

Compliance Corner: Electronic Notices and Elections for Employee Benefit Plans

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On October 20, 2006, the IRS published its final regulations (the "Final Regulations") regarding the electronic delivery of certain employee benefit-related notices, consents and elections. These Final Regulations, which generally apply to notices and elections made on or after January 1, 2007, align IRS' guidance with the requirements of the Electronic Signatures in Global and National Commerce Act, commonly known as the "E-SIGN Act."

Relevant Employee Benefit Programs

For any requirement under the Code or regulations that an employee benefit notice or election be in writing or in written form, the standards set forth in these regulations are generally the exclusive rules for providing such communication through the use of an electronic medium. For any employee benefit notice or election that is not required to be in writing or in written form, the standards set forth in these regulations function as a safe harbor.

HSA's Will Grow Significantly in 2007 Despite Congressional Doubts

Market Wire

Amid growing Congressional pressure to make some changes in the Health Savings Account (HSA) regulations, a new forecast on their expanding usage and popularity may give some political leaders pause.

Information Strategies, Inc. (ISI) has issued a new estimate on year-end and future growth based on interviews with HSA, CDH and more traditional plan users as well as corporate and custodial managers.

"Many people are just now learning about the changes effected in the closing days of the last congress and they are taking advantage of the new higher savings limits and the greater flexibility in rules," said JoAnn M. Laing, ISI's President & CEO.

ISI expects these changes, which some in Congress indicate they would like modified, to drive the popularity of HSAs even higher.

CONTINUED ON PAGE 2

CONTINUED ON PAGE 3

Compliance Corner: Electronic Notices and Elections for Employee Benefit Plans

– CONTINUED FROM PAGE 1

The Final Regulations apply to a broad spectrum of employee benefit programs, including welfare or fringe benefit programs covered under Sections 104(a)(3) and 105 (accident and health), 125 (FSAs and other cafeteria arrangements), 127 (educational assistance), 132(f) (transportation fringe), 220 (Archer MSAs), and 223 (health savings accounts), as well as IRAs and tax-qualified retirement plans. The Final Regulations, however, do not apply to disclosures that are also (or exclusively) subject to the authority of other regulatory agencies such as the Department of Labor. This means that the Final Regulations do not apply to summary plan descriptions, summary annual reports, or any COBRA notices or elections required under ERISA.

General Requirements

The Final Regulations provide that the following requirements apply in general to electronic delivery methods for notices, consents and elections:

- The notice must be reasonably designed to provide the information in a manner no less understandable than if provided in a written paper document;
- At the time the notice is provided, the recipient must be alerted as to the

significance of the information and be provided with any instructions needed to access the notice;

- Timing and content rules as applicable to written communications also apply to electronic communications; and
- Electronic records of the notice or election must be maintained in a form that is capable of being retained accurately and reproduced for later reference. Failure to do so may cause the legal effect, validity, or enforceability of the electronic record to be denied.

Electronic Delivery Methods for Notices

In addition to the general requirements described above, the Final Regulations require that electronic delivery of notices satisfy one of the following methods:

Consumer Consent Method

Under this method, the recipient must be provided with a "clear and conspicuous statement" of:

- The right to receive a paper version of the notice (to the extent that would be

CONTINUED ON PAGE 4

HSA's Will Grow Significantly in 2007 Despite Congressional Doubts

– CONTINUED FROM PAGE 1


Speaking at a Washington, DC meeting of industry leaders, Laing provided the following estimates of sector metrics at the end of 2007:

- The number of Health Savings Accounts will reach 8 million.
- Deposits in custodial accounts will total \$13.6 billion at year-end.
- Average accounts will pass \$1,700 mark, with those accounts being in existence two or more years hovering at \$4,400.
- 22% of employers will offer HSAs.
- More than 40% of all companies will fund 50% or more of the first year's deductible.
- New HSA-covered lives will exceed eight million, bringing the HSA-insured total to 18 million.
- Number of institutions offering HSA custodial accounts will pass 1,600.
- Investment options for custodial accounts will become more numerous and diverse with major giants such as Fidelity taking a leading role.
- Online portals and other integrated offerings will surge in the fourth quarter.

Laing said her company this year had surveyed more than 400 custodial institutions, 2,300 companies as well as 2,000 Americans about their HSA plans. In the past 30 months, the company has interviewed or surveyed almost 20,000 Americans. "What we are seeing is a growing desire by respondents to take more control of their

healthcare and retirement efforts," she added.

"Clearly HSAs, along with Health Reimbursement Accounts (HRAs) and Flexible Spending Accounts (FSAs) are gaining popularity both with individuals and employers of all sizes," Laing said.

"HSAs are popular with individuals and smaller company managers as a healthcare insurance alternative and even the larger firms such as Deere are jumping in with plans that require more effort on the part of employees but give them some part of their insurance premiums back in the form of savings," Laing said. 

About Information Strategies, Inc.

Information Strategies, Inc. (ISI) is a media and marketing company serving large corporations as an advisor and marketing channel and small and medium size businesses as a management information source. It is also the parent of www.hsafinder.com, the Internet's only independent source of data on HSAs and consumer directed healthcare issues.

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Compliance Corner: Electronic Notices and Elections for Employee Benefit Plans

– CONTINUED FROM PAGE 2

required in the absence of the electronic method);

- The right to withdraw consent (including any associated procedures, consequences or fees);
- The scope of the consent (i.e., whether the consent applies only to a particular transaction or to other identified transactions);
- Procedures for updating recipient's electronic contact information; and
- Hardware and/or software requirements for access and retention of the notice.

In addition, the prospective recipient must affirmatively consent to electronic delivery of the notice or election. Such consent must be either (a) given electronically in a manner that reasonably demonstrates that the recipient can access the notice, or (b) given in a non-electronic form (such as a paper document), so long as the recipient confirms the consent electronically. Withdrawal of consent prior to delivery of the notice will prevent this requirement from being satisfied.

Once a recipient provides consent, he or she must be informed of any subsequent change in

hardware or software requirements that could interfere with access to or retention of a notice. Before future electronic notices can be sent to the recipient following a change in hardware or software requirements, the recipient must reaffirm his or her consent. The recipient has to be given the right to withdraw consent without being subject to any conditions or fees other than those disclosed when the recipient first provided the consent.

Lastly, this method excludes any use of oral communication, recorded or otherwise.

Alternative Method

The Final Regulations provide an electronic alternative, which will likely be the preferred choice for many plan sponsors. Under this method, electronic communications need not comply with the requirements under the Consumer Consent Method if:

- The recipient has the "effective ability" to access the electronic medium used to provide the applicable notice; and
- At the time of the notice, the recipient is told that a written paper copy of the notice will be provided upon request and without charge.

CONTINUED ON PAGE 5

Compliance Corner: Electronic Notices and Elections for Employee Benefit Plans

– CONTINUED FROM PAGE 4

Unlike the Consumer Consent Method, this “Alternative Method” does not exclude the use of oral communication; the generally applicable content requirement (as described above), however, would likely preclude oral communication of overly complicated or lengthy notices.

Electronic Delivery Method for Elections

With regard to the receipt of electronic elections by individuals, the Final Regulations establish two general requirements. First, the electronic system must be reasonably designed to provide the information in the election to a recipient in a manner that is no less understandable to the recipient than a written paper election.

Second, the Final Regulations require satisfaction of the following requirements:

- The individual must have the "effective ability" to access the electronic medium that will be used to make the election;
- Safeguards must be in place to prevent any person other than the appropriate individual from making the election (e.g., via use of a PIN);
- The individual making the election must have the opportunity to review, confirm, modify, or rescind the terms of the election before the election becomes effective; and
- Once the election is made, the individual must receive confirmation of the election, either in writing or through one of the two notice methods described above.

In cases where an election and/or spousal consent is required to be witnessed by a plan representative or notary public, signatures made in the physical presence of a plan representative or notary will be effective. [Even though the use of electronic acknowledgment or notarization is permitted if done in accordance with requirements under the E-SIGN Act and State law applicable to notary publics, the "physical presence" requirement makes this option administratively onerous.] 🚫

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Use of Consumer Driven Healthcare Plans is Growing, but Confusion Causes Some Employees to Avoid Them

PR Newswire

Although industry surveys indicate that employers anticipate strong growth in consumer-driven healthcare plans (CDHC), low selection rates remain a significant stumbling block among employees offered such plans as one option among many, according to a report released today by The Conference Board, the international business research organization.

One of the principal reasons that consumers shy away from such plans is the lack of a coherent message about participating in them.

"If employees find the information they're offered about CDHC plans too confusing, the programs will fail," says Jon Gabel, author of The Conference Board report and senior fellow at the National Opinion Research Center. "Employees are unlikely to switch to plans that they don't understand."

To communicate effectively with employees, employers and health plans must present information in a format that minimizes the amount of cognitive analysis required by employees. Early and repeated face-to-face meetings have proven particularly effective in increasing enrollment in CDHC plans. Improving the quality of information available to employees will require pooling medical claims data from a number of health plans. Quality measures also need to be standardized

and developed jointly with providers, health plans and employers.

A consumer-driven healthcare plan is a high-deductible health plan combined with a tax-advantaged spending account. Of the latter, there are currently two types of plans that meet this definition -- health savings accounts (HSAs) and health reimbursement accounts (HRAs) -- and the basic difference between them is their relative portability. HRAs, which are based on regulatory decisions made by the U.S. Treasury in 2001 and 2002, are owned and funded by employers. On the other hand, HSAs, which were created by the Medicare Prescription Drug Improvement and Modernization Act of 2003, are employee-owned and fully-portable spending accounts. Employer contributions to HSAs are optional.

In 2005, about 2.4 million U.S. (nonfederal) workers, or 3.5 percent of employees with job-based insurance, were enrolled in a consumer-driven healthcare plan. A typical CDHC plan in 2005 had a deductible of approximately \$1,900 and an employer contribution of \$792 in HRA plans and \$553 in HSA plans. Preventive benefits are often carved out or excluded from these plans. In a 2006

CONTINUED ON PAGE 7

Use of Consumer Driven Healthcare Plans is Growing, but Confusion Causes Some Employees to Avoid Them

– CONTINUED FROM PAGE 6

study by the Kaiser Family Foundation, 74 percent of workers in HRA plans and 82 percent of workers enrolled in HSAs had these benefits carved out. An examination of the use of healthcare by CDHC participants prior to their enrollment in a consumer-directed plan indicates that they tend to have a lower rate of use than other employees. They are also more highly educated, more highly paid, and more likely to be males.

In the five case studies included in the report, three of the CDHC plans experienced lower increases in medical claims expenses during the first year of operation. In the second or third year, often as a result of several catastrophic illnesses in the employee population, two of these companies experienced increases in claims expenses that were similar to or higher than those in traditional plans.

"There is little evidence, and much of what does exist is contradictory, as to whether CDHC makes employees better consumers," says Gabel. "To date, there have been no studies of medical records or claims audits to determine if the percentage of medically appropriate care improves under CDHC or if employees are more likely to select high-quality, low-cost providers." Although most CDHC plan websites that now exist are improvements over prior information delivery systems, many others are still being developed or lack basic information on quality and cost of care for individual physicians. 🏠

Source: Consumer-Driven Healthcare: Current Practices, Future Upgrades Report #1392-06-WG, The Conference Board

SOURCE The Conference Board

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