WageWorks

January 5, 2015

The Honorable Orrin G. Hatch
Chairman
Committee on Finance
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Erik Paulsen
Committee on Ways and Means
U.S. House of Representatives
127 Cannon House Office Building
Washington, D.C. 20515

Re: Comments on Family and Retirement Health Investment Act of 2015 Discussion Draft

Dear Chairman Hatch and Representative Paulsen,

On behalf of WageWorks, Inc. I greatly appreciate the opportunity to provide you with comments to your draft legislation, the Family and Retirement Health Investment Act, before it is reintroduced in the 114th Congress. We commend your efforts to make consumer-directed health care work for working Americans. As champions of consumer-directed care solutions, you appreciate that in addition to being popular among participants, these options empower consumers to take a more active role in their care, make informed decisions about specific items and services, and generally become more cost-conscious consumers of health care.

WageWorks is a leader in consumer-directed health account solutions as the nation's largest independent administrator of health savings accounts (HSAs), health reimbursement arrangements (HRAs) and health flexible spending accounts (FSAs). We serve many of the nation's largest and most innovative companies representing more than 3.8 million HSA, HRA, and FSA participants.

WageWorks supports the overall objectives of your legislation and is confident that many of its provisions, if enacted, would make consumer-directed health account solutions more accessible and useful to participants. Although we have some suggestions for improving individual provisions in the bill, the single most important policy change for consumer-directed health care is to avert the overarching threat posed by the so-called "Cadillac tax." We fear that any modifications to the tax treatment of these accounts would be in vain if they are wiped out by the impending tax.

As you know, section 9001 the Affordable Care Act (ACA) imposes a 40-percent excise tax on health insurance valued in excess of $10,200 for an individuals and $27,500 for families beginning in 2018. Given the growing cost of health care, these are not particularly high thresholds for "excess benefits," especially in some areas of the country. Although the Joint Committee on Taxation estimated that the tax would impact 40 percent of plans, more recent analyses suggest that roughly half of employer-sponsored health plans will be subject to the tax in 2018 and upwards of 80 percent of plans within five years.[1] In many cases, even our high-deductible health plan offerings would exceed these dollar thresholds, and even without accounting for individual contributions to an HSA. This was pegged as a tax on "gold-plated" or "Cadillac" coverage; in fact, it is a tax on "Chevy" coverage.

Others have asserted that the actual intent of an excise tax on "excess benefits" was nefarious and designed to tax individuals out of employer-sponsored coverage and into the individual market vis-à-vis new health insurance exchanges. Whatever the motivation, the unrealistic vision of robust coverage options through the individual market has not yet been realized. Even in

[1] Towers Watson, *Health Care Changes Ahead Survey: 2014*, http://www.towerswatson.com/en-US/Insights/IC-Types/Survey-Research-Results/2014/09/2014-health-care-changes-ahead-survey-report (Sept. 2014).

states with functioning exchanges, many individuals and families have struggled to find affordable options that allow them to see their current providers and adequately shield them from exorbitant financial risk. It is unrealistic to presume that employers and insurers subject to the tax will immediately eliminate longstanding employee benefits. In the short term, they are far more likely to pursue a combination of options to minimize and offset the tax burden, including scaling back coverage, increasing deductibles, copayments, and other out-of-pocket spending, and otherwise pass the costs along to employees.[2] As critics have pointed out, this tax on middle class working families is an inefficient, regressive, and deeply flawed approach to eroding employer-sponsored coverage.[3]

Another stated purpose of an excise tax on excess benefits was to disincentivize coverage that is so generous that it inoculates individuals from costly and inefficient care choices. While this is a roundabout way to achieve an otherwise laudable goal, leading studies indicate that the generosity of coverage is not a significant factor in plan cost, which is far more attributable to factors like employer's industry and regional variation.[4] The ACA imposed minimum coverage requirements that made it impossible for many existing health plans to remain in existence,[5] and will then impose a hefty excise tax on the replacement plans for providing "excess" benefits. Moreover, the excise tax paradoxically (and disproportionately) targets consumer-directed health care solutions that make individuals more savvy consumers. Because individual's contributions to HSAs and FSAs count toward the dollar threshold for calculating the excise tax,[6] saving and spending one's own money on health care is treated the same as employer-paid insurance premiums. Because these "add-ons" are generally easier to eliminate, observers predict that they will be first on the chopping block as employers look to reduce their tax liability—despite the fact that these options are saving both employers and employees money.[7]

While WageWorks supports efforts to repeal this ill-conceived middle class tax in its entirety, we believe that the Family and Retirement Health Investment Act is the right legislation for critical reforms to exempt consumer-directed health care solutions from the tax. Individual employees responsibly putting their own money away in personal accounts to help to pay for co-pays and other out-of-pocket expenses is not the same as overly generous employer contributions to health insurance premiums and it should not be treated the same. Specifically, our proposed provision would remove employee contributions to HSAs and FSAs from the "excess benefit" calculation.

Accordingly, we urge you to consider including the following provision in the Family and Retirement Health Investment Act:

LIMITING EMPLOYER-SPONSORED EXCISE TAX TO EMPLOYER CONTRIBUTIONS—
(a) IN GENERAL.— Section 4980I of the Internal Revenue Code of 1986 is amended by excluding from the definition "Excess Benefit" all employee contributions to Health FSAs, Archer MSAs and HSAs, regardless of taxable status, for purposes of determining the cost of employer-sponsored health coverage.

---

[2] *See id.*

[3] *See, e.g.,* CHRISTOPHER J. CONOVER, AMERICAN HEALTH ECONOMY ILLUSTRATED (AEI Press 2011).

[4] An independent study published in *Health Affairs* in 2010 found that high-cost employer-sponsored health coverage *does not* provide unusually rich benefits to enrollees. Only 3.7 percent of the variation in the cost of family coverage in employer-sponsored health plans is attributable to differences in the actuarial value of benefits. Instead, regional and industry variations explain much more of the variation, but the majority is unexplained. Jon Gabel et al., *Taxing Cadillac Health Plans May Produce Chevy Results*, 29 HEALTH AFFAIRS 174-181 (2010).

[5] *See* U.S. Departments of Health & Human Services, Labor, and Treasury, *Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act*, 75 FED. REG. 34538 (June 17, 2010).

[6] I.R.C. § 4980I(d)(2)(C). Leading industry groups, plan sponsors, and tax preparers differ on whether employee contributions to an HSA that are taken out of an employee's paycheck on a pre-tax basis are subject to the tax.

[7] *See* Towers Watson, *supra* note 1.

(b) DETERMINATION OF COST FOR HEALTH FSAS.—Subparagraph (B) of section 4980I(d)(2) is amended by striking everything after "the cost of the coverage shall be equal to" and replaced by "the amount of any employer contributions under the arrangement, excluding any salary reduction elections by the employee."
(c) DETERMINATION OF COST FOR ARCHER MSAS AND HSAS.—Subparagraph (C) of section 4980I(d)(2) is amended by striking everything after "the cost of the coverage shall be equal to" and replaced by "the amount of any employer contributions under the arrangement, excluding any salary reduction elections by the employee."
(d) CONFORMING AMENDMENTS.—
[as necessary]

Although the ACA excise tax does not technically take effect until January 1, 2018, to have a chance at preventing consumers from losing employer-sponsored coverage, having reduced coverage that leaves them vulnerable, and fewer consumer-directed care options, Congress would need to act much sooner. As you know, businesses plan well ahead in selecting employee benefits and plan offerings. If Congress were to wait until 2017 to repeal or delay the tax, little to none of these harms would be averted as many employers may have already acted to eliminate these benefits from employer-sponsored coverage. Thus, it is imperative that Congress revisit section 9001 of the ACA within the next year and, if not repeal it in its entirety, make important revisions to avoid some of the most unintended consequences of this burdensome middle class tax.

Beyond the overarching concerns that we have with the Cadillac tax, we would like to propose a modification to sections 201 and 202 of the draft legislation. While we support expanding the definition of "medical care" to include other justifiable health care expenses relating to nutrition and physical fitness, we believe that annual limits on such expenses would be bureaucratically burdensome on employers, plan administrators, and insurers, as well as the government. While we appreciate that annual dollar limits may be necessary in the context of calculating taxable income, as applied to consumer-directed health care plans, they are needless and burdensome. Given the strict annual dollar limits that already apply to HSAs and FSAs, additional limits on categories of covered items are unnecessary and would be a challenge for employers or plan administrators to monitor and regulate at the point of sale. Accordingly, we propose the following change to subparagraph (B) of newly added paragraphs (12) and (13) to section 213(d) of the Internal Revenue Code:

''(B) LIMITATION.—**For purposes of the allowance of a deduction as described in subsection (a), but not for other purposes, such as the definition of "qualified medical expenses" in section 223, a**~~A~~mounts treated as medical care under subparagraph (A) shall not exceed $1,000 with respect to any individual for any taxable year.

On behalf of our company, our clients and their employees, we thank you for your longstanding support of consumer-directed health care. We believe that with critical safeguards from the Cadillac tax, the Family and Retirement Health Investment Act would go much further in ensuring that these health account solutions continue to be available for American workers' beneficial use now and in the future. We applaud you for your continued leadership and dedication on behalf of millions of working families across the nation.

Sincerely,

Joe Jackson
Chief Executive Officer
WageWorks, Inc.