plan sponsor requirements that go into effect after 2013.

The Departments anticipate issuing guidance under § 2716. As a more specific follow-up to the public comments provided in response to Notice 2010–63, additional public comments are requested on the issues that should be addressed in that guidance and on the suggested resolution of those issues, including the following:

1. The basis on which the determination of what constitutes nondiscriminatory benefits under § 105(h)(4) should be made and what is included in the term "benefits." For example, is the rate of employer contributions toward the cost of coverage (or the required percentage or amount of employee contributions) or the duration of an eligibility waiting period treated as a "benefit" that must be provided on a nondiscriminatory basis?

2. The suggestion made in previous comments that the Departments have the authority to provide for an alternative method of compliance with § 2716 that would involve only an availability of coverage test.

3. The application of § 2716 to insured group health plans beginning in 2014 when the health insurance exchanges become operational and the employer responsibility provisions (§ 4980H of the Code), the premium tax credit (§ 36B of the Code), and the individual responsibility provisions (§ 5000A of the Code) and related Affordable Care Act provisions are effective.

4. The suggestion in previous comments that the nondiscriminatory classification provision in § 105(h)(3)(A)(iii) could be used as a basis to permit an insured health care plan to use a highly compensated employee definition in § 414(q) of the Code for purposes of determining the plan's nondiscriminatory classification.

5. The suggestion in previous comments that the nondiscrimination standards should be applied separately to employers sponsoring insured group health plans in distinct geographic locations and on whether application of the standards on a geographic basis should be permissive or mandatory.

6. The suggestion in previous comments that the guidance should provide for "safe harbor" plan designs. Specifically, comments are requested on potential safe and unsafe harbor designs that are consistent with the substantive requirements of § 105(h).

7. Whether employers should be permitted to aggregate different, but substantially similar, coverage options for purposes of § 2716 and, if so, the basis upon which a "substantially similar" determination could be made.

8. The application of the nondiscrimination rules to "expatriate" and "inpatriate" coverage.

9. The application of the nondiscrimination rules to multiple employer plans.

10. The suggestion in previous comments that coverage provided to a "highly compensated individual" (as defined in § 105(h)(5)) on an after-tax basis should be disregarded in applying § 2716.

11. The treatment of employees who voluntarily waive employer coverage in favor of other coverage.

12. Potential transition rules following a merger, acquisition, or other corporate transaction.

13. The application of the sanctions for noncompliance with § 2716.

Comments must be submitted by March 11, 2011. All materials submitted will be shared with the Departments of Labor and Health and Human Services and will be available for public inspection and copying. Comments should be submitted to Internal Revenue Service, CC:PA:LPD:RU (Notice 2011–1), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20224. Submissions may also be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Courier's Desk, 1111 Constitution Avenue, NW, Washington, DC 20224, Attn: CC:PA:LPD:RU (Notice 2011–1), Room 5203. Submissions may also be sent electronically via the internet to the following e-mail address: *Notice.Comments@irscounsel.treas.gov*. Include the notice number (Notice 2011–1) in the subject line.

V. DRAFTING INFORMATION

The principal author of this notice is Jamie Dvoretzky of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), though other Treasury Department and IRS officials participated in its development. For further information on the submission of comments or the comments submitted, contact Regina Johnson at (202) 622–7180 (not a toll-free number). For further information on all other provisions of this notice, contact Ms. Dvoretzky at (202) 622–6060 (not a toll-free number).

Guidance on the Application of Section 162(m)(6)

Notice 2011–2

I. PURPOSE

This notice provides guidance on the application of section 162(m)(6) of the Internal Revenue Code (Code). Section 162(m)(6) limits the allowable deduction for remuneration for services provided by individuals to certain health insurance providers. Section 162(m)(6) was added to the Code by section 9014 of the Patient Protection and Affordable Care Act (Public Law 111–148, 124 Stat. 119, 868 (2010)).

Section III of this notice provides guidance on certain issues the Treasury Department and the IRS have determined require immediate guidance. Section V requests comments as to the application of the provisions of this notice as well as all other aspects of the application of section 162(m)(6). The Treasury Department and the IRS anticipate that the guidance provided in this notice will be incorporated into future regulations issued under section 162(m)(6).

II. BACKGROUND

Section 162(m)(6) limits the allowable deduction to $500,000 for "applicable individual remuneration" and "deferred deduction remuneration" attributable to services performed by "applicable individuals" that is otherwise deductible by a "covered health insurance provider" in taxable years beginning after December 31, 2012.

Section 162(m)(6)(C)(i)(I) provides that for taxable years beginning after December 31, 2009, and before January 1, 2013, the term "covered health insurance provider" means any employer that is a health insurance issuer as defined in section 9832(b)(2) and which receives premiums from providing health insurance coverage (as defined in section 9832(b)(1)) ("pre–2013 covered health insurance provider"). For taxable years beginning after December 31, 2012, section 162(m)(6)(C)(i)(II) provides that the term "covered health insurance provider" means any employer that is a health insurance issuer as defined in section 9832(b)(2) and with respect to which not less than 25% of the gross premiums received from providing health insurance coverage (as defined in section 9832(b)(1)) are from minimum essential coverage (as defined in section 5000A(f)) ("post–2012 covered health insurance provider"). Section 162(m)(6)(C)(ii) provides that two or more persons who are treated as a single employer under section 414(b), (c), (m), or (o) are treated as a single employer for purposes of section 162(m)(6), except that in applying section 1563(a) for purposes of any such subsection, paragraphs (2) and (3) thereof are disregarded.

Section 162(m)(6) applies to applicable individual remuneration attributable to services performed in a "disqualified taxable year" beginning after December 31, 2012 that is otherwise deductible in such taxable year. Section 162(m)(6)(B) provides that a disqualified taxable year for any employer is any taxable year for which the employer is a covered health insurance provider. Section 162(m)(6)(D) provides that applicable individual remuneration for any disqualified taxable year is the aggregate amount otherwise allowable as a deduction for such taxable year for remuneration for services performed by such individual (whether or not during the taxable year), but does not include any deferred deduction remuneration with respect to services performed during the disqualified taxable year.

In addition, section 162(m)(6) applies to deferred deduction remuneration attributable to services performed in a disqualified taxable year beginning after December 31, 2009 that is otherwise deductible in a taxable year beginning after December 31, 2012. Section 162(m)(6)(E) provides that deferred deduction remuneration is compensation for services that an applicable individual performs during a disqualified taxable year but that is not deductible until a later taxable year (for example, nonqualified deferred compensation). In the case of deferred deduction remuneration attributable to services performed in a disqualified taxable year, the unused portion of the $500,000 limit (if any) for the taxable year in which the services to which the deferred deduction remuneration is attributable were performed is carried forward to the taxable year or years in which such compensation is otherwise deductible, and applied in calculating the allowable deduction with respect to such amount.

Section 162(m)(6)(F) provides that an applicable individual, with respect to any covered health insurance provider for any disqualified taxable year, is any individual (i) who is an officer, director, or employee in such taxable year, or (ii) who provides services for or on behalf of such covered health insurance provider during such taxable year.

III. GUIDANCE

A. Application of Deduction Limitation to Deferred Deduction Remuneration for 2010 through 2012 Taxable Years

The deduction limitation under section 162(m)(6) applies to applicable individual remuneration and deferred deduction remuneration attributable to services performed in a disqualified taxable year beginning after December 31, 2012 that is otherwise deductible by a covered health insurance provider in a taxable year beginning after December 31, 2012. In addition, the deduction limitation under section 162(m)(6) applies to deferred deduction remuneration attributable to services performed in a taxable year beginning after December 31, 2009 and before January 1, 2013 if (1) the employer was a pre–2013 covered health insurance provider for the taxable year in which the services were performed to which the deferred deduction remuneration is attributable, and (2) the employer is a post–2012 covered health insurance provider for the taxable year in which such deferred deduction remuneration is otherwise deductible.

The following examples illustrate this rule:

Example 1. Corporation A is a calendar year taxpayer. For 2010, 2011, and 2012, Corporation A is a pre–2013 covered health insurance provider. Corporation A is a post–2012 covered health insurance provider for all taxable years after 2012 because 25% or more of its gross premiums from health insurance coverage (as defined in section 9832(b)(1)) are from minimum essential coverage (as defined in section 5000A(f)). Corporation A is a covered health insurance provider for all taxable years. Accordingly, deferred deduction remuneration attributable to services performed in 2010, 2011, and 2012 is subject to the section 162(m)(6) deduction limitation in the taxable years after 2012 in which such amounts are otherwise deductible.

Example 2. Assume the same facts as in *Example 1*, except that for all taxable years after 2012, Corporation A remains a health insurance issuer (as defined in section 9832(b)(2)), but does not qualify as a post–2012 covered health insurance provider because less than 25% of its gross premiums from health insurance coverage (as defined in section 9832(b)(1)) are from minimum essential coverage (as defined in section 5000A(f)). For all taxable years beginning after 2012, Corporation A is not a covered health insurance provider. Accordingly, any deferred deduction remuneration attributable to services performed in 2010, 2011, and 2012 is not subject to the section 162(m)(6) deduction limitation in the taxable year in which such amounts are otherwise deductible.

Example 3. Assume the same facts as in *Example 1*, except that after its 2012 taxable year, Corporation A remains a health insurance issuer (as defined in section 9832(b)(2)), but does not qualify as a post–2012 covered health insurance provider for the 2013, 2014 and 2015 taxable years because less than 25% of its gross premiums from health insurance coverage (as defined in section 9832(b)(1)) are from minimum essential coverage (as defined in section 5000A(f)). However, for 2016 and subsequent taxable years, Corporation A qualifies as a post–2012 covered health insurance provider because 25% or more of its gross premiums from health insurance coverage (as defined in section 9832(b)(1)) are from minimum essential coverage (as defined in section 5000A(f)). Corporation A is a covered health insurance provider during its 2010, 2011, 2012, 2016 and subsequent taxable years. Accordingly, deferred deduction remuneration attributable to services performed in 2010, 2011, and 2012 that is otherwise deductible in 2016 and subsequent years is subject to the deduction limitation under section 162(m)(6) in the year in which such amounts are otherwise deductible. Any deferred deduction remuneration attributable to services performed in 2010, 2011, and

2012 that is otherwise deductible in 2013, 2014, or 2015 is not subject to the deduction limitation under section 162(m)(6) in the year in which such amounts are otherwise deductible. Any deferred compensation attributable to services performed in Corporation A's 2013 through 2015 taxable years is not subject to the deduction limitation under section 162(m)(6) for the taxable years in which such amounts are otherwise deductible.

Example 4: Assume the same facts as in *Example 1*, except that for its 2010, 2011, and 2012 taxable years, Corporation A is not a pre–2013 covered health insurance provider. However, Corporation A is a post–2012 covered health insurance provider for its 2013 taxable year and all subsequent years because 25% or more of its gross premiums from health insurance coverage (as defined in section 9832(b)(1)) are from minimum essential coverage (as defined in section 5000A(f)). Accordingly, any deferred compensation attributable to services performed in Corporation A's 2010, 2011, and 2012 taxable years is not subject to the deduction limitation under section 162(m)(6) for the taxable years in which such amounts are otherwise deductible.

B. *De Minimis* Rule

An employer (including an employer as determined in accordance with the aggregation rules under section 162(m)(6)(C)(ii)) will not be treated as a covered health insurance provider within the meaning of section 162(m)(6)(C)(i)(I) for a taxable year beginning after December 31, 2009 and before January 1, 2013 if the premiums received by the employer for providing health insurance coverage as defined in section 9832(b)(1) are less than 2% of the employer's gross revenues for that taxable year. For taxable years beginning after December 31, 2012, an employer will not be treated as a covered health insurance provider within the meaning of section 162(m)(6)(C)(i)(II) for a taxable year beginning after December 31, 2012 if the premiums received for providing health insurance coverage as defined in section 9832(b)(1) that are from providing minimum essential coverage (as defined in section 5000A(f)) for that taxable year are less than 2% of the employer's gross revenues for that taxable year.

The following example illustrates this rule:

Example. Corporations D and E are treated as a single employer under section 162(m)(6)(C)(ii). Corporations D and E are calendar year taxpayers. Corporation E does not receive any health insurance premiums within the meaning of section 9832(b)(1) for the 2010 taxable year. Corporation D receives health insurance premiums within the meaning of section 9832(b)(1) for the 2010 taxable year in an amount that is less than 2% of the combined gross revenues of D and E. Accordingly, Corporations D and E are not treated as a covered health insurance provider within the meaning of section 162(m)(6)(C) for the 2010 taxable year. Deferred compensation attributable to services performed in the 2010 taxable year that is otherwise deductible for taxable years after 2012 is not subject to the deduction limitation under section 162(m)(6).

C. Definition of Applicable Individual

Section 162(m)(6)(F) provides that an applicable individual, with respect to any covered health insurance provider for any disqualified taxable year, is any individual (i) who is an officer, director, or employee in such taxable year, or (ii) who provides services for or on behalf of such covered health insurance provider during such taxable year. For purposes of section 162(m)(6)(F), the term "applicable individual" for a taxable year does not include an independent contractor with respect to whom a compensation arrangement would not be subject to section 409A pursuant to Treasury Regulation §1.409A–1(f)(2) (generally excepting arrangements with independent contractors providing substantial services to multiple unrelated customers).

D. Certain Reinsurers Are Not Covered Health Insurance Providers

Solely for purposes of determining whether a taxpayer is a "covered health insurance provider" within the meaning of section 162(m)(6)(C), premiums received under an indemnity reinsurance contract are not treated as premiums from providing health insurance coverage.

IV. EFFECTIVE DATE

The guidance provided in section III of this notice is effective for taxable years beginning on or after January 1, 2010. The Treasury Department and the IRS anticipate incorporating this guidance into regulations. Any future guidance, including regulations, addressing the issues covered by this notice in a manner that would expand the coverage of section 162(m)(6), such as a modification of, or a restriction on, the application of the *de minimis* rule in section III.C, or broadening of the definition of an applicable individual under section III.D, will apply prospectively.

V. REQUEST FOR COMMENTS

The Treasury Department and the IRS request comments as to the application of this notice, as well as all aspects of the application of section 162(m)(6). Specifically, comments are requested on the application of the deduction limitation to remuneration for services performed for insurers who are captive or who provide reinsurance or stop loss insurance, and specifically with respect to stop loss insurance arrangements that effectively constitute a direct health insurance arrangement because the attachment point is so low. Comments are also requested on the application of the term "covered health insurance provider", including the *de minimis* rule set forth in this notice and possible alternative *de minimis* rules. Comments are also requested on the application of the term "covered health insurance provider" in the case of a corporate event such as a merger, acquisition or reorganization. Comments are also requested as to whether the allocation rules set forth in Notice 2008–94, 2008–2 C.B. 1070, Q&A–9, should be applied for purposes of determining the services and the taxable year to which deferred deduction remuneration is attributable and as to any alternatives to those rules, including the services and the taxable year to which deferred deduction remuneration is attributable in the case of a corporate event such as a merger, acquisition or reorganization. Comments may be submitted through March 23, 2011 to Internal Revenue Service, CC:PA:LPD:RU (Notice 2011–02), Room 5203, PO Box 7604, Ben Franklin Station, Washington DC 20044. Submissions may also be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Courier's Desk at 1111 Constitution Avenue, NW, Washington DC 20224, Attn: CC:PA:LPD:RU (Notice 2011–02), Room 5203. Submissions may also be sent electronically via the internet to the following email address: *Notice.comments@irscounsel.treas.gov*. Include the notice number (Notice 2011–02) in the subject line.

VI. DRAFTING INFORMATION

The principal author of this notice is Ilya Enkishev of the Office of Division Counsel/Associate Chief Counsel (Tax Ex-

empt and Government Entities), although other Treasury and IRS officials participated in its development. For further information on the provisions of this notice, contact Ilya Enkishev at (202) 622–6030 (not a toll-free number).

Funding Relief for Single-Employer Pension Plans under PRA 2010

Notice 2011–3

I. PURPOSE

This notice provides guidance on the special rules relating to funding relief for single-employer defined benefit pension plans (including multiple employer defined benefit pension plans) under the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010), Pub. L. No. 111–192.

II. BACKGROUND

Section 430 of the Internal Revenue Code (Code) specifies the minimum funding requirements that apply to single-employer defined benefit pension plans pursuant to § 412. For purposes of calculating the minimum required contribution, § 430 generally requires a plan to establish a shortfall amortization base with respect to a plan year for which the value of a plan's assets is less than the amount of the plan's funding target. Section 430(c)(2) generally provides for amortization of a shortfall amortization base over 7 years.

Section 201(b)(1) of PRA 2010 adds § 430(c)(2)(D) which permits a plan sponsor to elect, in lieu of the otherwise applicable amortization schedule, to amortize the shortfall amortization base established for certain plan years under one of two alternative amortization schedules: the 2 plus 7-year amortization schedule, or the 15-year amortization schedule. The 2 plus 7-year amortization schedule is described in § 430(c)(2)(D)(ii) and the 15-year amortization schedule is described in § 430(c)(2)(D)(iii). Section 201(b)(2) of PRA 2010 amends § 430 by adding § 430(c)(7), which provides for an acceleration of the required installments under an alternative amortization schedule in the case of certain compensatory payments, dividends, and stock redemptions.

Under § 430(c)(2)(D)(v), an election to use an alternative amortization schedule may generally be made only with respect to one or two eligible plan years, and, under § 430(c)(2)(D)(iv)(II), if the plan sponsor makes the election for two plan years, the same amortization schedule must be used for both plan years. An eligible plan year is a plan year that begins in 2008, 2009, 2010, or 2011, but only if the due date for the minimum required contribution to the plan for such plan year under § 430(j)(1) occurs on or after June 25, 2010 (the date of enactment of PRA 2010). Section 430(c)(2)(D)(iv)(III) provides that any such election may be revoked only with the consent of the Secretary, after consultation with the Pension Benefit Guaranty Corporation.

Pursuant to § 430(c)(2)(D)(vi), a plan sponsor that makes an election under § 430(c)(2)(D) for a plan year is required to provide notice of the election to participants and beneficiaries of the plan. Under § 430(c)(2)(D)(vi)(II), the plan sponsor must also inform the Pension Benefit Guaranty Corporation of such election in such form and manner as the Director of the Pension Benefit Guaranty Corporation may prescribe.

Sections 104, 105, and 106 of the Pension Protection Act of 2006 (PPA '06), Pub. L. No. 109–280, provide that the effective dates for the minimum funding rules under § 430 and funding-based benefit restrictions under § 436 are delayed for certain plans. For plans described in section 104 or 105 of PPA '06, these provisions do not generally apply for plan years beginning before January 1, 2017, and January 1, 2014, respectively. For plans described in section 106 of PPA '06, the provisions of §§ 430 and 436 of the Code do not apply for plan years beginning before January 1, 2011.

Section 202(a) of PRA 2010 amends Title I of PPA '06 to allow a plan sponsor of a plan described in section 104 or 105 of PPA '06 to elect, for any two eligible plan years (using the same definition as applies under § 430), one of two alternative amortization schedules with respect to a portion of the plan's unfunded new liability. The schedules, set forth in sections 107(b) and 107(c) of PPA '06, as amended by PRA 2010, are generally similar to the 2 plus 7-year amortization schedule and the 15-year amortization schedule.

Section 202(a) of PRA 2010 also provides for the election of one of the alternative amortization schedules for plans described in section 106 of PPA '06. Such plans are subject to the minimum funding rules of § 430 of the Code for plan years beginning on or after January 1, 2011, and the election to use an alternative amortization schedule under section 202(a) of PRA 2010 is available for these plans only for one eligible year beginning in 2008, 2009, or 2010. Sponsors of these plans may also make an election under section 201(b)(1) of PRA 2010 to use an alternative amortization schedule to amortize the shortfall amortization base for a plan year beginning in 2011.

Section 202(b) of PRA 2010 amends section 104 of PPA '06 to provide a delayed effective date for application of the minimum funding requirements of § 430 and the funding-based benefit restrictions under § 436 to certain plans maintained by eligible charities. Under this provision, eligible charity plans (certain plans maintained by employers described in § 501(c)(3)) generally will not be subject to the rules of §§ 430 and 436 for plan years beginning before January 1, 2017. However, plan sponsors may elect to have the provisions of §§ 430 and 436 apply for plan years beginning after December 31, 2007, and on or before December 31, 2008.

Section 303(c)(2) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), is parallel to § 430(c)(2) of the Code, and section 201(a)(1) of PRA 2010 amends section 303(c)(2) of ERISA in a manner parallel to the amendments made to § 430(c)(2) of the Code by section 201(b)(1) of PRA 2010. Section 201(a)(2) of PRA 2010 adds section 303(c)(7) of ERISA, which is parallel to new § 430(c)(7). Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of the Treasury has interpretive jurisdiction over the subject matter of this notice for purposes of ERISA as well as the Code. Thus, this notice applies for both purposes.

Notice 2010–55, 2010–33 I.R.B. 253, states that the Service expects to issue future guidance on the special funding rules under PRA 2010 for single-employer plans. Notice 2010–55 also states that, in