Submitted Electronically Via Notice.Comments@irscounsel.treas.gov

Internal Revenue Service
CC:PA:LPD:PR (Notice 2010-59)
1111 Constitution Avenue NW
Washington, DC 20044

Attn: Notice 2010-59

RE: Amounts Received under Accident and Health Plans, Section 106 – Contributions by Employers to Accident and Health Plans, Section 125 – Cafeteria Plans, Section 220 – Archer MSAs, Section 223 – Health Savings Accounts

To Whom It May Concern:

The U.S. Chamber of Commerce (the “Chamber”) submits these comments in response to Notice 2010-59 (“Notice”), in which the Treasury Department (“Treasury”) and the Internal Revenue Service (“IRS”) invited comments regarding the guidance on the revised definition of medical expenses for employer-provided accident and health plans including health Flexible Spending Arrangements (“health FSAs”) and Health Reimbursement Arrangements (“HRAs”), as well as the definition for qualified medical expenses for Health Savings Accounts (“HSAs”) and Archer Medical Savings Accounts (“Archer MSAs”).

The Chamber respectfully requests that the Treasury and the IRS recall this Notice, which imposes additional, unnecessary administrative burdens on individuals that hold these tax-preferred health care accounts or arrangements. Not only do the Notice’s burdensome requirements go beyond the statutory language of the Patient Protection and Affordable Care Act (PPACA), they also prohibit common practices that should not be considered objectionable. There are already common instances where health FSA holders are permitted to substantiate a payment made with a tax preferred account debit card for qualified medical expenses after the fact. Finally, we ask that in reissuing this Notice that the IRS and Treasury recognize verbally

1 Notice 2010-59, Amounts Received under Accident and Health Plans, Section 106 – Contributions by Employers to Accident and Health Plans, Section 125 – Cafeteria Plans, Section 220- Archer MSAs, Section 223- Health Savings Accounts, The Treasury Department and The Internal Revenue Service, September 3, 2010.

2 For example Flexible Spending Accounts cannot be used to pay for teeth whitening, yet an account holder can use an FSA debit card to pay for services rendered by a dentist as long as he/she provides substantiation after the fact that the services rendered were qualified medical expenses (i.e. not teeth whitening).
transmitted prescriptions from a physician’s office to a pharmacist as a permissible form of a “prescription.”

The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region, with substantial membership in all 50 states. These comments have been developed with the input of member companies with an interest in improving the health care system.

**Burdensome Guidance Requirements Exceed Statutory Language**

The Patient Protection and Affordable Care Act prohibits the use of tax preferred dollars (from health FSAs and HRAs) to purchase over the counter drugs **without** a prescription. The Chamber appreciates the operational difficulties in implementing this prohibition. Nevertheless, the Notice 2010-59 goes too far in implementing this statutory provision, by prohibiting use of health debit cards for prescribed over-the-counter (OTC) drugs where the existence of a valid prescription can be verified at the point-of-sale, otherwise satisfying the statutory requirements as well as the requirements of IRS Notice 2006-69. The statute contains no such prohibition and instead merely requires account holders purchasing over-the-counter medicine to have a valid prescription. There is no statutory basis for requiring individuals to buy prescribed OTC drugs with post-tax dollars and then seek reimbursement after the purchase.

**Post-Purchase Substantiation Already Permitted**

In many instances, health FSAs and HRAs currently require individuals to substantiate the use of account funds **after** the time of purchase to ensure that the funds are being used appropriately for qualified medical expenses. However, in these instances, individuals are still permitted to deduct the funds from an FSA or HRA with a debit card and then substantiate the purchase after the fact. We believe that this should continue to be the case when purchasing over-the-counter medicine with a prescription, as well. Therefore, we ask that the Notice 2010-59 be revised to allow the use of health FSA and HRA debit cards to purchase OTC drugs with a valid prescription at the point of sale subject to post-purchase substantiation.

**Some Systems Already Verify Pre-Purchase Substantiation**

We are particularly concerned that Notice 2010-59 states that health FSA or HRA debit cards cannot be used by merchants that use the Inventory Information Approval System (IIAS), even though current IIAS systems can (and do) verify that a prescription exists at the point-of-sale when the OTC medication is dispensed as a prescription. We urge that existing IIAS systems continue to be allowed, regardless of whether the medication is an OTC medication. Pharmacists or pharmacy personnel can process and handle the purchase of an OTC medication with a prescription in the same manner as they process and handle the purchase of a prescription-only

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4 Sec. 9003. Distributions for Medicine Qualified Only if for Prescribed Drug or Insulin. “(f) Reimbursements for Medicine Restricted to Prescribed Drugs and Insulin.—For purposes of this section and section 105, reimbursement for expenses incurred for a medicine or a drug shall be treated as a reimbursement for medical expenses only if such medicine or drug is a prescribed drug (determined without regard to whether such drug is available without a prescription) or is insulin.”
medication. Where the merchant does not have an IIAS system in place, consumers can submit substantiating information after the purchase to enable the third party administrator to confirm that the OTC medication was dispensed pursuant to a valid prescription.

Verbally Transmitted Prescriptions Allowed

IRS Notice 2010-59 also states that a “prescription” means a written or electronic order for a medicine or drug that meets the legal requirements of a prescription in the state in which the medical expense is incurred and that is issued by an individual who is legally authorized to issue a prescription in that state. We ask that IRS clarify that verbally transmitted prescriptions are included in the defined term “prescription,” in addition to written or electronic prescriptions mentioned in the guidance. Commonly, prescribers communicate prescriptions to pharmacists verbally over the telephone; the receiving pharmacist transcribes the order to paper. We believe that the IRS did not intend to exclude prescriptions transmitted in this manner.

Bad Policy

Requiring individuals, who have already set aside money on a tax-preferred basis to purchase these products, to pay for prescribed OTC drugs with out of pocket funds up front will undermine the incentive and ease of these accounts. Adding these administrative hoops will make individuals reluctant to fill prescriptions for OTC drug and create a perverse incentive for the use of non-OTC drugs. The cost to the health care system of some of the OTC-purchasing population exchanging an out-of-pocket cost for a reimbursed prescription drug should be a serious concern. Prescription drugs cost anywhere from two to ten times more than an OTC. This phenomenon has the potential to increase costs to the health care system by billions of dollars for conditions and medicines consumers were previously managing on their own.

Conclusion

In conclusion, the Chamber appreciates the opportunity to submit public comments on the guidance contained in Notice 2010-59. We urge the IRS to permit the continued use of debit cards for OTC medication purchases when a pharmacist or pharmacy personnel can validate the existence of a prescription at the point-of-sale. We hope you will consider our recommendations and we look forward to working with you on this and other guidance.

Sincerely,

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