

# Compliance Alert

## 105(h) Rules for Fully-Insured Plans Delayed

Alert Date: 12/23/10

In a welcome development for employers who sponsor fully-insured health plans, the implementation of Section 105(h) non-discrimination rules contained in the Patient Protection and Affordable Care Act (PPACA), as applied to fully-insured plans, has been delayed. The IRS has released Notice 2011-1, which delays the application of the 105(h) non-discrimination rules to fully insured plans until after the release of regulatory guidance. A copy of the notice can be found on the IRS website at <http://www.irs.gov/pub/irs-drop/n-11-01.pdf>.

### Guidance Needed for Compliance

In the notice the IRS recognized that there were *“fundamental concerns about plan sponsors’ ability to comply with § 2716 without regulatory guidance”*. Particularly, the PPACA’s reference to the requirement that fully insured plans must comply with rules *“similar to the rules contained in...section 105(h).”* The IRS goes on to state that *“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...and in what respects insured plans are subject to rules reflecting a different (although “similar”) application of those statutory provisions.”*

### Delayed Effective Date

Due to this need for regulatory guidance, the IRS, DOL, and HHS, have determined that a fully-insured plan’s compliance with the 105(h) non-discrimination rules will not be required until after guidance has been issued. The IRS has also opened an additional comment period regarding applicability of these rules through March 11th, 2011. It is expected that regulatory guidance will be released soon after the close of the comment period. The rules would then be effective for plan years that begin sometime (yet to be determined) after the guidance is released.

In effect this means the earliest that fully-insured plans would be subject to the rules would be plan years beginning April 1, 2011. However, considering the time it may take to release guidance, and the IRS comment that the rules would not go into effect until a *“specified period after guidance is released”*, it is likely that the actual effective date will be significantly later. Regardless of the date guidance is issued, the earliest that the rules could apply to a plan with a January 1<sup>st</sup> plan year, would be January 1, 2012.

### Time to Plan Ahead

As reported earlier, the penalty for non-compliance with the rules for fully-insured plans will be the imposition of an excise tax of up to \$100 per day per individual discriminated against. This delay will give employers additional time to plan their benefit design strategies, but does not change the fact that eventually many employers will need to make changes to their plans to comply with the 105(h) non-discrimination rules.

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