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# INSURANCE BRIEF

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## Medicare Part D Notices Revised

CMS has updated its model creditable coverage notices to reflect changes in the Medicare Part D enrollment period. The final regulation issued in April 2011 changed the time-frame for notifying Medicare participants whether a group health plan's prescription drug coverage is considered "creditable" for purposes of Medicare Part D. The enrollment period was changed from November 15 through December 31 to October 15 through December 7. The deadline to provide the annual notice is expected to be moved up to October 14 from November 15.

The new notices are to be used effective April 1. If you sent the old notice prior to April 1 to meet the 2011 annual requirement, you can rely on the rules in place at that time and therefore you do not need to do a second mailing for 2011. However, if you sent the it after April 1 you will need to send the updated notice to meet the 2011 requirement.

The notices are available in English and Spanish. Currently they are only in .pdf format. <http://www.cms.gov/CreditableCoverage/Model%20Notice%20Letters.asp#TopOfPage>

## ERISA Electronic Distribution Rules

The U.S. Department of Labor (DOL) completed a request for information (RFI) last month concerning the use of electronic media to provide information to ERISA Plan participants. The DOL had announced last year it would reconsider its electronic delivery standards in light of new pension plan disclosures effective in 2012.

Many employers use an electronic delivery process for employment-related communications. Some of the advantages are that it is often more cost effective and less burdensome to administer than paper-based systems, allows for more timely communication, and is environmentally friendly.

The RFI indicates that the DOL is considering updating its existing standards, which have been unchanged since 2002. While we are hopeful that some changes will come out of the RFI, until then Plan Sponsors must abide by the 2002 rules as explained below.

Current Regulations: Required ERISA disclosures covered by the DOL regulations include: summary plan descriptions (SPDs); summaries of material modifications, summary annual reports, individual benefit statements, COBRA notifications, QDROs, QMCSOs and HIPAA certificates of creditable coverage. You may not realize that an SPD can be a single document or a combination of carrier and Plan Sponsor documents. For example, an Evidence of Coverage (EOC) or Certificate Booklet issued by a carrier along with a Plan Sponsor's wrap SPD constitutes the complete Plan document. Many carriers only provide their EOC or Certificates electronically and the responsibility of distributing them is the Plan Sponsor's.

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## ERISA Electronic Distribution Rules *cont'd*

The regulations do not require the use of any specific form of electronic media. Examples of permissible forms of electronic disclosure include delivery of documents by email, attachment to an email, posting documents on a company Web site, or on CD-ROM or DVD.

Under the guidelines contained within the regulations, merely placing an SPD on a company Web site available to employees will not *by itself* satisfy ERISA's disclosure requirements. The plan administrator must also send a notice, either electronically or in paper form, that notifies the employee that the SPD is available on the Web site.

A plan administrator that intends to distribute SPDs, SMMs, and SARs electronically might do the following:

- Post SPDs, SMMs, and SARs on a company Web site available to all employees.
- Obtain consent to electronically deliver SPDs, SMMs, and SARs from employees and COBRA participants that do not have regular work-related computer access. For example, employees working for a manufacturer in the plant may agree to access the Web site from his or her home computer.
- Send an email notice to *all* employees that have work-related computer access or that have provided consent *each* time an SPD, SMM, or SAR is posted on the Web site. Use email features such as return receipt and notice of non-delivery.
- Continue to provide in paper form copies of SPDs, SMMs, and SARs to employees that do not have regular work-related computer access and that have not provided consent.
- Continue to provide in paper form copies of SPDs, SMMs, and SARs upon request free of charge.

Note: The plan administrator is generally not required to distribute SPDs, SMMs, or SARs to each beneficiary under the plan. Therefore, the plan administrator is not required to obtain consent from each beneficiary under the plan (e.g. spouses, dependents).

The rules allow plan administrators to provide COBRA notices electronically. However, because COBRA notices must be provided via first-class mail to the home address where a spouse or dependent is also covered under the plan, the plan administrator must obtain consent from the spouse or dependent before delivering COBRA notices electronically. Therefore, providing COBRA notices electronically may not be as practical as electronically delivering SPDs, SMMs, or SARs.

Plan administrators are required to use measures reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries. The regulations provide some guidance on what measures are reasonably calculated to ensure actual receipt when electronic delivery is used.

- Notices. A notice must be sent either electronically or in paper form to each plan participant or beneficiary at the time the document is provided electronically. The notice must a) indicate the significance of the document when it is not otherwise reasonably evident as transmitted, and b) explain the participant's right to request a paper copy.
- Confirmation of Receipt. The plan administrator must make use of electronic mail features such as return-receipt or notice that the email was not delivered. The plan must also conduct periodic reviews to confirm receipt of the transmitted information.
- Confidentiality. When personal information pertaining to an individual's benefits or accounts is transmitted electronically, steps must be taken to protect the confidentiality of the information.
- Style, Format, and Content Requirements. Documents delivered electronically must continue to be furnished in a manner consistent with the applicable style, format, and content requirements contained within ERISA. For example, summary plan descriptions provided electronically must contain all the disclosures otherwise required by ERISA's disclosure requirements. The Department of Labor's comments within the preamble to the regulations indicate that the appearance of paper and electronic versions need not be identical.

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## ERISA Electronic Disclosure Rules *cont'd*

- Paper Copy. Plan participants and beneficiaries are entitled to receive a paper copy of any ERISA disclosure provided electronically. Where a plan participant or beneficiary requests a paper copy of a document originally provided electronically, the general rules governing whether a plan administrator may or may not charge for paper copies apply.

The regulations set forth guidelines for providing disclosures to a) employees with work-related computer access, and b) other plan participants and beneficiaries who consent to receive disclosures electronically.

### Employees With Work-Related Computer Access

ERISA disclosures may be delivered electronically to employees that

- have the ability to effectively access documents furnished in electronic form at any location where the employee is reasonably expected to perform his duties, *and*
- are expected to have access to the employer's electronic information system as an integral part of those duties.

Merely providing employees access to a computer in a common area (e.g. computer kiosks) is not a permissible means by which to deliver documents required to be furnished to plan participants.

### Beneficiaries and Other Plan Participants That Consent to Receive Disclosures Electronically

A plan administrator must obtain written consent prior to electronically delivering ERISA disclosures to beneficiaries and other plan participants that do not have work-related access to a computer. The consent may be received in either electronic or paper form. A consent must include a clear and conspicuous statement that explains:

- The types of documents to which the consent will apply;
- That consent can be withdrawn at any time without charge;
- The procedures for withdrawing consent and for updating the address used for receipt of electronically furnished documents;
- The right to request and obtain a paper version of an electronically furnished document, including whether the paper version will be provided free of charge; and
- Hardware or software needed to access and retain the documents delivered electronically.

If the plan administrator changes its hardware or software requirements, it must provide a new notice and obtain a new consent.

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## 2012 HSA Limits

The IRS issued Revenue Procedure 2011-32 announcing the 2012 cost-of-living adjustments for HSA contribution limits and for high deductible health plan (HDHP) deductibles and out-of-pocket maximum.

The overall limits are the following:

- **Maximum HSA Contribution:** \$3,100 for individual, \$6,250 for families
- **Minimum HDHP Deductible:** \$1,200 self-only coverage, \$2,400 family coverage
- **Out of Pocket Maximum:** \$6,050 self-only coverage, \$12,000 family coverage
- **Post-55 "Catch-Up" Limit** remains at \$1,000



## Health Care Reform in the Courts

The Sixth Circuit Court of Appeals ruled on June 29th holding that it was constitutional for Congress to require that Americans buy health insurance. This is just the first of three opinions to be delivered by separate courts of appeal. The Fourth and Ninth Circuits are expected to rule soon.

This opinion was notable if for no other reason than it is the first that did not split along party lines. In the 2-1 ruling, a judge appointed by a Republican president joined one named by a Democrat to write the majority opinion.

The fate of health care reform will be decided by the U.S. Supreme Court possibly next year.



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## Benefits Legislation

The Tax Parity for Health Plan Beneficiaries Act (H.R. 2088/S. 1171) introduced by Representative Jim McDermott (D-Wash.) and Senator Charles Schumer (D-N.Y.) would extend tax preferences for employer-provided health benefits to all those eligible for the employer's health plans.

Under current law, employer contributions to health coverage for employees and their spouses, dependents, and adult children 26 and younger are excluded from the employee's income for both income and payroll tax purposes. The law also excludes from employee income employer reimbursements for medical expenses and amounts reimbursed under health flexible spending accounts (FSAs) and health reimbursement arrangements (HRAs) for spouses, dependents and adult children. Other beneficiaries, however, such as domestic partners, are not eligible for this favorable tax treatment. Employers must include in the employee's gross income the value of coverage provided to anyone other than a spouse, dependent or child recognized under the Internal Revenue Code.

Under the proposed legislation, domestic partners would receive the same tax exclusion as spouses. The act would apply the same tax treatment to health savings account reimbursements and would direct the Treasury Department to issue guidance addressing reimbursements from health FSAs and HRAs.

Although a revenue estimate for the act is not available, an earlier version was scored as costing \$4 billion over 10 years. The Tax Parity for Health Plan Beneficiaries Act likely faces an uphill battle in the current legislative environment, where tensions over health care reform are running high and revenue offsets are scarce.

The Family and Retirement Health Investment Act of 2011 (S. 1098) introduced by Senator Orrin Hatch (R-Utah), would change the FSA and HSA rules. This legislation would allow among other things: a husband and wife to make a catch-up contribution to the same HSA, remove the over-the-counter drug restrictions (again!), allow individuals to rollover up to \$500 in their FSA, and all seniors enrolled in Medicare Part A only to continue contributing to their HSA's.

This bill was referred to the Senate Finance committee on May 26. The fact that it has not made it out of committee by this time indicates it is not likely to get through. Because some of the proposed changes would decrease revenues it faces the same uphill battle as the Tax Parity for Health Plan Beneficiaries Act.