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OFFICE OF THE CHIEF COUNSEL

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The Honorable Jackie Speier
Member, U.S. House of Representatives
155 Bovet Road, Suite 780
San Mateo, CA 94402

Attention:

Dear Representative Speier:

I am responding to your January 6, 2022 letter on behalf of your constituent, . explained he will have unused amounts in his employer's commuter benefit plan (CBP) because his employer decided he can work from home permanently due to COVID-19. Since he no longer needs to use the CBP to pay for parking, he asked to receive an IRS ruling to allow a transfer of remaining CBP amounts to a health flexible spending arrangement (FSA) under a Section 125 cafeteria plan.

I'm sorry to hear of the difficulty experienced trying to get information about his employer's CBP. Generally, we cannot provide binding legal advice to taxpayers unless they request a private letter ruling as described in Revenue Procedure 2022-1, 2022-1 I.R.B. 1. However, I can provide the following general information on qualified transportation fringe benefits under Section 132(f) of the Internal Revenue Code (Code) and qualified benefits under a Section 125 cafeteria plan.

Employers who provide their employees with transportation benefits can exclude the benefit from an employee's gross income if the benefit is a "qualified transportation fringe" under Section 132(a)(5) of the Code. A qualified transportation fringe includes:

- Transportation in a commuter highway vehicle between home and work

- Any transit pass
- Qualified parking

By law, the amount of qualified transportation fringe benefits that an employer provides to an employee that can be excluded from gross income cannot exceed a maximum monthly dollar amount adjusted for inflation.[1]

Section 132(f)(4) provides an exception from constructive receipt principles. This exception permits employers to offer employees a choice between cash compensation and any qualified transportation fringe. Accordingly, employers may provide qualified transportation fringe benefits up to the applicable statutory monthly limit either in addition to employees' stated compensation, or by reducing employees' stated compensation (compensation reduction).

For purposes of responding to your letter, we assume that what you refer to as a "Commuter Plan FSA" are amounts of qualified transportation fringe benefits received through compensation reduction agreements. Qualified transportation fringe benefits are not qualified benefits under a Section 125 cafeteria plan and are not part of an FSA. In a compensation reduction agreement, employees may designate a portion of the amount they otherwise would receive as compensation to fund qualified transportation fringe benefits provided by their employer. The compensation reduction is excluded from an employee's income and wages for federal tax purposes if the employee uses the compensation reduction amount exclusively to fund qualified transportation fringe benefits.

Employees can elect to reduce their compensation each month by an amount that does not exceed the maximum monthly excludable amount under the Code. When an employee elects to reduce their compensation for a month by an amount that exceeds the qualified transportation fringe benefits actually provided in that month, the employer may apply this excess towards qualified transportation fringe benefits in subsequent years. This applies as long as the employee does not receive qualified transportation fringe benefits in excess of the maximum excludable amount in any month.[2]

Under no circumstance can an employer provide a cash refund, even when the employee's compensation reduction amounts exceed the employee's qualified transportation fringe benefits.[3] In other words, an employee may receive a cash reimbursement of compensation reduction amounts only as a reimbursement of qualified transportation fringe benefits, and not for any other fringe benefit.

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[1] See Section 132(f)(2) of the Code.
[2] See Treasury Regulation Section 1.132-9, Q&A-15.
[3] See Treasury Regulation Section 1.132-9, Q&A-14(d).

A Section 125 cafeteria plan is a written plan maintained by an employer.[4] Employees who participate in a Section 125 cafeteria plan may choose among two or more benefits consisting of cash and qualified benefits.[5] Qualified benefits that may be provided under a Section 125 cafeteria plan include, but are not limited to, employer-provided accident and health plans, health FSAs, and dependent care assistance programs.

However, Section 125(f)(1) provides that qualified transportation fringe benefits under Section 132(f) may not be offered under a Section 125 cafeteria plan. In addition, IRS rules do not permit unused qualified transportation fringe benefits to be contributed to a health FSA under a Section 125 cafeteria plan.

Regarding health FSA elections, we note that Notice 2021-15 provided guidance on Section 214 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Act). The Act provided the flexibility for an employer to allow employees to make mid-year election changes to their health FSAs for plan years ending in 2021. Specifically, the Act permitted employers to amend a Section 125 cafeteria plan to allow employees to revoke an election, make a new election, or decrease or increase an existing election for a health FSA. Whether to amend a plan to include the flexibility the Act provides is solely in the discretion of the employer. However, there is no provision under the Code that would permit an employee to transfer a qualified transportation fringe to a health FSA. You can find the notice on IRS.gov at www.irs.gov/pub/irs-drop/n-21-15.pdf.

I hope this information is helpful. If you have additional questions, please contact me or at .

Sincerely,

Denise Trujillo
Branch Chief, Health and Welfare Branch
Office of Associate Chief Counsel
(Employee Benefits, Exempt Organizations,
and Employment Taxes)

[4] See Section 125(d)(1) of the Code.
[5] Subject to certain exceptions, Section 125(f) defines a qualified benefit as any benefit which, with the application of Section 125(a), is not includable in the gross income of the employee by reason of an express provision of the Code.