ALSTON&BIRD LLP

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424

404-881-7000
Fax:404-881-7777
www.alston.com

Mr. Ashley Gillihan **Direct Dial: 404-881-7390** **E-mail: ashley.gillihan@alston.com**
John R. Hickman **Direct Dial: 404-881-7885** **E-mail: john.hickman@alston.com**

January 22, 2009

William Decker
Center for Medicare and Medicare Services
7500 Security Boulevard
Baltimore, MD 21244-1850

Re: Application of MSP Reporting to Health Reimbursement Arrangements

Dear Bill (and the others):

Thank you so much for your time last week. It was very helpful for us to hear your comments, thoughts and concerns.

I wanted to take a moment and reiterate our (ECFC) request for several items related to application of the MSP reporting requirements to HRAs (I plan to also send this via a more formal letter but I am sending via email first in light of your specific request last week).

First, we request a delay in the effective date of the mandatory reporting for HRA administrators until at least the first HRA plan year beginning on/after *January 1, 2010*. Accordingly, HRA administrators would begin collecting information regarding active covered individuals in an HRA on or after such plan year beginning on or after January 1, 2010 (regarding active covered individuals on or after January 1, 2010) and would begin reporting such information beginning with the first quarter of 2010 following the beginning of such plan year.

As we have discussed, the reporting requirements caught virtually all of the HRA administrators by surprise. Since HRA reimbursement is controlled almost entirely by the participant, i.e. it is typically at the participant's discretion whether to submit the expense and when the expense is submitted for reimbursement, very few if any HRA administrators actually coordinate with any other arrangements. They simply pay upon receipt of the request if the expense is eligible and there is an account balance. Thus, most HRA administrators would tell you, if asked, that the MSP rules do not apply and I believe that this is the cause of the universally applicable surprise. Regardless of the HRA administrator's belief, collection of information for retroactive coverage is impossible and collection for 2009 is also virtually impossible.

The nature of HRAs is such that HRA administrators do not collect the majority of the required data and they do not have a reasonable means of collecting such data at this time. Consequently, HRA administrators need additional time to develop entirely new systems and processes that will enable HRA administrators to efficiently and effectively collect and report the needed information. Such development cannot be done quickly. For example, HRAs typically do not use an enrollment process whereby much of the information could be effectively and efficiently collected from the employee. In fact, many HRAs do not even collect the identity of any eligible dependents that may be covered. Unlike HRAs, traditional group health plans utilize an enrollment process that enables them to collect the data from the employee at the outset and during the year if there are family status changes-----this fact alone puts HRA administrators at a significant disadvantage compared to traditional group health plan administrator/insurers. HRA administrators will need to establish affirmative "enrollment" procedures to more efficiently and effectively collect the needed information at the outset of coverage and to collect family status changes and that cannot be reasonably done prior to January 1, 2010, which further means that they cannot collect data related to coverage prior to that date. Also, to the extent that HRA eligibility is tied to the traditional group health plan, HRA administrators may be able to partner with the traditional group health plan administrator/insurer to collect the information or engage the traditional group health plan administrator/insurer to be a reporting agent, but these actions will also take time as confidentiality/indemnification agreements must be negotiated/executed prior to forming such partnerships.

We also request that any such delay be communicated as soon as possible as the first quarter reporting date is looming for 2009.

Second, we also request a delay in testing. We discussed this during our meeting and at the time it seemed reasonable that testing would not be delayed, especially since it would presumably be conducted with "dummie" data but after further thought and discussion with our membership/clients, testing during the prescribed times in 2009 is also virtually impossible. HRA administrators simply do not have the systems in place at this time to meaningfully test. Again, we don't collect the information required by CMS; therefore, the systems are not designed to facilitate housing that type of data. A requirement to test at this time will result in frustration for HRA administrators and CMS. We request that required testing be delayed until the first quarter in 2010--this will give employers/HRA administrators time to revise systems to house/collect the necessary data so that testing will be meaningful.

Third, we request a "threshold" exemption for de minimis HRAs. We note that some HRAs are established with rather small benefits to serve as a source of reimbursement for ancillary expenses (e.g., vision, dental, preventive care, and OTC drugs). These types of arrangements often have monthly benefit coverage of less than $100 per month ($1200 per year) or even less. Thus, we request a complete exemption for HRAs with a monthly accrual rate of less than $100 per month.

Moreover, a number of HRA arrangements are established merely to facilitate wellness and disease management programs. Thus, for example, compliance with a particular wellness regime might result in contribution of dollars to an HRA account for other unreimbursed medical expenses. We note that in most cases the return on investment (ROI) with respect to these wellness programs far exceeds the cost of the program (including the HRA deposit). Thus, the employer's primary plan (and Medicare) benefit greatly from the improved health attributable to the proliferation of these arrangements. We would propose a complete exemption for HRAs funded as a result of participation in a wellness program arrangement.

Fourth, we request clarification regarding the definition of HRA subject to the reporting obligations. We understand that CMS' reference to "HRAs" includes employer funded reimbursement arrangements that include a carry over function and those that don't but the legal definition of "HRA" based on the original 2002 IRS ruling and the industry understanding of HRAs is that they are limited to an employer funded arrangement with a carry over function. On this note, we respectfully request an exemption for HRAs with no carry over. There simply is no material conceptual difference between an "HRA" with no carry over and a Health FSA, which CMS has clearly indicated is exempt. One point worth noting with respect to HRAs with no carry over is that most arrangements only reimburse claims incurred during the plan year. Thus, amounts made available in year 2 would not be available to pay expenses incurred in year 1. This will create administrative difficulty for CMS as it will appear to CMS in any subsequent plan year as though an HRA exists but it may not with respect to claims incurred in a prior year.

Fifth, we request clarification/confirmation that an HRA providing only dental and/or vision benefits is exempt from the reporting. With the onset of HSAs, many employers have established "limited purpose" HRAs that limit reimbursement to dental and vision expenses so that participants in such HRAs are not disqualified from establishing an HSA.

If you have any questions or you need additional information, please do not hesitate to contact me or John Hickman (our contact information is below).

Thanks again for your time and attention.

Very truly yours,

____
Ashley Gillihan, Esq.
Alston & Bird, LLP
1201 W. Peachtree Street
Atlanta, GA 30309
(w) 404-881-7390
(c) 404-593-4259
(f) 404-253-8598
ashley.gillihan@alston.com

____
John Hickman, Esq.
Alston & Bird, LLP
1201 W. Peachtree Street
Atlanta, GA 30309
(w) 404-881-7885
john.hickman@alston.com

AG:del