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April 15, 2008

The Honorable Nancy Pelosi
The Honorable Steny Hoyer
The Honorable John Boehner
U.S. House of Representatives

Dear Madame Speaker, Majority Leader Hoyer and Minority Leader Boehner:

I am writing to make you aware that H.R. 5719, the Taxpayer Assistance and Simplification Act of 2008, contains provisions that would impair and perhaps eliminate the ability of financial institutions to administer the approximately 2.3 million Health Savings Accounts (HSAs) that finance healthcare for nearly 6 million Americans.

The provisions, if enacted into law, would require that "substantiation" protocols, similar to those required on employer-owned Flexible Spending Arrangements (FSAs) be applied by HSA Trustees and Custodians to individually owned HSAs. Such a requirement would be a dramatic departure from current law and greatly harm the HSA industry and the Americans that use it to pay for their healthcare.

Currently, HSA owners and HSA Trustees and Custodians must report to the IRS the amount of contributions and distributions made in a year to and from each account. The IRS has the authority to audit these accounts and assess penalties for non-compliance. The proposed law would insert a third party administrator (TPA) into the transaction, by requiring that TPAs substantiate every distribution from a HSA before it is made.

There are significant legal problems with this procedure that the proposed law does not address.

First, there are no instructions to HSA Trustees and Custodians about how to prevent individuals from accessing their own money. Unlike FSAs, HSAs are owned by the individual, not the employer. In a FSA, employees contribute their pre-tax dollars to their employer who has the responsibility to make sure those funds are only spent on qualified medical expenses. The employer typically hires a TPA to "substantiate" the claims of his employees. This process is very inefficient: 90% of all FSA transactions are non-electronic – paper-based – while only 10% are electronic due to the substantiation requirements inherent in the FSA.

Furthermore, employees electing a FSA must use those funds completely by the end of every year or they are forfeited to the employer, the owner of the money.

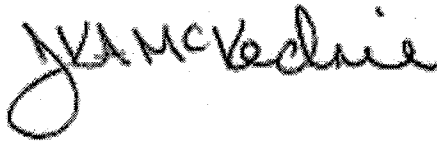
HSA's work much more efficiently; 90% of all HSA transactions are electronic and only 10% are paper-based, the reverse of the FSA marketplace; and, the individual, not the employer, owns the funds in the account regardless of the source of the funds. Where FSAs are largely about moving paper between the medical services provider, the employee, the employer and the TPA, HSA's are usually debit-card based - electronic.

Second, there are no instructions to Trustees and Custodians about how to treat the balances already accrued in each account. Would Trustees and Custodians apply the "substantiation" rules to the entire balance of a HSA or just to funds accumulated post-enactment? This is a threshold question for financial institutions: only pursuant to a court order or through the lien process are financial institutions able to deny individuals access to their private property, which the funds in HSA's clearly are.

The provisions in H.R. 5719 would, therefore, put financial institutions in a precarious position with respect to private property rights, by creating a protocol of dubious legality whereby HSA Trustees and Custodians would have an obligation to restrict their customers' access to their own money. The liability inherent in such a scheme is too large to manage and the proposed law provides no relief or direction about how the responsibilities of HSA Trustees and Custodians would be altered to accommodate this change

For these reasons, I urge you to remove the HSA substantiation provisions from this legislation as it is debated on the House floor today.

Sincerely,

A handwritten signature in cursive script that reads "J. Kevin A. McKechnie". The signature is written in dark ink and is positioned above the typed name.

J. Kevin A. McKechnie
Staff Director