February 1, 2017

The Honorable Orrin Hatch
Chairman
Committee on Finance
United States Senate
Washington, DC 20510

By Hand

Dear Mr. Chairman:

The Employers Council on Flexible Compensation (ECFC) would like to take this opportunity to convey our legislative priorities regarding HSAs and flexible benefit plans as your Committee evaluates changes in the health care and employee benefits marketplace. For this Congress, repeal and replacement of the Affordable Care Act (the "ACA") is a top priority and there has been strong support for consumer-directed health arrangements, such as Health Savings Accounts (HSAs). The repeal of the Cadillac Tax created by the ACA and the focus on its impact on health-based 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 through both HSAs and Flexible Spending Accounts (FSAs).

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 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.

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 acting 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. Indeed, some favor

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HSAs over FSAs, believing that HSAs are widely available. Under current law, both are critical for Americans as they seek to afford rising out-of-pocket costs, but, many Americans while being covered under a high deductible health plan may not be able to contribute to an HSA because they are eligible for some type of medical coverage below the deductible. In fact, there are four times as many FSA account holders as there are HSA account holders. In addition, for many Americans, the immediate availability of an FSA enables families to afford expenses that occur early in the year.

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 Congress will recognize the importance of health-based accounts to American families. Any legislative action by your Committee 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 your Committee 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 Congress should take steps to stop the harmful 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. For example, in the 114th Congress, you introduced *The Health Savings Act of 2016* (S. 2499) which would have provided a carveout of employee contributions to HFSAs and HSAs for the calculation of the Cadillac Tax. Any actions Congress would take that would either repeal the Cadillac Tax or exempt employee contributions to FSAs and HSAs from the Cadillac 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 to legislation repealing the ACA, Congress is 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. Similarly, the House Republican Study Committee proposal, *The American Health Care Reform Act*, contains similar enhancements to HSAs and ECFC also supports those proposals. However, ECFC has concerns that both proposals would adversely impact other consumer-directed health arrangements in these efforts to reform health care.

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, FSAs 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 leave 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 the Committee 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.

The Republican Study Committee's proposal would have a greater impact on employer-provided plans, like FSAs and HRAs. The proposal would replace the current law tax exclusion for employer-provided health care a standard deduction. The current law tax exclusion for employer-provided health care is the foundation for the continued operation of FSAs and HRAs; elimination of the exclusion would mean that employers would no longer be able to offer those plans. ECFC believes that FSAs and HRAs are an important benefit to middle-class families and we would urge the Committee not to advance legislation which would eliminate these important programs which help employees and their families rely on to manage the costs of health care. American families like these plans and they should be able to keep them under any health reform program passed by Congress.

Dependent Care Assistance FSAs

President Trump advocated a new tax deduction for child care expenses during his campaign. 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. If the Committee considers a new tax deduction for child care expenses, we would advocate that dependent care FSAs continue as a benefit available to employees and not be curtailed even if a tax deduction is provided for child care expenses.

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We look forward to working with you in 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,

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William F. Sweetnam, Jr.
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