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## Notice 2011-1

### I. PURPOSE

This notice addresses the timing of the application of the Affordable Care Act provisions prohibiting insured group health plans from discriminating in favor of highly compensated individuals.

### II. 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, Pub. L. 111-152, was enacted on March 30, 2010. The Affordable Care Act adds § 9815 (a) (1) to the Code and § 715 (a) (1) to the Employee Retirement Income Security Act (ERISA) to incorporate the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) into the Code and ERISA.

Section 10101 (d) of the Affordable Care Act adds § 2716 to the PHS Act. PHS Act § 2716 (§ 2716) provides that a group health plan (other than a self-insured plan) must satisfy the requirements of § 105 (h) (2) of the Code and that "rules similar to the rules contained in paragraphs (3) [nondiscriminatory eligibility classification], (4) [\*2] [nondiscriminatory benefits], and (8) [certain controlled groups] of § 105 (h) of such Code shall apply." Section 2716 also provides that the term "highly compensated individual" has the meaning given by § 105 (h) (5). Section 2716 is included in the PHS Act sections incorporated by § 9815 of the Code into chapter 100 of the Code.

Section 2716 references the substantive nondiscrimination requirements of § 105 (h) of the Code (but not the taxes on highly compensated individuals in § 105 (h) (1)) and applies them to insured group health plans. An insured group health plan that fails to comply with these rules may be subject to: (1) an excise tax that generally applies for a plan failing to comply with the requirements of chapter 100 of the Code (generally, an excise tax under § 4980D of \$100 for each day in the noncompliance period with respect to each individual to whom such failure relates, limited in the case of failures due to reasonable cause and not applicable in limited circumstances, such as where a failure is due to reasonable cause and not to willful neglect and is corrected within a specified time period), (2) in the case of a non-Federal governmental group health plan, civil [\*3] money penalties under title XXVII of the PHS Act (generally up to \$100 per day per individual for each day the plan does not comply with the requirement, also not applicable in limited circumstances), or (3) a civil action to enjoin a noncompliant act or practice or for other appropriate equitable relief under part 5 of ERISA. Thus, if a self-insured plan fails to comply with § 105 (h), highly compensated individuals lose a tax benefit; if an insured group health plan fails to comply with § 2716, the plan or plan sponsor may be subject to an excise tax, civil money penalty, or a civil action to compel it to provide nondiscriminatory benefits.

Section 2716 does not apply to grandfathered health plans. See §§ 54.9815-1251T, 29 CFR 2590.715-1251, and 45 CFR 147.140. The rules of § 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. TIMING OF APPLICATION OF § 2716

*Notice 2010-63, 2010-41 I.R.B. 420*, issued on September 20, 2010, requested public comments on guidance needed regarding § 2716. Comments raised fundamental concerns about plan sponsors' ability to comply with § 2716 without regulatory [\*4] guidance, including, in particular, guidance regarding the meaning of § 2716 (b) (1), which provides that "[r]ules *similar to* the rules contained in *paragraphs (3), (4) and (8) of section 105 (h)* of such Code shall apply" [emphasis added] to insured plans. The § 2716 (b) (1) reference to rules "similar to" means that guidance must specify in what respects insured plans are subject to the same statutory provisions that apply to self-insured plans under § 105 (h) (3), (4) and (8) and in what respects insured plans are subject to rules reflecting a different (although "similar") application of those statutory provisions. Because regulatory guidance is essential to the operation of the statutory provisions, the Treasury Department and the IRS, as well as the Departments of Labor and Health and Human Services (collectively, the Departments), have determined that compliance with § 2716 should not be required (and thus, any sanctions for failure to comply do not apply) until after regulations or other administrative guidance of general applicability has been issued under § 2716. In order to provide insured group health plan sponsors time to implement any changes required as a result of the [\*5] regulations or other guidance, the Departments anticipate that the guidance will not apply until plan years beginning a specified period after issuance. Before the beginning of those plan years, an insured group health plan sponsor will not be required to file IRS Form 8928 with respect to excise taxes resulting from the incorporation of PHS Act § 2716 into § 9815 of the Code.

The United States Department of Labor and the United States Department of Health and Human Services have reviewed this Notice and have requested the Department of the Treasury and the IRS to state that the Departments of Labor and Health and Human Services agree with the Notice.

### IV. REQUEST FOR COMMENTS

As noted, comments submitted in response to *Notice 2010-63* maintained that, without regulations or other administrative guidance under § 2716, plan sponsors are uncertain how to apply the nondiscrimination provisions. In addition to what is meant by rules "similar to," comments raised a number of other issues regarding the application of § 2716. Comments suggested that guidance address the application of § 2716 before plan years beginning in 2014 (when the State Exchanges, employer responsibility and penalty provisions, [\*6] and related provisions take effect) and also in and after 2014. The Departments recognize that the guidance under § 2716 must take into consideration the Exchange operations and individual and plan sponsor requirements that go into effect after 2013.

The Departments anticipate issuing guidance under § 2716. As a more specific follow-up to the public comments provided in response to *Notice 2010-63*, additional public comments are requested on the issues that should be addressed in that guidance and on the suggested resolution of those issues, including the following:

1. The basis on which the determination of what constitutes nondiscriminatory benefits under § 105 (h) (4) should be made and what is included in the term "benefits." For example, is the rate of employer contributions toward the cost of coverage (or the required percentage or amount of employee contributions) or the duration of an eligibility waiting period treated as a "benefit" that must be provided on a nondiscriminatory basis?
2. The suggestion made in previous comments that the Departments have the authority to provide for an alternative method of compliance with § 2716 that would involve only an availability of coverage [\*7] test.
3. The application of § 2716 to insured group health plans beginning in 2014 when the health insurance exchanges become operational and the employer responsibility provisions (§ 4980H of the Code), the premium tax credit (§ 36B of the Code), and the individual responsibility provisions (§ 5000A of the Code) and related Affordable Care Act provisions are effective.
4. The suggestion in previous comments that the nondiscriminatory classification provision in § 105 (h) (3) (A) (iii) could be used as a basis to permit an insured health care plan to use a highly compensated employee definition in § 414 (q) of the Code for purposes of determining the plan's nondiscriminatory classification.
5. The suggestion in previous comments that the nondiscrimination standards should be applied separately to employers sponsoring insured group health plans in distinct geographic locations and on whether application of the standards on a geographic basis should be permissive or mandatory.
6. The suggestion in previous comments that the guidance should provide for "safe harbor" plan designs. Specifically, comments are requested on potential safe and unsafe harbor designs that are consistent with the substantive [\*8] requirements of §105 (h).
7. Whether employers should be permitted to aggregate different, but substantially similar, coverage options for purposes of § 2716 and, if so, the basis upon which a "substantially similar" determination could be made.
8. The application of the nondiscrimination rules to "expatriate" and "inpatriate" coverage.
9. The application of the nondiscrimination rules to multiple employer plans.
10. The suggestion in previous comments that coverage provided to a "highly compensated individual" (as defined in § 105 (h) (5)) on an after-tax basis should be disregarded in applying § 2716.
11. The treatment of employees who voluntarily waive employer coverage in favor of other coverage.

12. Potential transition rules following a merger, acquisition, or other corporate transaction.
13. The application of the sanctions for noncompliance with § 2716.

Comments must be submitted by March 11, 2011. All materials submitted will be shared with the Departments of Labor and Health and Human Services and will be available for public inspection and copying. Comments should be submitted to Internal Revenue Service, CC:PA:LPD:RU (Notice 2011-1), Room 5203, PO Box 7604, Ben Franklin Station, Washington, [\*9] DC 20224. Submissions may also be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Courier's Desk, 1111 Constitution Avenue, NW, Washington, DC 20224, Attn: CC:PA:LPD:RU (Notice 2011-1), Room 5203. Submissions may also be sent electronically via the internet to the following e-mail address: Notice.Comments@irs.counsel.treas.gov. Include the notice number (Notice 2011-1) in the subject line.

#### V. DRAFTING INFORMATION

The principal author of this notice is Jamie Dvoretzky of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), though other Treasury Department and IRS officials participated in its development. For further information on the submission of comments or the comments submitted, contact ReginaJohnson at (202) 622-7180 (not a toll-free number). For further information on all other provisions of this notice, contact Ms. Dvoretzky at (202) 622-6060 (not a toll-free number).