NFIB
1201 F Street NW, Suite 200
Washington, DC 20004

Via www.regulations.gov
and U.S. First Class Mail

December 12, 2018

The Honorable Steven T. Mnuchin, Secretary of the Treasury
The Honorable R. Alexander Acosta, Secretary of Labor
The Honorable Alex M. Azar II, Secretary of Health and Human Services
c/o CC:PA:LPD:PR (REG-136724-17)
Room 5205, Internal Revenue Service (IRS)
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

Dear Secretaries Mnuchin, Acosta, and Azar:

RE: Comments in Response to Departments of the Treasury, Labor, and Health and Human Services Notice of Proposed Rulemaking Titled "Health Reimbursement Arrangements and Other Account-Based Group Health Plans," REG-136724-17, 83 *Fed. Reg.* 54420 (October 29, 2018)

The National Federation of Independent Business (NFIB) submits these comments in response to your Departments' notice of proposed rulemaking titled "Health Reimbursement Arrangements and Other Account-Based Group Health Plans" and published in the *Federal Register* of October 29, 2018. NFIB supports the portion of the proposed rule of key interest to small businesses, which would allow employers under certain conditions to provide a tax-preferred health reimbursement arrangement (HRA) benefit to employees who obtain individual health insurance coverage, a benefit that could include HRA reimbursement of premiums paid by the employee for that coverage.

NFIB is an incorporated nonprofit association with nearly 300,000 members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. Small and independent business owners often seek to assist or encourage their employees to obtain affordable, flexible, and predictable coverage for themselves and their families. Allowing small businesses to provide an HRA benefit to their employees who obtain individual health insurance provides another option for small businesses seeking to assist their employees in meeting health insurance needs.

The Departments define a Health Reimbursement Arrangement as follows:

> . . . An HRA is a type of account-based group health plan funded solely by employer contributions (with no salary reduction contributions or other contributions by employees) that reimburses an employee solely for medical care expenses incurred by the employee, or the employee's spouse, dependents, and children who, as of the end of the taxable year, have not attained age 27, up to a maximum dollar amount for a coverage period. The reimbursements under these types of arrangements are excludable from the employee's income and wages for Federal income tax and employment tax purposes. (83 *Fed. Reg.* at 54421, col. 1, footnote omitted and emphasis added)

Sections 2711 and 2713 of the Public Health Service Act (42 U.S.C. 300gg-11 and -13) prohibit a group health plan from establishing lifetime limits or, in most cases, annual limits on "essential health benefits" (defined in section 1302(b) of the Affordable Care Act (42 U.S.C. 18022(b)), and require a group health plan to offer without any cost-sharing requirements certain services. Because an HRA provides coverage "up to a maximum dollar amount for a coverage period," an HRA fails to comply on its own with sections 2711 and 2713. But your departments previously have determined that an HRA complies with the requirements of section 2711 and 2713 when the HRA is integrated with a non-HRA *group* coverage plan (83 *Fed. Reg.* 54429, col. 2). And now the proposed rule would establish conditions under which an HRA complies with the requirements of section 2711 and 2713 when the HRA is integrated with *individual* health insurance coverage (see proposed 26 CFR 54.9802-4(c) and 54.9815-2711(d)(4); 29 CFR 2510.3-1(l), 2590.702-2(c), and 2590.715-2711(d)(4); and 45 CFR 144.103, 146.123(c), and 147.126(d)(4)). Thus, the proposed rule would allow an employer to offer an HRA benefit to an employee who obtains individual health insurance coverage.

The Departments' notice acknowledged the complexity of the tasks facing a small business that wants to pursue for its employees an HRA integrated with individual health insurance coverage. The notice states (83 *Fed. Reg.* at 54445, col. 3) that, among other things, small businesses would have to establish reasonable procedures to substantiate that the HRA-covered individuals have individual health insurance coverage; provide notice to HRA-eligible employees of the Premium Tax Credit (PTC) eligibility consequences of accepting the HRA benefit; follow the documentation and reporting requirements applicable to group health insurance plans; establish systems to reimburse premiums and reimburse employee out-of-pocket medical expenses (or hire third-party administrators to do so); and learn about and follow applicable provisions of the Internal Revenue Code.

NFIB recommends that your departments plan to release, before the applicability date of the final rule, a publication that explains in plain English, step-by-step, how small businesses can establish, administer, and comply with rules for an HRA benefit integrated with individual health insurance coverage. Unlike larger businesses, small businesses cannot afford the services of lawyers, accountants, and health care experts

to wade through complex regulations in order to determine how to establish and administer an HRA benefit. For many small businesses, it is do-it-yourself or not at all. Your departments would do them a great service by providing a basic HRA how-to manual that small businesses could follow and on which they could rely.

For comments in response to specific requests in the notice by your Departments for comments, please see the attachment. We appreciate the opportunity to comment on the Departments' proposed rules on health reimbursement arrangements.

Sincerely,

David S. Addington

David S. Addington
Senior Vice President and General Counsel

Attachment as stated

ATTACHMENT

ADDITIONAL COMMENTS IN RESPONSE TO
SPECIFIC REQUESTS BY DEPARTMENTS FOR COMMENTS

1. Departmental Comment Request: Choice Between Traditional Group Insurance and HRA Integrated with Individual Insurance. "The Departments solicit comments on whether employers should be able to offer employees a choice between a traditional group health plan or an HRA integrated with individual health insurance coverage, and on the definition of 'traditional group health plan,' including whether an alternate definition or term might be appropriate and whether a definition should be codified as part of these proposed regulations." (83 *Fed. Reg.* at 54430, col. 3)

Response: Small and independent business owners often seek to assist or encourage their employees to obtain affordable, flexible, and predictable coverage for themselves and their families. Part of the flexibility sought is the ability of employees to choose from among the broadest possible range of choices in the marketplace. The Departments should allow employers who have the wherewithal and administrative capacity to do so to offer their employees a choice between (1) a traditional group health plan, or (2) an HRA integrated with individual health insurance coverage. Allowing employees to have that choice is consistent with achieving the President's objective of giving employees of small businesses more options for financing their health care (see section 1(b)(iii) of Executive Order 13813 of October 12, 2017).

2. Departmental Comment Request: Size of Classes of Employees. "To minimize burden and complexity, the Departments do not propose a minimum employer size or employee class size for purposes of applying the proposed integration rules. The Departments recognize that very small employers could manipulate these classes (for example, a very small employer could put someone who is a higher-risk employee in a separate class on his or her own), but note that other economic incentives related to attracting and retaining talent would discourage employers from doing so. The Departments invite comments on whether employer size or employee class size should be considered in determining permissible classes of employees." (83 *Fed. Reg.* at 54431, col. 3)

Response: The very small employers that appear to concern the Departments are among the employers least likely to have any clue how to "manipulate" employee class size or any interest in doing so. Generally, they simply want to extend health care benefits to their employees if they can manage to do so, both to help the employees care for themselves and their families and to help themselves as very small business owners in attracting and retaining talented employees, which is particularly difficult when the labor market is tight. In any situation involving small businesses in which the Departments have difficulty deciding how best to balance various factors as they formulate the final rule, the Department should resolve the balance in favor of small businesses, as is consistent with the President's guidance to the heads of the Departments (see

section 1(b)(iii) of Executive Order 13813 of October 12, 2017) ("Expanding the flexibility and use of HRAs would provide many Americans, including employees who work at small businesses, with more options for financing their healthcare.").

3. Departmental Comment Request: HRA Integration with Short Term, Limited Duration Insurance. "The Departments also considered whether to propose a rule to permit HRAs to be integrated with other types of non-group coverage other than individual health insurance coverage, such as STLDI. However, while all individual health insurance coverage that is currently written is non-grandfathered coverage, and therefore is subject to and, presumably, compliant with PHS Act sections 2711 and 2713 (and most individual market coverage that is renewed is also non-grandfathered), other types of non-group coverage, such as STLDI, may not be subject to PHS Act sections 2711 and 2713, in which case, integration would not be sufficient to ensure that the combined benefit package satisfies these requirements. The Departments request comments on whether integration with STLDI (which is not required to, but which may, satisfy PHS Act sections 2711 and 2713) should be permitted, including whether integration should be permitted with any other type of coverage that satisfies PHS Act sections 2711 and 2713, how such integration rules should be structured, as well as comments on what, if any, potential benefits and problems might arise from allowing these types of HRA integration." (footnote omitted) (83 *Fed. Reg.* at 54436, col. 1)

Response: Small and independent business owners often seek to assist or encourage their employees to obtain affordable, flexible, and predictable coverage for themselves and their families. Part of the flexibility sought is the ability of employees to choose from among the broadest possible range of choices in the marketplace. The Departments should, to the fullest extent the law permits, allow employers who have the wherewithal and administrative capacity to do so to offer their employees the choice of an HRA integrated with short term, limited duration health insurance. For many less-well-off employees at very small just-making-it businesses, the only real health insurance choice may be between STLDI and nothing. The Departments should, to the extent they can, encourage those employees to choose STLDI over nothing; allowing their employers to help employees, through an HRA, with the cost of the STLDI constitutes such encouragement. The Departments should do whatever they can to give very small businesses and their employees at least one affordable, flexible, and predictable option through which the employer can, if possible, help the employees obtain and afford health insurance.

4. Departmental Comment Request: Meaning of Reimbursement. "DOL also specifically invites comments on which forms of payment are appropriately treated as 'reimbursement' to participants for purposes of this regulatory clarification, consistent with the terms and purposes of ERISA section 3(1). For example, should 'reimbursement' be interpreted to include direct payments, individual or aggregate, by the employer, employee organization, or other plan sponsor to the insurance company?" (83 *Fed. Reg.* at 54441, col. 3)

Response: With regard to HRAs integrated with individual health insurance coverage, as long as the employee has a legal obligation to pay for the individual health insurance coverage, it should make no difference whether the HRA benefit dollars go (1) from the employer to the employee and then to the insurance issuer to discharge the employee's premium payment obligation, or (2) directly from the employer to the insurance issuer to discharge the employee's premium payment obligation. The economic substance of the transaction in both situations is the same, so the term "reimbursement" from an HRA should cover both situations. When an employer offers an HRA integrated with individual health insurance coverage, the employer should have the opportunity to offer the convenience to the employee of sending the HRA benefit dollars directly to the insurance issuer in the discharge of the employee's premium obligation.

5. Departmental Comment Request: Reporting on HRA Use. "In light of the fact that HRAs are subject to many statutory rules and regulations not specifically addressed in this proposed rulemaking, including various reporting, disclosure, fiduciary, and enforcement provisions under title I of ERISA, DOL also specifically invites comment on whether it would be helpful for DOL to issue additional regulations or guidance addressing the application of ERISA reporting and disclosure requirements to HRAs integrated with such non-ERISA individual health insurance coverage (for example, SPD content and Form 5500 annual reporting requirements)." (83 *Fed. Reg.* at 54442, col. 1)

Response: The Departments should take great care to ensure that requirements for reporting to the government on the use of HRAs do not discourage employers from offering to their employees HRAs integrated with individual health insurance coverage. In particular, the Department should preserve for small businesses, unchanged by any new HRA-related rules, any exemptions from filing reports, or preferences allowing the filing of shortened or simpler reports, such as those relating to Form 5500, "Annual Return/Report of Employee Benefit Plan" (see section 104 of the Employee Retirement Income Security Act (ERISA) (29 USC 1024) and 29 CFR 2520.104-41). Small businesses often cannot afford the services of lawyers, accountants, and clerks to handle reporting requirements; a government-imposed duty to report creates a substantial disincentive for small businesses to undertake the conduct that triggers the reporting requirements. The Departments should not overburden small businesses with HRA-related reporting requirements and thereby cause employees to lose help from their employers in paying for health insurance.

6. Departmental Comment Request: Special Enrollment Periods. "Lastly, since these proposed rules would allow for HRAs to be integrated with individual health insurance coverage both on and off Exchange (and because individuals with QSEHRAs may enroll in individual health insurance coverage both on and off Exchange), HHS proposes to include this special enrollment period in the limited open enrollment periods available off Exchange, in accordance with current regulations at 45 CFR 147.104(b)(2).

Therefore, an employee or an employee's dependent who gains access to an HRA integrated with individual health insurance coverage or who is provided a QSEHRA may elect to enroll in or change to different Exchange or off-Exchange individual health insurance coverage. HHS seeks comments on these proposals. If an employer begins offering an HRA or providing a QSEHRA to its employees during the calendar year outside of the Exchange annual open enrollment period, subsequent plan years likely will also begin during the calendar year. Therefore, HHS also seeks comments about whether the proposed new special enrollment period at 45 CFR 155.420(d)(14) should be available to employees who have and are enrolled in an HRA or are provided a QSEHRA each year at the time their new health plan year starts. This would allow employees to enroll in or change to a new plan in response to updated information about their HRA or QSEHRA benefit for each of their group health plan years." (83 *Fed. Reg.* at 54443, col. 3)

RESPONSE: Small and independent business owners often seek to assist or encourage their employees to obtain affordable, flexible, and predictable coverage for themselves and their families. The Departments should do whatever they can to give small businesses and their employees options through which the employer can, if possible, help the employees obtain and afford health insurance. The proposed rule contemplates a new option: an HRA integrated with individual health insurance coverage. The Departments should do whatever they can with respect to enrollment periods to ensure that employees can obtain the individual health insurance coverage whenever they need it throughout the year and that the employer can, at any time through the HRA, help them afford it.

* * * * *