DECEMBER 22, 2010

Insured Nondiscrimination Rule Compliance Delayed

This evening the IRS released Notice 2011-1, exempting insured plans from the new nondiscrimination rules in the Affordable Care Act (and related penalties for non-compliance) until regulations are issued. Further, the notice provides that the regulations are expected to apply to plan years beginning after issuance. Meaning that for calendar year plans, the earliest the nondiscrimination rules should apply is January 1, 2012. It could even be later than that depending on when the IRS issues the nondiscrimination regulations, which is currently expected in Q2 or Q3 of 2011. (The new nondiscrimination rules do not apply to insured grandfathered plans.)

By way of background, the Affordable Care Act provides that a group health plan (other than a self-insured plan) must satisfy certain nondiscrimination rules and that rules similar to the rules contained in Section 105(h) of the Code shall apply. The Affordable Care Act provides this new nondiscrimination rule to be effective as of January 1, 2011. An insured group health plan that fails to comply with these rules may be subject to an excise tax of $100 per day per participant, subject to certain limitations and maximums. Because the Affordable Care Act provides that rules “similar to” the Code Section 105(h) rules apply, the IRS notes that the IRS must issue guidance specifying in what respects insured plans are subject to the same statutory provisions that apply to self-insured plans under Code Section 105(h), and in what respects insured plans are subject to rules reflecting a different (although “similar”) application of those statutory provisions.

The IRS and Treasury in recent months have held meetings with certain interest groups, who were concerned about the fact that a penalty would apply without any guidance on how to avoid the penalty. This Notice is certainly a response to these concerns and allows plan sponsors to continue to sponsor their insured plans for the time being without fear of the Affordable Care Act nondiscrimination penalty.