

August 28, 2017

The Honorable Nicholas A. Iarocci  
Ashtabula County Prosecuting Attorney  
Ashtabula County Courthouse  
25 West Jefferson Street  
Jefferson, Ohio 44047-1092

SYLLABUS:

2017-026

1. As a result of the exclusion of a “qualified small employer health reimbursement arrangement” from the definition of “group health plan” in 42 U.S.C.A. § 300gg-91(a)(1) (West Supp. 2017), the advice in 2015 Op. Att’y Gen. No. 2015-021 is modified to the extent that it treats cash payments or reimbursements that a board of township trustees provides to township officers and employees under R.C. 505.601 or R.C. 505.603 as “group health plans” that are subject to the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11(a) (West 2011), when those cash payments or reimbursements constitute “qualified small employer health reimbursement arrangements.” The conclusions reached in 2015 Op. Att’y Gen. No. 2015-021 with respect to reimbursements a board of township trustees provides to township officers and employees under R.C. 505.60(D) are not altered. (2015 Op. Att’y Gen. No. 2015-021, syllabus, paragraphs 1 through 9, modified, in part, and followed, in part.)
2. Cash payments and reimbursements that a board of township trustees provides under R.C. 505.601 or R.C. 505.603 in circumstances that satisfy the requirements of 26 U.S.C.A. § 9831(d)(2) (West 2017) constitute “qualified small employer health reimbursement arrangements” and do not constitute “group health plans” that are subject to the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11(a) (West 2011).
3. If a resolution of a board of township trustees authorizing cash payments or reimbursements to a township officer under R.C. 505.601 or R.C. 505.603 was effective prior to the commencement of the township officer’s term of office, and if the cash payments or reimbursements were discontinued to ensure compliance with the requirements of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), resumption of the cash payments or reimbursements during the township officer’s term of office does not violate the prohibition against in-term changes in a public officer’s compensation in Article II, § 20 of

the Ohio Constitution. (2015 Op. Att’y Gen. No. 2015-021, syllabus, paragraph 10, explained.)

4. A resolution adopted by a board of township trustees declaring that cash payments or reimbursements provided to township officers and employees under R.C. 505.601 or R.C. 505.603 will be discontinued to ensure compliance with the requirements of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), supersedes a previous resolution in which the board of township trustees authorized cash payments or reimbursements to township officers and employees under R.C. 505.601 or R.C. 505.603. Therefore, a board of township trustees shall adopt a resolution authorizing the resumption of cash payments and reimbursements before a township fiscal officer may make the cash payments or reimbursements.
5. If a board of township trustees discontinued cash payments or reimbursements to township officers and employees under R.C. 505.601 or R.C. 505.603 to ensure compliance with the requirements of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), without adopting a resolution memorializing its intention to discontinue the cash payments or reimbursements, the board should adopt a new resolution memorializing the board’s decision to resume cash payments or reimbursements that meet the requirements of 26 U.S.C.A. § 9831(d) (West 2017).
6. Article II, § 20 of the Ohio Constitution prohibits a board of township trustees from providing cash payments or reimbursements to township officers under R.C. 505.60(D), R.C. 505.601, or R.C. 505.603 during those officers’ terms of office if the board of township trustees was prohibited by federal law from offering those benefits to township officers at the commencement of their terms of office.



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August 28, 2017

OPINION NO. 2017-026

The Honorable Nicholas A. Iarocci  
Ashtabula County Prosecuting Attorney  
Ashtabula County Courthouse  
25 West Jefferson Street  
Jefferson, Ohio 44047-1092

Dear Prosecutor Iarocci:

You have asked us to advise you whether § 18001 of the 21st Century Cures Act, Pub. L. No. 114-255, 130 Stat. 1033 (2016), and its enactment of 26 U.S.C.A. § 9831(d) (West 2017), affects in any way the advice in 2015 Op. Att’y Gen. No. 2015-021. You ask us to answer the following questions:

1. How, if at all, does Section 18001 of the 21st Century Cures Act and its new definition of “group health plan” change the analysis and conclusions contained in 2015 Op. Att’y Gen. No. 2015-021?
2. How does the prohibition against in-term changes in compensation in Article II, § 20 of the Ohio Constitution affect those township fiscal officers and trustees who started their terms in 2016 when reimbursement by the township was not permitted? How does this same prohibition affect township fiscal officers and trustees who started their terms in 2015 when reimbursement by the township was first allowed and thereafter not allowed?
3. If a township that reimbursed health insurance premiums in 2015 has not passed a new resolution regarding health insurance, is the original resolution still in effect and enforceable?
4. May a township pass a resolution, while reimbursement is not allowed, finding that, if federal law changes in the future and reimbursement is allowed, the township would continue to reimburse health insurance premiums at the 2015 capacity?

**I. Effect of the Affordable Care Act upon the Authority of a Board of Township Trustees to Provide Cash Payments or Reimbursements to Township Personnel for Health Care Benefits – 2015 Op. Att’y Gen. No. 2015-021**

We begin with an explanation of the conclusions in 2015 Op. Att’y Gen. No. 2015-021 with respect to a board of township trustees’ authority to provide cash payments and reimbursements for health care expenses under R.C. 505.60(D), R.C. 505.601, and R.C. 505.603 in light of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (ACA). The opinion considered the following types of cash payments or reimbursements that a board of township trustees may provide to township officers and employees under R.C. 505.60(D), R.C. 505.601, and R.C. 505.603: (1) cash payments or reimbursements to purchase an individual market policy, (2) cash payments or reimbursements to pay for Medicare Parts B or D premiums, and (3) cash payments or reimbursements to obtain health care insurance coverage through an entity other than the township employer (*e.g.*, health care insurance coverage under a plan offered by the employer of the spouse of a township officer or employee). 2015 Op. Att’y Gen. No. 2015-021, at 2-211.

2015 Op. Att’y Gen. No. 2015-021 explained that a board of township trustees provides a “group health plan,” as understood by terms of the ACA, when it provides cash payments or reimbursements to township officers and employees to purchase an individual market policy, pay for Medicare Parts B or D premiums, or obtain health care insurance coverage through an entity other than the township employer, 2015 Op. Att’y Gen. No. 2015-021, at 2-222.<sup>1</sup> At the time of the issuance of the 2015 opinion, a “group health plan” was defined as an “employee welfare benefit plan (... to the extent that the plan provides medical care ... and including items and services paid for as medical care) to employees or their dependents ... directly or through insurance, reimbursement, or otherwise.” 2015 Op. Att’y Gen. No. 2015-021, at 2-216 (quoting 42 U.S.C.A. § 300gg-91(a)(1) (West 2015)) (footnote omitted). An “employee welfare benefit plan” was defined, in part, as “any plan, fund or program ... established or maintained by an employer ... to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event

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<sup>1</sup> The guidance in 2015 Op. Att’y Gen. No. 2015-021 presumes that cash payments and reimbursements a board of township trustees provides to township officers and employees under R.C. 505.60(D), R.C. 505.601, and R.C. 505.603 are group health plans under the ACA that are subject to the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11(a) (West 2011). The federal courts have since confirmed this understanding. *Ohio v. United States*, 154 F.Supp.3d 621, 634 (S.D. Ohio 2016), *aff’d*, 849 F.3d 313 (6th Cir. 2017). Thus, in this opinion, when discussing the analyses and conclusions of 2015 Op. Att’y Gen. No. 2015-021, we have omitted the opinion’s language stating that presumption.

of sickness, accident, disability, death or unemployment.” *Id.* (quoting 29 U.S.C.A. § 1002(1) (West 2015)).

Under the ACA, a “group health plan” may not establish “lifetime limits on the dollar value of benefits for any participant or beneficiary; or ... except as provided in [42 U.S.C.A. § 300gg-11(a)(2)]<sup>2</sup>, annual limits on the dollar value of benefits for any participant or beneficiary.” 42 U.S.C.A. § 300gg-11(a)(1)(A), (B) (footnote added). Insofar as cash payments and reimbursements offered by a board of township trustees under R.C. 505.60(D), R.C. 505.601, or R.C. 505.603 are “group health plans,” they are subject to the annual dollar limit prohibition set forth in 42 U.S.C.A. § 300gg-11(a)(1). 2015 Op. Att’y Gen. No. 2015-021, at 2-220 to 2-222.

The statutes authorizing a board of township trustees to provide cash payments or reimbursements for health care benefits or expenses require that the board set a dollar limit on the amount of the cash payments or reimbursements the board provides. R.C. 505.60(D) (“the township may reimburse the officer or employee for each out-of-pocket premium attributable to the coverage ... that the officer or employee otherwise obtains, but not to exceed an amount equal to the average premium paid by the township for its officers and employees under any health care plan it procures under [R.C. 505.60]”); R.C. 505.601(B) (the resolution authorizing reimbursements shall provide for a “uniform maximum monthly or yearly payment amount for each officer or employee to cover themselves and their immediate dependents, beyond which the township will not reimburse the officer or employee”); R.C. 505.603(A) (a board of township trustees may adopt a policy authorizing a cash payment to township officers or employees “but only if the cash payment does not exceed twenty-five per cent of the cost of premiums or payments that otherwise would be paid by the board for benefits for the officer or employee under an offered policy, contract, or plan”). Accordingly, cash payments or reimbursements that a board of township trustees provides under R.C. 505.60(D), R.C. 505.601, or R.C. 505.603 to township officers and employees to purchase an individual market policy, pay for Medicare Parts B or D premiums, or obtain health care insurance coverage through an entity other than the township may violate the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11. 2015 Op. Att’y Gen. No. 2015-021, at 2-222 to 2-224 and 2-226 to 2-227.

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<sup>2</sup> 42 U.S.C.A. § 300gg-11(a)(2) (West 2011) provides:

Annual limits prior to 2014. With respect to plan years beginning prior to January 1, 2014, a group health plan and a health insurance issuer offering group or individual health insurance coverage may only establish a restricted annual limit on the dollar value of benefits for any participant or beneficiary with respect to the scope of benefits that are essential health benefits under section 18022(b) of this title, as determined by the Secretary. In defining the term “restricted annual limit” for purposes of the preceding sentence, the Secretary shall ensure that access to needed services is made available with a minimal impact on premiums.

The 2015 opinion concluded that a board of township trustees violates the annual dollar limit prohibition if cash payments or reimbursements offered under R.C. 505.60(D), R.C. 505.601, or R.C. 505.603 are used to purchase health care coverage in the individual market or to reimburse Medicare Parts B and D premiums, unless the Medicare Parts B and D reimbursements are integrated with another group health plan in accordance with the criteria set forth in IRS Notice 2015-17. 2015 Op. Att’y Gen. No. 2015-021, at 2-226 to 2-227. The Attorney General further concluded that a board of township trustees will not violate the annual dollar limit prohibition if the township’s cash payments or reimbursements under the township’s employer payment plan are integrated with a group health plan provided through an entity other than the township in accordance with the requirements set forth in IRS Notice 2013-54 and Department of Labor Technical Release 2013-03. 2015 Op. Att’y Gen. No. 2015-021, at 2-226. Finally, the Attorney General concluded that “[a] board of township trustees may provide township officers and employees a cafeteria plan pursuant to R.C. 505.603 only to the extent that the cafeteria plan is used to purchase health care insurance coverage that complies with [the annual dollar limit prohibition].” 2015 Op. Att’y Gen. No. 2015-021 (syllabus, paragraph 8).

## II. Section 18001 of the 21st Century Cures Act

In 2016, the United States Congress enacted the 21st Century Cures Act. Among other things, § 18001 of the 21st Century Cures Act excepts “qualified small employer health reimbursement arrangements” from the ACA’s definition of “group health plan.” 42 U.S.C.A. § 300gg-91(a)(1) (West Supp. 2017) (the term “group health plan” “shall not include any qualified small employer health reimbursement arrangement (as defined in section 9831(d)(2) of Title 26”). As defined in 26 U.S.C.A. § 9831(d)(2), a “qualified small employer health reimbursement arrangement” is a reimbursement arrangement that satisfies the conditions set forth in 26 U.S.C.A. § 9831(d)(2)(B) and that is provided on the same terms to all “eligible employees” of an “eligible employer.” 26 U.S.C.A. § 9831(d)(2)(A). A qualified small employer health reimbursement arrangement satisfies the conditions set forth in 26 U.S.C.A. § 9831(d)(2)(B) if:

- (i) such arrangement is funded solely by an eligible employer and no salary reduction contributions may be made under such arrangement,
- (ii) such arrangement provides, after the employee provides proof of coverage, for the payment of, or reimbursement of, an eligible employee for expenses for medical care (as defined in section 213(d))<sup>3</sup> incurred by the eligible employee or the eligible employee’s family members (as determined under the terms of the arrangement), and

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<sup>3</sup> Title 26 U.S.C.A. § 213(d) (West 2011) defines the term “medical care” to include amounts paid for (A) the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body, (B) transportation to particular medical care facilities, (C) the provision of long-term medical care services, and (D) insurance for medical care and qualified long-term care insurance contracts.

(iii) the amount of payments and reimbursements described in clause (ii) for any year do not exceed \$4,950 (\$10,000 in the case of an arrangement that also provides for payments or reimbursements for family members of the employee). (Footnote added.)

An “eligible employee” is “any employee of an eligible employer, except that the terms of the arrangement may exclude from consideration employees described in any clause of section 105(h)(3)(B)<sup>4</sup> (applied by substituting ‘90 days’ for ‘3 years’ in clause (i) thereof).” 26 U.S.C.A. § 9831(d)(3)(A) (footnote added). An “eligible employer” is defined as an employer that “(i) is not an applicable large employer as defined in section 4980H(c)(2),<sup>5</sup> and (ii) does not offer a group health plan to any of its employees.” 26 U.S.C.A. § 9831(d)(3)(B) (footnote added).

Thus, an employer that employs an average of less than 50 full-time employees on business days during the preceding calendar year and that does not offer a group health plan to any of those employees may provide a health reimbursement arrangement to its employees that satisfies the conditions set forth in 26 U.S.C.A. § 9831(d)(2)(B).<sup>6</sup> An arrangement so described is not a “group health plan” and is not subject to the annual dollar limit prohibition of the ACA.

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<sup>4</sup> Title 26 U.S.C.A. § 105(h)(3)(B) (West 2011) provides:

Exclusion of certain employees. For purposes of subparagraph (A), there may be excluded from consideration--

- (i) employees who have not completed 3 years of service;
- (ii) employees who have not attained age 25;
- (iii) part-time or seasonal employees;
- (iv) employees not included in the plan who are included in a unit of employees covered by an agreement between employee representatives and one or more employers which the Secretary finds to be a collective bargaining agreement, if accident and health benefits were the subject of good faith bargaining between such employee representatives and such employer or employers; and
- (v) employees who are nonresident aliens and who receive no earned income (within the meaning of section 911(d)(2)) from the employer which constitutes income from sources within the United States (within the meaning of section 861(a)(3)).

<sup>5</sup> An “applicable large employer” is, with respect to a calendar year, “an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year,” subject to limited exceptions. 26 U.S.C.A. § 4980H(c)(2)(A) (West 2011).

<sup>6</sup> In 2015 Op. Att’y Gen. No. 2015-021 (syllabus, paragraph 9), the Attorney General concluded:

We now will address the effect of the exclusion of “qualified small employer health reimbursement arrangements” from the ACA’s definition of a “group health plan” upon the cash payments and reimbursements a board of township trustees may provide to township officers and employees under R.C. 505.60(D), R.C. 505.601, and R.C. 505.603.

**A. R.C. 505.60 – Group Health Care Insurance Coverage Provided by a Board of Township Trustees**

R.C. 505.60(A) and (B) authorize a board of township trustees to purchase group health care insurance coverage for township officers and employees and their immediate dependents. R.C. 505.60(D) authorizes a board of township trustees to reimburse a township officer or employee for out-of-pocket premiums attributable to health care coverage the officer or employee otherwise obtains when the officer or employee is either denied coverage or forgoes coverage under the township’s health care plan. Reimbursements a board of township trustees provides to a township officer or employee under R.C. 505.60(D) do not constitute “qualified small employer health reimbursement arrangements” as defined in 26 U.S.C.A. § 9831(d)(2).

To constitute a “qualified small employer health reimbursement arrangement,” the reimbursement arrangement shall be offered by an “eligible employer.” An employer cannot qualify as an “eligible employer” unless the employer “does not offer a group health plan to any of its employees.” 26 U.S.C.A. § 9831(d)(3)(B)(ii). Reimbursements a board of township trustees provides under R.C. 505.60(D) are authorized by the General Assembly only when a township officer or employee is denied coverage or forgoes coverage that is offered to the officer or employee under a group health care insurance plan that is purchased by a board of township trustees. A group health care insurance plan purchased by a board of township trustees for

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Whether a township employs fewer than fifty employees does not determine, for purposes of the annual dollar limit prohibition in section 2711 of the Public Health Service Act, 42 U.S.C.A. § 300gg-11, whether a board of township trustees may provide reimbursements for health care insurance coverage to township officers and employees under R.C. 505.60(D) or R.C. 505.601 or whether it may provide a cafeteria plan to township officers and employees under R.C. 505.603, provided a township employer is subject to section 2711’s annual dollar limit prohibition, as the federal Departments of Treasury, Labor, and Health and Human Services assert.

In light of the definition of “eligible employer” in 26 U.S.C.A. § 9831(d)(3)(B), the ninth syllabus paragraph of 2015 Op. Att’y Gen. No. 2015-021 is not an accurate statement of the law with respect to qualified small employer health reimbursement arrangements.

township officers or employees under R.C. 505.60(A) or (B) is a “group health plan” for the purpose of 26 U.S.C.A. § 9831(d)(2). *See* 42 U.S.C.A. § 300gg-91(a)(1). Since reimbursements under R.C. 505.60(D) are made in a situation in which a board of township trustees purchases and offers a group health care insurance plan for township personnel, the condition in 26 U.S.C.A. § 9831(d)(3)(B)(ii) is not satisfied. In that situation, a board of township trustees is not an “eligible employer” and, therefore, does not offer a “qualified small employer health reimbursement arrangement.” Thus, reimbursements a board of township trustees provides under R.C. 505.60(D) are subject to the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11(a).

**B. R.C. 505.601 – Group Health Care Insurance Coverage Purchased by Township Officers and Employees Other than Through the Township**

R.C. 505.601 applies when a board of township trustees does not provide group health care insurance coverage for officers and employees of the township under R.C. 505.60(A) or (B). In that situation, R.C. 505.601 authorizes a board of township trustees to provide reimbursements to township officers and employees for the cost of health care insurance coverage, as described in R.C. 505.60(A), that the township officers and employees purchase elsewhere for themselves and their dependents. To effect these reimbursements, a board of township trustees shall adopt a resolution that declares the board’s intention to elect that option, R.C. 505.601(A), provides a uniform maximum monthly or yearly payment amount for each officer or employee, beyond which the township will not reimburse the officer or employee, R.C. 505.601(B), and states the specific benefits listed in R.C. 505.60(A) for which the board will provide reimbursements, R.C. 505.601(C).

A reimbursement a board of township trustees provides in accordance with R.C. 505.601 constitutes a “qualified small employer health reimbursement arrangement” if the arrangement meets all the conditions set forth in 26 U.S.C.A. § 9831(d)(2)(B) and “is provided on the same terms to all eligible employees of the eligible employer.” 26 U.S.C.A. § 9831(d)(2)(A)(i)-(ii). A reimbursement arrangement meets all of the conditions set forth in 26 U.S.C.A. § 9831(d)(2)(B) if it is funded solely by the employer, without any salary reduction contributions by the employee; it provides for the payment of, or reimbursement of, medical care expenses incurred by an eligible employee or the employee’s family members; and the amount of payments or reimbursements do not exceed the annual dollar amounts specified in 26 U.S.C.A. § 9831(d)(2)(B)(iii). 26 U.S.C.A. § 9831(d)(2)(B). A board of township trustees is an “eligible employer,” as defined in 26 U.S.C.A. § 9831(d)(3)(B), if the board employs on average less than 50 full-time employees on business days during the preceding calendar year and does not offer a group health plan to any of those employees. 26 U.S.C.A. § 9831(d)(3)(B).

A reimbursement a board of township trustees provides under R.C. 505.601 to township officers and employees that satisfies all the foregoing conditions and requirements is a “qualified small employer health reimbursement arrangement,” as defined in 26 U.S.C.A. § 9831(d)(2) and does not constitute a “group health plan” under the ACA that is subject to the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11.

**C. R.C. 505.603 – Cafeteria Plans for Township Officers and Employees**

R.C. 505.603(A) declares that, in addition to or in lieu of providing benefits to township officers and employees under R.C. 505.60 or R.C. 505.601, “a board of township trustees may offer benefits to officers and employees through a cafeteria plan that meets the requirements of [I.R.C. § 125].” A board of township trustees may adopt a policy authorizing an officer or employee to receive a cash payment in lieu of a benefit otherwise offered to township officers or employees under R.C. 505.60 or R.C. 505.601,<sup>7</sup> but only if the cash payment does not exceed twenty-five per cent of the cost of premiums or payments that otherwise would be paid by the board for benefits provided to the officer or employee under an offered policy, contract, or plan. R.C. 505.603(A).

Division (C) of R.C. 505.603 permits a township fiscal officer to deduct from the salary or wages of a township officer or employee an amount to be paid for the benefits provided through the township’s cafeteria plan. To make such deductions, the deductions shall be authorized in writing by the township officer or employee and the cafeteria plan benefits shall be offered on a group basis, with at least ten per cent of the township’s officers and employees voluntarily electing to participate in the cafeteria plan. R.C. 505.603(C).

Cash payments provided under a cafeteria plan that is offered by a board of township trustees under R.C. 505.603 may constitute a “qualified small employer health reimbursement arrangement” if the requirements of 26 U.S.C.A. §9831(d)(2) are satisfied. First, the cafeteria plan shall meet all of the conditions set forth in 26 U.S.C.A. § 9831(d)(2)(B): it is funded solely by the employer, without any salary reduction contributions by the employee; it provides for the payment of, or reimbursement of, medical care expenses incurred by an eligible employee or the employee’s family members; and the amount of payments or reimbursements do not exceed the annual dollar amounts specified in 26 U.S.C.A. § 9831(d)(2)(B)(iii). 26 U.S.C.A. § 9831(d)(2)(B). In addition, the board of township trustees has to be an “eligible employer” as defined in 26 U.S.C.A. § 9831(d)(3)(B) (*i.e.*, employing on average less than 50 full-time employees on business days during the preceding calendar year and does not offer a group health plan to any of those employees). 26 U.S.C.A. § 9831(d)(3)(B).

As in the case of R.C. 505.60(D), cash payments made under R.C. 505.603(A) that are offered “in addition to” group health care insurance that a board of township trustees purchases for township officers and employees under R.C. 505.60(A) or (B) do not constitute a “qualified small employer health reimbursement arrangement.” Cash payments made pursuant to R.C. 505.603(A) constitute a “qualified small employer health reimbursement arrangement” only when a board of township trustees does not offer any other group health plan to township officers and employees.

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<sup>7</sup> Cash payments also may be offered under R.C. 505.603 in lieu of or in addition to a life insurance benefit offered under R.C. 505.602. You have not asked about life insurance benefits.

In addition, cash payments made pursuant to R.C. 505.603(A) constitute a “qualified small employer health reimbursement arrangement” only when they are funded solely by the township and no salary or wage reduction contributions are made by the township officers and employees. If a township fiscal officer deducts an amount from a township officer or employee’s salary or wages under R.C. 505.603(C), the benefits the board of township trustees offers through a cafeteria plan under R.C. 505.603(A) will not constitute a “qualified small employer health reimbursement arrangement.”

A board of township trustees’ cash payment arrangement established under R.C. 505.603(A) that satisfies all the foregoing conditions and requirements is a “qualified small employer health reimbursement arrangement,” as defined in 26 U.S.C.S § 9831(d)(2), and is not a “group health plan” under the ACA that is subject to the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11.

**D. Effect of Section 18001 of the 21st Century Cures Act upon 2015 Op. Att’y Gen. No. 2015-021**

As a result of the exclusion of a “qualified small employer health reimbursement arrangement” from the definition of a “group health plan” in 42 U.S.C.A. § 300gg-91(a)(1), the advice in 2015 Op. Att’y Gen. No. 2015-021 is modified to the extent that the opinion treats cash payments or reimbursements that a board of township trustees provides to township officers and employees under R.C. 505.601 or R.C. 505.603 as “group health plans” that are subject to the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11, when those cash payments or reimbursements constitute “qualified small employer health reimbursement arrangements.” Accordingly, we modify syllabus paragraphs 1 through 9 of 2015 Op. Att’y Gen. No. 2015-021 to the extent that their advice is not compatible with the terms of 42 U.S.C.A. § 300gg-91(a)(1) and 26 U.S.C.A. § 9831(d)(2).

**III. Effect of Section 18001 of the 21st Century Cures Act upon the Application of Article II, Section 20 of the Ohio Constitution to Township Officers**

In your second question you ask how the prohibition against in-term changes in the compensation of a public officer in Article II, § 20 of the Ohio Constitution affects township fiscal officers and trustees who started their terms in 2015 when reimbursements by a board of township trustees were permitted, and thereafter not permitted by the ACA, or who started their terms in 2016 when reimbursements were not permitted by the ACA. You pose these questions in the event we find that the enactment of 26 U.S.C.S § 9831(d) by § 18001 of the 21st Century Cures Act enables a board of township trustees to resume cash payments or reimbursements to township officers in the midst of their terms of office for the costs of health care benefits they purchase or obtain other than through the township.

Article II, § 20 declares that “[t]he general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.” As we explained in 2015 Op. Att’y Gen. No. 2015-021, at 2-228, “[t]he cost of

health care insurance is part of a public officer's compensation for purposes of Article II, Section 20." Therefore, "[t]he prohibition in Article II, Section 20 ... applies to changes in the health care benefits provided by a township to township officers that work an in-term change in an officer's compensation." *Id.*

In 2015 Op. Att'y Gen. No. 2015-021 we explained that, under certain circumstances, a board of township trustees would not comply with certain requirements of the ACA if the board were to provide cash payments or reimbursements to township officers and employees under R.C. 505.60(D), R.C. 505.601, or R.C. 505.603 as a component of the officers' and employees' compensation. We also recognized that discontinuing the cash payments or reimbursements to ensure compliance with the ACA's limitations would work a change in the compensation of a township's officers, perhaps implicating the prohibition in Article II, § 20 of the Ohio Constitution. 2015 Op. Att'y Gen. No. 2015-021, at 2-228. At length, however, we determined that a board of township trustees is not prohibited by Ohio Const. art. II, § 20 from discontinuing cash payments or reimbursements to township officers previously offered under R.C. 505.60(D), R.C. 505.601, or R.C. 505.603 to comply with the ACA. 2015 Op. Att'y Gen. No. 2015-021 (syllabus, paragraph 10). We reasoned that even if compliance with the ACA did cause an in-term change in compensation prohibited by Ohio Const. art. II, § 20, application of the constitutional prohibition would be preempted by the language of the ACA. 2015 Op. Att'y Gen. No. 2015-021 (syllabus, paragraph 10). Thus, it was not necessary in 2015 Op. Att'y Gen. No. 2015-021 to determine conclusively whether discontinuing cash payments or reimbursements in the case of township officers was an in-term change in compensation prohibited by Ohio Const. art. II, § 20. We answer that question in this opinion.

The Ohio Supreme Court has taken "various approaches ... in considering whether changes in an officer's salary or compensation are prohibited by Ohio Const. art. II, § 20." 2012 Op. Att'y Gen. No. 2012-024, at 2-201 to 2-202; *see also* 2005 Op. Att'y Gen. No. 2005-031, at 2-319 ("[o]ver the past thirty years, the courts have taken a variety of approaches to resolving the question whether changes in an officer's salary or compensation violate the terms of Ohio Const. art. II, § 20"). In *State ex rel. Artmayer v. Board of Trustees*, 43 Ohio St. 2d 62, 65, 330 N.E.2d 684 (1975), for example, the court determined that a township clerk was not entitled to receive an in-term increase in compensation in accordance with a statutory amendment enacted during the clerk's term of office. The court found that "[a] statute, ... the only effect of which is to increase the salary attached to a public office, contravenes Section 20, of Article II, of the Constitution of this state, in so far as it may affect the salary of an incumbent of the office during the term he was serving when the statute was enacted." *Artmayer*, 43 Ohio St. 2d at 64 (quoting *State ex rel. v. Raine*, 49 Ohio St. 580, 31 N.E. 741 (1892) (syllabus)).

A few years later, in *Schultz v. Garrett*, 6 Ohio St. 3d 132, 451 N.E.2d 794 (1983), the court recognized that, in certain circumstances, an in-term increase in the compensation of a public officer that results from a mid-term legislative enactment will not violate the prohibition in Ohio Const. art. II, § 20. In *Schultz*, the salary of a municipal court clerk had been fixed at the commencement of his term pursuant to R.C. 1901.31(C). R.C. 1901.31(C) "provided that "\*\*\*\* the clerk shall receive annual compensation in a sum equal to eighty-five per cent of the salary of

a judge of such court,” but “shall not exceed that of the clerk of courts of the county in which the municipal court is located.” *Schultz*, 6 Ohio St. 3d at 132 (quoting R.C. 1901.31(C)). R.C. 325.08 set the salary of the county clerk at an amount that was less than eighty-five percent of the salary of the municipal judge. *Id.* Therefore, the municipal court clerk in *Schultz* was “unable to be paid the full eighty-five percent of the municipal judge’s salary” as provided for in R.C. 1901.31(C). 2005 Op. Att’y Gen. No. 2005-031, at 2-322.

During the municipal court clerk’s term, the General Assembly amended R.C. 325.08, thereby increasing the salary of the clerk of courts of the county in which the municipal court was located. *Schultz*, 6 Ohio St. 3d at 132. Based upon this amendment, the municipal court clerk applied for, but was denied, an in-term increase in his compensation. *Id.* In denying the municipal court clerk’s application, the municipal finance director and county auditor reasoned that the in-term increase in compensation would violate Ohio Const. art. II, § 20. *Id.* at 133. The *Schultz* court disagreed:

A close examination of Section 20, Article II discloses that the prohibition of the section is directed towards a direct legislative adjustment of the formula used in calculating the salary of a clerk. The section states in pertinent part:

“The general assembly \*\*\* *shall fix* \*\*\* *the compensation* of all officers; but *no change therein* shall affect the salary of any officer during his existing term \*\*\*.” (Emphasis added.)

The language of the section directs that the General Assembly may not institute a “change therein.” However, in the present case no such change is involved in the “fix[ing] \*\*\* [of] the compensation of \*\*\* officers \*\*\*.”

What the General Assembly did was change the provisions of R.C. 325.08, the standard used for calculating the salary of a county clerk of courts. This change had an indirect effect on the salary of a municipal clerk in those areas where the county clerk’s salary was a ceiling limit on the municipal clerk’s pay. The change in R.C. 325.08 was in no way a change in the formula used to fix the compensation of a municipal clerk. Thus, it was not a change which, by the provision of the Ohio Constitution, could not be given to municipal clerks while in term.

...Where no intent to provide an in-term salary increase is found in a legislative act, the mere fact that such an increase is an incidental result of the act does not render the increase unconstitutional pursuant to the terms of Section 20, Article II of the Ohio Constitution.

*Schultz*, 6 Ohio St. 3d at 134.

*Schultz* thus stands for the proposition that an officer’s compensation may be changed during his term of office so long as the change is not the result of direct legislative action by the General Assembly upon the statute that determines, by formula or otherwise, the amount of the

officer's compensation at the commencement of his term of office. Conversely, in-term changes in the amount of an officer's compensation that occur because the General Assembly amends the statute that sets forth, by formula or otherwise, the amount of the officer's compensation, which is effective at the commencement of his term of office, violate the Ohio Const. art. II, § 20.

In certain instances the General Assembly has granted the power to fix the compensation of public officers to local government bodies. The principles in *Schultz v. Garrett* apply with equal force to the enactment, amendment, or repeal of ordinances or resolutions that set the compensation of public officers. See 2005 Op. Att'y Gen. No. 2005-031, at 2-325 (quoting 2000 Op. Att'y Gen. No. 2000-043, at 2-261) (recognizing that the prohibition in Ohio Const. art. II, § 20 “‘applies to compensation [changes] approved by subordinate bodies to whom the General Assembly has delegated the authority to fix compensation’”). In 2005 Op. Att'y Gen. No. 2005-031, at 2-324, for example, we recognized that in R.C. 305.171 the General Assembly has established the boundaries within which a board of county commissioners may provide health care benefits to county personnel. We explained in that opinion that a board of county commissioners exercises the authority granted under R.C. 305.171 by adopting a resolution that authorizes health care benefits for county officers in accordance with the terms of the statute. 2005 Op. Att'y Gen. No. 2005-031, at 2-326. We reasoned that if a board of county commissioners adopts a resolution pursuant to R.C. 305.171, the health care benefit component of a county officer's compensation is established by the action of the General Assembly enacting R.C. 305.171 *and* the legislative action of the board of county commissioners adopting the resolution authorizing benefits in accordance with that statute. *Id.* In that circumstance an in-term change to an officer's health care benefits under R.C. 305.171 may violate Ohio Const. art. II, § 20 if the change is the result of direct legislative action by the board of county commissioners by virtue of an amendment to, or rescission of, the resolution that set forth the benefits provided to the county officer at the commencement of his term of office. 2005 Op. Att'y Gen. No. 2005-031, at 2-326 (“[t]he resolution setting forth the county's health care options under R.C. 305.171 must, therefore, be the reference point for determining whether a mid-term change in an officer's health care benefits has occurred, and whether such change is prohibited by Ohio Const. art. II, § 20”).

In this matter the General Assembly has authorized a board of township trustees to provide cash payments or reimbursements to township officers and employees under R.C. 505.60(D), R.C. 505.601, and R.C. 505.603 for the costs of certain medical expenses or health care benefits the officers and employees obtain other than through the township. Whether and how these benefits are provided to township officers and employees is determined by the board of township trustees by means of a duly enacted resolution. See, e.g., 2005 Op. Att'y Gen. No. 2005-031 (syllabus, paragraph 2) (“[b]ecause the action taken by a board of county commissioners under R.C. 305.171 in designing a health care plan for county personnel is a type of legislative action, it ‘must be memorialized by a duly enacted ... resolution and may have prospective effect only,’” quoting 1982 Op. Att'y Gen. No. 82-006 (syllabus, paragraph 4)). See generally *Black's Law Dictionary* 1504 (10th ed. 2014) (defining “resolution,” in part, as “[f]ormal action by a corporate board of directors or other corporate body authorizing a particular act, transaction, or appointment”).

With the enactment of the ACA, cash payments and reimbursements provided by a board of township trustees under R.C. 505.60(D), R.C. 505.601, and R.C. 505.603 became “group health plans,” as defined in 42 U.S.C.A. § 300gg-91(A)(1). *See also* 2015 Op. Att’y Gen. No. 2015-021, at 2-222 (when a board of township trustees provides cash payments or reimbursements to township officers and employees to purchase an individual market policy, pay for Medicare Parts B or D, or obtain health care insurance coverage through an entity other than the township employer, the board of township trustees provides a “group health plan” as understood by the terms of the ACA). As group health plans, these cash payments and reimbursements became subject to the annual dollar limit prohibition set forth in 42 U.S.C.A. § 300gg-11. *Id.* Some of the cash payments and reimbursements provided by boards of township trustees prior to the enactment of the ACA may, upon the ACA’s enactment, violate the annual dollar limit prohibition. *See generally* 2015 Op. Att’y Gen. No. 2015-021 (syllabus, paragraphs 1 through 9).

Case law has addressed the meaning and application of Ohio Const. art. II, § 20 and Attorney General opinions that have applied that jurisprudence make it clear that Ohio Const. art. II, § 20 prohibits a board of township trustees from making in-term changes to cash payments or reimbursements that were available and provided to township officers at the beginning of their terms of office, when those changes are the result of direct legislative action by the board of township trustees. An amendment of a resolution, which was adopted by a board of township trustees at the commencement of the officers’ terms, or an enactment of a new resolution that provides benefits that were not previously available to township officers, are direct legislative actions. Your question, however, requires us to determine whether an in-term change in a township officer’s compensation that is compelled by the enactment of a federal law is a form of direct legislative action prohibited by Ohio Const. art. II, § 20.<sup>8</sup>

As explained in *State ex rel. Mack v. Guckenberger*, 139 Ohio St. 273, 278, 39 N.E.2d 840 (1942):

The purpose of [Ohio Const. art. II, § 20] . . . is to make sure that the [officer] and the electorate are advised before he is appointed or elected what his

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<sup>8</sup> The enactment of the ACA prevented a board of township trustees from making in-term changes in the health care benefits provided to township officers and employees when those benefits conflicted with the requirements of the ACA because the ACA preempts state law in cases of conflict. 2015 Op. Att’y Gen. No. 2015-021, at 2-226 (“[w]hen it is impossible to comply with [the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11(a)(1)] and to provide premium reimbursement under R.C. 505.60(D) or R.C. 505.601, then [42 U.S.C.A. § 300gg-11(a)(1)] and R.C. 505.60(D) and R.C. 505.601 are in conflict and the [federal law (the ACA)] preempts the state laws”). In addition, the ACA prevented a board of township trustees, as an employer providing a group health plan, from offering health care benefits to township officers and employees that violated the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11(a)(1).

compensation will be, with the assurance that it cannot be changed by the Legislature during the term; that the [officer] is precluded from using his personal influence or official action to have the Legislature increase his salary; and *that at the same time he is protected against the Legislature and the people from decreasing his compensation after his term begins.*

Insofar as the ACA was enacted by the United States Congress, rather than the Ohio General Assembly or a board of township trustees, the ACA's preemption of R.C. 505.60(D), R.C. 505.601, or R.C. 505.603 indirectly affects resolutions adopted by boards of township trustees authorizing the health care benefits described in those statutes. The enactment of a federal law that indirectly alters the authority of a board of township trustees to provide particular health care benefits to township officers under provisions of the Revised Code is not the type of legislative action that is prohibited by Ohio Const. art. II, § 20. *Cf.* 2003 Op. Att'y Gen. No. 2003-027, at 2-228 (neither the General Assembly nor the public decreases the statutorily-prescribed compensation of a public officer when he waives all or a portion of that compensation and so in that situation "the principal mischief at which the constitutional prohibition against in-term changes in compensation is aimed is not present"). *See also State ex rel. Hess v. City of Akron*, 132 Ohio St. 305, 7 N.E.2d 411 (1937) (syllabus, paragraphs 1 and 2) ("[t]he occupant of a public office may waive part of the established salary thereof," and "[s]uch waiver is not contrary to public policy"). A board of township trustees that ceases cash payments or reimbursements previously provided to township officers under R.C. 505.60(D), R.C. 505.601, or R.C. 505.603 to comply with the ACA does so as a result of actions by the United States Congress, actions that a board of township trustees cannot control or affect in any meaningful respect. A board of township trustees, as an employer, is prohibited from offering group health plans (*i.e.*, cash payments or reimbursements for health care benefits obtained other than through the township) that violate the ACA's annual dollar limit prohibition. Thus, a board of township trustees' action in ceasing cash payments or reimbursements is precipitated by the need to comply with federal law rather than by a motive that Article II, § 20 was meant to foreclose.

To effect the discontinuance of cash payments or reimbursements that were offered to township officers prior to the enactment of the ACA, a board of township trustees may have been required to amend or rescind a resolution that authorized the cash payments or reimbursements at the commencement of the officers' terms. Because, in this instance, the amendment or enactment of a resolution that changes the compensation provided to a public officer during the officer's term was not caused by the independent initiative of the board of township trustees, the amendment or enactment of a resolution to discontinue cash payments or reimbursements prohibited by the ACA does not constitute the type of direct legislative action that is prohibited by Ohio Const. art. II, §20. Accordingly, we conclude that an in-term cessation of cash payments or reimbursements to township officers by a board of township trustees to ensure compliance with the conditions of the ACA does not work an in-term change in the officers' compensation that is prohibited by Ohio Const. art. II, § 20.

We now consider whether a board of township trustees may resume cash payments or reimbursements to township officers in situations that meet all of the conditions of 26 U.S.C.A. § 9831(d). The enactment of 26 U.S.C.A. § 9831(d), like the enactment of the ACA, indirectly affects the authority of a board of township trustees to provide health care benefits as part of a township officer's compensation under R.C. 505.601 and R.C. 505.603. As set forth above, an in-term cessation of health care benefits previously provided to township officers by a board of township trustees in response to the enactment of the ACA is not a type of legislative action prohibited by Ohio Const. art. II, § 20. An in-term resumption of these benefits in response to the enactment of 26 U.S.C.A. § 9831(d) also is not a type of legislative action prohibited by Ohio Const. art. II, § 20.

Article II, § 20 prohibits an in-term change in a township officer's compensation when that change results exclusively from the decision of a board of township trustees to offer benefits that differ from the benefits that were offered to township officers at the commencement of their terms of office. A board of township trustees that offered cash payments or reimbursements to township officers under R.C. 505.601 or R.C. 505.603 at the commencement of those officers' terms may not make changes to those benefits on the board's own initiative. Accordingly, when able, a board of township trustees is required to provide to its township officers the compensation that was available to them at the commencement of their terms of office.

In this situation, health care benefits provided to township officers as they commenced their terms of office were discontinued as a result of the language the ACA, a federal law over which the township trustees had no control. If the federal law changes again, thereby permitting a board of township trustees to provide certain benefits that were offered at the start of the officers' terms, the board of township trustees will violate Ohio Const. art. II, § 20 if the board of township trustees withholds those benefits. After the enactment of 26 U.S.C.A. § 9831(d), if a board of township trustees decides not to resume cash payments or reimbursements that meet all of the conditions of 26 U.S.C.A. § 9831(d) and those benefits were offered to the township's officers at the commencement of their terms of office, the board will thereby make an independent decision to change the officers' compensation during their terms of office. That independent decision constitutes direct legislative action by the board of township trustees in violation of Ohio Const. art. II, § 20.

Neither the cessation of benefits upon the enactment of the ACA nor the resumption of benefits upon the enactment of 26 U.S.C.A. § 9831(d) represent in-term changes to a township officer's benefits that result from independent, unilateral legislative action by a board of township trustees. Accordingly, if a board of township trustees offered cash payments or reimbursements to township officers under R.C. 505.601 or R.C. 505.603 at the commencement of those officers' terms of office, and those cash payments or reimbursements were subsequently discontinued by the board of township trustees upon the enactment of the ACA, the resumption of those benefits pursuant to 26 U.S.C.A. § 9831(d) does not constitute the type of direct legislative change prohibited by Ohio Const. art. II, § 20. The resumption is not a prohibited in-term change in compensation because a board of township trustees is required, when able, to resume cash payments or reimbursements in accordance with its original resolution.

Therefore, we conclude that if, at the commencement of a township officer's term of office, a resolution was in effect in which the board of township trustees authorized cash payments or reimbursements to township officers under R.C. 505.601 or R.C. 505.603, resumption of the cash payments or reimbursements upon the enactment of 26 U.S.C.A. § 9831(d) does not violate Ohio Const. art. II, § 20's prohibition against in-term changes in a public officer's compensation. A board of township trustees may not authorize in-term cash payments or reimbursements to township officers under R.C. 505.601 or R.C. 505.603 that meet the conditions of 26 U.S.C.A. § 9831(d) if the board of township trustees did not authorize such cash payments or reimbursements at the commencement of the officers' terms of office.

#### **IV. Continuing Effect of a Resolution Authorizing Cash Payments or Reimbursements to Township Officers and Employees**

In your third question you ask whether a resolution adopted by a board of township trustees, prior to the enactment of the ACA, that authorizes cash payments or reimbursements to township officers and employees under R.C. 505.601 or R.C. 505.603, remains effective. You ask about the continuing validity of such a resolution for the purpose of determining whether a board of township trustees may resume cash payments or reimbursements to township officers and employees that were discontinued as a result of the strictures of the ACA, but that now meet the conditions of 26 U.S.C.A. § 9831(d).<sup>9</sup>

If a board of township trustees adopts a resolution in which the board declares that it is discontinuing cash payments or reimbursements to comply with the ACA, then it is reasonable to conclude that the second resolution supersedes the original resolution, which means that the original resolution is no longer effective. This will be the case even though the second resolution does not include language explicitly repealing the original resolution. When separate legislative acts are found to conflict in the language they employ, and the language of each cannot be harmonized and reconciled, the later enactment prevails. *See* R.C. 1.52(A), (B). In a circumstance like this, therefore, a board of township trustees that wishes to resume cash payments or reimbursements to township officers and employees will have to enact a new resolution to that effect.

The express repeal of a resolution by a board of township trustees means that the resolution is abrogated and no longer of any effect. *Black's Law Dictionary* (10th ed. 2014) (as a noun, "repeal" means the "abrogation of an existing law by express legislative act"). Thus, if a resolution of a board of township trustees discontinuing cash payments or reimbursements under

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<sup>9</sup> Whether a resolution is valid for the purpose of determining the authority of a board of township trustees to make cash payments or reimbursements to township officers and employees differs from the determination whether a board of township trustees authorized cash payments or reimbursements to township officers under R.C. 505.601 or R.C. 505.603 that satisfy the conditions of 26 U.S.C.A. § 9831(d) at the commencement of the officers' terms of office for the purpose of applying Ohio Const. art. II, § 20.

R.C. 505.601 or R.C. 505.603 for township officers and employees includes language expressly repealing the original resolution in which the board first authorized the cash payments or reimbursements, the board will have to adopt a new resolution declaring its intention to resume the cash payments or reimbursements.

Finally, it is possible that a board of township trustees discontinued cash payments or reimbursements under R.C. 505.601 or R.C. 505.603 for township officers and employees without adopting a resolution memorializing its intention to discontinue the cash payments or reimbursements. We cannot say with a reliable degree of certainty whether a resolution authorizing cash payments or reimbursements would, as a matter of law, survive discontinuance of the cash payments or reimbursements upon the enactment of a federal law prohibiting such payments, so that it would again be effective to permit a board of township trustees to resume the cash payments or reimbursements in the circumstances delineated in our discussion of your first question. The prudent course of action for a board of township trustees would be to adopt a new resolution memorializing the trustees' decision to resume the cash payments or reimbursements. Adoption of a new resolution may be necessary to relieve the trustees of personal liability for the unlawful expenditure of public moneys should the propriety of the expenditure be questioned in a future audit of township finances.

**V. Adopting a Resolution that Authorizes Cash Payments or Reimbursements Based Upon Subsequent Changes in the Affordable Care Act**

In your final question you ask whether a board of township trustees may adopt a resolution authorizing cash payments or reimbursements to township officers under R.C. 505.60(D), R.C. 505.601, or R.C. 505.603 in the event that future changes in the ACA make the cash payments or reimbursements lawful. You have in mind a situation in which cash payments or reimbursements that are, at present, foreclosed by provisions of the ACA may again be permitted as a result of amendments to the ACA by the United States Congress. The resolution thus will declare that the board of township trustees will resume cash payments or reimbursements to township officers under R.C. 505.60(D), R.C. 505.601, or R.C. 505.603 at such time as amendments to the ACA make the cash payments or reimbursements compatible with provisions of the ACA as so amended. This question implicates the application of Ohio Const. art. II, § 20.

As discussed above, the ACA prohibits a board of township trustees from offering group health plans under R.C. 505.60, R.C. 505.601, and R.C. 505.603 that violate the ACA's annual dollar limit prohibition. *See* 2015 Op. Att'y Gen. No. 2015-021, at 2-226 (the ACA preempts provisions of state law that are in conflict with the ACA). Accordingly, regardless of the language in a township resolution adopted at the start of the officers' terms, a board of township trustees is precluded by the federal law from offering those benefits. Because the trustees cannot offer those benefits at the time the resolution is adopted, the benefits have not been offered to the township officers at the start of their term for the purpose of Ohio Const. art. II, § 20. In other words, the language in the resolution purporting to authorize the provision of benefits at some point in the future has no legal effect. For the purpose of Ohio Const. art. II, § 20, the benefits

provided to the township officers at the start of their terms are only those benefits that a board of township trustees may legally offer. A provision in a township resolution stating that benefits will be provided in the future if the township trustees are given the authority to do so does not change the fact that the benefits are not available to the township's officers at the commencement of their terms of office.

A board of township trustees is not permitted to provide benefits under R.C. 505.60, R.C. 505.601, or R.C. 505.603 that do not meet the conditions of 26 U.S.C.A. § 9831(d)(2) until the federal law is changed. If a change in federal law occurs during the officers' terms, the commencement of the previously prohibited benefits constitutes an in-term change in compensation that is prohibited by Ohio Const. art. II, § 20. Accordingly, we conclude that Ohio Const. art. II, § 20 prohibits a board of township trustees from providing cash payments or reimbursements to township officers under R.C. 505.60(D), R.C. 505.601, or R.C. 505.603 during those officers' terms if the board of township trustees was prohibited by federal law from providing those benefits to township officers at the commencement of their terms.<sup>10</sup>

### **Conclusions**

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. As a result of the exclusion of a "qualified small employer health reimbursement arrangement" from the definition of "group health plan" in 42 U.S.C.A. § 300gg-91(a)(1) (West Supp. 2017), the advice in 2015 Op. Att'y Gen. No. 2015-021 is modified to the extent that it treats cash payments or reimbursements that a board of township trustees provides to township officers and employees under R.C. 505.601 or R.C. 505.603 as "group health plans" that are subject to the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11(a) (West 2011), when those cash payments or reimbursements constitute "qualified small employer health reimbursement arrangements." The conclusions reached in 2015 Op. Att'y Gen. No. 2015-021 with respect to reimbursements a board of township trustees provides to township officers and employees under R.C.

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<sup>10</sup> This opinion does not address a circumstance in which an amendment to the ACA has been enacted, but is not yet effective at the commencement of a township's officers' terms of office. It is possible that in such a situation, a board of township trustees may be able to adopt a resolution that declares that the board will provide cash payments or reimbursements to township officers under R.C. 505.60, R.C. 505.601, and R.C. 505.603 on the date that the amendment to the ACA becomes effective. Such a resolution would comply with one of the purposes of Ohio Const. art. II, § 20 that a public officer and the electorate be notified of the public officer's compensation at the commencement of his term of office. That situation is distinguishable from the resolution described in your letter.

505.60(D) are not altered. (2015 Op. Att’y Gen. No. 2015-021, syllabus, paragraphs 1 through 9, modified, in part, and followed, in part.)

2. Cash payments and reimbursements that a board of township trustees provides under R.C. 505.601 or R.C. 505.603 in circumstances that satisfy the requirements of 26 U.S.C.A. § 9831(d)(2) (West 2017) constitute “qualified small employer health reimbursement arrangements” and do not constitute “group health plans” that are subject to the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11(a) (West 2011).
3. If a resolution of a board of township trustees authorizing cash payments or reimbursements to a township officer under R.C. 505.601 or R.C. 505.603 was effective prior to the commencement of the township officer’s term of office, and if the cash payments or reimbursements were discontinued to ensure compliance with the requirements of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), resumption of the cash payments or reimbursements during the township officer’s term of office does not violate the prohibition against in-term changes in a public officer’s compensation in Article II, § 20 of the Ohio Constitution. (2015 Op. Att’y Gen. No. 2015-021, syllabus, paragraph 10, explained.)
4. A resolution adopted by a board of township trustees declaring that cash payments or reimbursements provided to township officers and employees under R.C. 505.601 or R.C. 505.603 will be discontinued to ensure compliance with the requirements of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), supersedes a previous resolution in which the board of township trustees authorized cash payments or reimbursements to township officers and employees under R.C. 505.601 or R.C. 505.603. Therefore, a board of township trustees shall adopt a resolution authorizing the resumption of cash payments and reimbursements before a township fiscal officer may make the cash payments or reimbursements.
5. If a board of township trustees discontinued cash payments or reimbursements to township officers and employees under R.C. 505.601 or R.C. 505.603 to ensure compliance with the requirements of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), without adopting a resolution memorializing its intention to discontinue the cash payments or reimbursements, the board should adopt a new resolution memorializing the board’s decision to resume cash payments or reimbursements that meet the requirements of 26 U.S.C.A. § 9831(d) (West 2017).

6. Article II, § 20 of the Ohio Constitution prohibits a board of township trustees from providing cash payments or reimbursements to township officers under R.C. 505.60(D), R.C. 505.601, or R.C. 505.603 during those officers' terms of office if the board of township trustees was prohibited by federal law from offering those benefits to township officers at the commencement of their terms of office.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE  
Ohio Attorney General