

December 29, 2010

IRS Issues Guidance Delaying Enforcement of Nondiscrimination Rules for Insured Health Plans

On December 23, 2010, the IRS issued Notice 2011-1 regarding the application of the nondiscrimination rules under Internal Revenue Code (Code) section 105(h) to non-grandfathered insured group health plans pursuant to the Patient Protection and Affordable Care Act (PPACA). According to the Notice, the IRS will not require insured plans to comply with nondiscrimination rules until further guidance has been issued. Furthermore, to allow insured plans adequate time to comply with the rules, it is likely that future guidance will not apply until plan years beginning at some time after the date that the guidance is issued. Thus, plan sponsors will not be required to pay excise taxes associated with noncompliance with the nondiscrimination requirements until then. The Notice also requested comments on a number of issues that may be addressed in future guidance.

Background

Code section 105(h), which applies only to self-insured medical expense reimbursement plans, includes two nondiscrimination tests – an eligibility test and a benefits test – that are used to determine if a plan disproportionately favors highly compensated individuals. However, because the 1981 final regulations under section 105(h) were complicated and difficult for plan sponsors to administer, the IRS has taken a “no-ruling” position with respect to the application of the rules to specific arrangements, and enforcement has been limited.

PPACA amended part A of Title XXVII of the Public Health Services Act (PHSA) to add a number of insurance market reforms applicable to group health plans. Among the new reforms enacted by PPACA is section 2716 of the PHSA, which provides that a group health plan that is an insured plan must satisfy the requirements of Code section 105(h)(2), and that rules “similar to” the rules in sections 105(h)(3) (relating to nondiscrimination with respect to eligibility), 105(h)(4) (relating to nondiscrimination with respect to benefits), and 105(h)(8) (applying certain controlled group rules) will apply to insured group health plans. Pursuant to PPACA, PHSA section 2716 is effective for non-grandfathered insured group health plans on the first day of the first plan year beginning on or after September 23, 2010. Noncompliant plans are subject to an excise tax of \$100 per day, per affected individual.

In September 2010, the IRS issued Notice 2010-63, requesting public comments on future guidance regarding the application of the section 105(h) nondiscrimination rules to insured plans. In response, the IRS received comments noting the uncertainty surrounding the section 105(h) rules in general and questioning how the statutory requirement to apply “similar” rules could be implemented without regulatory guidance on which rules for insured plans should be the same as, or should differ from, the rules for self-insured plans under Code section 105(h).

Time for Compliance

In response to the comments received pursuant to Notice 2010-63, the IRS, along with the Treasury Department, the Department of Labor (DOL), and the Department of Health and Human Services (HHS) (collectively, the Departments) determined that insured plans would not need to comply with nondiscrimination rules until guidance setting forth the standards for insured plans is released. In addition, no excise tax under the Code will apply until the additional guidance has been issued. The

© 2010 Sutherland Asbill & Brennan LLP. All Rights Reserved.

This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Sutherland and the recipient.

Notice says that DOL and HHS reviewed the Notice and agree with it, which presumably indicates that neither DOL nor HHS will attempt to impose sanctions on an insured plan for failure to meet nondiscrimination requirements until after the substantive guidance on the applicable nondiscrimination standards has been issued. The Notice further says that the Departments anticipate that future guidance will not apply until plan years beginning a specified period after issuance. Prior to that time, plan sponsors will not be subject to excise taxes for failing to comply with PHSA section 2716. Absent this Notice, most non-grandfathered insured group health plans would have been required to comply with the nondiscrimination rules as of January 1, 2011.

Comments

As a more specific follow-up to the request for comments under Notice 2010-63, the IRS requested additional comments on issues that should be addressed in future guidance under PHSA section 2716, including, among others, the following issues:

- Whether the rate of employer contributions should be tested as a nondiscriminatory benefit;
- Whether application of nondiscrimination standards should be conducted on a geographic basis;
- Guidance on potential “safe harbor” plan designs; and
- The potential aggregation of substantially similar coverage options for testing purposes.

Comments are due by March 11, 2011.



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Daniel M. Buchner	202.383.0869	daniel.buchner@sutherland.com
Adam B. Cohen	202.383.0167	adam.cohen@sutherland.com
Jamey A. Medlin	404.853.8198	jamey.medlin@sutherland.com
Alice Murtos	404.853.8410	alice.murtos@sutherland.com
Joanna G. Myers	202.383.0237	joanna.myers@sutherland.com
Robert J. Neis	404.853.8270	robert.neis@sutherland.com
Vanessa A. Scott	202.383.0215	vanessa.scott@sutherland.com
W. Mark Smith	202.383.0221	mark.smith@sutherland.com
William J. Walderman	202.383.0243	william.walderman@sutherland.com
Carol A. Weiser	202.383.0728	carol.weiser@sutherland.com