

December 28, 2018

The Honorable Alex M. Azar II
Secretary of Health and Human Services
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Steven Mnuchin
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable R. Alexander Acosta
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Submitted Electronically via the Federal rulemaking Portal: <http://www.regulations.gov>

Re: Health Reimbursement Arrangements and Other Account-Based Group Health Plans

Gentlemen:

On October 23, 2018, the Department of the Treasury, the Department of Health and Human Services and the Department of Labor (collectively, the “Agencies”) released a Notice of Proposed Rulemaking on rules to expand opportunities for working men and women and their families to access affordable, quality healthcare through proposed changes to the current rules regarding health reimbursement arrangements (“HRAs”) and other account-based group health plans. The notice asked for comments on the guidance proposed in the notice. The Employers Council on Flexible Compensation (“ECFC”) believes that the proposed guidance would expand the opportunities for employers to offer HRAs to their employees and appreciates the Agencies’ willingness to consider changes to current regulatory guidance in order to achieve this result.

ECFC is a membership association dedicated to preserving and expanding employer-provided tax-advantaged benefit choices for working Americans, including account-based plans which provide benefits in areas such as health care, child care, and commuting. These benefits provide families with the support they need to meet their everyday living expenses and remain productive members of the workforce. ECFC’s members include employers who sponsor employee benefit plans, including HRAs, Flexible Spending Arrangements (“FSAs”) (including dependent care assistance FSAs), and health savings accounts (“HSAs”), commuter and parking benefits as well as insurance, accounting, consulting, and actuarial companies that design or administer employee benefit plans. ECFC member companies assist in the administration of cafeteria plan and health benefits for over 33 million employees. Many ECFC members administer HRAs or advise employers about the establishment and operation of these arrangements and, as such, our comments should be of interest to the Agencies.

The following are comments on the proposed guidance provided suggested by ECFC membership.

Proposed Rules on Integrated HRAs

ECFC appreciates the Agencies' effort to expand the use of HRAs by removing the current prohibition against integrating an HRA with individual health insurance coverage as long as the arrangement complied with proposed integration rules. These individual insurance coverage HRAs ("ICHRA") will provide additional methods for employers to assist their employees in obtaining health coverage. These proposed integration rules provide that the ICHRA must require participants and any dependents covered by the ICHRA be enrolled in individual health insurance coverage and to substantiate compliance with this requirement. In addition, in order to avoid the risk of market segmentation and health factor discrimination, the proposed rules prohibit a plan sponsor from offering the same class of employees both a traditional group health plan and an ICHRA and that the ICHRA is offered on the same terms to all employees within the class. Lastly, the ICHRA is required to provide notice to participants of how participation in the HRA may affect their ability to claim a premium tax credit provided under the Affordable Care Act.

Substantiation of individual health insurance coverage. The proposed rules require that the individual receiving benefits under the ICHRA must be or will be enrolled in individual health insurance coverage for the plan year. The participant must substantiate enrollment by providing either (i) documentation from a third party (such as, the insurance company) or (ii) an attestation by the participant that the participant and beneficiaries are or will be enrolled in individual health insurance coverage. We request clarification that substantiation need not occur upon initial ICHRA enrollment; rather substantiation prior to first reimbursement would be adequate.

We believe that use of debit, credit, or other electronic payment card technology with the ICHRA can be structured so that the substantiation requirements are met, following the rules set out for the use of such cards with flexible spending arrangements. We would like the final guidance to acknowledge that electronic payment cards (and similar technology) can be used in conjunction with ICHRAs – particularly regarding each request for reimbursement.

ECFC supports the ability for a participant to attest to having coverage. We would suggest, however, if the participant incorrectly attests to having coverage, that participant's failure would not cause the ICHRA to fail to be considered integrated coverage.

Ability to offer excepted benefits and ICHRA. ECFC supports the provision in the proposed rule that allows employers to offer excepted benefits and an ICHRA. Thus, for example, employers may offer an ICHRA as well as a health FSA and dental or vision excepted benefits or EAPs. This is an important distinction from rules establishing qualified small employer health reimbursement arrangements ("QSEHRAs") that do not permit the employer to offer any other group health plan and the proposed rule will provide employers of all sizes with more flexibility.

Classes of Employees. The proposed ICHRA rules would provide that to the extent that an employer offers the ICHRA to any class of employees, the employer may not also offer a traditional group plan to the same class of employees. In addition, the ICHRA must be offered on the same terms to all members of the class of employees. The proposed rules provide a list of classes of employees which include full-time, part-time and seasonal employees, employees covered under a collective bargaining agreement, non-resident aliens, and other classification. We would ask that an additional class of employees be considered: exempt and non-exempt employees. Some employers provide different benefit structures for exempt and non-exempt employees and this would allow the employer to provide this benefit to either the exempt or non-exempt employees without providing it to both groups.

We request confirmation in the final regulations that classes are determined on an employer-by-employer basis not on a controlled group basis. If classes of employees are determined a controlled group basis, large employers may decide not to utilize ICHRA for those employees that they do not provide group health coverage because they may not be offering similar ICHRA coverage to other employees in a similar class in other parts of the controlled group.

The proposed rules state that collectively bargained employees can be considered a separate class. Some collective bargaining groups may want to be eligible to participate in the ICHRA as part of its collective bargaining agreement whereas other groups may prefer other health care alternatives as part of its collective bargaining agreement. We request that the final rules provide that an employer may distinguish different collective bargaining groups when determining the various classes of employees that may participate in the employer's ICHRA.

Individual Market Policies. Under the proposed ICHRA rules, the ICHRA participant must be enrolled in individual health insurance coverage. Enrollment in coverage that consists solely of excepted benefits will not satisfy this rule. We would like confirmation that the following types of coverage will satisfy this rule:

- An individual market policy sold pursuant to a state waiver under section 1332 of the ACA.
- An individual market policy sold through a private exchange model or platform.

Notice to Employees. The proposed ICHRA rules require a written notice to each participant in the ICHRA at least 90 days prior to the date on which the participant is first eligible to participate in the ICHRA or 90 days before the start of the plan year for individuals that are no longer eligible to participate in the ICHRA. The contents of the notice are spelled out in the proposed rules.

Some ECFC members are concerned that smaller employers may not have determined whether they will offer an ICHRA in time for the notice to be timely provided to participants and ask that the Agencies consider a shorter time period for providing the notice. While larger employers often have their benefit offerings planned out in advance of the plan year, that may not be the case with smaller employers that do not have staff dedicated to devising the employer's employee benefit offerings.

It would be helpful if the Agencies provided a model notice that would meet the requirements of the notice set out in the proposed rules. Model notices are often provided by the Agencies to assist employers in meeting notice requirements of various employee benefit laws and employers find them to be very helpful whether they adopt the notice in its entirety or use the notice when drafting the notice that they will provide to participants.

Coordination with HSAs. We request clarification that an ICHRA limited to health coverage and excepted benefit reimbursement (e.g., to facilitate use to purchase an HSA-qualified high deductible health plan (HDHP)) would not adversely impact HSA eligibility.

Coordination with Salary Reduction Arrangements. Current IRS guidance provides a roadmap on how a company could offer its employees a salary reduction arrangement to pay premiums for health insurance coverage in conjunction with offering an HRA to those same employees. Following the legal analysis outlined by the IRS in that guidance, we believe that an employer could also offer its employees a salary reduction arrangement to pay the premiums for health insurance that are not being reimbursed by the ICHRA. We believe that employers that offer an ICHRA will want to also provide a salary reduction arrangement so that all the premiums for health insurance coverage will receive similar tax advantaged treatment. In order that employers will feel comfortable in providing such an arrangement, we request that the final guidance make it clear that such an arrangement is permitted.

Employer shared responsibility payments. An employer may be subject to a shared responsibility payment under section 4980A of the Internal Revenue Code (the “Code”) if the employer fails to offer the opportunity to enroll in health care coverage. We request clarification in the final rules that an employer is considered to make an offer with respect to any employee in a designated class to whom the ICHRA is offered even if the employee (or dependent child) does not elect to have individual market coverage.

Use of excess ICHRA funds. To the extent that amounts in an ICHRA are not used to pay for individual market major medical insurance that qualifies the individual for the ICHRA, remaining funds may be used for other unreimbursed medical expenses, including out of pocket expenses and premiums for other insurance, such as dental and vision excepted benefits. We request clarification that HRAs, including ICHRAs and excepted benefit HRAs, can be used to purchase any excepted benefit health coverage, including hospital indemnity or other fixed indemnity health coverage and coverage for a specific disease or illness as described in section 2791(c)(3) of the Public Health Services Act, section 733(c)(3) of the Employee Retirement Income Security Act, and section 9832(c)(3) of the Code. The same clarification should apply with respect to excepted benefit HRAs.

Excepted Benefit HRA

ECFC also appreciates that the Agencies have used their authority to specify limited benefits that are excepted from the ACA’s market reform rules and proposed guidance that would allow employers to offer stand-alone HRAs that provide limited reimbursements to employees and their beneficiaries. For a stand-alone HRA to qualify as an excepted benefit, the Agencies propose that: (i) the HRA must not be an integral part of the plan, (ii) the HRA must provide limited benefits, (iii) the HRA cannot provide reimbursement for premiums for certain health insurance coverage and (iv) the HRA must be made available under the same terms to all similarly situated individuals.

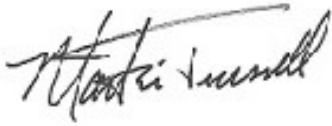
Limited Benefits under a Stand-Alone HRA. In the preamble to the proposed regulations, the Agencies discussed how they determined the maximum amount of reimbursement in the stand-alone HRA (\$1,800) and the methodology for determining annual cost-of-living increases of that amount (C-CPI-U).

For purposes of administrative ease, ECFC would suggest that the annual amount of limited benefits be announced at the same time that other account-based plan limits (such as HSAs) are announced. Employers and plan administrators need that time to set their benefit plans and communicate them to employees. For example, the annual increase in the limit for employer salary reduction contributions to an FSA was not announced by the IRS until the November 15, 2018, which gave employers a limited amount of time to develop and communicate to employees this new limitation. We understand that there are statutory reasons why the FSA limit was not able to be announced significantly earlier, but we would ask that, where there are no statutory constraints, the announcement of these limits be made as soon as possible.

Coordination with HSAs. To assist consumers who want to contribute to an HSA and employers who want to provide employees with the opportunity to contribute to an HSA, ECFC requests that the final guidance detail how use of this excepted benefit HRA would impact eligibility to contribute to an HSA.

We appreciate the opportunity to provide our comments on the proposed regulations regarding health reimbursement arrangements. If you have any questions regarding our comments, please contact ECFC's Legislative and Technical Director, Bill Sweetnam, at 202.465.6397 or at wsweetnam@ecfc.org.

Sincerely,



Martin Trussell
Executive Director



William F. Sweetnam, Jr.
Legislative and Technical Director

