



EMPLOYERS COUNCIL ON FLEXIBLE COMPENSATION

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

December 2, 2009

Dear Senator:

With deliberations underway on H.R. 3590, the “Patient Protection and Affordable Care Act of 2009”, the Employers Council on Flexible Compensation (ECFC) calls on the Senate to consider modifying provisions related to flexible spending accounts (FSAs) and the high-cost health plan excise tax. These provisions, if left unchanged, will negatively affect the availability of health benefits currently received by millions of Americans.

The proposed \$2,500 FSA cap is too low, particularly for patients with a chronic illness who, even with comprehensive coverage, face very high out of pocket costs. FSAs also help patients pay for services not covered by insurance. For example, parents of children with autism often rely on FSAs to help pay for therapies.

ECFC urges the Senate to reconsider imposing any cap on FSA contributions. If a cap is adopted, however, it must be indexed for future inflation and should be set at a higher level (e.g., the federal FSA plan and many state plans use a \$5,000 cap). Finally, the proposed change to require a prescription for tax-free reimbursement of over-the-counter (OTC) drugs should be removed or replaced with a provision that allows for tax-free reimbursement for OTC drugs where such drugs required a prescription at any time on or after January 1, 1978.

With respect to the high-cost plan excise tax, we believe that the provision as currently drafted is overly broad because it includes all health care coverage made available to employees. Requiring the inclusion of coverage other than primary health coverage will have the unintended consequence of causing employers to eliminate valuable coverage such as FSAs and HIPAA excepted benefit coverage, including vision, dental, and specified disease coverage. While this may occur immediately in some cases, it will likely increase over time because the thresholds for the excise tax increase at a much slower rate than medical inflation. Non-primary health benefits are critical to many Americans today in order to meet their health care needs and fill critical coverage gaps inherent in primary health care plans.

ECFC respectfully requests the Senate to consider the following modifications to the high-cost plan excise tax: (1) include only the value of primary health coverage in determining the application of the tax; (2) exclude contributions to FSAs, health savings accounts, or HIPAA excepted benefit coverage in determining the amount subject to the tax; (3) increase the tax threshold to a higher initial level and index the thresholds for medical inflation; and (4) exclude employee contributions (whether pre-tax or after-tax) in determining the amount subject to the tax.

The attached document presents additional information on ECFC’s views on these issues.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "David M. Carver".

David Carver
Executive Director

A handwritten signature in black ink that reads "Dennis C. Triplett". Below the signature, the text "PRESIDENT, HEALTHCARE SERVICES" is printed in a smaller font.

Dennis Triplett
Board Chair



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ECFC PRIORITY ISSUES: “PATIENT PROTECTION AND AFFORDABLE CARE ACT”

As deliberations begin on H.R. 3590, the “Patient Protection and Affordable Care Act of 2009”, the Employers Council on Flexible Compensation (ECFC) calls on the Senate to modify two specific provisions that, if left unchanged, will negatively affect the availability of health benefits currently received by millions of Americans. The provisions of most concern to ECFC are the limitations on Flexible Spending Accounts and the expansive reach of the High Cost Health Plan Excise Tax. ECFC’s views and recommendation are presented below.

1. **Flexible Spending Accounts (FSAs):** H.R. 3590 would cap contributions to flexible spending accounts at \$2,500 beginning in 2013. The legislation does not index the cap for future inflation. In addition, the bill would require individuals to obtain a prescription in order to be reimbursed for over the counter (OTC) medicines through their FSA beginning January 1, 2010.

ECFC Views: Approximately 35 million Americans rely on FSAs to obtain the health care services they need. Each year, prior to the beginning of the plan year, these participants review their health care needs and choose amounts to place into their medical FSAs from their own salaries to pay for qualified medical expenses that are not covered by their insurance policies. FSAs are particularly important for patients with chronic conditions, who even with comprehensive coverage can face thousands of dollars in out of pocket costs. FSAs also help patients pay for services not covered by insurance. For example, parents of children with autism often rely on FSAs to help pay for therapies. These types of out of pocket costs will remain even in a reformed health care system. FSAs are doubly affected because they are taken into account for purposes of the High Cost Health Plan Excise Tax and are subject to a separate cap, as well. These provisions, operating in tandem, will effectively eliminate FSAs in the very near future.

The proposed \$2,500 FSA cap is too low, particularly for patients with a chronic illness who, even with comprehensive coverage, face very high out of pocket costs. Since the legislation does not apply an inflation index to the cap, H.R. 3590 effectively will eliminate FSAs over time. This outcome is completely counter to the pledge made by many policy makers, including President Obama, that “if you like what you have you can keep it.” Finally, the provision calling for a doctor’s prescription to receive FSA reimbursement for OTCs will increase costs by requiring individuals to have a physician visit to obtain medication (e.g., an OTC for allergy or reflux) that is otherwise available as an OTC.

Recommendations: ECFC strongly urges the Senate to reconsider imposing any cap on FSA contributions. If one is adopted, however, it should be set at a higher, more reasonable level (e.g., the federal employee plan as well as many state governmental plans use a \$5,000) and must be indexed for future inflation. If the High Cost Health Plan Excise Tax (discussed below) is retained, contributions to FSAs must not apply toward the threshold for the tax. The proposed change to require a prescription for tax-free reimbursement of OTC drugs should be removed or replaced with a provision allowing FSA reimbursement for OTC drugs that required a prescription at any time on or after January 1, 1978.



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2. **High Cost Health Plan Excise Tax:** H.R. 3590 imposes a 40 percent excise tax on high-cost health plans defined to exceed \$21,000 for a family and \$8,000 for an individual as of January 1, 2013. In determining whether a health plan triggers the tax, H.R. 3590 calls for including the value of many employee benefits *other than primary health coverage* including FSAs, health savings accounts (HSAs), health reimbursement arrangements, and fixed indemnity coverage, such as accident, vision, dental, and cancer policies, among others. The bill makes no distinction between medical insurance premium payments and amounts that employees elect to take from their own take home pay to pay for amounts not covered by their insurance.

ECFC Views: While nominally imposed on insurers and employers, the burden of this tax will be felt by employees and their families. In order to avoid the tax and its onerous administrative burdens, many employers will reduce the primary health care options currently made available to employees or drop coverage altogether in order to avoid the cap. As a result, the significant tax increase will be felt largely by the middle class.

The proposed tax, as currently drafted, is overly broad in that it applies to all health care coverage made available to employees, and not just primary health coverage. This approach will have the unintended consequence of causing employers to eliminate coverage other than primary coverage, such as FSAs and supplemental coverage, including vision, dental, and specified disease coverage. While this may occur immediately in some cases, it will certainly increase over time, because the thresholds for the tax are increased at a rate much slower than medical inflation. Non-primary health benefits are critical to many Americans today in order to help finance their health care needs and fill critical coverage gaps inherent in primary health care plans.

Recommendations: If the High Cost Health Plan Excise Tax is retained, we urge the Senate to consider the following modifications which will make the tax more equitable and better ensure a continuing role for employer provided coverage of all types:

- Only include the value of primary health coverage in determining the application of the High Cost Health Plan Excise Tax. Do not take into account contributions to FSAs, health savings accounts, or supplemental benefits in determining the amount subject to the High Cost Health Plan Excise Tax cap. Including these contributions in the cap will seriously erode the ability of those with chronic diseases to continue to meet their health care needs.
- Increase the tax threshold to a higher initial level so that fewer plans (and employees) are initially subject to the tax, and index the threshold for medical inflation.
- Do not take into account plans paid for with employee contributions (whether pre-tax or after-tax) in determining the amount subject to the High Cost Health Plan Excise Tax.

ECFC is a membership association dedicated to maintaining and expanding private employee benefit programs on a tax-advantaged basis. ECFC's more than 100 members include employers who sponsor employee benefit plans as well as insurance, accounting, consulting, and actuarial companies that design or administer employee benefit plans throughout the nation.