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Re: Qualified Small Employer Health Reimbursement Arrangements under the 21st Century Cures Act

Dear Mr. Neis and Ms. Judson:

The recently enacted 21st Century Cures Act (the “Cures Act”) amended the Internal Revenue Code (the “Code”), the Employee Retirement Income Security Act of 1974 and the Public Health Service Act to establish a new type of health reimbursement arrangement for small employers, the Qualified Small Employer Health Reimbursement Arrangement (“QSEHRA”). Since this new arrangement is effective as of the beginning of 2017, the Employers Council on Flexible Compensation (“ECFC”) requests that the Department of the Treasury and the Internal Revenue Service (collectively, the “Agencies”) provide guidance under the Code on certain urgent issues relating to this new arrangement as soon as possible.

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.

Many ECFC member companies will administer these new QSEHRA or advise employers about the establishment of these arrangements. Consequently, we believe that it is imperative that the Agencies provide guidance as soon as possible to assist employers in determining whether they should establish a QSEHRA and plan administrators in designing procedures for the administration of these arrangements. This letter sets out the issues regarding QSEHRAs where our members believe that immediate guidance or further information by the Agencies is warranted in order for employers to offer a QSEHRA program to their employees. Many of these issues have come to our attention as ECFC members review the statutory provisions and answer questions from small employers that currently sponsor similar arrangements that reimburse employees for health insurance purchased on the individual market and other qualified medical...
expenses or are considering sponsoring such arrangements. Consequently, we request guidance on the following issues:

**Employers Eligible to Offer a QSEHRA**

Only “eligible employers” may offer a QSEHRA to its employees. Code § 9831(d)(2) of the Code. An eligible employer is an employer that is not an applicable large employer as defined in Code section 4980H(c)(2) and does not offer a group health plan to any of its employees. Code § 9831(d)(3)(B).

- **Group Health Coverage.** The term “group health plan” in Code section 9831(d)(3)(B)(ii) does not reference any other Code section as a definition of that term, so guidance is needed for employers to understand whether they are currently offering a disqualifying group health plan. The term group health plan is defined in the Code, but when that term is used for other purposes in the Code, the definition is modified by the excepted benefit provisions. We believe that, since the term “group health plan” is often modified by the excepted benefit provision, an employer that offers a plan that provides only excepted benefits would be eligible to offer a QSEHRA.

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 are 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. We would appreciate guidance from the Agencies confirming a small employer that only offered coverage of excepted benefits would be considered an eligible employer that could offer a QSEHRA.

- **Applicable Large Employer Determination.** Only an employer that is not an applicable large employer as defined in Code section 4980H(c)(2) will be eligible to offer a QSEHRA to its employees. The rules for determining whether an employer is an applicable large employer subject to the shared responsibility payment under Code section 4980H should be applicable in determining whether an employer is an applicable large employer that is not eligible to establish a QSEHRA and we request that the Agencies provide confirmation. The coordination of the definition of applicable large employer for both
application of the shared responsibility payment provisions and the ability to offer a QSEHRA is appropriate so that an employer that is not subject to the shared responsibility payment provisions would be eligible to offer a QSEHRA. In addition, using the look-back rules in determining whether an employer is an applicable large employer would be helpful to employers in case they become an applicable large employer at some time during the year so that they may offer the QSEHRA through the full year.

Reimbursements from a QSEHRA

Reimbursements from a QSEHRA may only be made for eligible expenses for medical care (as defined in Code section 213(d)) for the eligible employee and the employee’s family members after an employee has provided proof of coverage. Code § 9831(d)(2)(B)(ii). The maximum amount of reimbursement permitted under a QSEHRA is $4,950 or $10,000 in the case of an arrangement that also provides for payments or reimbursement for family members of the employee. Code §9831(d)(2)(B)(iii). Reimbursements must be made on the same terms to all eligible employees of the eligible employer. Code §9831(d)(2)(A)(ii). The QSEHRA will be treated as providing reimbursements on the same terms to all employees if the benefit varies in accordance with the variation in the price of an insurance policy in the relevant individual health insurance market based on (i) the age of the eligible employee or the employee’s family members if covered, or (ii) the number of family members covered. Code §9831(d)(2)(C). In addition, the reimbursement of qualified medical expenses will be excluded from an employee’s income only if the employee has minimum essential coverage (“MEC”) at the time the medical expense is incurred. Code §106(g).

- **Proof of Coverage.** The term “proof of coverage” is not defined in the statute. We would like confirmation that reimbursement by the QSEHRA of medical insurance premiums of a policy that provided MEC would be considered proof of coverage for this purpose. Further, if the reimbursement is for a qualified medical expense that is not a reimbursement of health insurance premiums and the QSEHRA already provided a reimbursement of medical insurance premiums during that month, we believe that no additional proof of coverage would be needed. However, if the QSEHRA has not provided a reimbursement of medical insurance premiums (either because the employee does not choose to get reimbursement from the QSEHRA or because the QSEHRA does not provide for the reimbursement of medical insurance premiums) and the employee has medical coverage from another source (such as, individual insurance purchased without using the QSEHRA, spousal coverage or coverage under TRICARE or Medicare), guidance should confirm that attestation by the employee that he or she has coverage is sufficient proof to verify that the employee has coverage. Self-attestation has been permitted by the Agencies in other circumstances, such as employee certification any expense paid through a health flexible spending arrangement has not been reimbursed and that the employee will not seek reimbursement from any other plan coverage. Proposed Treas. Reg. §1.125-6(b)(3)(ii).

- **Premium-Only Reimbursements.** We believe that a QSEHRA can limit reimbursements to only premiums for health insurance. We would like confirmation that an employer could, in fact, offer a QSEHRA that limits reimbursements to premiums for health insurance. Similarly, an employer can limit the types of qualified medical expenses that the QSEHRA would reimburse. This would facilitate, for example, an arrangement that would allow the purchase of a qualified HDHP and preserve HSA eligibility for a QSEHRA participant. We request guidance confirming that an employer could offer a QSEHRA that limited the types of reimbursements permissible.
• **Employer Discretion in Plan Design.** Since the statute does not state how reimbursements under the QSEHRA must be made, the current rules applicable to HRAs should apply to QSEHRAs, and an employer should be able to design its plan to provide reimbursements in the manner that it desires as long as reimbursements are limited to qualified medical expenses under Code section 213(d) and the employee provides proof of coverage. We request Agency guidance that would confirm this position.

• **Variations in Reimbursement Amounts.** Variations in the amount that a QSEHRA will reimburse are permissible under the statute as long as the variation is in accordance with the variation in the price of an insurance policy in the relevant individual health insurance market. Given that the statute states that the maximum contribution is $4,950 for individual coverage and $10,000 for family coverage, we believe that a QSHRA that reimburses at the maximum for individual and family coverage should be considered as providing coverage under the same terms for all eligible employees regardless of the difference in price between a health policy with single coverage and one with family coverage. We would like confirmation of our position in Agency guidance. In addition, guidance from the Agencies is necessary in order for employers to understand how to determine whether a variation in reimbursements is permissible under the new law and what documentation would be required in order to support that determination.

• **Allowance for After-Tax Payroll Deductions to Supplement HRA Funds.** In some areas, the cost of individual medical insurance may far exceed the statutory amounts that can be paid or reimbursed under a QSEHRA. In some cases, the QSEHRA will be established to reimburse the employee for the employees’ direct payment of insurance premiums. In other cases, the employer may facilitate the premium payments through a “list bill” payroll deduction arrangement. Such an arrangement may result in a premium discount for participating employees. An employer’s involvement with after tax payroll deduction for any excess cost of a QSEHRA funded policy (i.e., amounts in excess of the statutory limits) should not cause the employer to become ineligible to offer a QSEHRA, and we request confirmation of that in guidance.

• **Taxation of Reimbursement.** The statute provides that the taxability of any reimbursement from a QSEHRA will depend on whether the employee has MEC at the time that the medical expense is incurred. We contend that any reimbursement (within statutory limits) of health insurance premiums for insurance that provides MEC would automatically be excluded from the employee’s income without any further documentation. In addition, any other qualified medical expenses incurred during the time the QSEHRA has provided reimbursement for health insurance premiums would automatically be excluded from the employee’s income without further documentation. We believe that an employee can attest to the plan administrator that they have MEC and the plan administrator would not have to request or review any additional documentation. As noted previously, the Agencies has accepted self-attestation in other circumstances regarding health plans and guidance should confirm that self-attestation is appropriate in this situation. We request guidance confirming this interpretation.

• **Reporting and Withholding on Taxable Reimbursements.** If it is determined that a reimbursement from the QSEHRA is not excluded from income because the employee does not have MEC in the month in which the medical expense was incurred, the reimbursement must be included in the employee’s income as supplemental wages. It would be helpful if guidance would detail how these amounts should be reported and withheld upon.
Annual Notice to Employees

An employer funding a QSEHRA must provide a written notice to eligible employees that states (i) the amount of the benefit available under the QSEHRA for the year, (ii) that the employee should provide the information about the amount of the benefit to any health insurance exchange the employee applies to for subsidized coverage and (iii) a statement that if the employee does not have MEC for any month the employer may be subject to the individual mandate tax and reimbursements from the QSEHRA may be includible in gross income. Code §4931(d)(4)(B). This written notice must be given to an employee no later than 90 days prior to the beginning of the year of the arrangement or, if the employee is not eligible to participate as of the beginning of the year, on the date the employee first becomes eligible to participate in the QSEHRA. Code §4931(d)(4)(A). Failure to provide this notice will result in a tax of $50 per employee per incident of failing to provide the notice. Code §6652(o).

• Model Notice. The contents of this notice will be the same for all employers sponsoring a QSEHRA with the only difference being the amount of the benefit provided. It would be helpful to employers establishing these plans for the Agencies to provide a model notice that will satisfy the requirements for the notice.

• Notice and Establishment of a New QSEHRA. The statute states that a notice must be given to an on the date that the employee first becomes eligible to participate in the QSEHRA. For an employer that establishes a new QSEHRA, it would follow that the notice to be given to employees no later than the first day that the QSEHRA is established. In the years after the QSEHRA is initially established, the notice would be given 90 days prior to the beginning of the plan year. Confirmation of that interpretation would be helpful so that employers may make reimbursements from a QSEHRA as soon as possible after the QSHRA is established.

ECFC appreciates this opportunity to alert the Agencies on issues of concern to those employers who will establish QSEHRA and for those organizations that will administer these plans. If you have any questions and would like to discuss these issues in more detail, please feel free to contact me via e-mail at wsweetnam@ecfc.org or by telephone at 202-465-6397.

Sincerely,

[Signature]

William F. Sweetnam, Jr.
Legislative and Technical Director