NEW YORK STATE BAR ASSOCIATION
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September 9, 2013

The Honorable Mark Mazur
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
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Daniel I. Werfel
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: New York State Bar Association Tax Section Report on Proposed Regulations Under Section 162(m)(6)

Dear Messrs. Mazur, Werfel and Wilkins:

I am pleased to submit the enclosed New York State Bar Association Tax Section report which discusses the proposed regulations issued under Section 162(m)(6) of the Internal Revenue Code on April 2, 2013 (the "Proposed Regulations"). Section 162(m)(6), enacted as part of the Patient Protection and Affordable Care Act of 2010, limits the deduction for remuneration paid to individual service providers of "covered health insurance providers" ("CHIPs") to $500,000 per tax year.

We commend the Treasury Department and the Internal Revenue Service on the Proposed Regulations. Section 162(m)(6) is, in many respects, a difficult provision to implement, and the Proposed Regulations are comprehensive, clear, workable and administrable. Our recommendations are in the nature of fine-tuning. In particular, we focus principally on measures the Treasury Department and IRS can take to address the impact of Section 162(m)(6) on acquisition and similar

corporate transactions and to refine and simplify the rules used to attribute "deferred deduction remuneration" ("DDR") back to the tax years in which they are earned. We also respond to a number of specific requests for comments contained in the preamble to the Proposed Regulations

As described in the report, our recommendations are as follows:

1. If members of an acquiror group become CHIPs solely as a result of the group's acquisition of a CHIP, we recommend that those acquiror group members not be treated as CHIPs until their first taxable year beginning at least six months after the closing date of the acquisition transaction (rather than in the next taxable year in all cases, as under the Proposed Regulations).

2. We recommend that final regulations clarify that if a so-called "Aggregated Group" of entities disposes of a CHIP during a taxable year, the de minimis rule in the Proposed Regulations will be applied to the Aggregated Group for the year of the disposition taking into account the revenues earned by the transferred member only during the time it was a member of the Aggregated Group (even if that transferred member's taxable year does not close on the date it departs the group).

3. When an Aggregated Group that has designated a member as the "parent" entity for purposes of the Proposed Regulations disposes of that member,we recommend that, if there remains another CHIP in the Aggregated Group with the same taxable year as the old parent, that CHIP should be required to become the new designated parent. And that, in all other cases, the Aggregated Group be permitted to designate any remaining CHIP as the parent, with a short transitional testing year before the new designee's full testing year begins.

4. In a response to a request for comments on how to ensure that Section 162(m)(6) applies to remuneration paid for services in substance rendered directly by individuals (rather than entities), we recommend that when a CHIP reports remuneration payments on a Form 1099 or W-2 issued directly to a natural person, that natural person be considered the service provider for purposes of Section 162(m)(6); and that, when a CHIP reports remuneration as being paid to a service provider entity, and that reporting is not found to be incorrect (under Section 6041), the entity be respected as the service provider for Section 162(m)(6) purposes.

5. With respect to the attribution of DDR to taxable years, we make the following recommendations:

    a. We recommend that the final regulations allow CHIPs that select the so-called "standard method" of the Proposed Regulations to attribute amounts in account balance plans to taxable years be permitted to use the Proposed Regulations' "alternative method" to attribute amounts grandfathered from before 2010 (instead of being required to use the same method for both nongrandfathered and grandfathered amounts).

    b. We suggest an alternative method (to be included in the final regulations) for attributing payments under nonaccount balance plans to service years, under which each benefit payment is attributed to taxable years (including grandfathered pre-2010 years) in proportion to the increase in the formula benefit during the taxable year.

c. We recommend that the final regulations make optional, rather than mandatory, the multistep reattribution method requiring daily pro rata attribution over the applicable vesting period of account balance plans, nonaccount balance plans, and other legally binding rights subject to a substantial risk of forfeiture, and that CHIPs be allowed to determine plan-by-plan whether to apply this method.

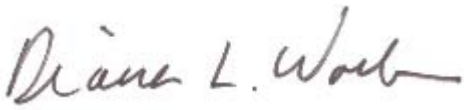
d. We suggest that, instead of attributing equity-based remuneration in daily pro rata portions from the date of grant to the date of vesting, exercise or payment, CHIPs have the option to attribute equity compensation entirely to the taxable year in which the equity-based compensation vests, is exercised, or is includible in income.

e. Where stock rights or RSUs vest on an acquisition or similar transaction, we recommend that CHIPs be permitted to use a reattribution rule (similar to that applicable to account balance and nonaccount balance plans) to attribute pre-transaction appreciation in those stock rights and RSUs to the pre-vesting period or, as suggested immediately above, to attribute such appreciation entirely to the year of vesting.

f. We suggest that final regulations clarify that the grandfathering rule applies to all forms of DDR (not only account balance plans, nonaccount balance plans and equity-based remuneration) and that, in the case of each form of DDR, grandfathered amounts should be attributed based on the attribution rules generally applicable to that form of DDR, but disregarding any substantial risk of forfeiture.

We very much appreciate your consideration of our recommendations and would be happy to discuss them with you or provide additional assistance.

Respectfully submitted,



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Chair

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