EMPLOYERS COUNCIL
ON FLEXIBLE COMPENSATION
927 15th Street, NW • Suite 1000 • Washington, DC 20005 • (202) 659-4300

August 27, 2010

Office of Consumer Information
and Insurance Oversight
Department of Health and Human Services
Room 445-G
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Reference: OCIIO-9994-IFC

Submitted Via Electronic Mail

Dear Sir or Madam:

The Employers Council on Flexible Compensation (ECFC) appreciates the opportunity to offer comments on the interim final rule to implement Patient Protection and Affordable Care Act (P.L. 111-148) provisions related to preexisting condition exclusions, lifetime and annual limits, rescissions, and patient protections (Federal Register, Vol. 75, No. 123, June 28, 2010). ECFC is a membership association dedicated to maintaining and expanding employee benefit programs offered on a pre-tax basis including health care, transportation, dependent/child care assistance and retirement plans. ECFC's more than 100 members include employers who provide these important benefits, as well as insurance, accounting, consulting, and actuarial companies that design or administer employee benefit plans throughout the nation. Together, ECFC member companies design, offer, or administer flexible benefits for tens of millions of working Americans, a majority of whom have middle class incomes.

HRAs Are A Valuable Benefit Tool for Employers and Employees That Should Be Exempt from the Annual Limit Prohibition

ECFC and its members are particularly interested in the interim final rule's effect on the availability of health reimbursement arrangements (HRAs) and is pleased that the agencies specifically requested input on that subject. HRAs have long been an important health benefit option for employers, employees and their dependents. In the majority of cases, employers offer their employees an HRA in tandem with primary health care coverage. Employers fund the account, which the employee can use to help defray costs, such as deductibles and other cost-sharing. Many public and private sector employers also offer HRAs to their retirees, often setting aside dollars in trust accounts for future HRA benefits.

SPECIFIC COMMENTS AND RECOMMENDATIONS RELATED TO HRAS

1. Codify Exceptions Discussed In Preamble In Regulation

Background: The interim final rule's preamble states:

> When HRAs are integrated with other coverage as part of a group health plan and the other coverage alone would comply with the requirements of PHS Act section 2711, the fact that benefits under the HRA by itself are limited does not violate PHS Act section 2711 because the combined benefit satisfies the requirements. Also, in the case of a stand-alone HRA that is limited to retirees, the exemption from the requirements of ERISA and the Code relating to the Affordable Care Act for plans with fewer than two current employees means that the retiree-only HRA is generally not subject to the rules in PHS Act section 2711 relating to annual limits. The Departments request comments regarding the application of PHS Act section 2711 to stand-alone HRAs that are not retiree-only plans (pp. 37190-37191).

The preamble language taken together with language in the interim final rule and proposed rule on grandfather status (Federal Register, Vol. 75, No. 1116, June 17, 2010) make it clear that the PPACA annual limit prohibition does not apply to the following:

i) HRAs "integrated" with other coverage that complies with PPACA requirements;
ii) HRAs that are limited to certain excepted benefit (e.g., vision or dental) coverage; and
iii) HRAs offered only to retirees.

Recommendation: ECFC encourages the Departments to incorporate these exceptions described in the preamble into the regulatory language itself.

2. Extend Exemption From Annual Limit Prohibition To All HRA Arrangements

Background: As described above, employers fund their employees' or retirees' HRAs, which serve to supplement an employee's or retiree's primary health care coverage. HRA benefits are paid based on the individual's account balance when a claim is made. A number of variables, such as length of participation in the arrangement, affect individual participants' account levels. This structure is in contrast to a bright-line annual cap that stipulates that claims in excess of a specified aggregate amount will not be paid. More specifically, accruals to the individual's HRA, such as pre-scheduled monthly accruals or incentives for wellness services, can provide the individual additional benefits under the arrangement. For these reasons, ECFC believes that an HRA account balance is not the type of annual financial limitation intended to be addressed by PPACA.

In addition, post-2014, it is not likely that employers or individuals will intend to use an HRA on its own to meet the PPACA essential benefits requirements. The more likely scenario is that

HRAs will continue to serve as an additional supplemental benefit fully-funded by the employer to assist account holders in offsetting out-of-pocket costs. In our view, employers will have little incentive to offer employees an HRA as a supplemental benefit if they are subject to the annual limit prohibition.

Recommendation: Given that HRAs are not set up with a bright line annual limit and that they are most often used in conjunction with primary coverage as a supplemental benefit, ECFC urges the agencies to exempt all HRAs from the prohibition on annual limits. The exemption should apply regardless of whether or not primary coverage is offered through the individual's employer or is obtained through another avenue, such as a spouse's employer. ECFC raises this issue because language in the preamble indicates that an HRA integrated with another PPACA compliant plan would not violate the annual limit prohibition. ECFC encourages the agencies to clarify the term "integrated" to ensure that it captures HRAs that may be offered through a different ERISA plan than the primary coverage. Should the agencies not take this approach, ECFC recommends the adoption of a waiver program modeled after those for other limited medical benefit programs to ensure that employers will be permitted to offer employer-funded HRAs and that enforcement of the annual limit prohibition does result in employees and retirees losing access to these important benefits.

3. Apply A Plan-Wide Rather than Participant-Level Rule In Determining When An HRA Qualifies As An FSA Plan

Background: In addition to the exemptions noted above, the interim final rule specifically does not apply the annual limit prohibition to arrangements that meet the definition of a flexible spending arrangements (FSAs) set forth in IRC Section 106. These types of flexible spending arrangements are benefit plans that provide employees coverage under which:

(i) specified incurred expenses may be reimbursed (subject to reimbursement maximums and other reasonable conditions), and

(ii) the maximum amount of reimbursement which is reasonably available to a participant for such coverage is less than 500 percent of the value of such coverage.

Under the Section 106 definition, an arrangement will be determined to qualify as an FSA if "the maximum amount of reimbursement which is reasonably available to a participant for such coverage is less than 500 percent of the value of such coverage," often referred to as the 5 times rule. Guidance offered in IRS Notice 2002-45, 2002 IRB 93, Part VII regarding the 5 times rule indicates that the collective experience of the HRA arrangement, not participant-level experience should be used in determining whether or not an HRA arrangement meets the rule.

Recommendation: An HRA should be exempt from the annual limit prohibition when aggregate projected claims determined using the actuarial method for determining COBRA rates or when claims for the preceding year calculated using the past cost method exceed 20 percent of the aggregate maximum HRA benefit available under the arrangement. A blended approach, which is currently permissible under IRS guidance on COBRA, would enable employer/plan sponsors to

determine on an HRA plan-wide basis whether annual limit prohibition applies to the arrangement.

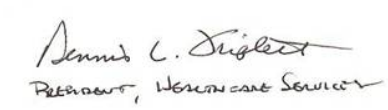
4. Provide Employers And Employees A Transition Period

Background: The design of HRAs permits balances to be carried over from year to year and accruals can occur on varying schedule.

Recommendation: Should the agencies not expand the exemption to the annual limit prohibition such that it applies to all HRAs, ECFC urges the agencies to allow employees a transition period such that they do not forfeit funds in their accounts as a result of the PPACA provision.

Again, ECFC appreciates the opportunity to offer comments on the interim final rule. If you have any questions or need additional information, please do not hesitate to contact John Hickman, ECFC Board Member and Legislative Committee Chair at (404) 881-7885.

Sincerely,



Dennis L. Triplett
Board Chair