

## **NOTICE OF APPLICATION FOR ATTORNEYS' FEES AND HEARING**

TO: Employee welfare benefit plans that (1) are Class Members; (2) timely submitted identification forms in response to a Notice of Pendency of Class Action, Proposed Class Settlement and Hearing; and (3) identified themselves as paying for prescription drugs primarily on a self-insured or self-funded, or administration fee plus cost basis, and participated in Medco's brand-to-brand therapeutic interchange program.

### **PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY.**

In 2003 or 2004, you received in the mail a Notice of Pendency of Class Action, Proposed Class Settlement and Hearing (the "First Notice"). The First Notice described a proposed settlement of this class action lawsuit brought under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.*, and advised you of the terms of the proposed settlement and related matters. The First Notice defined Class Members as

All employee welfare benefit plans that have or have had contracts with Medco, whether directly or indirectly (including through third party administrators, HMOs, insurance companies, Blue Cross Blue Shield entities or other intermediaries (collectively, "TPAs")), where the contracts with Medco were both (a) in force at any time between December 17, 1994, and the date of the final approval of the Settlement contemplated by the Settlement Agreement, as amended, and (b) subject to ERISA.

You were required to submit an identification form that was appended to the First Notice in order to participate in the settlement. You are receiving this Notice because you did timely submit an identification form identifying yourself as a member of the Class in this class action lawsuit. On your identification form, you checked a box indicating that your Plan has paid Medco Health Solutions, Inc. ("Medco") for prescription drug benefits primarily based on the volume of drugs and type of drugs dispensed to your Plan members (*e.g.*, on a self-insured or administration fee plus cost basis). In addition, Medco had identified your plan as one that participated in the brand-to-brand therapeutic interchange program administered by Medco.

### **SELF-FUNDED PLANS' OBJECTIONS TO ALLOCATION OF THE SETTLEMENT PROCEEDS**

In response to the First Notice, several Class Members who are self-funded plans like yours – the Central States Southeast and Southwest Areas Health and Welfare Fund ("Central States"), the Iron Workers Tri-State Welfare Fund ("Iron Workers") and Sweetheart Cup Company ("Sweetheart") (collectively, the "Objectors") – objected to the allocation of the settlement proceeds between self-funded plans and insured (and capitated) plans, and presented their objections to the District Court. In the original settlement agreement, the settlement proceeds were to be allocated among class members according to the amounts of their individual drug purchases through Medco. The drug purchases of insured and capitated plans were to be discounted by 55%. The Objectors argued that insured and capitated plans should receive no share of the settlement proceeds at all because they suffered no harm as a result of the alleged misconduct of Medco. Specifically, the Objectors asserted that, with regard to insured plans, the insurer or, in the case of capitated plans, Medco bore the risk of claims for prescription drug costs and that the alleged misconduct by Medco in providing drug benefits did not affect the premiums that insurers charged to insured plans or that Medco itself charged to capitated plans.

On May 25, 2004, the District Court overruled those objections and approved the settlement and its plan of allocation on the terms described in the First Notice. In addition, the District Court determined that an award of \$12.75 million – 30% of the settlement proceeds before interest – was fair and reasonable compensation for counsel for the plaintiff class with respect to their efforts obtaining the settlement with Medco.

After the District Court approved the settlement, the Objectors appealed the District Court's ruling on their objections to the United States Court of Appeals for the Second Circuit (the "Second Circuit"). Following briefing, argument, additional discovery on the question of the plaintiff class representatives' standing to sue Medco and additional briefing on that issue, the Second Circuit sent the case back to the District Court for further proceedings. Agreeing with the Objectors, the Second Circuit determined that (1) the "District Court's conclusion that the 55% discount to the insured plans was fair, reasonable and adequate did not rest on any specific factual findings or adequately explain how it accounted for the difference in these relationships" and (2) that a "new subclass containing only self-funded Plans will be better able to assert any challenge to the discount with the benefit of independent counsel." The Second Circuit ordered the District Court to certify a subclass made up of employee welfare benefit plans that paid for prescription drugs primarily based upon the volume and type of drugs dispensed to plan members, such as your Plan ("self-

funded plans”), to reconsider the allocation of the settlement proceeds and make specific factual findings regarding the allocation of the Settlement Fund as between self-funded and insured plan class members. In addition, the Second Circuit stated that “counsel retained to represent the interests of the new subclass on remand also may be entitled to recover reasonable attorneys’ fees,” and left “it to the District Court’s informed discretion to determine how to accommodate a fee claim by counsel for the subclass within the 30% cap provided in the Settlement Agreement.”

On March 13, 2008, the District Court certified a subclass consisting of all members of the Class that were self-funded plans (the “Self-Funded Plan Subclass”). The Court appointed the Objectors, Central States, Iron Workers and Sweetheart, as class representatives of the subclass. Each of these Class Members has been an active participant in this litigation since late 2003, when each objected to the original plan of allocation of the settlement fund. The Court also appointed the Coleman Law Firm (the “Coleman Firm”) and the law firm of Pavalon, Gifford & Laatsch (the “Pavalon Firm”) as counsel for the Self-Funded Plan Subclass. Insured and capitated plans continue to be represented by the law firms of Abbey Spanier Rodd & Abrams, LLP and Boies, Schiller & Flexner LLP, who represented the entire plaintiff class prior to certification of the two subclasses.

After the Self-Funded Plan Subclass was certified, counsel for the Self-Funded Plan Subclass and counsel for the insured and capitated plan subclass engaged in lengthy and vigorous negotiations with respect to the allocation of the settlement proceeds between the two subclasses. During these negotiations, counsel for the Self-Funded Plan Subclass maintained that there was no evidence that insured plans’ insurance companies would necessarily have reduced their premiums if Medco passed on rebates received from drug manufacturers. Counsel for the insured and capitated plans maintained their previously expressed position that Medco’s alleged misconduct affected insured plans, albeit indirectly, resulting in increased premiums. After arduous negotiations, counsel for the respective subclasses agreed that the 55% discount to the insured and capitated plans’ recovery should be increased to 85% (referred to as the “Modified Allocation Plan”), and that plans that failed to adequately identify themselves as self-funded in their Settlement Identification Forms would be deemed to be insured plans.

On March 31, 2008, the parties signed the Second Amendment to the Settlement Agreement (the “Second Amended Settlement”). On that same day, the District Court entered its order preliminarily approving the Second Amended Settlement and the Notice of Amendment to be sent to the Class Members whose recovery would be reduced by the reallocation of settlement proceeds (*i.e.*, insured and capitated plans). On June 26, 2009, the District Court entered its Memorandum Decision and Order granting final approval to the Second Amended Settlement Agreement and approving the Modified Allocation Plan.

As a result of the efforts by counsel for the Self-Funded Plan Subclass, including but not limited to their objections to the original plan of allocation of the settlement proceeds, their successful appeal of the District Court’s denial of those objections, and their prosecution of their objections and negotiation of a more beneficial allocation of settlement proceeds to self-funded plans after remand by the Court of Appeals, the Self-Funded Plan Subclass will receive more than allocated to self-funded plans under the original Settlement Agreement. It is the position of counsel for the Self-Funded Plan Subclass that their efforts increased the recovery of the Self-Funded Plan Subclass by approximately \$4.7 million plus the interest that has accrued on that amount since 2003. Because of the delay in distribution caused by the appeals and remand, all class members will also receive their percentage shares of the interest that has accrued on their original shares of the settlement proceeds prior to the reallocation.

Included in the increased recovery of the Self-Funded Plan Subclass is approximately \$2.2 million realized by the increase of the discount of the claims of the insured and capitated plans subclass from 55% to 85% provided in the Modified Allocation Plan. Counsel for the Self-Funded Plan Subclass take the position that their efforts also resulted in an additional approximately \$2.5 million being shifted to the true members of the Self-Funded Plan Subclass, such as your plan, by discounting the claims of 298 class members which did not properly identify themselves as self-funded plans. Counsel for the insured and capitated plan subclass do not agree that this latter amount derives from the efforts of counsel for the Self-Funded Plan Subclass, and contend that they would have reclassified improperly identified class members as insured plans without intervention by counsel for the Self-Funded Plan Subclass.

Since December 2003, counsel for the Self-Funded Plan Subclass have, without any compensation or reimbursement whatsoever, jointly expended approximately 1,900 attorneys’ hours and advanced approximately \$35,000 of their own money in unreimbursed costs successfully prosecuting the Objectors’ position on behalf of the Self-Funded Plan Subclass. Thus, subclass counsel intends to file with the District Court an application for attorneys’ fees in an amount not to exceed \$1.5 million and reimbursement of all documented out-of-pocket costs to be paid from the increase to the Self-Funded Plan Subclass’s share of the settlement proceeds. The Coleman Firm and the Pavalon Firm have agreed that each will evenly split any fees approved by the Court between themselves. These firms have no other fee-sharing agreements. If the application of counsel for the Self-Funded Plan Subclass is approved by

the Court, the award will cause the total counsel fees awarded in this class action to exceed, by as much as 3.5%, the cap on attorneys' fees of 30% of the recovery provided in the original settlement agreement and approved by the Court of Appeals. Fees approved in excess of the 30% cap will be paid from the increased recovery to the Self-Funded Subclass and will result in the Self-Funded Subclass paying a greater percentage of its recovery in attorneys' fees than the Insured and Capitated Plan Subclass. The purpose of this Notice is to advise you of the Self-Funded Subclass counsel's intent to file a fee application.

### **INSTRUCTIONS**

YOU NEED NOT TAKE ANY ACTION IN RESPONSE TO THIS NOTICE. You have already returned a completed Medco ERISA Settlement Identification Form in 2004 and you do not need to do anything else to receive the increased benefits to which you are entitled under the amended terms of the settlement.

You do, however, have a right to object to the application for attorneys' fees and reimbursement of out-of-pocket costs which was filed by counsel for the Self-Funded Plan Subclass on September 4, 2009 ("Fee Application"). If you wish to object to the Fee Application, you must file a written objection with the Clerk of the Court, United States District Court for the Southern District of New York; 300 Quarropas Street, White Plains, New York 10601 *no later than September 28, 2009* and simultaneously serve copies of your objection by mail on counsel to Medco (James P. Tallon, Shearman & Sterling LLP, 599 Lexington Avenue, New York, New York 10022), counsel for the insured plans (Karin E. Fisch, Abbey Spanier Rodd & Abrams, LLP, 212 East 39<sup>th</sup> Street, New York, New York 10016 and Edward Normand, Boies, Schiller & Flexner, LLP, 333 Main Street, Armonk, New York 10504), and counsel for the Self-Funded Plan Subclass (Kenneth P. Ross, Coleman Law Firm, 77 West Wacker Drive, Suite 4800, Chicago, Illinois, 60601 and Eugene I. Pavalon, Pavalon Gifford & Laatsch, Two North LaSalle Street, Suite 1600, Chicago, Illinois, 60602) *no later than September 28, 2009*.

Any objection must be in the form of a written statement from a member of the Self-Funded Plan Subclass and must set forth: (1) the caption of this case; (2) the objector's name; (3) a statement as to whether the subclass member intends to appear at the Fee Application Hearing; (4) a statement of the specific basis for the objection, including identification of all papers the objector intends to rely on at the hearing; (5) the names of all witnesses the subclass member intends to call at the Fee Application Hearing; (6) the objector's current address and telephone number; (7) the objector's signature or that of his or her authorized representative; (8) verification that the objector is a member of the Self-Funded Plan Subclass. If you do not appear at the Fee Application Hearing, the Court will read and consider your objection based on your written submission.

### **HEARING ON THE FEE APPLICATION**

The Court will set a date and time for a hearing on the Fee Application. Any objectors or other member of the Self-Funded Plan Subclass who expresses interest in attending the Fee Application hearing will be notified of the date, time and location of the hearing.

At this hearing, the Court will determine what fee and reimbursement of out-of-pocket costs will be awarded to counsel for the Self-Funded Plan Subclass. No aspect of the settlement other than the Fee Application will be considered by the Court at this hearing.

### **ADDITIONAL INFORMATION**

Copies of documents relevant to the Fee Application, including the Fee Application, First Notice, the Second Amended Settlement, the decision of the Second Circuit, and the District Court's June 26, 2009 Memorandum Decision and Order, will be available on the Internet at [www.erisasettlement.com](http://www.erisasettlement.com).

The pleadings and other records in the lawsuit also may be examined at any time during regular business hours at the Office of the Clerk of the United States District Court for the Southern District of New York.

If you need additional information, you may contact counsel for the self-funded plans by writing to them at the addresses listed above.

**YOU SHOULD NOT CALL OR WRITE TO THE CLERK OF THE COURT.**

Dated: September 4, 2009

MEDCO ERISA SETTLEMENT  
C/O COMPLETE CLAIM SOLUTIONS, LLC  
P.O. BOX 24612  
WEST PALM BEACH, FL 33416

**IMPORTANT COURT DOCUMENT**