

May 22, 2017

The Honorable Orrin G. Hatch
Chairman
Committee on Finance
United States Senate
215 Dirksen Senate Office Building
Washington, DC 20510

Re: Health Care Reform

Dear Mr. Chairman:

The Employers Council on Flexible Compensation (ECFC) is appreciative of your efforts to reform the health care system and your request for input from stakeholders on this process. We are writing to provide the perspective of ECFC's membership on various issues that may be under consideration as the Committee addresses tax reform.

ECFC is a membership association dedicated to preserving and expanding employer-provided tax-advantaged benefit choices for working Americans, including account-based benefit 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 Health Reimbursement Arrangements (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.

We strongly support preserving the tax advantaged accounts currently allowed under the tax code so employers and employees can together invest in their life needs such as health care, commuting and child care that allow them to remain productive and working. Without support from the tax code, many working families would not be able to fulfill their financial obligations while addressing unpredictable costs such as health event, increased housing costs or a growing family.

Importance of Consumer-Directed Health Arrangements

Many employers are moving toward higher deductible health plans or plans that increase the cost sharing amounts borne by employees. In addition, employers are taking action to reduce the costs of their health coverage options, yet continue to protect employees from higher out of pocket costs by moving to account-based, consumer-directed arrangements. Consequently, consumer-directed benefit arrangements, such as FSAs, HRAs and HSAs, are of increasing importance to American workers and their families, covering an estimated 100 million Americans. You have recognized the importance of consumer-directed health arrangements when you introduced the Health Savings Act of 2017 (S. 403), and ECFC supports the provisions of that legislation which would expand the availability and effective use of these consumer-directed health arrangements.

Excise Tax on High Cost Health Plans

The Affordable Care Act (ACA) created a new excise tax, commonly referred to as the Cadillac Tax, on certain high-end health care plans. Currently, when determining what constitutes a “Cadillac” plan, an overly broad net is cast including many employer- sponsored arrangements that actually promote efficient health care such as wellness program incentives and consumer-directed coverage arrangements such as FSAs, HRAs, and HSAs. In particular, the statute is being interpreted under guidance issued by the Treasury Department and the Internal Revenue Service (IRS) to require the contributions made by individuals into their HSAs and FSAs to be deemed as if they were provided by the employer for purposes of calculating the tax. As a result, employers have considered curtailing or eliminating employee contributions to FSAs and HSAs in order to avoid triggering the Cadillac Tax. This trend is alarming, and Congress should take steps to stop the impact of the Cadillac Tax on consumer-directed health plans.

We are appreciative of Congress’ efforts to delay or repeal the Cadillac Tax. The American Health Care Act of 2017 passed by the House of Representatives would delay the effective date of the implementation of the Cadillac Tax until 2026. The repeal of this excise tax is an important priority of ECFC’s members. If, due to the budget reconciliation rules, full repeal of the excise tax is not feasible as part of health care reform legislation, we would advocate that employee contributions to FSAs and HSAs be exempted from the calculation of the Cadillac Tax or any direct limitation that may be proposed on employer-provided coverage. The Health Savings Act of 2016 (S. 2499), that you introduced in 2016, included such a provision. While delay of the effective date of the Cadillac Tax is helpful in the short run, delay will only slow the trend of employers eliminating or curtailing employee contributions to FSAs and HSAs; only complete repeal of the Cadillac Tax or the exemption of employee contributions from the calculation of the tax will stop this trend.

Tax Exclusion for Employer-Provided Health Coverage

The tax exclusion for employer-provided health coverage is an important tax benefit for employees and it provides the foundation for consumer-directed health accounts offered by employers. This exclusion exempts employer-provided health coverage from both income taxes and employment taxes. With this exclusion, the employer-paid portion of health coverage (such as premiums for health insurance or coverage under a self-insured health plan) is not taxed and the employee’s portion paid by salary reduction through a cafeteria plan is also not taxed. Similarly, any contributions an employer makes to a consumer-directed health account that only reimburses employees for qualified health costs (such as an HRA, FSA or HSA) is not taxed. The health care aspects of employer-provided wellness programs are also not taxed due to the exclusion. Finally, employee contributions to an FSA or an HSA through a cafeteria plan are not taxed due to the exclusion.

Proposals have been advanced which would eliminate or place a cap on the tax exclusion for employer-provided health coverage. ECFC’s membership strongly objects to those proposals. Without the exclusion, the costs of health care costs for coverage to hard-working employees would increase as they will lose the tax benefits currently provided by FSAs, HSAs and HRAs. Employers will no longer incur the costs of establishing consumer-directed plans if there is no tax benefit to employees to participate in these plans. In addition, any cap created on the exclusion could include contributions made by

employees to their accounts. Individuals and families rely on these accounts to save for and manage their health care expenses and the ability to deduct them from their taxes allows them to invest in the preventative care they need and still continue to fulfill their other financial obligations.

Some have said that elimination of the exclusion is appropriate because the tax exclusion shields employees from a true realization of the cost of health care and results in employees being inefficient consumers of health care since they don't understand the real cost of the health care they are consuming. However, employees who participate in consumer-directed health account have a real appreciation of the costs of health care, since it is the dollars in their accounts that are used purchase health care. If the goal is to make people more cognizant of health care costs and become better consumers of health care, eliminating consumer-directed health accounts by eliminating or capping the exclusion makes little sense.

Another reason advanced to eliminate the exclusion is that the current tax treatment does not treat all tax payers equally; those who receive health coverage through their employers get better tax treatment than self-employed individuals or those who work for employers that do not provide health coverage. While it is true that the tax treatment of health care is not the same for all taxpayers, it does not follow that we should tear down the employer system in order to put everyone on the same footing. Republicans called President Obama to task when he stated if you liked your health plan, you could keep it under the ACA. Similarly, Republicans should be wary of a tax reform proposal which will result in employees losing coverage they currently receive from their employer.

ECFC believes that any cap of the employer exclusion is bad for employees and will result in employers curtailing the maintenance of consumer-directed health accounts, particularly those accounts funded through employee salary deductions through a cafeteria plan.

American Health Care Act of 2017

The American Health Care Act of 2017 (AHCA) that was passed by the House of Representatives contains a number of provisions regarding consumer-directed health arrangements that ECFC supports and believes will expand the availability and effective use of these consumer-directed health arrangements. Those provisions are:

Over-the-Counter Medicines: The ACA provided that the only medicines or drugs that are prescribed or insulin would be considered qualified medical expenses eligible for reimbursement from a FSA, HSA or HRA, while expenses for over-the-counter medicines could no longer be reimbursed through these arrangements. The AHCA repealed that prohibition allowing individuals again to use FSAs, HSAs and HRAs be reimbursed for these medicines – without having to visit a doctor for a prescription.

Additional Tax on HSA Distributions Not Used for Qualified Medical Expenses: The ACA increased the excise tax on distributions from an HSA from 10% of the distribution not used for qualified medical expenses to 20% of the distribution. This increase in the excise tax made HSAs less attractive to individuals. The AHCA provided eliminated this increase on the excise tax again making HSAs more attractive to consumers.

Cap on Employee Contributions to an FSA: The AHCA eliminated the cap on employee contributions to an FSA imposed by the ACA. This will give employees more flexibility in financing their health care expenses through the use of an FSA.

Increase in HSA Contribution Limit: Under current law, contributions to an HSA are limited by a monthly amount which is adjusted for cost of living increases. The recently-announced contribution limit for HSA contributions for 2018 is \$3,450 for single coverage and \$6,900 for family coverage. The AHCA increased the maximum contribution to an HSA to be equal to the sum of the annual deductible and the out-of-pocket expense maximum for single or family coverage. This change will make HSAs more attractive to consumers since they will be able to finance the deductible and out-of-pocket costs by tax-deductible contributions to an HSA.

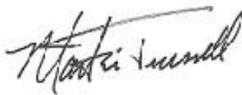
Catch-Up Contributions for Spouses: The AHCA will permit both spouses that are eligible to make additional catch-up contributions to a single HSA, eliminating an unnecessary administrative complication for older HSA holders.

Treatment of Medical Expenses Incurred Prior to the Establishment of the HSA: Under current law and regulations, only medical expenses incurred after the establishment of an HSA are considered eligible medical expenses that can be reimbursed from the HSA. The AHCA addresses the administrative problems connected with this requirement by providing that as long as the HSA is established within 60 days of the date of coverage under the eligible high deductible health plan begins, any medical expenses incurred after the coverage date of the high deductible plan will be considered eligible medical expenses regardless that the expenses may be incurred prior to the establishment of the HSA.

Excise Tax on High Cost Health Plans: As we discussed earlier in this letter the Cadillac Tax imposes difficulties on potential plan sponsors of consumer-directed health arrangements and may cause current sponsors of these plan to eliminate or curtail them. While ECFC is appreciative that the AHCA pushed back the effective date of the Cadillac Tax to 2026, total repeal of the tax is an important priority of ECFC members. However, if total repeal is not possible through this legislative effort, ECFC members would advocate that employee contributions to FSAs and HSAs not be included to calculating the excise tax.

Consumer-directed health arrangements are an important component for working Americans and the families in the effective financing of their health care needs. We hope that the Senate in the process of developing health care reform legislation is mindful of the advantages provided to working Americans through these arrangements and works to expand and not contract the opportunities that employees currently have with these plans. If you have any questions with regard to our recommendations or would like further information, please contact Martin Trussell (202.350.1788 or mtrussell@ecfc.org) or Bill Sweetnam (202.465.6397 or wsweetnam@ecfc.org).

Sincerely,



Martin Trussell
Executive Director



William F. Sweetnam, Jr.
Legislative and Technical Director