June 30, 2017

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

Re: Tax Reform Recommendations

Dear Mr. Chairman:

The Employers Council on Flexible Compensation (ECFC) is appreciative of your efforts on comprehensive tax reform 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.

Excise Tax on High-Cost Health Plans

The Affordable Care Act (the 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

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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 are curtailing or eliminating employee contributions to FSA and HSA 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 efforts in Congress to repeal the Cadillac Tax. The recently released draft of health reform legislation, the Better Care Reconciliation Act of 2017, addresses the Cadillac Tax; however, the bill does not repeal the tax but only delays the effective date of the tax until 2026. The repeal of this excise tax is an important priority of ECFC's members. If full repeal of the excise tax is not feasible as part of tax 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. You introduced the Health Savings Act of 2016 (S. 2499) which 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 FSA and HSA; 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. 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. While an employee can deduct a contribution to an HSA on his or her income tax return if the employer does not offer a cafeteria plan, that HSA contribution will still be subject to employment taxes.

Tax reform 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 would 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 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.

Dependent Care

ECFC members sponsor and administer dependent care assistance FSAs. Dependent care assistance FSA are a valuable benefit for millions of working Americans. In 2014, 39 percent of civilian workers had access (available for their use) to employer-sponsored dependent care reimbursement accounts, and 11 percent of civilian workers had access to workplace-funded childcare. Dependent care assistance FSAs are pre-tax dollars set aside to offset work-related dependent care costs. ECFC believes that the current benefits provided Americans are important and should be preserved under any tax reform proposal. In addition, there are two changes to the current rules under the Code pertaining to dependent care FSA and tax reform legislation may be an appropriate vehicle to make these changes.

One change relates to the maximum contribution that can be made to a dependent care assistance FSA. Under the Code, only $5,000 per year can be contributed to a dependent care assistance FSA. This statutory limit was set over twenty years ago and did not have an inflation adjustor attached to the limit. ECFC has advocated for an increase in this contribution limitation. ECFC supports the Family Care Savings Act (H.R. 782), recently introduced by Rep. McHenry, which would increase the dollar limitation to $10,000 and index that amount for inflation in future years.

Under the Code, the average benefits provided under a dependent care FSA to employees that are not highly compensated must be at least 55 percent of the average benefits provided to highly compensated employees. Under this average benefits test, employees whose compensation is less than $25,000 may be disregarded under this average benefits test, because these lower-paid employees typically elect the child care tax credit rather than salary reduction to a dependent care FSA. However, when Congress increased the child care tax credit to $6,000, the $25,000 compensation exclusion was not concurrently adjusted causing more dependent care assistance plans to fail the average benefits test. ECFC has advocated for changes that would restore the original balance under the Code when the child care tax credit was lower.

Commuter Benefits

As efforts to reform the tax code move forward, Congress should preserve the tax treatment of the current commuter benefit. The Protecting Americans from Tax Hikes (PATH) Act of 2015 permanently established parity between employer-provided parking and mass transit benefits. For more than 25 years, Congress has provided employers the opportunity to offer their employees, either tax-free subsidies or on salary reduction basis, commuting expenses, including mass transit, van pools, and commuter parking. This allows employers to help their workforce get to the workplace by the most efficient manner possible, enhancing productivity and helping relieve one of the major costs associated with working.

This middle-class benefit helps working Americans cover what is often their second largest household expense – transportation, particularly transportation related to work. Eliminating or decreasing the mass transit benefit effectively raises taxes on millions of middle-class working families who are accustomed to budgeting for this important benefit that helps them meet the rising costs of commuting. Suburban families who commute into cities have the highest commuting costs.

When considering the cost to the government of continuing the current commuter benefit, the Committee should consider other savings to the government outside of the tax code by incentivizing employees to use public transit. A study conducted by the non-profit TransitCenter found that when commuter benefits are offered in the workplace, 18 percent of employees alter their commuting from single occupancy vehicles to public transit – a significant modal shift. The transit benefit saves the government money by reducing the need for federal spending on roads, bridges, and the accompanying infrastructure – increasing transit ridership means that fewer people will be driving and less federal funding is needed to repair, replace, and expand our nation's vital roadways. Increased utilization of mass transit also reduces road congestion, vehicle emissions, and dependence on foreign sources of energy. When commuters use the nation's mass transit system, it helps support self-reliance on the part of mass transit systems which otherwise must rely on government subsidies.

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We hope that the Committee in the process of reforming the tax laws will maintain and enhance account-based benefit plans in areas such as commuter benefits, health care and child care. If you have any questions regarding 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,

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