

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

March 5, 2013

The Honorable Jack Lew
Secretary of the Treasury
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Steve Miller
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224
Submitted via LegAffairs@do.treas.gov

**Re: Internal Revenue Service Notice 2011-1: Affordable Care Act Non-discrimination Provisions
Applicable to Insured Group Health Plans**

Dear Secretary Lew and Acting Commissioner Miller:

Prior to the enactment of the Patient Protection and Affordable Care Act,¹ § 105 (h) of the Internal Revenue Code (IRC) prohibited self-funded health insurance plans from discriminating by offering higher compensated employees more generous non-taxable health insurance coverage than other employees. The health care law extended similar non-discrimination provisions to employer-sponsored fully insured group health insurance plans.²

As you know, on December 22, 2010, the Internal Revenue Service (IRS) issued Notice 2011-1,³ delaying⁴ the effective date of § 2716 of the health care law,⁵ which extends the IRC § 105(h) non-discrimination provisions⁶ to fully insured group plans. The delay is effective while the Department of

¹ Pub. L. No. 111-148, 124 Stat. 119-1025 (2010) [hereinafter "health care law" or "the law"].

² Hereinafter "fully insured group plans."

³ INTERNAL REVENUE SERVICE, NOTICE 2011-1, available at <http://www.irs.gov/pub/irs-drop/n-11-01.pdf>.

⁴ Under § 2716 of the Patient Protection and Affordable Care Act, the Internal Revenue Code's § 105(h) non-discrimination provisions were to be extended to fully insured group plans beginning on September 23, 2010.

⁵ Pub. L. No. 111-148, 124 Stat. 119-1025 (2010).

⁶ Pub. L. No. 111-148, § 2716 (2010).

the Treasury, Department of Labor and Department of Health and Human Services promulgate regulations on how the IRC's provisions will apply to fully insured group plans. The Committee has heard from associations representing small employers who are very concerned that unless existing fully insured group plans are grandfathered, the operation of the new non-discrimination provisions may result in a small business's health plan being found to be discriminatory and the business to incur substantial penalties.

For many years, it has been customary for companies to provide their officers with non-taxable health insurance as part of their compensation and benefits package. Such plans sometimes require lower premiums from these employees than others. Small businesses need strong leadership if they want to succeed, and they often do not have an established reputation. Superior benefits are one tool that small firms can employ to attract and retain talented executives.

The health care law does not define "high wage employee," nor does the health care law or the IRC provide an exception from the application of the new non-discrimination provisions for small employers. However, without grandfathering or a small employer exemption, the application of the new provisions may have severe consequences. Small employers with fully insured group plans who fail to comply may be subject to penalties of \$100 per day per employee⁷ who is deemed discriminated against. Because most small businesses offer insured plans, a violation could prohibit small employers from offering competitive benefits for their executives.

I ask that you, the Secretary of Labor and Secretary of Health and Human Services consider the viability of small businesses, our recovering economy's best job creators, when drafting the regulations on how the non-discrimination rules will be applied.

Sincerely,



Sam Graves
Chairman

⁷ Pub. L. No. 111-148, § 2716 (2010).