

## Part III - Administrative, Procedural, and Miscellaneous

### Request for Comments on Requirements Prohibiting Discrimination in Favor of Highly Compensated Individuals in Insured Group Health Plans

Notice 2010-63

#### **PURPOSE**

This notice invites public comments concerning the application of rules prohibiting insured group health plans from discriminating in favor of highly compensated individuals. The United States Department of Labor and the United States Department of Health and Human Services have reviewed this notice and have advised the Department of the Treasury and the Internal Revenue Service (IRS) that they agree with it.

#### **I. BACKGROUND**

The Patient Protection and Affordable Care Act (the Affordable Care Act), Pub. L. 111-148, was enacted on March 23, 2010; the Health Care and Education Reconciliation Act (the Reconciliation Act), Pub. L. 111-152, was enacted on March 30, 2010. The Affordable Care Act and the Reconciliation Act reorganize, amend, and add to the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The Affordable Care Act adds section 9815(a)(1) to the Internal Revenue Code and section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) to incorporate the provisions of part A of title XXVII of the PHS Act into the Code and ERISA, and make them applicable to group health plans, and health insurance issuers providing health insurance coverage in connection with group health plans.

Section 10101(d) of the Affordable Care Act adds section 2716 to the PHS Act. Section 2716 of the PHS Act provides that a group health plan (other than a self-insured plan) must satisfy the requirements of section 105(h)(2) of the Code; that rules similar to the rules of section 105 in paragraphs (h)(3) (nondiscriminatory eligibility classification), (h)(4) (nondiscriminatory benefits), and (h)(8) (certain controlled groups) apply; and that the term “highly compensated individual” has the meaning given by section 105(h)(5). These requirements for insured group health plans are effective for plan years beginning on or after September 23, 2010. New section 9815 of the Code incorporates by reference the requirements of section 2716 of the PHS Act into chapter 100 of the Code. Section 4980D of the Code provides that group health plans that fail to satisfy the requirements of chapter 100 are subject to an excise tax.

Section 105(h)(1) of the Code provides that the exclusion in section 105(b), which generally excludes from gross income amounts paid through employer-sponsored health care coverage, does not apply to amounts paid to a highly compensated individual under a self-insured medical reimbursement plan that does not satisfy the requirements of section 105(h)(2) for a plan year, to the extent the amounts constitute an excess reimbursement of the highly compensated individual. Section 105(h)(2) provides that a self-insured medical reimbursement plan satisfies the requirements of that section only if (1) the plan does not discriminate in favor of highly compensated individuals as to eligibility to participate and (2) the benefits provided under the plan do not discriminate in favor of participants who are highly compensated individuals. Treasury Regulation §1.105-11 provides guidance on the application of section 105(h).

## **II. APPLICATION OF THE NONDISCRIMINATION RULES IN CODE SECTION 105(h)(2) TO INSURED GROUP HEALTH PLANS**

PHS Act section 2716 incorporates the substantive nondiscrimination requirements of Code section 105(h) (but not the taxes on highly compensated individuals in section 105(h)(1)) and applies them to insured group health plans. An insured group health plan failing to comply with the nondiscrimination requirements of Code section 105(h) is subject to the taxes, remedies, and penalties that generally apply for a plan failing to comply with the requirements of chapter 100 of the Code (generally, an excise tax of \$100 per day per individual discriminated against for each day the plan does not comply with the requirement), part 7 of ERISA (a civil action to enjoin a noncompliant act or practice or for appropriate equitable relief), or title XXVII of the PHS Act (civil money penalties of \$100 per day per individual discriminated against for each day the plan does not comply with the requirement). Thus, if a self-insured plan fails to comply with Code section 105(h), highly compensated individuals lose a tax benefit; if an insured group health plan fails to comply with Code section 105(h), the plan is subject to a civil action to compel it to provide nondiscriminatory benefits and the plan or plan sponsor is subject to an excise tax or civil money penalty of \$100 per day per individual discriminated against.

For determining the application of PHS Act section 2716 to grandfathered health plans, see 26 CFR 54.9815-1251T, 29 CFR 2590.715-1251, and 45 CFR 147.140 (providing that the rules prohibiting discrimination in favor of highly compensated individuals by insured group health plans do not apply to grandfathered health plans). The rules of section 105(h) of the Code continue to apply to any self-insured medical reimbursement plan regardless of whether the plan is a grandfathered health plan.

### **III. REQUEST FOR COMMENTS**

The final regulations under section 105(h) of the Code,<sup>1</sup> prohibiting discrimination in favor of highly compensated individuals under self-insured medical expense reimbursement

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<sup>1</sup> 26 CFR 1.105-11.

plans, were issued in 1981. The Department of the Treasury and the IRS are considering issuing guidance on the extension, through section 2716 of the PHS Act and new section 9815 of the Code, of the requirements of section 105(h)(2) to insured group health plans. The Department of the Treasury and the IRS request comments on what additional guidance relating to the application of section 105(h)(2) would be helpful with respect to insured group health plans.

Date: Comments must be submitted by November 4, 2010.

Addresses: Comments, identified by “Notice 2010-63”, may be sent by one of the following methods:

- Electronic: Send to the following e-mail address:  
*Notice.Comments@irs.counsel.treas.gov*. Include “Notice 2010-63” in the subject line.
- Mail: CC:PA:LPD:PR (Notice 2010-63), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.
- Hand or courier delivery: Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (Notice 2010-63), Courier’s Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington DC 20224.

All submissions will be open to public inspection and copying in room 1621, 1111 Constitution Avenue, NW, Washington, DC from 9 a.m. to 4 p.m.

#### **IV. DRAFTING INFORMATION**

The principal author of this notice is Karen Levin of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Ms. Levin at (202) 622-6080 (not a toll-free call).