

SMALL BUSINESS FLEXIBILITY ACT

JUNE 12, 2023.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Missouri, from the Committee on Ways and Means, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3798]

The Committee on Ways and Means, to whom was referred the bill (H.R. 3798) to amend the Internal Revenue Code of 1986 to inform employers of flexible health insurance benefits, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:  
Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Small Business Flexibility Act”.

**SEC. 2. NOTIFICATION OF FLEXIBLE HEALTH INSURANCE BENEFITS.**

(a) IN GENERAL.—Subchapter C of chapter 100 of the Internal Revenue Code of 1986 is amended by adding at the end the following new section:

**“SEC. 9835. NOTIFICATION OF FLEXIBLE HEALTH INSURANCE BENEFITS.**

“(a) IN GENERAL.—Not later than 1 year after the date of enactment of this section, the Secretary shall notify employers of the availability of tax-advantaged flexible health insurance benefits, with an initial focus on small businesses.

“(b) DEFINITIONS.—In this section:

“(1) EMPLOYER.—The term ‘employer’ has the meaning given such term in section 3(5) of the Employee Retirement Income Security Act (29 U.S.C. 1002(5)).

“(2) FLEXIBLE HEALTH INSURANCE BENEFITS.—The term ‘flexible health insurance benefits’ means—

“(A) an individual contribution health reimbursement arrangement (as described in the rule entitled ‘Health Reimbursement Arrangements and Other Account-Based Group Health Plans’ (84 Fed. Reg. 28888 (June 20, 2019));

“(B) a qualified small employer health reimbursement arrangement (as defined in section 9831(d)(2)); and

“(C) the small employer health insurance credit determined under section 45R.”.

(b) CLERICAL AMENDMENT.—The table of sections for subchapter C of chapter 100 of such Code is amended by adding at the end the following new item:

“Sec. 9835. Notification of flexible health insurance benefits.”.

## I. SUMMARY AND BACKGROUND

### A. PURPOSE AND SUMMARY

The bill, H.R. 3798, the “Small Business Flexibility Act,” as ordered reported by the Committee on Ways and Means on June 7, 2023, to require the Treasury Department to notify businesses of the various flexible coverage options available to them, including CHOICE Arrangements, Qualified Small Employer Health Reimbursement Arrangements, and the Small Business Health Care Tax Credit.

### B. BACKGROUND AND NEED FOR LEGISLATION

Small businesses currently have access to a variety of tax-advantaged health benefit policies. 26 CFR 54.9802–4 established the Individual Coverage Health Reimbursement Arrangement (ICHRA), which allows businesses the option to offer their employees tax-exempt, defined contributions to purchase qualified health insurance on the individual market. Similarly, Qualified Small Employer Health Reimbursement Arrangements (PL 114–255) allows small businesses with fewer than 50 employees the option to offer their employees tax-exempt, defined contributions to purchase qualified health insurance on the individual. Additionally, the Small Business Health Care Tax Credit (PL 111–148) allows small businesses with fewer than 25 employees to claim a tax credit to cover up to 50% of the cost of a qualified health plan for a two year time period. Unfortunately, surveys show 70% of small businesses do not know these flexible health care coverage options exist. Legislation is needed to help inform small businesses of the flexible, tax-advantaged coverage options available to them.

### C. LEGISLATIVE HISTORY

#### *Background*

H.R. 3798 was introduced on June 5, 2023, and was referred to the Committee on Ways and Means.

#### *Committee hearings*

On Thursday, March 23, 2023, the Ways and Means Subcommittee on Health held hearing on “Why Health Care is Unaffordable: The Fallout of Democrats’ Inflation on Patients and Small Businesses”.

#### *Committee action*

The Committee on Ways and Means marked up H.R. 3798, the “Small Business Flexibility Act,” on June 7, 2023, and ordered the bill, as amended, favorably reported (with a quorum being present).

### D. LEGISLATIVE HISTORY

Pursuant to clause 3(c)(6) of rule XIII, the following hearings were used to develop and consider H.R. 3798:

(1) Committee on Ways and Means Committee on Ways and Means Subcommittee on Health “Why Health Care is Unaffordable: The Fallout of Democrats’ Inflation on Patients and Small Businesses”.

## II. EXPLANATION OF THE BILL

### A. NOTIFICATION OF FLEXIBLE HEALTH INSURANCE BENEFITS (SEC. 2 OF THE BILL AND NEW SEC. 9835 OF THE CODE)

#### PRESENT LAW

Under present law, there is no requirement for the Treasury to notify employers of the availability of tax-advantaged flexible health insurance benefits.

#### REASONS FOR CHANGE

The Committee observes that 70 percent of small businesses are not aware of flexible health coverage options including individual contribution health reimbursement arrangements, qualified small employer health reimbursement arrangements, and the small employer health insurance credit and that only 31 percent of small businesses with less than 50 employees offer health insurance to their employees. The Committee believes that establishing an outreach program to businesses, with a focus on small businesses, providing information about such flexible health coverage options would increase their utilization.

#### EXPLANATION OF PROVISION

Under the provision, not later than one year after the date of enactment, the Secretary is required to notify employers<sup>1</sup> of the availability of tax-advantaged flexible health insurance benefits, with an initial focus on small businesses. For purposes of the provi-

<sup>1</sup>As defined in section 3(5) of the Employee Retirement Income Security Act of 1974 (“ERISA”), Pub. L. No. 93–406, Sept. 2, 1974.

sion, flexible health insurance benefits include: (1) an individual contribution health reimbursement arrangement;<sup>2</sup> (2) a qualified small employer health reimbursement arrangement;<sup>3</sup> and (3) the small employer health insurance credit.<sup>4</sup>

#### EFFECTIVE DATE

The provision is effective on the date of enactment.

### III. VOTE OF THE COMMITTEE

Pursuant to clause 3(b) of rule XIII of the Rules of the House of Representatives, the following statement is made concerning the vote of the Committee on Ways and Means in its consideration of H.R. 3798, the “Small Business Flexibility Act,” on June 7, 2023.

The bill, H.R. 3798, the “Small Business Flexibility Act,” as amended, was ordered favorably reported to the House of Representatives by a roll call vote of 36 Yeas to 3 Nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Smith (MO) .....	X	.....	.....	Mr. Neal .....	.....	.....	.....
Mr. Buchanan .....	X	.....	.....	Mr. Doggett .....	.....	X	.....
Mr. Smith (NE) .....	X	.....	.....	Mr. Thompson .....	X	.....	.....
Mr. Kelly .....	X	.....	.....	Mr. Larson .....	X	.....	.....
Mr. Schweikert .....	X	.....	.....	Mr. Blumenauer .....	X	.....	.....
Mr. LaHood .....	X	.....	.....	Mr. Pascrell .....	.....	X	.....
Dr. Wenstrup .....	X	.....	.....	Mr. Davis .....	X	.....	.....
Mr. Arrington .....	X	.....	.....	Ms. Sanchez .....	.....	.....	.....
Dr. Ferguson .....	X	.....	.....	Mr. Higgins .....	X	.....	.....
Mr. Estes .....	X	.....	.....	Ms. Sewell .....	X	.....	.....
Mr. Smucker .....	.....	.....	.....	Ms. DelBene .....	.....	.....	.....
Mr. Hern .....	X	.....	.....	Ms. Chu .....	.....	X	.....
Ms. Miller .....	X	.....	.....	Ms. Moore .....	X	.....	.....
Dr. Murphy .....	X	.....	.....	Mr. Kildee .....	X	.....	.....
Mr. Kustoff .....	X	.....	.....	Mr. Beyer .....	X	.....	.....
Mr. Fitzpatrick .....	X	.....	.....	Mr. Evans .....	X	.....	.....
Mr. Steube .....	X	.....	.....	Mr. Schneider .....	X	.....	.....
Ms. Tenney .....	X	.....	.....	Mr. Panetta .....	X	.....	.....
Mrs. Fischbach .....	X	.....	.....				
Mr. Moore .....	X	.....	.....				
Mrs. Steel .....	X	.....	.....				
Ms. Van Duynes .....	X	.....	.....				
Mr. Feenstra .....	X	.....	.....				
Ms. Malliotakis .....	X	.....	.....				
Mr. Carey .....	X	.....	.....				

### IV. BUDGET EFFECTS OF THE BILL

#### A. COMMITTEE ESTIMATE OF BUDGETARY EFFECTS

In compliance with clause 3(d) of rule XIII of the Rules of the House of Representatives, the following statement is made concerning the effects on the budget of the bill, H.R. 3798, as reported.

The bill is estimated to have no effect on the Federal fiscal year budget receipts for the period 2023 through 2033.

<sup>2</sup> As described in the rule entitled “Health Reimbursement Arrangements and Other Account-Based Group Health Plans,” T.D. 9867, 84 Fed. Reg. 28888, June 20, 2019.

<sup>3</sup> As defined in sec. 9831(d)(2).

<sup>4</sup> Determined under section 45R.

**B. STATEMENT REGARDING NEW BUDGET AUTHORITY AND  
TAX EXPENDITURES BUDGET AUTHORITY**

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee states that the bill involves no new or increased budget authority. The Committee states further that the bill involves no new or increased tax expenditures.

**C. COST ESTIMATE PREPARED BY THE  
CONGRESSIONAL BUDGET OFFICE**

The Committee has requested but not received from the Director of the Congressional Budget Office a statement as to whether this bill contains any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

**V. OTHER MATTERS TO BE DISCUSSED UNDER THE  
RULES OF THE HOUSE**

**A. COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS**

With respect to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee made findings and recommendations that are reflected in this report.

**B. STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES**

With respect to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee advises that the bill does not authorize funding, so no statement of general performance goals and objectives is required.

**C. INFORMATION RELATING TO UNFUNDED MANDATES**

This information is provided in accordance with section 423 of the Unfunded Mandates Reform Act of 1995 (Pub. L. No. 104-4).

The Committee has determined that the bill does not contain Federal mandates on the private sector. The Committee has determined that the bill does not impose a Federal intergovernmental mandate on State, local, or tribal governments.

**D. CONGRESSIONAL EARMARKS, LIMITED TAX BENEFITS, AND  
LIMITED TARIFF BENEFITS**

With respect to clause 9 of rule XXI of the Rules of the House of Representatives, the Committee has carefully reviewed the provisions of the bill, and states that the provisions of the bill do not contain any congressional earmarks, limited tax benefits, or limited tariff benefits within the meaning of the rule.

**E. TAX COMPLEXITY ANALYSIS**

Pursuant to clause 3(h)(1) of rule XIII of the Rules of the House of Representatives, the staff of the Joint Committee on Taxation has determined that a complexity analysis is not required under section 4022(b) of the IRS Reform Act because the bill contains no provisions that amend the Internal Revenue Code of 1986 and that

have “widespread applicability” to individuals or small businesses, within the meaning of the rule.

#### F. DUPLICATION OF FEDERAL PROGRAMS

In compliance with clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of the bill establishes or reauthorizes: (1) a program of the Federal Government known to be duplicative of another Federal program; (2) a program included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139; or (3) a program related to a program identified in the most recent Catalog of Federal Domestic Assistance, published pursuant to the Federal Program Information Act (Pub. L. No. 95–220, as amended by Pub. L. No. 98–169).

### VI. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

#### A. CHANGES IN EXISTING LAW PROPOSED BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

#### INTERNAL REVENUE CODE OF 1986

\* \* \* \* \*

### Subtitle K—Group Health Plan Requirements

\* \* \* \* \*

#### CHAPTER 100—GROUP HEALTH PLAN REQUIREMENTS

\* \* \* \* \*

#### Subchapter C—GENERAL PROVISIONS

Sec.

9831. General exceptions.

\* \* \* \* \*

9835. *Notification of flexible health insurance benefits.*

\* \* \* \* \*

#### SEC. 9835. NOTIFICATION OF FLEXIBLE HEALTH INSURANCE BENEFITS.

(a) *IN GENERAL.*—Not later than 1 year after the date of enactment of this section, the Secretary shall notify employers of the availability of tax-advantaged flexible health insurance benefits, with an initial focus on small businesses.

(b) *DEFINITIONS.—In this section:*

(1) *EMPLOYER.—The term “employer” has the meaning given such term in section 3(5) of the Employee Retirement Income Security Act (29 U.S.C. 1002(5)).*

(2) *FLEXIBLE HEALTH INSURANCE BENEFITS.—The term “flexible health insurance benefits” means—*

*(A) an individual contribution health reimbursement arrangement (as described in the rule entitled “Health Reimbursement Arrangements and Other Account-Based Group Health Plans” (84 Fed. Reg. 28888 (June 20, 2019)));*

*(B) a qualified small employer health reimbursement arrangement (as defined in section 9831(d)(2)); and*

*(C) the small employer health insurance credit determined under section 45R.*

\* \* \* \* \*

## VII. DISSENTING VIEWS

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON WAYS AND MEANS,  
Washington, DC, June 7, 2023.

DISSENTING VIEWS ON THE SMALL BUSINESS FLEXIBILITY ACT,  
H.R. 3798

H.R. 3798 (Rep. Tenney, R-NY) requires the United States Department of Treasury (Treasury) to educate employers about certain tax-preferred health accounts that could be offered to employees: (1) an individual contribution health reimbursement arrangement; (2) a qualified small employer health reimbursement arrangement; or (3) the small employer health insurance credit. This legislation provides no additional resources for Treasury to conduct this education campaign.

*Consumers need better tools and unbiased information.* This legislation directs the Treasury Secretary to educate employers about various tax-preferred arrangements and accounts. However, employers offering these arrangements or accounts could inadvertently cause employees to be worse off because, if an employer offers the account, a low-income employee could be barred from accessing more affordable, subsidized marketplace coverage. In any education campaign, the Secretary should ensure materials directed at employers clearly explain how to determine whether any employees would be disadvantaged by the offering of such tax-preferred item.

*The intersection between what health insurance an employer offers employees, affordability, and access to subsidized marketplace coverage is complex and confusing.* Some tax-preferred arrangements will block an employee from subsidized marketplace coverage because the value of the arrangement is deemed affordable even if it leaves a significant cost burden on the worker. Consumers often have difficulty navigating whether their offer of employer health insurance coverage is “affordable” or whether they are eligible to get subsidized coverage in the ACA marketplaces. Calculating affordability and understanding whether health insurance coverage meets minimum standards are not straightforward and consumers often do not have all the necessary information to make this determination. Navigating and overcoming the affordability test can be particularly problematic for lower-wage workers who may face high costs for employer coverage but, due to rules around employer health insurance offerings and affordability, cannot access premium tax credits in the Marketplace that would make their health insurance coverage cheaper.

*To better assist consumers and help employers ensure that an offer of coverage does not inadvertently make their workers worse off, Treasury should tailor educational materials to clearly explain these issues.* It is important for employers to understand how offer-

ing some of these accounts could bar employees from better assistance in the marketplace and a more complete understanding of *all* their health options.

RICHARD E. NEAL,  
*Ranking Member.*

RANKING MEMBER RICHARD E. NEAL, OPENING STATEMENT, COMMITTEE ON WAYS AND MEANS MARKUP OF H.R. 3798,

*Wednesday, June 7, 2023.*

I support employers looking to understand what the best coverage options are for their employees. However, it's equally important that consumers understand the health insurance options available to them. That's why I'm disappointed in this process. This is a simple reporting bill. It shouldn't be partisan. But instead of working with us, the Republicans gave us no opportunity to provide input or work together on this legislation.

Simply notifying businesses about the availability of items like individual contribution health reimbursement arrangements, qualified small employer health reimbursement arrangements, or the small employer health insurance credit is insufficient. We ought to provide small businesses with information about what could be best for their employees. I'm disappointed that Republicans didn't give us the opportunity to help craft this legislation to ensure employers understand how to offer these arrangements in a way that doesn't make their employees worse off.

Some tax-preferred arrangements can block an employee from subsidized marketplace coverage. We know that far too many employees, particularly low-wage workers, face very high costs for employer coverage but due to a quirk in the affordability test, they cannot access subsidized coverage in the Marketplace. Determining whether an employee cannot access subsidized marketplace coverage is complex. It is important for Treasury to educate employers on these facts too, so that well-meaning employers don't inadvertently offer a product or subsidy that leaves their workers worse off by locking them out of assistance in the Marketplaces.

Secondly, we should be look at providing assistance to employees to understand how to navigate the complex interaction of health care and the tax code. We need to give consumers better tools and unbiased information to make informed decisions about which coverage is best for them.

My colleague, Mr. Kildee, has long been interested in better funding and expansion of health insurance navigators, who could take on that role. I think that is something the Committee should consider and I hope we can work on that legislation this Congress. We need to help ordinary Americans make these choices, not just businesses. Unfortunately, we weren't given the opportunity to offer any input and improve access to information for employees. I would hope we can do better in the future.

Thank you and I yield back.

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