Non-discrimination provision (Section 105(h)) for fully insured management carve-out / executive medical plans

The Affordable Care Act (ACA), which became law on March 23, 2010, extended the Section 105(h) rules of the Internal Revenue Code to non-grandfathered fully insured group health plans. Section 105(h) prohibits employers from discriminating in favor of highly compensated individuals relative to other employees in eligibility and benefits under a group health plan.

The ACA stated that the 105(h) rules would apply to non-grandfathered fully insured group health plans on their first plan year on or after September 23, 2010. On December 22, 2010, however, the IRS (with the support of the Departments of Labor and HHS) announced that compliance with the rules will not be required of insured plans until guidance is provided regarding their application. Until that time, sanctions for failure to comply with the rules will not apply. Furthermore, the agencies expect that when such guidance is issued, its effective date will be delayed until plan years beginning a certain time after issuance.

Under 105(h), highly compensated individuals generally consist of officers and owners and individuals in the top quartile of employees (when ranked according to compensation). Certain types of non-grandfathered insured plans, such as class/carve-out or executive medical plans (that only cover a class of employees that consist primarily of highly compensated individuals or cover such class at a higher benefit level than another class that does not include highly compensated individuals), may be impacted under 105(h). Insured plan sponsors that violate the 105(h) rules will be subject to a $100 per day per failure penalty, which will likely apply to each non-HCI who is impermissibly excluded under the plan.

Under the amended grandfather rules, the following fully insured plans are not grandfathered and may be impacted by the 105(h) rules:

- an insured plan sold with a new coverage effective date after March 23 and before November 15, 2010; or
- an insured plan that was grandfathered on March 23, 2010, and subsequently lost its grandfather status due to changes in the plan; or
- an insured plan that did not cover at least one individual on March 23, 2010.

If these non-grandfathered plans are class/carve-out/executive medical plans as described above, they may face compliance issues under the 105(h) rules, depending on how the future guidance takes shape.

Customers that have a fully insured non-grandfathered class or carve-out or executive medical plan, or that have questions about the application of the 105(h) rules to their plan, should review the matter with their tax or legal counsel. Customers concerned that their plans may be considered discriminatory under 105(h) may contact their broker or UnitedHealthcare representative to discuss alternatives. **UnitedHealthcare will not provide nondiscrimination testing or consulting services regarding 105(h) compliance.**

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UHCEW678527-000