January 5, 2017

The Honorable Donald J. Trump
The President-Elect of the United States
Office of the Presidential Transition Team
1800 F Street NW
Washington, DC 20006

By Hand

Dear Mr. President-Elect:

The Employers Council on Flexible Compensation (ECFC) looks forward to working with you as you transition into the White House and develop your health care, tax, and employer related policies. In particular, we appreciated your strong support for consumer-directed health arrangements, including Health Savings Accounts. During your campaign, you made repeal and replacement of the Affordable Care Act (the "ACA") an important priority. Your repeal of the Cadillac Tax created by the ACA and the focus on its impact on Health FSA and Health Savings accounts are important steps in ensuring consumers of health care retain important tools to manage their health care needs and expenses. In addition, there are a variety of policies that help employers empower their employees to make good health care choices.

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 ("FSAs") (including both health and dependent care assistance FSAs), health reimbursement arrangements ("HRAs") and health savings accounts ("HSAs"), 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.

Therefore, we would like to provide you with an overview of ECFC's legislative and regulatory priorities in the event they can help guide you as you evaluate changes in the health care and employee benefits marketplace.

Importance of Consumer-Directed Health Arrangements

Many employers are moving toward higher deductible health plans or plans that increase the amount of cost sharing borne by employees. In addition, employers are taking action to reduce the costs of their health coverage, yet 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. These tools provide a means of financing health care costs incurred under health plans, particularly under high-deductible health plans, and help many Americans afford critical health care procedures that might otherwise force them into bankruptcy.

Critics that say HSAs and FSAs are only benefits to the high-income individuals are incorrect. The users of HSAs and FSAs are middle class families. On average, they have a household income of roughly $57,000 per year, which is less than 300% of the federal poverty level (FPL). We hope that the Trump Administration will recognize the importance of health-based accounts to American families. Any action that the Trump Administration can take to support these health-based accounts will be of benefit to middle class families.

Repeal of Obamacare

We understand that one of the first priorities of the Congressional Republican leadership and your Administration is the repeal of the ACA. We also understand that complete repeal may not be immediately feasible and that parts of the ACA will be repealed with the repeal of some provisions may be delayed to effectuate coordination with ACA-replacement legislation.

The ACA created a new excise tax, commonly referred to as the Cadillac Tax, on certain high-end health care plans. The purported purpose of this tax was to discourage employers from offering health insurance plans with excessively rich benefits. The tax is equal to 40 percent of the value of any coverage in excess of $10,200 for an individual and $27,500 for a family. The tax, required to be paid by the health plan itself (or in some cases the employer sponsoring an arrangement or its plan administrator), applies to current and retired employees and includes “any applicable employer-sponsored coverage.” To determine whether these cost thresholds are exceeded, 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 are curtailing or eliminating employee contributions to FSA and HSA in order to avoid triggering the Cadillac Tax. This trend is alarming and the new Administration should take steps to stop the impact of the Cadillac Tax on consumer-directed health plans.

A complete repeal of the ACA would include repeal of the Cadillac Tax -- the most direct way to counteract the deleterious impact of the Cadillac Tax on consumer-directed plans. However, if it is not possible to repeal the Cadillac Tax, it may be possible to take steps that would shield consumer-directed health plans from the impact of the Cadillac Tax. If the complete repeal of the Cadillac Tax is not possible in legislation that would repeal part of the ACA, we would ask that provisions be added which would exempt employee contributions to an FSA or HSA from the Cadillac Tax. We would also ask that your Administration revisit the guidance issued by the Obama Administration Treasury Department and the IRS which stated employee contributions to FSAs and HSAs would be considered contributions from the employer for purposes of calculating the Cadillac Tax. We believe that it is well within the regulatory authority of the Treasury Department and IRS to come to the rational conclusion that *employee contributions* to an FSA or HSA not be considered *employer contributions* for purposes of calculating the Cadillac Tax. Any actions that your Administration would take that would either repeal the Cadillac Tax or exempt employee contributions to FSAs and HSA from the Tax would be of benefit to the middle-class families that rely on these arrangements to help finance their health care expenses.

Healthcare Reform Legislation

We understand that in addition legislation repealing the ACA, Congressional Republican Leadership and the Trump Administration are looking to advance healthcare reform legislation that would replace the ACA. ECFC supports legislation to help reform the health care system and replace the ACA, but we would ask that any such legislation supports all consumer-directed healthcare arrangements.

The House Republican vision of health care reform, entitled "A Better Way," supports consumer-directed health care arrangements, such as an expansion of opportunities for contributing to an HSA. The Better Way proposal also advocates the use of HRAs by employers to provide reimbursements to employees for the purchase of health insurance on the individual market. (The recently passed 21st Century Cures Act provides a way for small employers to do so.) ECFC supports legislative efforts that would expand opportunities for individuals to participate in consumer-directed health plans.

Of concern to ECFC is a provision of the House Republicans' Better Way proposal to place a cap on the amount of the tax exclusion on employer-provided health care, so that the cost of employer-provided health coverage that exceeds a specified dollar threshold would be taxable to the employee directly. The Better Way proposal does not specify the dollar amount of the cap, but it states that most employer-provided plans will be under the cap. Under this proposal, contributions to FSAs would count in determining whether the cap was reached, resulting in the same challenges to the continued maintenance of these plans as is currently the case under the Cadillac Tax. Showing House Republicans' overall support of HSAs and recognizing the adverse impact to HSAs if they were to be counted under the cap, employee contributions to HSAs would not be counted toward the cap under the Better Way proposal.

ECFC believes that that FSAs are an important component of any health care reform effort. Like HSAs, FSA are funded through an employee's own money and consequently the employee is unlikely to waste those set aside funds on unnecessary expenditures. FSAs provide a great budgeting opportunity for employees to accumulate funds for increased medical expenses since contributions are automatically deducted from their paychecks and deposited to their FSA. This is especially helpful to lower-paid employees who when they get hit with a co-payment they can use funds already available in their FSA rather than trying to pay these amounts out of their weekly budget. It is important to remember that the restrictive rules regarding contributions to HSAs leaves many employees unable to contribute to an HSA; contributing to an FSA may be the only means for some employees to set aside money to pay for increased deductibles and co-payments on a tax-preferred basis. We ask that your Administration advocate for continued availability of FSAs for middle class families by making sure that employee contributions to FSAs not be counted under any cap placed on the tax exclusion for employer-provided health care.

Dependent Care Assistance FSAs

As a candidate, you advocated that the tax code be amended to provide a tax deduction for child care expenses. We support that effort but want to make sure that any such change to the tax code to provide for such a tax deduction does not adversely impact dependent care FSAs that are currently permitted. A dependent care FSA provides a means for employees to make a tax-deductible contribution to an FSA which is used to pay for expenses for the care of their dependents while they are at work or school; contributions to a dependent care FSA are capped at $5,000 per year. We would advocate that dependent care FSAs continue as a benefit available to employees and that they should not be curtailed even if a tax deduction is provided for child care expenses.

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We look forward to working with your Administration is supporting the growth of consumer-directed health arrangements and helping working American families with expenses for child care. If you have any questions regarding the issues raised in this letter, please feel free to contact either Martin Trussell by phone at 202-350-1788 or by e-mail at mtrussell@ecfc.org or Bill Sweetnam by phone at 202-465-6397 or by e-mail at wsweetnam@ecfc.org.

Sincerely,

Martin Trussell
Executive Director

William F. Sweetnam, Jr.
Legislative and Technical Director