EMPLOYERS COUNCIL
ON FLEXIBLE COMPENSATION

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December 21, 2012

Centers for Medicare and Medicaid Services
Department of Health and Human Services
P.O. Box 8010
Baltimore, MD 21244-8010

Attention: CMS-9980-P *Sent electronically to http://www.regulations.gov*

Dear Sir or Madam:

The Employers Council on Flexible Compensation (ECFC) recognizes the enormity of the task before the Department of Health and Human Services (HHS/Department) in implementing the Affordable Care Act (ACA). The ACA exchanges will chart new territory, necessitating the development of many new and extremely technical regulations. ECFC's more than 150 members include employers who sponsor employee benefit plans, including health flexible spending arrangements (FSAs), as well as insurance, 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 and dependents.

ECFC appreciates the opportunity to submit comments on the Department's proposed rule, "Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation" (*Federal Register,* November 26, 2012). However, given the proposed rule's significant implications, ECFC respectfully requests that the Department provide for at least a 60-day comment period. A longer comment period is wholly-consistent with Executive Order 13563, under which President Obama instructed federal departments and agencies to afford stakeholders a "meaningful opportunity to comment through the internet on any proposed regulation, with a comment period that should generally be at least 60 days." Despite working diligently to digest the proposed rule and prepare this response, ECFC–along with any number of stakeholders–could benefit from a longer comment period, which will help ensure that the comments and recommendations received by HHS are well-informed, constructive, and complete.

Below ECFC offers its preliminary comments and again, urges the Department to give thoughtful consideration to its request to extend the comment period. We would welcome the opportunity to discuss our initial recommendations further. Should you have any questions, please do not hesitate to contact John R. Hickman at 404-881-7885 or email at jhickman@alston.com.

Sincerely,

Natasha L. Rankin

Natasha L. Rankin
Executive Director

PRELIMINARY COMMENTS AND RECOMMENDATIONS

Clarification of application of annual cost-sharing limitations to self-funded and large group plans

Issue: Public Health Service (PHS) Act section 2702(b) provides that a group health plan shall ensure that any cost sharing imposed by the plan does not exceed the limitations provided for under Affordable Care Act (ACA) §1302(c)(1). Section 715(a)(1) of the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) of the Internal Revenue Code (IRC) incorporate PHS Act section 2702(b) into ERISA and the IRC. HHS, Department of Labor, and Department of Treasury have determined that the scope of ACA §1302(c) also applies to the scope of PHS Act section 2707(b). As such, the deductible limitations apply only to plans and issuers in the small group market and not to self-insured plans or health insurance issuers offering health insurance coverage in the large group market.

Comment/Recommendation: ECFC appreciates that HHS clarified that PHS Act section 2707(b) does not apply to self-funded plans or issuers offering coverage in the large group market. Although included in the preamble to the proposed rule, we believe that this conclusion should be codified so as to avoid any future doubt with regard to the issue.

Consideration of employer contributions to a flexible spending arrangement (FSA) when determining maximum deductibles

Issue: At §156.130(b), the proposed rule would codify the ACA annual limits on deductibles for small group coverage. Under the proposed language, the annual deductible limits ($2,000 for self-only and $4,000 for other than self-only in 2014) would increase each year by a premium adjustment factor for self-only coverage and double for family coverage or any coverage other than self-only. Although the ACA allows for increases in deductible maximums set forth in §156.130(b) by amounts made "reasonably available" to an employee under an FSA (determined without regard to any salary reduction arrangement), HHS has interpreted the ACA as granting authority, but not requiring, HHS to take FSAs into account when determining the maximum deductible. For purposes of this rule, we note that the Code Section 106 definition of FSAs includes certain employer funded health reimbursement arrangements (HRAs) and self-funded reimbursement arrangements. Under this interpretation, HHS elected not to take FSA amounts into account.

Comment/Recommendation: To support its decision not to take FSAs (and similar arrangements that qualify as FSAs under Section 106) into account when determining the maximum deductible, HHS noted that doing so could result in having to make plans that differed in deductibles available to employees based on their FSA elections. Although ECFC agrees that taking employee salary reduction FSA elections into account would complicate the administration of the regulatory provisions on the maximum deductible amounts, that rationale is not consistent with the ACA language. Rather, the ACA calls for employer-provided FSA contributions–amounts that are known to employers when employees make benefit elections–to be considered.

ECFC urges the Department to reconsider its proposed position for a number of reasons and to modify the final rule such that it permits the inclusion of employer-funded FSA amounts when determining whether or not a plan complies with the small group maximum deductible amounts. First, to reiterate, considering employer contributions to an FSA is in line with the statute. Second, it will ensure alignment with the treatment of such amounts for purposes of determining actuarial value and minimum value. Third, it will grant employers important flexibility in determining benefit designs that will help ensure that employees have access to coverage that best meets their needs and preferences, and more importantly, is affordable.

In addition, HHS is proposing to include amounts contributed by an employer to a health savings account (HSA) and amounts made available under an HRA when calculating actuarial value and minimum value since doing otherwise could understate the value of a high deductible health plan (HDHP). ECFC encourages HHS to apply the same approach to FSAs–accounting for employer contributions to a FSA will allow insurers to demonstrate the complete value of the provided coverage. Of equal, if not more importance, it will enable individuals in better understanding the complete value of a particular plan when comparing coverage options.