

May 21, 2019

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2019-30) Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Submitted Electronically via the Federal eRulemaking Portal

Re: 2019-2020 Priority Guidance Plan

To Whom It May Concern:

Pursuant to Notice 2019-30, the Employers Council on Flexible Compensation (“ECFC”) would like to provide public comment on recommendations for items that should be included on the 2019-2020 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 recommends that the following items be included in the 2019-2020 Priority Guidance Plan:

Qualified Medical Expenses. 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. Guidance on these issues would provide clarity in the administration of these consumer-directed account plans and lessen the burden on participants in these plans in determining whether expenses are eligible for reimbursement from these plans as qualified medical expenses.

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.

In addition, new products and treatments have been developed with may be considered as providing medical care. 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)”).

We recognize that few taxpayers will deduct medical expenses under section 213 of the Code, however, section 213(d) is also used to define what a medical expense is 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 and IRS Publication 502, *Medical and Dental Expenses*, is a useful reference, updating of the regulations is long overdue. With this Administration’s focus on the importance of consumer-directed health plans as a means of reforming the nation’s health care system, having this project placed on the published business plan and prioritizing its publication in the upcoming plan year will do much to support and advance the cause of consumer-directed health plans.

Cafeteria Plans. Many ECFC members administer cafeteria plans or provide assistance in the administration of those plans. Regulations under Code section 125 were proposed in 2007 and have not been finalized. There have also been legislative changes to Code section 125 (such as the limit on employee deferrals to a flexible spending arrangement) since then as well as sub-regulatory guidance (such as the carryover rules). In addition, some have promoted arrangements that run afoul of the rules

under Code section 125 and addressing those arrangements in the finalized section 125 regulations would result in better compliance with the rules under Code section 125. ECFC members believe that it would be helpful to them in administering cafeteria plans that follow the rules to have the Code section 125 regulations finalized. Consequently, we request that finalization of the Code section 125 regulations be included in the Priority Guidance Plan.

ECFC appreciates this opportunity to provide recommendations of issues to be placed 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

