

United States Senate

WASHINGTON, DC 20510

November 19, 2019

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW, Room 3000
Washington, DC 20224-0002

Dear Commissioner Rettig:

We write to encourage the IRS to help Americans access healthy lifestyles by modernizing the treatment of “nutritional supplements” and by recognizing their valuable role in attaining better health. Specifically, we request that you revise Internal Revenue Service (IRS) Publication 502 to permit nutritional and dietary supplements to be considered “medical expenses” under the Internal Revenue Code (IRC). This change would allow Americans to be reimbursed from their Health Savings Accounts (HSAs), their Flexible Spending Accounts (FSAs), or their Health Reimbursement Arrangements (HRAs) for the out-of-pocket expenses they pay for nutritional and dietary supplements.

Section 262 of the IRC states that, except as otherwise expressly provided, no deduction shall be allowed for expenses from these tax-advantaged accounts unless it is for the medical care of the taxpayer, the taxpayer’s spouse, or the taxpayer’s dependents. 26 CFR §1.213-1(e)(1)(i) provides that qualifying medical care expenses can include “expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness.” While the statute lists some exclusions, it does not list dietary supplements. However, IRS Publication 502, as revised for tax year 2000, specifically excluded “nutritional supplements” from the definition of “medical expenses.” This sub-regulatory guidance document disregards the mandate of both the statute and the regulations, which permit funds from tax-advantaged accounts to be used for preventive medical care.

The IRC defined “medical care” in 1954 as “amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.” Congressional definitions of dietary or nutritional supplements conform to this definition in two ways:

- First, the 1994 Dietary Supplement Health and Education Act (DSHEA) allows dietary supplement manufacturers to lawfully make a claim that a nutrient or dietary ingredient will “affect the structure or function in humans,” or “acts to maintain such structure or function.” See 21 U.S.C. 343(r)(6)(A). Congressional intent clearly indicates that nutritional or dietary supplements are expressly permitted to be identified as “affecting any structure or function of the body,” satisfying the IRC’s medical care definition.
- Second, under the 1990 Nutrition Labeling and Education Act (NLEA), nutritional and dietary supplements may carry health claims regarding the reduced risk of disease. See 21 U.S.C. 343(r)(3). Nutritional or dietary supplements making such claims should be covered by the IRC’s “medical care” definition.

Science into the value of nutritional and dietary supplements has revealed a range of specific health benefits associated with the use of these products. More than three-quarters of Americans use dietary supplements for a range of benefits, from addressing nutrient deficiencies to strengthening bones and helping to prevent osteoporosis. Dietary supplements can be a part of preventative care, creating cost savings to the healthcare system, to employers, and individual consumers. A study commissioned by the Council for Responsible Nutrition in 2012 found that high-risk populations can reduce the number of disease-associated medical events by taking certain dietary supplements, representing the potential for hundreds of millions of dollars—and in some cases billions—of savings.

Therefore we urge the IRS to revise its sub-regulatory Publication 502 for tax years 2019 to permit taxpayers to reimburse their out-of-pocket expenses for dietary supplements from HRA, HSA, and FSA accounts, provided that such products are labeled with a structure/function claim or a health claim authorized by the FDA. This revision would modernize the treatment of nutritional supplements by the IRS to recognize the contributions these products make to better the health of Americans.

Thank you for your attention to this matter and we look forward to your response,

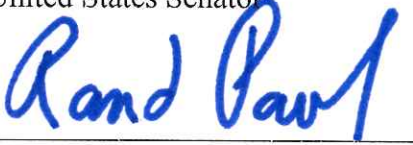
Sincerely,



TIM SCOTT
United States Senator



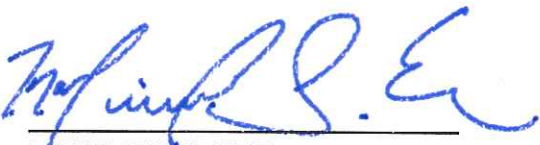
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