
Guidance on Complying with the Prohibition on Using Early Retiree Reinsurance Program Reimbursements as General Revenue

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Background

The Early Retiree Reinsurance Program (ERRP) statute and regulation prohibit the use of ERRP reimbursements as general revenue for the plan sponsor. 42 U.S.C. §18002(c)(4); 45 C.F.R. §149.200(b). The ERRP regulation further specifies that a plan sponsor may use ERRP reimbursements only for the following purposes: (1) To reduce the sponsor's health benefit premiums or health benefit costs, (2) To reduce health benefit premium contributions, copayments, deductibles, coinsurance, or other out-of-pocket costs, or any combination of these costs, for plan participants, or (3) to reduce any combination of the costs specified in (1) and (2). 45 C.F.R. §149.200(a). The statute also requires the Secretary of the U.S. Department of Health & Human Services "to develop a mechanism to monitor the appropriate use of reimbursement payments." 42 U.S.C. §18002(c)(4). In the ERRP regulation, we noted that we "expect that sponsors will continue to provide at least the same level of contribution to support the applicable plan, as it did before the program." 75 Fed. Reg. 24458 (May 5, 2010).¹

This guidance is intended to give plan sponsors some flexibility in applying the maintenance of contribution requirement, while also helping to ensure that sponsors do not violate the prohibition against using ERRP reimbursement as general revenue. To the extent that a plan sponsor is unable to use the maintenance of contribution approaches set forth in this guidance, the sponsor may demonstrate compliance with this requirement in other ways. In such situations, the sponsor may be required, upon audit, to demonstrate how its approach is consistent with the statutory and regulatory requirements.

Below, we provide examples of how a sponsor may comply with the maintenance of contribution requirement set forth in the ERRP regulation. We identify the plan years for which a sponsor must comply with the maintenance of contribution requirement, the costs that are to be used to determine a sponsor's level of contribution toward the plan for ERRP purposes, the baseline period sponsors may use to determine their required contribution level, and various methodologies a sponsor may employ to measure maintenance of contribution.

¹ All principles discussed in this guidance regarding maintenance of contribution, apply to the applicable plan. All examples of those principles, are examples of how the principles apply to the applicable plan.

Plan Years to Which the Maintenance of Contribution Requirement Applies

The regulatory maintenance of contribution requirement requires plan sponsors to “provide at least the same level of contribution to support the applicable plan, as it did before the program.” 75 Fed. Reg. 24458 (May 5, 2010). We interpret this requirement to mean that, for each plan year to which the maintenance of contribution requirement applies, a sponsor must provide at least the same level of contribution, net of any ERRP reimbursement received that the sponsor uses toward that contribution, to support the applicable plan, as it did before the program. We believe that this requirement extends to plan years for which the sponsor receives ERRP reimbursement, and to any plan years during which it receives ERRP reimbursement, that is, years during which the plan is in some way participating in the program. Additionally, in order to guarantee that ERRP funds are used in a manner consistent with the statute and regulations, the maintenance of contribution requirement extends to any other plan year during which the sponsor possesses ERRP reimbursement that has not yet been used for permissible purposes, regardless of how many days within that plan year the sponsor possessed such reimbursement.

Costs Used to Determine a Sponsor’s Level of Contribution Toward the Plan

Throughout this paper, we indicate that the amount a sponsor allocates for or spends on “health benefits”, as defined by the ERRP statute, regulation, and other guidance,² and/or spent for premiums for “health benefits”, for a given plan year to which the maintenance of contribution requirement applies, must be at least as much as the sponsor allocates for or spends for such purposes, for its baseline period. We realize, however, that it may be more difficult for a sponsor to determine such amounts allocated for or spent on health benefit costs for certain baseline periods, and/or for health benefit premiums for certain baseline periods and for plan years to which the maintenance of contribution requirement applies, than it is to determine amounts allocated for or spent on all health plan benefits and/ or all health plan premiums (i.e., amounts allocated for or spent on benefits that also include benefits that are not defined as “health benefits” for ERRP purposes, and amounts spent on premiums for such benefits). Thus, if a sponsor does not know with certainty the amount it allocated for or spent on “health benefits”, as defined by the ERRP statute, regulation, and other guidance, and/or spent on premiums for “health benefits” (as so defined), it may use any reasonable methodology to estimate or extract such amount from the presumably larger amounts the sponsor allocated for or spent on all health plan benefits and/ or all health plan premiums (i.e., including benefits that are not “health benefits”) for the baseline period and for any given plan year for which the maintenance of contribution requirement applies. Upon audit, a sponsor may be required to demonstrate its methodology, and explain why it believes the methodology is reasonable.

Also, in all instances in this guidance that discuss the amount a sponsor would have to allocate or spend in any given plan year for which the maintenance of contribution requirement applies, either in terms of dollars or percentages, the amount is net of any ERRP reimbursement received that the sponsor uses toward that contribution , and the

² In all instances in this paper where we refer to “health benefits” and “health benefit” premiums, we are referring to health benefits as defined by the ERRP statute, regulation, and other guidance.

percentage is calculated net of any ERRP reimbursement received that the sponsor uses toward that contribution.

Baseline Period Sponsors May Use for Determining Their Contribution Level

Plan Sponsors may use any of the following periods as their baseline period for determining their contribution level.

The Plan Sponsor's Most Recent 12-Month Plan Year that Ended Before the Date the Sponsor Submitted its ERRP Application

Under this option, a sponsor may demonstrate that it has spent or allocated at least as much in health benefit costs and/or health benefit premiums for each plan year to which the maintenance of contribution requirement applies, as it did for the sponsor's most recent 12-month plan year that ended before the date the sponsor submitted its ERRP application (as evidenced by the application's postmark or delivery service acceptance date). For example, a sponsor's plan year is on a calendar year cycle, and it submitted its ERRP application on November 1, 2010. A sponsor choosing this option for determining its baseline period would use its January 1, 2009 - December 31, 2009 plan year, as its baseline period.

A Period Consisting of up to Five of the Plan Sponsor's Most Recent Consecutive 12-Month Plan Years, Including the Plan Sponsor's Most Recent 12-Month Plan Year that Ended Before the Date The Sponsor Submitted its ERRP Application

Under this option, a sponsor may choose how many such consecutive plan years (up to five, but including the most recent plan year that ended prior to submitting its ERRP application) to include in its baseline period. A sponsor would calculate its baseline spending or allocation amount by averaging its amount of spending or allocation of health benefit costs and/or health benefit premiums for each of those consecutive plan years. It would demonstrate that it has spent or allocated at least that same amount (i.e. the average amount) for each plan year to which the maintenance of contribution requirement applies. For example, a sponsor has a plan year cycle that runs from July 1 - June 30. The sponsor submitted its ERRP application on July 15, 2010. Although the sponsor has sponsored an employment-based plan for every such 12-month plan year for each of the past 10 years, it chooses to use, as its baseline period, a period consisting only of its following plan years: July 1, 2007 - June 30, 2008, July 1, 2008 - June 30, 2009, and July 1, 2009 - June 30, 2010. On average, it spent \$1 million in health benefits for each of these plan years. Thus, for each plan year for which the maintenance of contribution requirement applies to this sponsor, it would have to spend or allocate at least \$1 million in health benefit costs and/or premiums, net of any ERRP reimbursement.

A Period Consisting of a Single 12-Month Plan Year for which the Sponsor's Budget for Health Benefits and/or Health Benefit Premiums was Finalized, or for Which a Collective Bargaining Agreement was Ratified, Before June 1, 2010.

The effective date of the ERRP regulation was June 1, 2010. The Centers for Medicare & Medicaid Services realizes, however, that some plan sponsors with one-year budget cycles may

have, before June 1, 2010, finalized their budgets, or ratified collective bargaining agreements, that set maximum health benefit cost and/or health benefit premium spending levels for plan years for which the sponsor could otherwise participate in ERRP, but for the fact that the sponsor cannot satisfy the maintenance of contribution requirement by using either of the two previously mentioned baseline periods. In such cases, the sponsor may use, as its baseline period, a period consisting of a single 12-month plan year that ends after June 1, 2010, for which the budget was finalized or the collective bargaining agreement was ratified on a date before June 1, 2010. For example, a state that wishes to participate in ERRP as a plan sponsor has a plan year cycle that runs from October 1 – September 30. It submitted its ERRP application on July 7, 2010, and wishes to participate in ERRP for its plan year of October 1, 2009 - September 30, 2010. By applying either of the two previously discussed methods for determining the baseline period, the state would fail the maintenance of contribution test, as a result of a finalized health benefits budget that reduces health benefit spending for years for which it would like to participate in ERRP. In this example, the state finalized its health benefits budget for its October 1, 2009 – September 30, 2010 plan year on May 1, 2009. That budget calls for the state to spend or allocate a maximum of \$30 million in health benefit costs and or health benefit premiums for that plan year. The state could satisfy the maintenance of contribution requirement by spending or allocating that maximum amount specified in the budget for health benefit costs and/or health benefit premium costs, for each plan year for which the maintenance of contribution requirement applies to the state.

Under this method of defining the baseline period, if a multi-year (as opposed to a single-year) budget cycle was finalized or a multi-year collective bargaining agreement was ratified before June 1, 2010, and by applying either of the previously discussed methods for determining the baseline periods, the sponsor would fail to meet the maintenance of contribution requirement, the sponsor could satisfy the maintenance of contribution requirement by spending or allocating the maximum amount specified in the budget or collective bargaining agreement for health care costs and/or health benefit premium costs for any one single year of the budget or collective bargaining agreement, for each plan year for which the maintenance of contribution requirement applies to the plan sponsor. Thus, if a sponsor is bound by a two-year collective bargaining agreement that was ratified before June 1, 2010, and using the spending levels established in that agreement for one of those years as the baseline for which the sponsor must satisfy the maintenance of contribution requirement would cause the sponsor to violate the collective bargaining agreement, the sponsor could use the spending levels set for the other of the two plan years in the collective bargaining agreement, as the baseline spending amount.

Comparing Spending vs. Comparing Allocation

As discussed in the following section of this paper, a sponsor may demonstrate that it has satisfied the maintenance of contribution requirement by either: (1) comparing (in one of several different ways) the amount it actually spent on health benefits and/or health benefit premiums, in the baseline period, to each plan year for which it is required to comply with the maintenance of contribution requirement, or (2) comparing the amount it actually spent on health benefits and/or health benefit premiums as a percentage of all health benefits and health benefit costs (i.e., the amount the plan spent as a percentage of the sum of the amount the plan spent plus the amount plan participants spent).

However, in instances where a plan is exclusively self-funded for all health benefits for each year of its chosen baseline period and each plan year for which it is required to comply with the maintenance of contribution requirement, the sponsor may compare what it actually spent on average for each year of its baseline period, either with the amount the sponsor actually spent for each plan year for which the maintenance of contribution requirement applies, or with the amount the sponsor allocated (set aside) to spend exclusively on health benefit costs for each such year. For example, in the baseline period chosen by such a sponsor with an exclusively self-funded plan for all applicable plan years, the sponsor spent \$1,000,000 on average per plan year in health benefit costs. For each year in which the sponsor is required to comply with the maintenance of contribution requirement, it may either demonstrate that it spent \$1,000,000 in health benefit costs for claims incurred for that plan year, or that it allocated (i.e., set aside) \$1,000,000 to pay for such costs, even if it didn't actually spend that much. This flexibility is intended to ensure that sponsors of self-funded plans that reduce utilization through, for example, effective programs and procedures for plan participants with chronic and high cost conditions, are not penalized. However, if the plan chooses to take this approach to meeting the maintenance of contribution requirement, it will need to demonstrate that for any such plan year, the full amount of such funds (net of any ERRP reimbursement) were available in a fund or trust, the terms of which prohibit the fund's or trust's assets from being used for any purpose other than paying claims for health benefits, for each entire plan year(s) for which the sponsor is required to comply with the maintenance of contribution requirement.

We note that, in the discussion of permissible maintenance of contribution methodologies that follows, comparing allocations instead of spending is only appropriate when using one of the Total Dollars methodologies, and is not appropriate when using one of the Percentage methodologies. This is because comparing allocations is irrelevant with respect to the Percentage methodologies.

Permissible Maintenance of Contribution Methodologies

In the past, CMS has indicated that plan sponsors may demonstrate that they meet the maintenance of contribution requirement in a number of general ways, including using aggregate spending trends, or per-capita spending trends. What follows is a description of acceptable methodologies under each of these two general categories. For each methodology, plan sponsors may select any of the approaches discussed in this paper for defining the sponsor's baseline period. If it is not possible for a sponsor to use one of these methodologies, a sponsor is responsible for using another reasonable methodology to demonstrate that it meets the maintenance of contribution requirement. A sponsor may be required upon audit to explain why it could not use one of the specified methodologies, and why its alternative methodology is reasonable and consistent with the statute, regulation, and other program guidance.

We reiterate that, in all instances in this guidance that discuss the amount a sponsor would have to allocate or spend in any given year for which the maintenance of contribution requirement applies, either in terms of dollars or percentages, the amount is net of any ERRP reimbursement received that the sponsor uses toward that contribution, and the percentage is calculated net of any ERRP reimbursement received that the sponsor uses toward that contribution.

Aggregate Spending Trend, Percentage Methodology

Under this approach, the sponsor demonstrates that it spent at least the same percentage (i.e., amount of plan-paid health benefit costs and/or health benefit premiums divided by the amount of such plan-paid costs and/or premiums plus the amount of costs and/or premiums paid for by plan participants), in the aggregate across the plan for each plan year for which the sponsor is required to satisfy the maintenance of contribution requirement, as it did on average for each plan year of the baseline period. For example, the sponsor paid on average 70% towards plan participants' health benefit and/or health benefit premium costs for each year in the baseline period. The sponsor would need to demonstrate that it then paid at least 70% of such costs for each plan year for which the sponsor is required to satisfy the maintenance of contribution requirement.

Aggregate Spending Trend, Total Dollars Methodology

Under this approach, the sponsor demonstrates that it spent or allocated at least the same total amount in the aggregate across the plan for each plan year for which the sponsor is required to satisfy the maintenance of contribution requirement, as it did on average for each year of the baseline period. For example, a sponsor spent \$1,000,000 on plan participants' health benefit costs and/or health benefit premium costs on average for each year of its baseline period. The sponsor would need to demonstrate that it then spent at least \$1,000,000 on such costs for each plan year for which it is required to comply with the maintenance of contribution requirement.

Per Capita Spending Trend, Percentage Methodology

Under this approach, the sponsor demonstrates that it spent at least the same percentage (i.e., amount of plan-paid health benefit costs and/or health benefit premiums divided by the amount of such plan-paid costs and/or premiums plus the amount of costs and/or premiums paid for by plan participants) on average, per plan participant, for each plan year for which the sponsor is required to satisfy the maintenance of contribution requirement, as it did on average for each year of the baseline period. For example, the sponsor paid 70%, on average, per plan participant, towards plan participants' health benefit and/or health benefit premium costs for each year in the baseline period. The sponsor would need to demonstrate that it then paid at least 70%, on average, per plan participant, of such costs for each plan year for which the sponsor is required to satisfy the maintenance of contribution requirement.

Per Capita Spending Trend, Total Dollars Methodology

Under this approach, the sponsor demonstrates that it spent or allocated at least the same total amount on health benefit costs and/or health benefit premium costs, on average, per plan participant, for each plan year for which the sponsor is required to satisfy the maintenance of contribution requirement, as it did on average, per plan participant, for each year of the baseline period. For example, a sponsor spent \$1,500 on plan participants' health benefit costs and/or health benefit premium costs on average, per plan participant, for each year of its baseline period. The sponsor must then spend at least \$1,500 on such costs, on average, per plan participant, for each plan year for which it is required to comply with the maintenance of contribution requirement.