



**Testimony of Jennifer Hatcher
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**Before the House Ways and Means Committee, Subcommittee on
Oversight**

**Hearing on the Impact of Limitations on the Use of Tax-Advantaged
Accounts for the Purchase of Over-the-Counter Medication**

Wednesday, April 25, 2012

Mr. Chairman and Members of the House Ways and Means Subcommittee on Oversight, my name is Jennifer Hatcher, and I am Senior Vice President, Government and Public Affairs, with the Food Marketing Institute (FMI). Thank you for the opportunity to testify before the Committee on Ways and Means Subcommittee on Oversight on the impact of limitations on the use of tax-advantaged accounts for the purchase of over-the-counter (OTC) medicines.

The Food Marketing Instituteⁱ represents supermarket retailers and wholesalers. The supermarket industry sells a wide variety of grocery items and other consumer products, including over-the-counter (OTC) medications. More than 68% of supermarkets have pharmacies and both pharmacy and OTC products represent an important component of our overall health and wellness offerings.

Our members use a variety of payment types to purchase OTC products. Until January 1, 2011, when purchases for FSA OTC medicines were cut off for customers using an FSA debit card without a prescription, FMI members were seeing growth in the use of debit cards to make purchases with a Flexible Spending Account. Below is a history of the issue and our members' investments in point-of-sale (POS) equipment.

In July 2006, the IRS published updated health benefit card guidance for FSAs (Flexible Spending Account) and HRAs (Health Reimbursement Account). This IRS guidance required members of FMI and other retailers to develop and implement an Information Inventory Approval System (IIAS) if they wished to be able to continue to accept FSA debit cards for purchases.

Our members are in the business of selling food and other retail products. As you can imagine, developing a system as complex as an IIAS was an enormous task. Under the new IRS requirements, a merchant's point-of-sale system must have the ability to verify in real-time that the merchandise being purchased with an FSA/HRA card is an eligible medical expense. A massive database of all eligible items had to be designed and built. Each merchant POS system had to be engineered to identify and flag all eligible products and decline all ineligible products electronically. An associate had to be assigned to monitor and update this system on a monthly basis. The system also had to be able to maintain the data electronically to be produced in the event of an IRS audit. Anyone who has ever had the responsibility for an IT project can envision the complexity of this assignment.

In 2007, FMI joined with a group of merchants, acquirer processors, issue processors, third-party benefit plan administrators and payment card networks to develop a non-profit, membership corporation to develop the database part of this project to ensure consistency across all participants. We did not want customer confusion where an item was determined to be eligible at one store and ineligible at a store down the street. FMI and the other founding members provided the seed money and staff support to start this project. At the time of its

founding, this group, the Special Interest Group for IIAS Standards (SIGIS), included about a dozen stakeholders and now its membership includes more than 11,000 companies.

The guidance we had from the IRS regarding the eligibility of certain items was extremely limited. I believe it was only about one page in length. We consulted numerous attorneys and the IRS as often as they were willing and had dozens of conference calls to ensure the database was accurate and comprehensive. The hard work to develop this database of products has been successful and each month an electronic list by UPC code is updated to identify eligible and ineligible products and a link is emailed to each company.

In addition to the creation of the eligible product database, FMI members were required to also have the merchant side of this system implemented by January 1, 2008 in order to continue to accept the FSA/HRA debit cards. Much work had to be done to ensure that the items could be downloaded and flagged and that an unflagged item could not be purchased with an FSA/HRA debit card, which was the IRS's ultimate concern. This was a tremendous amount of work to accomplish in this timeframe, but many of our members met this deadline, and many others were able to bring their systems online just a few weeks after the January 1, 2008 date.

The FSA business increased as customers, merchants and the IRS seemed to be happy with this new system. It was consistent, efficient and accurate and was created without a single taxpayer dollar.

On March 23, 2010 this all changed. In an attempt to raise revenue for the health care law "PPACA" (P.L. 111-148), this provision was modified to say that the expenses associated with OTC drugs or medicines will only be considered to be eligible for reimbursement under an FSA or HRA account if they are accompanied by a prescription. OTC medical supplies and equipment can continue to be purchased under the existing IIAS system. The practical effect of this change is to require a \$130 doctor's office visit for a prescription to purchase an \$18 package of Claritin. Bandages and contact solution remain eligible without a prescription.

On December 20 and 23, 2010 the IRS finally released guidance on how the change must be implemented and the change had to take place by January 1, 2011. All of the eligible item lists for all merchant locations had to be updated at the busiest time of the year, which for grocery stores is between Thanksgiving and New Year's. In total, 16,000 OTC medicines had to be removed from the SIGIS electronic eligible items list. Beginning January 1, 2011, the extreme effort and expense that more than 11,000 companies undertook to comply with the original IRS requirement by January 1, 2008 for an IIAS was negated. The associates in our member companies who invested so much of their time and resources into developing this system were frustrated.

In gathering information for this testimony, I asked our member companies for an estimate of their expenditures toward the IT necessary for development of their part of the IAS system and their data retention. Each respondent reported more than \$100,000 in expenses. In government dollars that may not seem like a lot, but with a 1% industry profit margin, that equates to more than \$10 million in grocery sales just to break even on the expense. Our largest members reported numbers far in excess of \$100,000. These expense figures do not even consider the cost and disservice to sick customers of tying up a pharmacist for handling an Advil or Claritin prescription (should one come in) or the \$130 doctor's office visit expense to get the prescription that either the individual or insurance company must pay.

Regardless of how you feel about PPACA, this change is unfair to customers and to retailers and just does not make sense. Bandages and contact solution are eligible, but Advil and Claritin require a prescription? FMI believes Congress should preserve affordable consumer access to OTC medicines through FSA accounts. We strongly support legislation to fix limitations on FSA debit card OTC purchases including: H.R. 2010 – the Family and Retirement Health Investment Act of 2011, and H.R. 605 - the Patients' Freedom to Choose Act, both authored by Congressman Paulsen, and H.R. 2529, the Restoring Access to Medication Act, authored by Congresswoman Lynn Jenkins and each of their Senate companions.

Thank you for inviting FMI to testify on this important issue. Our industry is committed to providing our customers with a wide range of products; including both food and medical products. The restrictions on FSA OTC purchases create a real burden for consumers and the retail community, and they will significantly diminish our members' investments unless Congress acts to amend the health care legislation. The elimination of FSA OTC purchases is basically a new tax on consumers who previously could put aside pre-tax dollars to pay for health-related items throughout the course of a year. Moreover, in our opinion, the provisions in PPACA that took away this benefit will not reduce overall health care costs, but will simply shift these costs to other areas of our health care delivery such as physicians, pharmacists and other practitioners. FMI urges the restoration of this important OTC tax-preferred health account benefit.

ⁱ Food Marketing Institute (FMI) conducts programs in public affairs, food safety, research, education and industry relations on behalf of its nearly 1,250 food retail and wholesale member companies in the United States and around the world. FMI's U.S. members operate more than 25,000 retail food stores and almost 22,000 pharmacies with a combined annual sales volume of nearly \$650 billion. FMI's retail membership is composed of large multi-store chains, regional firms and independent operators. Its international membership includes 126 companies from more than 65 countries. FMI's nearly 330 associate members include the supplier partners of its retail and wholesale members.