May 22, 2017

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2017-28)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Submitted Electronically via the Federal eRulemaking Portal

Re: 2017-2018 Priority Guidance Plan

To Whom It May Concern:

Pursuant to Notice 2017-28, the Employers Council on Flexible Compensation ("ECFC") would like to provide public comment on recommendations for items that should be included on the 2017-2018 Priority Guidance Plan being developed by the Department of the Treasury and the Internal Revenue Service ("IRS").

ECFC is a membership organization dedicated to promoting and protecting the availability of benefit choices for working Americans through account-based benefit plans which provide benefits in areas such as health care, child care and commuting. ECFC's members include employers who sponsor employee benefit plans, including flexible spending arrangements, health reimbursement arrangements and health savings accounts, as well as third party administrators, health plan providers, payers, providers, payment networks, processors, financial institutions, and 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.

ECFC would like to recommend the following two items be placed on the Priority Guidance Plan. Guidance on these issues would provide administrative certainty for ECFC members that design and administer employee benefit plans.

Qualified Small Employer Health Reimbursement Arrangements. The recently enacted 21st Century Cures Act (the "Cures Act") established a new type of health reimbursement arrangement for small employers, the Qualified Small Employer Health Reimbursement Arrangement ("QSEHRA"). Because this new arrangement is effective as of the beginning of 2017, we request that guidance on certain issues relating to this new arrangement be included on the Priority Guidance Plan. On February 23, 2017, we submitted a request for guidance to Robert Neis, Benefits Tax Counsel, Office of Tax Policy, Department of the Treasury, and Victoria Judson, Associate Chief Counsel, Tax Exempt and Government Entities, Internal Revenue Service, which detailed the issues that should be addressed. (A copy of that letter is attached.)

Expenses for Medical Care. Many ECFC members administer health plans (such as flexible spending arrangements (FSA) or health reimbursement arrangements (HRA)), which requires them to make determinations of whether a claim for reimbursement is for an expense is for medical care as described in Section 213(d) of the Internal Revenue Code and is therefore eligible for reimbursement under the plan. Similarly, health savings account (HSA) holders need to know whether an expense may be reimbursed from the account tax-free as an expense for medical care under section 223(d). Accordingly, we request that the regulations under Section 213 be updated

and revised to reflect changes in the tax law and changes in the products, practices and procedures relating to medical care.

The regulations under section 213 were last revised in 1979. The statute since has been amended six times. The current regulations provide extensive rules and examples relating to provisions no longer in the law, such as a floor on deducting expenses for medicines and drugs and a maximum deduction amount that was in effect for 1962 through 1966. In addition to removing those rules, the statutory amendments have added many new provisions, including:

- Medicine and drugs must require a prescription (for reimbursements, must be prescribed).
- Expenses for cosmetic procedures are disallowed.
- Long term care services and long term care insurance premiums are added to the definition of medical care.
- Payments to relatives providing long term care are disallowed.
- Expenses for lodging while traveling away from home are limited and meals are disallowed.
- The floor on deductions has been raised.

There is a critical need for the regulations to be updated to reflect and interpret these provisions and to address other issues that have been arisen over the last several decades. Some issues have been addressed in subregulatory guidance such as revenue rulings or in private letter rulings. In some cases, the IRS seems to have developed informal positions that have not been issued in writing (for example, fees for "concierge medical practices"), and in some cases the IRS has indicated that it does not have a position (what is a medicine or drug, defined in the current regulations as items "generally accepted as falling within the category of medicine and drugs (whether or not requiring a prescription)"). While we recognize that few taxpayers will deduct medical expenses under Section 213 of the Code, section 213(d) determines what is a medical expense for purposes of reimbursement from an FSA, HRA, or HSA. Accordingly, current and thorough guidance on whether an expense is for medical care as defined in section 213(d) of the Code is essential to administrators of and participants in these health plans. While IRS personnel have been helpful in providing assistance to plan administrators in determining whether an expense is for medical care, updating of the regulations is long overdue. We urge you to retain this project on the published business plan and to prioritize its publication in the upcoming plan year.

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ECFC appreciates this opportunity to provide comments on the Priority Guidance Plan. If you have any questions or require further information regarding our comments, please feel free to contact me by telephone at (202)465-6397 or by e-mail at wsweetnam@ecfc.org.

Sincerely,

William F. Sweetnam, Jr.
Legislative and Technical Director