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S. 988

To amend the Internal Revenue Code of 1986 to allow small businesses to set up simple cafeteria plans to provide nontaxable employee benefits to their employees, to make changes in the requirements for cafeteria plans, flexible spending accounts, and benefits provided under such plans or accounts, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 6, 2009

Ms. SNOWE (for herself, Mr. BOND, and Mr. BINGAMAN) introduced the following bill; which was read twice and referred to the Committee on Finance

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A BILL

To amend the Internal Revenue Code of 1986 to allow small businesses to set up simple cafeteria plans to provide nontaxable employee benefits to their employees, to make changes in the requirements for cafeteria plans, flexible spending accounts, and benefits provided under such plans or accounts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

(a) SHORT TITLE.—This Act may be cited as the "SIMPLE Cafeteria Plan Act of 2009".

(b) AMENDMENT OF 1986 CODE.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1986.

SEC. 2. ESTABLISHMENT OF SIMPLE CAFETERIA PLANS FOR SMALL BUSINESSES.

(a) IN GENERAL.—Section 125 (relating to cafeteria plans) is amended by redesignating subsections (i) and (j) as subsections (j) and (k), respectively, and by inserting after subsection (h) the following new subsection:

"(i) 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 with respect to benefits provided under the plan 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) CONTRIBUTIONS REQUIREMENTS.—

"(A) IN GENERAL.—The requirements of this paragraph are met if, under the plan—

"(i) the employer makes matching contributions on behalf of each employee who is eligible to participate in the plan and who is not a highly compensated or key employee in an amount equal to the elective plan contributions of the employee to the plan to the extent the employee's elective plan contributions do not exceed 3 percent of the employee's compensation, or

"(ii) the employer is required, without regard to whether an employee makes any elective plan contribution, to make a contribution to the plan on behalf of each employee who is not a highly compensated or key employee and who is eligible to participate in the plan in an amount equal to at least 2 percent of the employee's compensation.

"(B) MATCHING CONTRIBUTIONS ON BEHALF OF HIGHLY COMPENSATED AND KEY EMPLOYEES.—The requirements of subparagraph (A)(i) shall not be treated as met if, under the plan, the rate of matching contribution with respect to any elective plan 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) SPECIAL RULES.—

"(i) TIME FOR MAKING CONTRIBUTIONS.—An employer shall not be treated as failing to meet the requirements of this paragraph with respect to any elective plan contributions of any compensation, or employer contributions required under this paragraph with respect to any compensation, if such contributions are made no later than the 15th day of the month following the last day of the calendar quarter which includes the date of payment of the compensation.

"(ii) FORM OF CONTRIBUTIONS.—Employer contributions required under this

paragraph may be made either to the plan to provide benefits offered under the plan or to any person as payment for providing benefits offered under the plan.

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

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

"(i) ELECTIVE PLAN CONTRIBUTION.—The term 'elective plan contribution' means any amount which is contributed at the election of the employee and which is not includible in gross income by reason of this section.

"(ii) HIGHLY COMPENSATED EMPLOYEE.—The term 'highly compensated employee' has the meaning given such term by section 414(q).

"(iii) 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 less than 1 year of service with the employer as of any day during the plan year,

"(ii) who have not attained the age of 21 before the close of a 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.—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. This subparagraph shall cease to apply if the employer employs an average of 200 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).".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to years beginning after December 31, 2009.

SEC. 3. MODIFICATIONS OF RULES APPLICABLE TO CAFETERIA PLANS.

(a) APPLICATION TO SELF-EMPLOYED INDIVIDUALS.—

(1) IN GENERAL.—Section 125(d) (defining cafeteria plan) is amended by adding at the end the following new paragraph:

"(3) EMPLOYEE TO INCLUDE SELF-EMPLOYED.—

"(A) IN GENERAL.—The term 'employee' includes an individual who is an employee within the meaning of section 401(c)(1) (relating to self-employed individuals).

"(B) LIMITATION.—The amount which may be excluded under subsection (a) with respect to a participant in a cafeteria plan by reason of being an employee under subparagraph (A) shall not exceed the employee's earned income (within the meaning of section 401(c)) derived from the trade or business with respect to which the cafeteria plan is established.".

(2) APPLICATION TO BENEFITS WHICH MAY BE PROVIDED UNDER CAFETERIA PLAN.—

(A) GROUP-TERM LIFE INSURANCE.—Section 79 (relating to group-term life insurance provided to employees) is amended by adding at the end the following new subsection:

"(f) EMPLOYEE INCLUDES SELF-EMPLOYED.—

"(1) IN GENERAL.—For purposes of this section, the term 'employee' includes an individual who is an employee within the meaning of section 401(c)(1) (relating to self-employed individuals).

"(2) LIMITATION.—The amount which may be excluded under the exceptions contained in subsection (a) or (b) with respect to an individual treated as an employee by reason of paragraph (1) shall not exceed the employee's earned income (within the meaning of section 401(c)) derived from the trade or business with respect to which the individual is so treated.".

(B) ACCIDENT AND HEALTH PLANS.—Subsection (g) of section 105 (relating to amounts received under accident and health plans) is amended to read as follows:

"(g) EMPLOYEE INCLUDES SELF-EMPLOYED.—

"(1) IN GENERAL.—For purposes of this section, the term 'employee' includes an individual who is an employee within the meaning of section 401(c)(1) (relating to self-employed individuals).

"(2) LIMITATION.—The amount which may be excluded under this section by reason of subsection (b) or (c) with respect to an individual treated as an employee by reason of paragraph (1) shall not exceed the employee's earned income (within the meaning of section 401(c)) derived from the trade or business with respect to which the accident or health insurance was established.".

(C) CONTRIBUTIONS BY EMPLOYERS TO ACCIDENT AND HEALTH PLANS.—

(i) IN GENERAL.—Section 106, as amended by subsection (b), is amended by inserting after subsection (b) the following new subsection:

"(c) EMPLOYER TO INCLUDE SELF-EMPLOYED.—

"(1) IN GENERAL.—For purposes of this section, the term 'employee' includes an individual who is an employee within the meaning of section 401(c)(1) (relating to self-employed individuals).

"(2) LIMITATION.—The amount which may be excluded under subsection (a) with respect to an individual treated as an employee by reason of paragraph (1) shall not exceed the employee's earned income (within the meaning of section 401(c)) derived from the trade or business with respect to which the accident or health insurance was established.".

(ii) CLARIFICATION OF LIMITATIONS ON OTHER COVERAGE.—The first sentence of section 162(l)(2)(B) is amended to read as follows: "Paragraph (1) shall not apply to any taxpayer for any calendar month for which the taxpayer participates in any subsidized health plan maintained by any em-

ployer (other than an employer described in section 401(c)(4)) of the taxpayer or the spouse of the taxpayer.''.

(b) LONG-TERM CARE INSURANCE PERMITTED TO BE OFFERED UNDER CAFETERIA PLANS AND FLEXIBLE SPENDING ARRANGEMENTS.—

(1) CAFETERIA PLANS.—The last sentence of section 125(f) (defining qualified benefits) is amended to read as follows: ''Such term shall include the payment of premiums for any qualified long-term care insurance contract (as defined in section 7702B) to the extent the amount of such payment does not exceed the eligible long-term care premiums (as defined in section 213(d)(10)) for such contract.''.

(2) FLEXIBLE SPENDING ARRANGEMENTS.—Section 106 (relating to contributions by employer to accident and health plans) is amended by striking subsection (c).

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2009.

SEC. 4. MODIFICATION OF RULES APPLICABLE TO FLEXIBLE SPENDING ARRANGEMENTS.

(a) MODIFICATION OF RULES.—

(1) IN GENERAL.—Section 125, as amended by section 2, is amended by redesignating subsections (j) and (k) as subsections (k) and (l), respectively, and by inserting after subsection (i) the following new subsection:

"(j) SPECIAL RULES APPLICABLE TO FLEXIBLE SPENDING ARRANGEMENTS.—

"(1) IN GENERAL.—For purposes of this title, a plan or other arrangement shall not fail to be treated as a flexible spending or similar arrangement solely because under the plan or arrangement—

"(A) the amount of the reimbursement for covered expenses at any time may not exceed the balance in the participant's account for the covered expenses as of such time,

"(B) except as provided in paragraph (4)(A)(ii), a participant may elect at any time specified by the plan or arrangement to make or modify any election regarding the covered benefits, or the level of covered benefits, of the participant under the plan, and

"(C) a participant is permitted access to any unused balance in the participant's accounts under such plan or arrangement in the manner provided under paragraph (2) or (3).

"(2) CARRYOVERS AND ROLLOVERS OF UNUSED BENEFITS IN HEALTH AND DEPENDENT CARE ARRANGEMENTS.—

"(A) IN GENERAL.—A plan or arrangement may permit a participant in a health flexible spending arrangement or dependent care flexible spending arrangement to elect—

"(i) to carry forward any aggregate unused balances in the participant's accounts under such arrangement as of the close of any year to the succeeding year, or

"(ii) to have such balance transferred to a plan described in subparagraph (E).

Such carryforward or transfer shall be treated as having occurred within 30 days of the close of the year.

"(B) DOLLAR LIMIT ON CARRYFORWARDS.—

"(i) IN GENERAL.—The amount which a participant may elect to carry forward under subparagraph (A)(i) from any year shall not exceed $500. For purposes of this paragraph, all plans and arrangements maintained by an employer or any related person shall be treated as 1 plan.

"(ii) COST-OF-LIVING ADJUSTMENT.—In the case of any taxable year beginning in a calendar year after 2010, the $500 amount under clause (i) shall be increased by an amount equal to—

"(I) $500, multiplied by

"(II) the cost-of-living adjustment determined under section 1(f)(3) for such calendar year, determined by substituting '2009' for '1992' in subparagraph (B) thereof.

If any dollar amount as increased under this clause is not a multiple of $100, such amount shall be rounded to the next lowest multiple of $100.

"(C) EXCLUSION FROM GROSS INCOME.—No amount shall be required to be included in gross income under this chapter by reason of any carryforward or transfer under this paragraph.

"(D) COORDINATION WITH LIMITS.—

"(i) CARRYFORWARDS.—The maximum amount which may be contributed to a health flexible spending arrangement or dependent care flexible spending arrange-

ment for any year to which an unused amount is carried under this paragraph shall be reduced by such amount.

"(ii) ROLLOVERS.—Any amount transferred under subparagraph (A)(ii) shall be treated as an eligible rollover under section 219, 223(f)(5), 401(k), 403(b), or 457, whichever is applicable, except that—

"(I) the amount of the contributions which a participant may make to the plan under any such section for the taxable year including the transfer shall be reduced by the amount transferred, and

"(II) in the case of a transfer to a plan described in clause (ii) or (iii) of subparagraph (E), the transferred amounts shall be treated as elective deferrals for such taxable year.

"(E) PLANS.—A plan is described in this subparagraph if it is—

"(i) an individual retirement plan,

"(ii) a qualified cash or deferred arrangement described in section 401(k),

"(iii) a plan under which amounts are contributed by an individual's employer for an annuity contract described in section 403(b),

"(iv) an eligible deferred compensation plan described in section 457, or

"(v) a health savings account described in section 223.

"(3) DISTRIBUTION UPON TERMINATION.—

"(A) IN GENERAL.—A plan or arrangement may permit a participant (or any designated heir of the participant) to receive a cash payment equal to the aggregate unused account balances in the plan or arrangement as of the date the individual is separated (including by death or disability) from employment with the employer maintaining the plan or arrangement.

"(B) INCLUSION IN INCOME.—Any payment under subparagraph (A) shall be includible in gross income for the taxable year in which such payment is distributed to the employee.

"(4) TERMS RELATING TO FLEXIBLE SPENDING ARRANGEMENTS.—

"(A) FLEXIBLE SPENDING ARRANGEMENTS.—

"(i) IN GENERAL.—For purposes of this subsection, a flexible spending arrangement is a benefit program which provides employees with coverage under which specified incurred expenses may be reimbursed (subject to reimbursement maximums and other reasonable conditions).

"(ii) ELECTIONS REQUIRED.—A plan or arrangement shall not be treated as a flexible spending arrangement unless a participant may at least 4 times during any year make or modify any election regarding covered benefits or the level of covered benefits.

"(B) HEALTH AND DEPENDENT CARE ARRANGEMENTS.—The terms 'health flexible spending arrangement' and 'dependent care flexible spending arrangement' means any flexible spending arrangement (or portion thereof) which provides payments for expenses incurred for medical care (as defined in section 213(d)) or dependent care (within the meaning of section 129), respectively.".

(2) CONFORMING AMENDMENTS.—

(A) The heading for section 125 is amended by inserting "**AND FLEXIBLE SPENDING ARRANGEMENTS**" after "**PLANS**".

(B) The item relating to section 125 in the table of sections for part III of subchapter B of chapter 1 is amended by inserting "and flexible spending arrangements" after "plans".

(b) TECHNICAL AMENDMENTS.—

(1) Section 106 is amended by striking subsection (e) (relating to FSA and HRA Terminations to Fund HSAs).

(2) Section 223(c)(1)(B)(iii)(II) is amended to read as follows:

"(II) the individual is transferring the entire balance of such arrangement as of the end of the plan year to a health savings account pursuant to section 125(j)(2)(A)(ii), in accordance with rules prescribed by the Secretary.".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act.

SEC. 5. RULES RELATING TO EMPLOYER-PROVIDED HEALTH AND DEPENDENT CARE BENEFITS.

(a) HEALTH BENEFITS.—Section 106, as amended by section 4(b)(1), is amended by adding at the end the following new subsection:

"(e) LIMITATION ON CONTRIBUTIONS TO HEALTH FLEXIBLE SPENDING ARRANGEMENTS.—

"(1) IN GENERAL.—Gross income of an employee for any taxable year shall include employer-provided coverage provided through 1 or more health flexible spending arrangements (within the meaning of section 125(j)) to the extent that the amount otherwise excludable under subsection (a) with regard to such coverage exceeds the applicable dollar limit for the taxable year.

"(2) APPLICABLE DOLLAR LIMIT.—For purposes of this subsection—

"(A) IN GENERAL.—The applicable dollar limit for any taxable year is an amount equal to the sum of—

"(i) $7,500, plus

"(ii) if the arrangement provides coverage for 1 or more individuals in addition to the employee, an amount equal to one-third of the amount in effect under clause

(i) (after adjustment under subparagraph (B)).

"(B) COST-OF-LIVING ADJUSTMENT.—In the case of taxable years beginning in any calendar year after 2010, the $7,500 amount under subparagraph (A) shall be increased by an amount equal to—

"(i) $7,500, multiplied by

"(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting '2009' for '1992' in subparagraph (B) thereof.

If any dollar amount as increased under this subparagraph is not a multiple of $100, such dollar amount shall be rounded to the next lowest multiple of $100.".

(b) DEPENDENT CARE.—

(1) EXCLUSION LIMIT.—

(A) IN GENERAL.—Section 129(a)(2) (relating to limitation on exclusion) is amended—

(i) by striking "$5,000" and inserting "the applicable dollar limit", and

(ii) by striking "$2,500" and inserting "one-half of such limit".

(B) APPLICABLE DOLLAR LIMIT.—Section 129(a) is amended by adding at the end the following new paragraph:

''(3) APPLICABLE DOLLAR LIMIT.—For purposes of this subsection—

''(A) IN GENERAL.—The applicable dollar limit is $7,500 ($10,000 if dependent care assistance is provided under the program to 2 or more qualifying individuals of the employee).

''(B) COST-OF-LIVING ADJUSTMENTS.—In the case of taxable years beginning after 2010, each dollar amount under subparagraph (A) shall be increased by an amount equal to—

''(i) such dollar, multiplied by

''(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting '2009' for '1992' in subparagraph (B) thereof.

If any dollar amount as increased under this clause is not a multiple of $100, such dollar amount shall be rounded to the next lowest multiple of $100.''.

(2) AVERAGE BENEFITS TEST.—

(A) IN GENERAL.—Section 129(d)(8)(A) (relating to benefits) is amended—

(i) by striking ''55 percent'' and inserting ''60 percent'', and

(ii) by striking ''highly compensated employees'' the second place it appears and inserting ''employees receiving benefits''.

(B) SALARY REDUCTION AGREEMENTS.—Section 129(d)(8)(B) (relating to salary reduction agreements) is amended—

(i) by striking ''$25,000'' and inserting ''$30,000'', and

(ii) by adding at the end the following: ''In the case of years beginning after 2010, the $30,000 amount in the first sentence shall be adjusted at the same time, and in the same manner, as the applicable dollar amount is adjusted under subsection (a)(3)(B).''.

(3) PRINCIPAL SHAREHOLDERS OR OWNERS.—Section 129(d)(4) (relating to principal shareholders and owners) is amended by adding at the end the following: ''In the case of any failure to meet the requirements of this paragraph for any year, amounts shall only be required by reason of the failure to be

included in gross income of the shareholders or owners who are members of the class described in the preceding sentence.''.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2009.

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