



December 3, 2010

Submitted Electronically

Email: Notice.comments@irs.counsel.treas.gov.

CC:PA:LPD:PR (Notice 2010-59)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station,
Washington, DC 20044

Re: Notice 2010-59 guidance on the treatment of over-the-counter drugs under health flexible spending accounts (FSAs) and health reimbursement arrangements (HRAs).

Dear Sir or Madam:

The Food Marketing Institute (FMI) appreciates the opportunity to respond to the Internal Revenue Service's (IRS) request for comment on revisions to the treatment of over-the-counter (OTC) drugs under FSAs as required in Section 9003 of the Patient Protection and Affordable Care Act (PPACA).

FMI is the national trade association that conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies – food retailers and wholesalers – in the United States and around the world. FMI's members in the United States operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of \$680 billion represents three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms, and independent supermarkets.

We appreciate the opportunity to provide you with information on how the changes to the treatment of OTC drug purchases with FSA and HRA debit cards, as required in Notice 2010-59, will affect the supermarket retail industry and its customers.

Clarification on use of FSA Debit Cards at Pharmacy Counter

The supermarket industry helped establish the Inventory Information Approval System (IIAS) to ensure that a retailer could distinguish between eligible medical and non-eligible products in real time at the point-of-sale, while also correctly transmitting and storing the necessary

information for authorization and audit purposes. This was an extensive technology investment that benefitted both merchants and consumers who were able to continue to purchase eligible products with their FSA debit cards in retail stores without disruption. Under the IIAS system, when an OTC item is purchased with an FSA debit card it is scanned at any store register by the checkout clerk and run against a list of eligible items to verify the product is available for purchase with an FSA debit card. This product substantiation is done in real-time in the checkout lane due to the capability of the IIAS system.

We recognize that as a result of the new OTC drug restrictions, current IIAS processes that allow OTC drug purchases without verification that there is a prescription will no longer be permitted. We also understand that the Special Interest Group for IIAS Standards (SIGIS) has revised its list of eligible products to exclude OTC drugs so they cannot be purchased without a prescription. Supermarket retailers will be able to program this eligible item list update by the January 15, 2011 transition period cut-off.

Notice 2010-59, however, appears to go further and prohibit the use of FSA debit cards for OTC drug purchases even if the customer has a prescription that is substantiated at an in-store pharmacy in accordance with existing IRS standards. When a customer uses a FSA debit card to purchase a prescription drug at an in-store pharmacy, the pharmacist validates that the customer has the prescription and then runs the purchase as a prescription. All prescribed drugs – whether OTC or available only by prescription -- qualify as eligible items so the debit card purchase is substantiated and completed. But it appears that the Notice may not recognize that prescribed OTC drugs that are substantiated at the point-of-sale under the existing IIAS system may be purchased with a health debit card in compliance with the new OTC drug requirements.

In addition, because the current IIAS system cannot distinguish between prescribed OTC drugs and drugs that are only available with a prescription, the Notice effectively will also prevent our customers from using their FSA debit cards to purchase drugs that are available only by prescription until time-consuming and costly systems changes can be made. When a customer presents a pharmacist with an OTC drug prescription, it is treated the same as any other prescription. As such, differentiating between FSA debit card prescription-only purchases and prescription OTC purchases will pose a major challenge for our industry.

Therefore, we strongly recommend that the IRS issue additional guidance clarifying that prescribed OTC drugs that are purchased with a health debit card and substantiated at the point-of-sale in accordance with existing IRS standards comply with the new OTC drug requirements. Clarification that prescribed OTC medicines can continue to be purchased with an FSA debit card would result in less extensive technology changes.

Implementation Timeline Challenges

Retail point-of-sale technology changes are generally scheduled 12 to 18 months ahead of time. Should retailers need to make significant changes to their point-of-sale systems by January 1, 2011, or even by January 15, 2011, the end of the grace period, it will pose a significant challenge for the industry. Additionally, most retailers do not schedule any technology changes during the November and December months because it is their busiest time of year. We recommend consideration of a one to two year delay of the new requirements to allow retail supermarkets adequate time to make the necessary programming changes, and to educate our customers about the purchasing capabilities they have when using their FSA debit cards in our stores.

Conclusion

In conclusion, we strongly recommend that the IRS clarify that prescribed OTC drugs that are purchased with a health debit card and substantiated at the point-of-sale in accordance with existing IRS standards comply with the new OTC drug requirements.

Additionally, we encourage IRS and the Treasury to consider a one to two year delay of the new requirements to give retailers adequate time to make necessary technology changes and to educate our customers. To that end, any clarification we can receive prior to the close of the comment period on December 27, 2010 would be extremely helpful as we have very limited time to implement any necessary operational changes.

Thank you for your time and consideration.

Respectfully Submitted,



Jennifer Hatcher
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Food Marketing Institute

CC: George Bostick
Helen Morrison