



# NEW YORK STATE BAR ASSOCIATION

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## TAX SECTION

2011-2012

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March 30, 2011

The Honorable Michael F. Mundaca  
Assistant Secretary (Tax Policy)  
Department of the Treasury  
1500 Pennsylvania Avenue, N.W.  
Washington, DC 20220

The Honorable Douglas H. Shulman  
Commissioner  
Internal Revenue Service  
111 Constitution Avenue, NW  
Washington, DC 20224

The Honorable William J. Wilkins  
Chief Counsel  
Internal Revenue Service  
111 Constitution Avenue, NW  
Washington, DC 20224

Re: Report on Certain Continued Coverage Under Insured Group Health Plans in  
Light of the PPACA Nondiscrimination Rules and IRS Notice 2011-1

Dear Sirs:

I am pleased to submit the New York State Bar Association Tax Section's Report 1236 commenting on certain aspects of Section 2716 of the Public Health Service Act of 1944, as amended (the "PHSA"). The Patient Protection and Affordable Care Act of 2010, as amended ("PPACA") added Section 2716 to the PHSA (the "PPACA Nondiscrimination Rules"). Section 2716 of the PHSA generally provides that if a group health plan fails to comply with certain nondiscrimination requirements, the plan sponsor (or the plan itself) may be subject to an excise tax under Section 4980D of the Code and that such provision of discriminatory benefits may be a violation of substantive law.

This PPACA Nondiscrimination Rules apply to group health plans other than self-insured plans, and provide that such plans are subject to nondiscrimination rules “similar” to the rules under Section 105(h) of the Internal Revenue Code of 1986, as amended (the “Code”). Section 105 of the Code generally provides that if an employee is reimbursed by his/her employer’s accident or health plan for amounts paid by the employee for medical care, the employee may exclude the reimbursement from income, and subsection (h) of Section 105 prevents this tax benefit from being available on a discriminatory basis to certain highly compensated individuals.

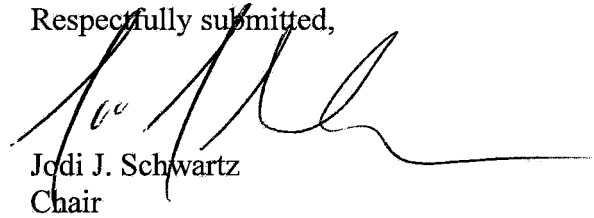
Internal Revenue Service (“IRS”) Notice 2010-63 requested comments on how the PPACA Nondiscrimination Rule should be implemented. Subsequently, IRS Notice 2011-1 requested further comments on the implementation of Section 2716 of the PHSAs, including on whether coverage provided to a “highly compensated individual” on an after-tax basis should be disregarded in applying Section 2716 of the PHSAs, and also delayed enforcement of the new provisions until after regulations are issued.

As described in more detail in the Report, we provide comments on the potential application of Section 2716 of the PHSAs to employees who have terminated their employment, and offer recommendations relating to such application. In summary, in the Report:

1. we recommend that the PPACA Nondiscrimination Rules should be interpreted and implemented such that, when a former employee who is eligible for coverage under rules initially added by the Consolidated Omnibus Reconciliation Act of 1985 (“COBRA”) (or is eligible under a plan to continue coverage under provisions that satisfy the PPACA Nondiscrimination Rules with respect to the continuation) elects continued coverage, and the employer pays or reimburses the former employee for the COBRA or other premium, in whole or in part, (i) the employer’s payment or reimbursement of the premiums is not considered to involve discriminatory coverage or to be a discriminatory benefit under the PPACA Nondiscrimination Rules, and (ii) the employee is taxed in respect of the employer-paid or otherwise reimbursed premium;
2. we request that guidance be provided as to whether or not providing continuing coverage to terminated employees who are no longer eligible for continuation coverage under generally applicable plan provisions for COBRA (or other continued) coverage on an ad hoc, non-uniform or discriminatory basis is permissible, and, if it is permissible, what if any conditions must be met (for example, treating the cost of the coverage as taxable compensation to the former employee); and
3. we recommend that if non-uniform post-employment coverage or benefits are not ultimately permitted, then grandfathering and transitional rules should be adopted.

We appreciate your consideration of our comments. Please let us know if you would like to discuss these matters further or if we can assist you in any other way.

Respectfully submitted,



Jodi J. Schwartz  
Chair

Enclosure

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