January 15, 2018

U.S Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Internal Revenue Service
CC:PA:LPD:PR (Notice 2017-67)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

*Submitted Electronically at Notice.comments@irscounsel.treas.gov*

Re: Notice 2017-67 – Qualified Small Employer Health Reimbursement Arrangements

Dear Sir or Madam:

On October 31, 2017, the Department of the Treasury and the Internal Revenue Service (the "Agencies") released Notice 2017-67 which provides guidance on Qualified Small Employer Health Reimbursement Arrangements ("QSEHRAs"). QSEHRAs were established by an amendment of the Internal Revenue Code (the "Code") by the 21st Century Cures Act enacted on December 13, 2016. These new employer reimbursement plans provide a means in which small employers can continue to reimburse employees for qualified medical expenses, including premiums for health insurance policies, without running afoul of some of the provisions of the Affordable Care Act ("ACA"). Pursuant to the Notice, the Agencies requested comments on the guidance provided in the Notice. The Employers Council on Flexible Compensation ("ECFC") appreciates that proposed guidance regarding QSEHRAs has been provided. The following are comments on the proposed guidance provided under the Notice suggested by ECFC membership.

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. Many ECFC members will assist in the administration of these new QSEHRAS or advise employers about the establishment of these arrangements and, as such, our comments should be of interest to the Agencies.

**Eligible Employer**

To be eligible to establish a QSEHRA for employees, the employer must not be an applicable large employer and must not offer a group health plan to any of its employees. Code § 9831(d)(3)(B). We believe that the rules proposed in the Notice regarding when an otherwise eligible employer may offer a group health plan which would make that employer ineligible to offer a QSEHRA are needlessly broad and will hurt small employers that have provided some type of health coverage to their employees.

Excepted Benefits. The Notice provides that a group health plan would include a plan that provides only excepted benefits described in Code section 9831(c), such as a vision or dental health plan. We request that the final guidance provide that an employer that offers a plan that provides only excepted benefits should be an eligible employer. We believe that, since the term "group health plan" is often modified by the excepted benefit provision, the Agencies have the authority to interpret Code section 9831(d)(3)(b) to provide that an employer that offers a plan that provides only excepted benefits would be eligible to offer a QSEHRA. We believe that the IRS and Treasury Department have the authority to define group health plan in this instance to exclude excepted benefits.

A "group health plan" is defined extremely broadly in Code section 5000(b) as a plan of an employer to provide health care (directly or otherwise) to the employees, former employees or their families and a group health plan must comply with various requirements. This broad definition is modified for certain purposes under the Code in that certain non-major medical ancillary and supplemental benefits (referred to as excepted benefits) are not subject to the ACA requirements for a group health plan. Code §9832(c). Excepted benefits include separate coverage for accident or disability insurance, workers compensation insurance, automobile medical payment insurance, and coverage for on-site medical clinics. Code §9832(c)(1). Also included as an excepted benefit if offered separately is limited scope dental or vision benefits and long-term care benefits. Code §9832(c)(2). In addition, coverage for a specified disease or illness or hospital indemnity or other fixed indemnity insurance will be considered excepted benefits if offered as an independent, non-coordinated benefit. Code §9832(c)(3).

Strict application of the Code section 5000(b) definition for QSEHRAs would lead to perverse results. By way of example, an employer that offered dental coverage or an EAP to employees would be unable to sponsor a QSEHRA. We believe that Congress did not intend that coverage of excepted benefits would be considered group health coverage causing an employer to be unable to offer a QSEHRA to its employees. The requirement that no employee had employer-provided health coverage was a means of ensuring that the employer did not offer major medical coverage to some employees through a group plan and let other high-risk employees purchase their coverage on the individual market – thereby driving up costs of coverage on the individual market. Coverage for excepted benefits poses no such risks and employers that offer such coverage should be permitted to offer a QSEHRA.

The QSEHRA provisions are in new section 9831(d) of the Code. Section 9832 does reference a definition of group health plan which applies for purposes of "this chapter," i.e., chapter 100. However, section 9833 contains a broad grant of regulatory authority, establishing that the Treasury "may promulgate such regulations as may be necessary or appropriate to carry out the provisions of this chapter." For the reasons discussed above, the term group health plan should not extend to the non-comprehensive coverage extended through excepted benefits. We believe that allowing a QSEHRA to be established by employers whose only other group health plan offered to employees is an excepted benefit plan is "consistent with the provisions of this chapter [relating to QSEHRAs]."

Carryover Amounts in HRAs and FSAs. The Notice provides in Q&A 2 that an employer would not be eligible to offer a QSEHRA if it provides current employees with continued access to amounts which accumulated in an HRA in previous year or carryover amounts in an FSA – although the employer would be eligible if it suspends access to those amounts. This is counterproductive to the policy behind consumer-directed health accounts such as HRAs and FSAs which is to make individuals better consumers of health care dollars. Instead, employees will be incented to engage in unnecessary health care spending before the suspension occurs; this is the opposite health care spending result that the Agencies have been following in the guidance establishing HRAs and allowing FSA carryovers. The Agencies should revisit this conclusion in the final regulations so that a small employer who offered an FSA or HRA before the QSEHRA provision was available will not have employees lose access to health care funds they accumulated as conscientious consumers of health care.

**Proof of MEC Requirement**

Under section 9831(d)(2)(B)(ii), a QSEHRA may only make reimbursements to an eligible employee after the employee provides proof that coverage is minimum essential coverage ("MEC"). Q&As 41 and 42 of the Notice provide detailed requirements for how this requirement would be satisfied on a yearly basis. The Notice states that proof would consist of either (i) a document from a third party showing that the employee or individual has coverage and attestation by that individual that the coverage is MEC or (ii) attestation by the employee or individual that they have coverage that is MEC and the date coverage began and the name of the provider of the coverage. This proof must be provided at least annually. At each request for reimbursement, the employee must attest that the employee or individual whose expense is being reimbursed continues to have coverage that is MEC. ECFC members are concerned about the difficulty of administering such documentation requirements and, given the administrative burdens of collecting the data required, whether such data will be useful in enforcement. We would suggest that attestation alone should suffice for reimbursements to be made from the QSEHRA.

We appreciate the opportunity to provide our comments on the proposed regulations regarding QSEHRAs contained in Notice 2017-67. If you have any questions regarding our comments, please contact ECFC's Legislative and Technical Director, Bill Sweetnam, at 202.465.6397 or at wsweetnam@ecfc.org.

Sincerely,

William F. Sweetnam, Jr.

Legislative and Technical Director