

# BENEFIT

## Plan Developments

A monthly report covering plan design and legislative changes

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### HIPAA Guidance As It Applies To Business Associates

The Office for Civil Rights (OCR) within the Department of Health and Human Services (DHHS) Office issued additional guidance regarding **The Health Insurance Portability and Accountability Act of 1996 (HIPAA)** on December 4, 2002. The guidance is provided in 14 sections—one of which addresses privacy as it concerns “business associates.”

The OCR says a “business associate’s” functions and activities include: claims processing or administration; data analysis, processing, or administration; utilization review; quality assurance; billing; benefit management; practice management; and repricing.

A covered entity’s contract or written arrangement with business associates must contain elements specified at 45 CFR 164.504(e). For example, the contract must: (1) describe

the permitted and required uses of protected health information; (2) provide that the information will not be

used or disclosed other than as permitted by the contract; and (3) require that appropriate safeguards be taken to prevent a use or disclosure of protected health information other than as provided for by the contract.

A covered entity is not required to have a business associate contract or other written agreement in place in certain situations. Among them:

- With persons or organizations (e.g., janitorial service or electrician) whose functions or services do not involve the use or disclosure of protected health information, and where any access to protected health information by such persons would be incidental, if at all.
- With a person or organization that acts merely as a conduit for protected

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HIPAA does not require covered entities to monitor how their business associates carry out privacy safeguards.

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health information. For example, the U.S. Postal Service, certain private couriers, and their electronic equivalents.

- To disclose protected health information to a researcher for research purposes, either with patient authorization, pursuant to a waiver under 45 CFR 164.512(i), or as a limited data set pursuant to 45 CFR 164.514(e).
- When a financial institution processes consumer-conducted financial transactions by debit, credit, or other payment card, clears checks, initiates or processes electronic funds transfers, or conducts any other activity that directly facilitates or effects the transfer of funds for payment for health care or health plan premiums. When it conducts these activities, the financial institution is providing its normal banking or other financial transaction services to its customers; it is not performing a function or activity for, or on behalf of, the covered entity.

HIPAA does not require covered entities to monitor or oversee the means by which their business associates carry out privacy safeguards, or the extent to which they abide by the privacy requirements of the contract. However, if a material breach or violation of the contract is discovered, the covered entity must take reasonable steps to fix the breach or end the violation. If unsuccessful in doing so, the covered entity must terminate the contract with the business associate. If termination is not feasible, the covered entity must report the problem to OCR [45 CFR 164.504(e)(1)].

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## Health Care, Drugs Could Dominate Congressional Agenda

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The economy and terrorism aside, health care and prescription drugs will be among the major issues taken up and discussed by this year's 108<sup>th</sup> Congress, according to a survey by the Health Insurance Association of America (HIAA, 2000).

The HIAA surveyed association executives and lobbyists, 28% of whom identified health care and prescription drugs as being a priority congressional item. For perspective, only 13% of the respondents identified taxes and spending as a top priority, while 12% pointed to education.

Among the health care issues likely to receive legislative attention are: adding a prescription drug benefit to Medicare; expanding children's health insurance programs; passing a tax incentive for long-term care insurance; passage of a patients' bill of rights that excludes the right to sue health plans; mental health parity; and capping medical malpractice awards. Many respondents, however, expressed skepticism that these legislative issues would become law.

Part of the skepticism was attributed to the start of 2004 presidential campaign activities and the attention it would draw. As for a challenger to President Bush, incidentally, 16% of the respondents named Sen. John Edwards, D-NC; 14% named Sen. John Kerry, D-MA; 9% named Sen. Joe Lieberman, D-CT; 8% named Sen. Tom Daschle, D-SD; 4% named Sen. Dick Gephardt, D-MO; and 1% named Sen. Bill Bradley, D-NJ.

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## New Deductions For Medical, Dental Expenses

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With the federal tax deadline approaching, taxpayers will inevitably study the 2002 version of IRS Publication 502, which outlines medical and dental expenses that qualify for deductions under Code Section 213 (expenses that exceed 7.5% of adjusted gross income). Publication 502 contains a number of new and revised items. They include:

- **Standard mileage rate.** The standard rate when using your car for medical reasons is now 13 cents a mile. Taxpayers can also include the cost of parking fees and tolls as part of their medical expenses.
- **Self-employed health insurance deduction rate increase.** The rate has increased to 70% from 60%. This applies to each individual who: (1) had a net profit for the year; (2) was a general partner or limited partner receiving guaranteed payments; or (3) received wages from an **S corporation** in which he or she was more than a 2% shareholder.
- **Obesity as a disease as diagnosed by a physician.** This includes fees paid to join a weight reduction group and to attend periodic meetings. Not included: membership dues in a gym, health club, or spa.
- **Health insurance credit (effective December 2002).** This credit is available to

certain individuals who are displaced by foreign trade (receiving a trade adjustment allowance under Section 246 of the Trade Act of 1974), or who are receiving a pension from the **Pension Benefit Guarantee Corporation (PBGC)**. The credit is available for up to 65% of premiums paid for qualified health insurance coverage (Consolidated Omnibus Reconciliation Act of 1985 (COBRA) included) for individuals and their families.

- **Disabled dependent care expenses.** Some disabled dependents may qualify as both medical (Code Section 213) and work-related expenses (Code Section 21). These expenses can be applied either way but cannot be claimed in both areas.
- **Health reimbursement arrangements (HRAs).** This is an employer-funded plan that reimburses employees for medical care expenses and allows unused amounts to be carried forward.

Some deductible expenses outlined in Publication 502 are not reimbursable under a **flexible spending account (FSA)**.

### Legislative Activity

There are several bills that have been discussed in Congress that would further increase the attractiveness of **Section 125** plan benefits to employees. H.R. 63 and H.R. 167, for example, propose eliminating or mitigating the “use-it-or-lose-it” rules. Another bill, H.R. 253, would increase the amount participants would be able to contribute to a **dependent care spending account**.

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## Senator Says COLI Should Be A Taxed Benefit

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**Corporate owned life insurance (COLI)** could become a taxed benefit if Sen. Jeff Bingaman, D-NM introduces legislation this year to tax death benefits from those type of policies. Sen. Bingaman, a member of the Senate Finance Committee and chairman of the Senate Energy Committee, says he plans to offer his proposal as an amendment to Enron-related pension legislation Congress is scheduled to debate this year.

In recent months, the IRS has been targeting tax-shelter promoters and anyone who takes advantage of such schemes. The IRS has included COLI among the latter and has cited three cases where COLI products “lacked economic substance.”

A number of organizations, such as the National Association of Insurance and Financial Advisors (NAIFA), take issue with the proposed legislation and state the cases cited by the IRS are not the norm. They note that COLI arrangements have been used for more than half a century, most often to fund employee-benefit plans.

NAIFA points out that businesses use the benefits from COLI to pay for the cost of health care, retirement, survivor, and other benefits. The financial organization also notes that the Financial Standards Accounting Board, in FAS 106, requires businesses to include the present value of such future retiree health benefits in their annual statements.

The use of COLI has been controversial for years. From time to time, Congress has debated its use as a corporate tax shelter and, in 1996, the IRS disallowed some

deductions claimed by companies. Sen. Bingaman admits there are legitimate reasons for companies to use COLI—such as to purchase **key-man** coverage to pay for succession expenses. However, the senator takes issue with companies receiving indirect, potentially abusive tax breaks. Sen. Bingaman has said he will ask the Joint Committee on Taxation to calculate how much COLI is costing U.S. taxpayers. (GAMA International, a financial services organization, has reported that taxing COLI could raise as much as \$10 billion over 10 years.)

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## FYI: Educational Assistance

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Nearly four out of five employers offer educational assistance programs for their employees with the ultimate aim of improving motivation, retention, and productivity, according to a 2002 Benefits Survey conducted by the Society for Human Resource Management.

Under Section 127 of the Internal Revenue Code, employers are allowed to provide up to \$5,250 per year to each of their employees in tax-free reimbursement for tuition, books, and fees for non-job-related education. The Code permits the tax exclusion for both undergraduate and graduate-level course work.

Section 127 has been part of the federal Tax Code since 1978 and has been regularly extended by Congress since that time. Most recently, Section 127 was extended by The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). However, to comply with the Congressional Budget Act, EGTRRA is currently scheduled to expire on January 1, 2011.

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