



EMPLOYERS COUNCIL ON FLEXIBLE COMPENSATION

927 15th Street, NW • Suite 1000 • Washington, DC 20005 • (202) 659-4300

Dennis Triplett
Chair, Board of Directors

September 18, 2009

The Honorable Max Baucus
Chairman
Committee on Finance
United States Senate
Washington, DC 20510

Dear Chairman Baucus:

On behalf of the Employers Council on Flexible Compensation (ECFC) and its more than 100 member organizations, we are writing to express our appreciation for your dedicated efforts to advance health care reform legislation. As leading employer/plan sponsors and organizations on the front line of health benefit design and delivery, ECFC members recognize the important need to address the shortfalls with our nation's current health care system, expand coverage access, and to make coverage more affordable. We are concerned, however, that certain provisions included in the Chairman's Mark for the America's Healthy Future Act of 2009 (the "Mark") will have significant negative consequences for millions of Americans who currently have access to health coverage, and will result in fewer coverage choices for employers, their employees and families. As the Committee continues its preparations for a mark-up, we respectfully request that the Mark be modified as follows:

- i) The separate cap on FSAs be eliminated, or at least set at a reasonable level (e.g., the federal employee plan uses \$5,000) and indexed for future inflation. In addition, the "use-it-or lose-it" rule should be eliminated;
- ii) The excise tax provision be modified to exclude contributions to account based plans (FSAs, HRAs, and HSAs), HIPAA excepted benefits, and after-tax funded coverage; and
- iii) The proposed change to require a prescription for tax-free reimbursement of over-the-counter (OTC) drugs be removed.

Reconsider Contribution Limit and Modify Current Rules to Ensure Meaningful Role for FSAs in Reformed Health System

Millions of middle class Americans depend on their FSA to get the health care services they and their families need. Limiting the amount that Americans can contribute to their FSA will directly increase taxes for middle-class families when they are already faced with significant financial challenges.

In addition to increasing tax burdens on the middle-class, limiting FSAs will undermine patients' ability to get the care they need to maintain their health. Americans use their FSA to pay for



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preventive care, wellness programs, vision and dental expenses, which are often not paid for by insurance or government programs. FSAs are particularly important for patients with chronic conditions who rely on them to pay for out of pocket costs, which have been shown to exceed an average of \$4,000.

Indeed, federal employees provide a case in point. Despite access to comprehensive and high quality health coverage, federal employees are permitted to contribute up to \$5,000 to an FSA. The suggested \$2,000 cap is well below amounts needed to deal with out of pocket costs and as a result, may cause patients to delay or forego entirely the care they need to manage their chronic illness and avoid costly complications. It is particularly unfortunate that the Mark applies no inflationary factor to the FSA cap (in contrast to the excise tax cap which is indexed to the CPI). As a result, assuming a continuation of 8% annual medical inflation, this \$2,000 limit turns into \$1,000 in just nine years. In short, the proposal virtually eliminates the FSA program which now helps an estimated 35 million mostly middle-income Americans.

Moreover, in many cases employees fail to enroll and participants underutilize FSAs due to concerns about the current “use-it-or-lose-it” requirement. Elimination of this rule (e.g., with a taxable cashout or a rollover of unused funds) will allow FSA participants to focus their health care dollars on necessary medical care and avoid unnecessary spending to avoid forfeiting their dollars.

Determination of High Cost Insurance Excise Tax Threshold Should Not Include Account-Based Plans or Excepted Benefits

It is ECFC’s understanding that the Committee’s goal in levying an excise tax on insurance is to discourage the offering of so-called “high cost” plans in an effort to drive down health care spending and costs. Under the Mark, funds in account based plans, such as flexible spending accounts (FSAs), health reimbursement arrangements (HRAs), and health savings accounts (HSAs), as well as premiums for non-comprehensive excepted benefit policies (e.g., vision, dental, and indemnity policies such as critical illness insurance), would count toward the excise tax threshold.

Account based plans and excepted benefit insurance policies are important components of the nation’s health insurance system. FSAs, for example, help individuals meet cost-sharing obligations not otherwise covered by insurance and get services they need to maintain their health. They are particularly important for Americans with a chronic illness, who may see multiple providers and take multiple prescription medications each month. Even with nominal cost-sharing, these financial obligations can quickly add up. Including account based and excepted benefit coverage in determining the excise threshold will create strong disincentives for employers to offer these types of plans and take away an important tool in designing benefits that best meet their employees needs. Given policy makers’ concerns about health-related bankruptcies, we believe that it is inappropriate to include contributions for such benefits in determining the threshold.



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More specifically, ECFC urges the Committee to clarify its approach such that the following are expressly excluded from the determination of the excise tax threshold:

- i) Account based plans (especially employee funded amounts such as FSAs);
- ii) HIPAA excepted benefit coverage; and
- iii) Any coverage funded by employees on an after-tax basis (i.e., employee contributions other than cafeteria plan pre-tax salary reductions should not be considered).

This treatment would be consistent with the treatment of such coverages for purposes of HIPAA portability, Medicare coordination, and other existing legal requirements.

Proposed Change to Definition of Qualified Medical Expenses Related to Over the Counter Medicines Will Lead to Higher Costs

The Mark provides that a prescription would be required for an over-the-counter (OTC) medication to be eligible for reimbursement under an HSA, FSA, or HRA. Rather than driving down health care costs, this approach would increase costs by requiring patients to have a doctor visit to get cost-effective treatments already determined to be safe by the Food and Drug Administration (FDA) for conditions such as allergies and acid reflux. The added cost associated with this requirement may cause some patients to forego taking medications or in some cases, opt for a more expensive prescribed medication after visiting their physician.

ECFC understands the challenges and complexity of the issues related to achieving health care reform. Our members appreciate the careful and thoughtful consideration the committee has given in its work to craft a proposal. We hope, as that work continues, it will strive to achieve better affordability and accessibility without unnecessarily jeopardizing current policies that have enabled millions of employees and their dependents and individuals to receive dependable, quality health care coverage that best meets their health care needs.

Sincerely,

A handwritten signature in black ink that reads "Dennis C. Triplett". Below the signature, the text "President, Healthcare Services" is written in a smaller, cursive script.

Dennis C. Triplett
President, Healthcare Services

Dennis Triplett
Chair, Board of Directors

cc: Members, United States Senate Committee on Finance