Office of Chief Counsel
Internal Revenue Service
Memorandum

Number: **201618010**
Release Date: 4/29/2016

CC:TEGE:EB
POSTN-140042-15

UILC: 9832.00-00

date: March 21, 2016

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subject: Review of Chief Counsel Advice on Application of Section 162(m)(6) to Risk-Bearing Entities Providing Services to Medicaid Recipients

This is in response to the request for review of the Chief Counsel Advice #POSTN-140042-15. That advice determined that certain risk-bearing entities providing services to Medicaid recipients may be subject to the deduction limitations under section 162(m)(6), if certain conditions are met. Two of those conditions are that the entity constitute a health insurance issuer under section 9832(b)(2) and that the entity provide health insurance coverage under section 9832(b)(1)(A). The advice determined that in certain circumstances, those conditions could be met. A further condition included that the payments that the health insurance issuer was receiving qualify as premiums in accordance with the section 162(m)(6) regulations.

The definitions of health insurance coverage and health insurance issuer were added to the Code as part of the Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996), which simultaneously added mirror provisions to section 733(b) of ERISA (which falls within the jurisdiction of the Department of Labor) and Title XXVII of the Public Health Service Act (which falls within the jurisdiction of the Department of Health and Human Services). With respect to the mirror definitions and overlapping jurisdiction, HIPAA provides that:

> The Secretary of the Treasury, the Secretary of Health and Human Services, and the Secretary of Labor shall ensure, through the execution of a memorandum of understanding, that—
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> (1) Regulations, rulings and interpretations issued by such Secretaries relating to the same matter over which two or more such Secretaries have responsibility under this subtitle (and the amendments made by this subtitle and section 401) are administered to have the same effect at all times; and
>
> (2) Coordination of policies relating to enforcing the same requirements through such Secretaries in order to have a coordinated enforcement strategy that avoids duplication of enforcement efforts and assigns priorities in enforcement.

Pub. L. No. 104-191, 110 Stat. 1936, section 104 (1996).

The three departments generally have met these requirements through the publication of regulations under each provision which mirror each other. In this case, the definitions provided for health insurance issuer and health insurance coverage mirror each other in the three departments' regulations. See 26 CFR 54.9801-2; 29 CFR 2590.701-2; and 45 CFR 144.103.

Arrangements between a State and a risk-bearing entity providing services to a Medicaid recipient present unique issues unlike those raised in the private market context of insured employee benefit plans and individual insurance policies. As indicated by your initial inquiry, whether a risk-bearing entity providing services to Medicaid recipients may fall within the statutory and regulatory definitions of health insurance issuer and health insurance coverage, and if so under what particular types of arrangements with a State, is not explicitly addressed in the statute or regulations and has not been directly addressed by other generally applicable guidance of the three departments.

In this case, the determination of whether section 162(m)(6) applies to a risk-bearing entity providing services to Medicaid recipients requires application of the definitions of health insurance issuer and health insurance coverage to those arrangements. The application set forth in the prior advice was not coordinated with the other agencies. Although section 162(m)(6) is a provision that is not part of HIPAA but rather is a provision of the Internal Revenue Code over which the Treasury Department and the IRS have sole jurisdiction, the failure to coordinate the definition raises significant litigation hazards with respect to enforcement of the application of the deduction limitation to these entities.

It may be argued that the application of an Internal Revenue Code-only provision does not require the coordination contemplated in HIPAA's coordination provisions, because the application of section 162(m)(6) does not risk failing to have a different

effect as applied by another agency, and does not implicate a need for a coordinated enforcement strategy across agencies, because the IRS will be the only agency applying and enforcing the provision. However, the application of the statutory and regulatory definitions of health insurance issuer and health insurance coverage inherent in the application of section 162(m)(6) to these entities may be considered to have precedential consequences, given that its application could become the subject of litigation and courts necessarily would consider the meaning of those definitions in order to apply section 162(m)(6). Accordingly, we advise that for purposes of section 162(m)(6) the type of organizations identified in the recently issued CCAs not be identified as health insurance issuers and that the arrangements not be treated as providing health insurance coverage until such time as that coordination has been completed, and that any such treatment depend on the result of such coordination.