 2013-71 and the Summary Plan Description (as modified by the attached SMM).

[Employer's Name]

By: _____

Title: _____

SUMMARY OF MATERIAL MODIFICATIONS TO THE CAFETERIA PLAN

This document summarizes important changes to your Flexible Benefits Plan (the “Plan”) and Health Care Spending Account (“Health FSA”). If you have any questions regarding the changes summarized in this Summary of Material Modifications (“SMM”), you should contact [insert appropriate contact]. You should keep a copy of this SMM with your Summary Plan Description for future reference.

This SMM is effective with the first plan year beginning on or after **January 1, 2013**.

Notwithstanding anything to the contrary in the Summary Plan Description, the “grace period” is terminated immediately for the Health FSA. In lieu of the grace period, Health FSA balances that are unused for a Plan Year may be used for reimbursement of eligible Health FSA expenses incurred at any time in the subsequent Plan Year (in addition to the amount that is otherwise available for reimbursement in the subsequent Plan Year)—not just during the first two (2) ½ months--subject to the following terms and conditions:

- No more than \$500 of the unused amount for a Plan Year (“Carryover Maximum”) may be rolled over for use in the subsequent Plan Year
- The specific Carryover amount is generally determined at the end of the run out period following such Plan Year (“Carryover”).
 - For example, if you have an unused Health FSA balance at the end of the 2013 Plan Year equal to \$1000, and you have no other expenses that were incurred in 2013, your 2013 Carryover amount that may be used in the 2014 Plan Year is \$500. However, if you have 2013 Plan Year expenses equal to \$600 that you timely submit during the run out period for the 2013 Plan Year, then your 2013 Carryover amount that may be used in the 2014 Plan Year will only be \$400.
- If you incur an eligible expense during a Plan Year (“Current Year Expense”) but before the end of the prior Plan Year’s run out period, the plan administrator may, at its discretion, apply up to \$500 of the amount unused *at the end of the prior Plan Year* (if any) towards the Current Year Expense. NOTE: This will reduce the amount that is available to reimburse expenses incurred during the prior Plan Year (“Prior Year Expenses”) submitted during the prior Plan Year’s run out period and it will reduce the Carryover Maximum by the same amount.
 - For example, assume that you have \$800 at the end of the 2013 Plan year and you have elected \$2500 for the 2014 Plan Year. On February 1, 2014, you incur a \$2700 eligible medical expense. The entire \$2,700 expense will be reimbursed with the \$2,500 elected for 2014 and \$200 of the \$800 unused at the end of the 2013 Plan Year. However, only \$600 will be available for 2013 Plan Year expenses submitted during the run out period for the 2013 Plan year and your 2013 Carryover Maximum is reduced to \$300 (\$500 maximum minus the \$200 already used). Further assume that after reimbursement of the \$2,700 expense that was incurred on February 1, 2014 but before the end of the run out period for the 2013 Plan Year, you submit a \$750 expense incurred in 2013. Only \$600 of that 2013 expense will be reimbursed and you will have no 2013 Carryover for use in the 2014 Plan Year.
- The Carryover does not count against the maximum salary reduction election identified in the Summary Plan Description.

- If you are otherwise eligible for the Health FSA for a Plan Year but you do not make an election to participate, you may still use any Carryover from the prior Plan Year for Current Year Expenses and Prior Year Expenses (in accordance with terms of the Plan and the ordering rules described above).
- Under IRS rules, if you have unused Health FSA amounts on the last day of a Plan Year in a general purpose Health FSA (i.e., anything other than a \$0 balance), you (and your spouse, if you are married) cannot contribute to an HSA during the following plan year. For this purpose, whether you have unused Health FSA amounts is determined on a cash basis—that is, without regard to any claims that have been incurred but have not yet been reimbursed (whether or not the claims have been submitted). Unless, based on IRS clarification, your employer allows you to waive any Carryover eligibility and/or direct such amounts to a limited purpose Health FSA (if offered) you must exhaust your general purpose Health FSA account prior to the last day of the Plan Year to retain HSA eligibility.
- You must be a participant in the Health FSA as of the last day of the Plan Year to benefit from the Carryover. Termination of employment and cessation of eligibility will generally result in a loss of Carryover eligibility unless a COBRA election is made.