



December 20, 2010

Robin Ehrenberg
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

Dear Ms. Ehrenberg:

The American College of Physicians (ACP), representing over 130,000 internists and students, appreciates the opportunity to comment on: *Section 105. - Amounts Received Under Accident and Health Plans (Also Section 213. - Medical, Dental, etc., Expenses)*. This ACP comment letter addresses an issue of importance to the College: the 2011 requirement for a physician order for non-prescription drug items.

Section 9003 of the Affordable Care Act (ACA) revised the definition of medical expenses related to over-the-counter drugs, and adds new section 106(f) of the Internal Revenue Code. *“New § 106(f), as added by the Affordable Care Act, provides that, for purposes of §§ 106 and 105, beginning after December 31, 2010, 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. Thus, under new § 106(f), expenses incurred for medicines or drugs may be paid or reimbursed by an employer-provided plan, including a health FSA or HRA, only if (1) the medicine or drug requires a prescription, (2) is available without a prescription (an over-the-counter medicine or drug) and the individual obtains a prescription, or (3) is insulin.”*

ACP believes that the new requirement places a significant administrative burden on physicians, and may have a number of unintended consequences. The College recommends that the IRS rescind its rule and engage in a process that involves key stakeholders that aims to implement this provision in the ACA in the most efficacious manner. Our rationale for proceeding cautiously in the implementation of this ACA provision—the excessive administrative burden on physicians, the potential increase in cost for activities unrelated to improving patient care, and the potential to diminish physician capacity to treat newly insured patients—is provided in detail below. One

potential product of a stakeholder engagement process would be to determine whether it is prudent, for the government to convey the expectation that patients should plan to include less money in their flexible spending accounts rather than the message that the only change is that a physician prescription is now required when it previously had not. The messaging would potentially be based on the intent of the Congress in including this provision in law and other factors.

For the prescribing physician, their medical practice will be forced to schedule a greater volume of brief office visits to accommodate patients who are being seen only for a prescription for over-the-counter items (OTCs). This, in turn, will greatly increase the physician's amount of time and effort spent on medical documentation.

In the case of a physician who prescribes by telephone, the task of ordering non-prescription drugs to satisfy the IRS requirement becomes a largely unpaid expense, because most patients' insurance plans do not cover telephone health services.

Whether it is an in-person office visit or a telephone interaction, the interactions necessary for a patient to secure a prescription of an over-the-counter item would likely rarely occur in the normal course of patient treatment. Thus, these interactions represent additional work and stress on the physician and the office staff merely to satisfy this new legal requirement. This will be a poor use of physician time, especially at a time when our already-stressed primary care physicians will need to gear up to serve as a usual source of care from the millions of newly insured individuals who have access to health care coverage under the same law that established this burdensome requirement.

The rule also has the potential to shift the patient population towards more prescription medications, which will increase health care costs. Some physicians may react by ordering the prescription form of a drug, to simplify their monitoring of patients' use of the medications.

ACP encourages the IRS to provide the regulatory impact of this new directive. The College also encourages the IRS to engage collaboratively with major stakeholder groups, to determine ways in which the regulatory burden of compliance can be alleviated.

Thank you for considering the ACP comments. Please contact Debra Lansey, Associate for Regulatory and Insurer Affairs, by phone at 202-261-4544 or e-mail at dlansey@acponline.org if you have questions or need additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald W. Hatton MD FACP". The signature is written in a cursive, somewhat stylized script.

Donald W. Hatton, MD, FACP
Chair, Medical Practice and Quality Committee