COMMENTS ON REG-136724-17

Internal Revenue Service

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Prepared on behalf of the Foundation for Government Accountability

To whom it may concern:

My firm represents the Foundation for Government Accountability (FGA), a non-profit organization based in Naples, Florida, focused on developing principled strategies to replace failed health and welfare programs nationwide. On behalf of FGA, this letter responds to the request for comments issued by the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (collectively, the "Departments") in connection with proposed regulations under 26 CFR Parts 1 and 54, 29 CFR Parts 2510 and 2590, and 45 CFR Parts 144, 146, 147, and 155, Health Reimbursement Arrangements and other Account-Based Group Health Plans. We are generally very pleased with the priority the Departments have placed on Health Reimbursement Arrangements and other Account-Based Group Health Plans (collectively, "HRAs") in their regulatory guidance and believe that broadened availability of HRAs stands to make a significant difference to employers across the country. Our comments fall under twelve headings: dependent exception, summaries of benefits and coverage, PCORI fees, portable HRAs, proxy approach, age-differentiated safe harbor, individual markets, excepted-benefit HRAs, affordability—location safe harbor, affordability—use of prior year's rate information, section 6056 reporting, and timing.

Dependent Exception

The proposed regulations generally prohibit an employer from offering an HRA integrated with individual coverage to the same class of employees to which it offers its group health plan. Although we believe this restriction is reasonable, we would argue for an exception as applied to spouses and dependents. Specifically, group plans are often richer than individual plans and thus more expensive; many employers cannot afford to contribute to family premiums for coverage under their group health plan. Moreover, the ACA's provisions for affordability often render dependents ineligible for PTCs due simply to the affordable coverage offered to the employee only.

These factors argue for broader availability of the HRA when it comes to spouses and dependents. There is already adequate regulation of spouse and dependent reimbursement under Code section 213(d), which provides the definition of medical expenses for these purposes.

Summary of Benefits and Coverage

We recommend that the final regulations should effectively eliminate the SBC requirement for HRAs because they do not meet the definition of a "benefit package." Under current regulation and practice, a summary of benefits and coverage ("SBC") is required for an HRA, even though HRAs do not meet the definition of "benefit package" under 26 C.F.R. § 54.9815-2715(a), which triggers the SBC requirement. Specifically, an HRA is not a benefit package; it is simply a reimbursement arrangement. The SBC requirement was intended to create consistency in communicating complicated plan designs to health plan enrollees. HRAs simply do not fit this description.

PCORI Fees

We recommend creating a regulatory exception to the definition of "applicable self-insured health plan" under 26 C.F.R. § 46.4376-1(b)(1) for HRAs that are integrated with an employer's major medical plan. This exception would ensure that the PCORI fee does not apply to HRAs integrated with fully insured major medical plans. Under current regulation and practice, where a fully insured major medical plan is integrated with an HRA, PCORI fees are paid on both parts of the integrated plan, and in the final analysis, the employer pays for both. The employer pays for the HRA fees directly, and the fees on the major medical plan are passed through to the employer by the insurer. This results in double taxation on the employer, additional administrative burden, and is inequitable when compared to a fully insured plan without an HRA (for example, an

HDHP with an HSA) or a self-insured major medical plan with an integrated HRA, neither of which results in such double taxation.

Portable HRAs

We recommend that the Departments revise current guidance to permit employees to rollover HRA funds into a tax-free Portable HRA account after termination. Our goals for this alternative are to give both the employer and employee more flexibility regarding how HRAs are implemented in the workplace. On the employee side, a portable HRA would permit an employee to keep contributed employer dollars after termination and would keep those dollars from being taxed so long as they are spent on medical expenses. In addition, portable HRAs would give employers another tool in their compensation tool belt. Specifically, employers would have choice points on: (1) whether to carryover prior year's account balances (permitted under current law), (2) whether to permit employees to take their HRA dollars with them, and (3) if so, whether HRA dollars should be subject to a vesting period before they become portable.

Under current guidance, HRA dollars may stay in the employer's account after termination and the employee may continue to submit for reimbursement until the account is emptied—DOL Technical Release 2013-03, Q&A 5 (the "Technical Release"). This method is, however, administratively burdensome for both employer and employee, and could result in the employee losing the funds in the event the employer becomes insolvent (unless the HRA is trust-funded). The Portable HRA would solve these issues. It would work like a rollover by allowing the employee to set up a special account to hold HRA funds transferred from the former employer, then draw down on those funds as medical expenses are incurred.

Proxy Approach

We agree with the proxy approach in which the Departments would treat all individual health insurance coverage as subject to and compliant with PHS Act sections 2711 and 2713, except for coverage that consists solely of excepted benefits.

Age-Differentiated Safe Harbor

We agree with the Departments' intent to issue future guidance providing a safe harbor for employers that wish to differentiate HRA benefits based on age without violating section 105(h) of the Tax Code. We encourage the Departments to issue such guidance.

Individual Markets

We believe that the ability of employers to offer HRAs integrated with individual policies will greatly strengthen the individual markets, due to increased numbers of individuals using such employer funding to purchase individual policies.

Excepted Benefit HRAs

We generally applaud this development as we believe it is consistent with the actual use of HRAs for most employers. We encourage the Departments to consider ways to increase the maximum amount available under such HRAs. Two straightforward examples would be to (a) use the same limits as permitted under the QSEHRA rules or (b) use the out-of-pocket limits for high deductible health plans under section 223(c)(2)(A)(ii).

Affordability—Location Safe Harbor

We generally agree with the approach taken by the IRS in Notice 2018-88 to meld the proposed HRA regulations with existing ACA employer mandate rules. We specifically agree that adding a safe harbor for affordability by using the employee's primary work location would simplify this determination. We note that small group rates are generally determined using the employer's headquarters location. Using the headquarters location for determining affordability would further simplify the approach.

Affordability—Use of Prior Year's Rate Information

We agree with this approach as described in Notice 2018-88.

Section 6056 Reporting

Although we generally agree that further guidance is needed for purposes of section 6056 reporting, we note that this is one of the most troublesome aspects of the ACA for employers. The reporting, as it exists now, is complicated, time-consuming and fraught with opportunities for error. We encourage the Departments to be thoughtful in developing additional reporting requirements and ask that they be kept as simple and straightforward as possible.

Timing

As a final note, we encourage the Departments to issue the final regulations by the end of first quarter, 2019. We believe this is necessary to give employers adequate time to review their options and make desired changes to their benefit strategies and will give administrators enough time to update their IT and other infrastructure to be prepared for the regulations' implementation in 2020.

Respectfully submitted,

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SRG/smp

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Foundation for Government Accountability