September 9, 2014

The Honorable Jacob J. Lew
Secretary, U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Health Flexible Spending Accounts, permitted Health Reimbursement Arrangements and the Excise Tax on High-Cost Employer-Sponsored Health Plans

Dear Mr. Secretary:

Health flexible spending arrangements ("FSAs") and permitted (e.g., vision and dental) Health Reimbursement Arrangements ("HRAs") are valuable benefits provided to employees as they help employees manage out-of-pocket health care expenses. Unfortunately, the excise tax on high-cost employer-sponsored health plans of Section 4980I of the Internal Revenue Code (the "Code"), enacted as part of the Affordable Care Act ("ACA"), will likely result in employers ceasing to offer FSAs and permitted HRAs to their employees. To prevent this loss of a valuable benefit to employees, WageWorks, Inc. ("WageWorks") requests that the Administration include in its next budget a proposal that would amend Code section 4980I so that employee salary reduction contributions to an FSA and employer contributions to permitted HRAs not be counted in determining whether an employer sponsors a high- cost health plan. In addition, we would request that guidance be issued that delays the application of Code section 4980I to FSAs and permitted HRAs until such time as legislation is enacted that would provide that salary reduction contributions to an FSA and employer contributions to permitted HRAs not be counted toward application of the excise tax.

WageWorks is one of the nation's leading independent providers of consumer-directed spending solutions and services. WageWorks represents more than 3.8 million FSAs, health savings accounts (HSAs) and health reimbursement arrangements (HRAs) for more than 45,000 employer plan sponsors nationwide.

WageWorks appreciates previous guidance from the U.S. Departments of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") pursuant to the ACA that will make FSAs available to more employees. In particular, WageWorks appreciates IRS Notice 2013-71 which allowed FSAs to provide for a carryover of not more than $500 in unused account balances to the following year. However, WageWorks is concerned that Code section 4980I will result in employers reducing the availability of health FSAs to all workers in order to mitigate the application of this excise tax on their other employer-sponsored health plans.

The unintended result is that employees will be harmed because they will no longer be able to participate in this important benefit program. In fact, workers incur substantial out-of-pocket costs, even with the protections of the ACA[1]. The 2014 Milliman Medical Index[2] reports out-of-pocket expenses of $3,787 for a family of four covered by an employer-sponsored PPO.

Benefits of Health FSAs

FSAs are important components of health benefit packages that many employers provide to their employees. The FSA and permitted HRA is used by workers as a budgeting tool for large health care expenses and dental and vision expenses, and assists in assuring workers obtain needed medical care to comply with treatment protocols for chronic illnesses.

As employers try to manage the costs of providing health insurance to their employees—in part to ensure affordable plans are not considered excess benefit coverage subject to the excise tax—deductibles and co-payments are often increased. The increased costs to employees due to these changes can be mitigated if employees make tax-favored contributions to an FSA and then be reimbursed for the increased expenses through the FSA. Now that FSAs can provide a carryover of unused amounts, employee concern over forfeited funds contributed to their FSA has been greatly alleviated. As such, employees will be more likely to view health FSAs as a useful tool in meeting their increased financial obligations under the new ACA health coverage framework.

Application of Code §4980I to Health FSAs and Impact on Employees

An excise tax is imposed under Code section 4980I on any excess benefit provided under employer-sponsored health coverage over a specified dollar amount of coverage. The excise tax is equal to 40 percent of the excess benefit and is imposed on each provider of health coverage for that employer. This provision becomes effective in 2018.

For any employer that provides an excess benefit under its health coverages to employees, all providers of health coverages will be assessed an allocable share of the tax. The cost of coverage related to an FSA for purposes of determining whether an excess benefit exists is equal to all salary reduction contributions to the FSA and any reimbursements under the FSA in excess of those salary reduction contributions.

Code section 4980I was included in the ACA as a means to provide incentives to employers to reduce the amount of health coverage provided to their employees. Employers that provide coverage resulting in an excess will determine what medical coverage they can reduce or eliminate so they are not providing excess coverage. If salary reduction contributions by an employee result in employers providing excess benefits, thereby subjecting the employer's entire health plan to the excise tax, the employer will likely cease to make FSAs available in order to reduce excess benefits. This will eliminate an important cost-saving benefit to employees. This is particularly true since employees would use salary reduction amounts contributed to the FSA to pay deductible and co-payments under the employer's health plan in a tax-effective manner.

While there may be policy justifications for using the excise tax as a means of reducing the overuse of health care that is not cost effective, this is not the case for health FSAs which are statutorily limited in the amount that may be set aside. There is the $2,500 annual limit on amount of salary reduction an employee can make to an FSA with only $500 allowed to be carried over to the

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[1] The ACA caps out-of-pocket maximums at $6,350 for an individual and $12,700 for a family. Dental and Vision expenses are often in excess of these maximums.

[2] http://www.milliman.com/uploadedFiles/insight/Periodicals/mmi/pdfs/2014-mmi.pdf

following year. Further, the new $500 carryover provides an additional means for employees to conserve their FSAs, since they no longer are compelled to purchase medical goods or services at the end of the year in order to avoid forfeiting unused amounts in their FSA.

Requested Action

We understand that Code section 4980I specifically includes salary reduction contributions to an FSA in determining whether an employer is providing excess benefits subject to the excise tax. As such, Treasury and the IRS may be more limited in issuing guidance that would preclude the inclusion of FSA salary reductions in the calculation of employers' excess benefits. However, we would request that the Treasury advocate that Code section 4980I be amended so that FSA salary reductions are not included in the calculation of excess benefits. In particular, we request that Treasury include this provision amending Code section 4980I in the tax proposals submitted as part of the Administration's next budget. We would also ask that Treasury and IRS issue guidance that would delay the effective date of the application of Code section 4980I to FSAs – or provide a non-enforcement period -- until after 2018 in order to give Congress sufficient time to amend Code section 4980I.

Conclusion

Health FSAs provide an opportunity for employees to pay for certain health care expenses on a tax-favored basis. It is unfair to employees that the excise tax under 4980I will motivate employers to eliminate this important benefit. We hope that Treasury will take the lead in revisiting this provision in the ACA and take action encouraging the law be amended to eliminate this unfortunate result. We appreciate the opportunity to offer our suggestions and are happy to meet with representatives of the Treasury to discuss these issues further.

Sincerely,

Jody L. Dietel, ACFCI, CAS
Chief Compliance Officer

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