

Incentives for Nondiscriminatory Wellness Programs in Group Health Plans
Summary of Proposed Rule
November 27, 2012

On November 26, 2012, the Departments of Treasury, Labor and Health and Human Services (HHS) published in the *Federal Register* a notice of proposed rulemaking which proposed to amend, consistent with the Affordable Care Act (ACA), existing regulations regarding nondiscriminatory wellness programs in group health plans. The proposed changes in this rule related to group health plan wellness programs would apply to plan years beginning on or after January 1, 2014. Other changes to the regulatory text included in this proposed rule that would apply nondiscrimination rules to certain individual health insurance would commence with policy years beginning on or after January 1, 2014. Comments are specifically invited on the proposed applicability date.

Written comments, identified by “Wellness Programs” may be submitted to the Department of Labor and will be shared with the other departments and made publicly available. The 60-day comment period closes on January 25, 2013.

Key provisions of the proposed rule are summarized below. The proposed regulatory text, which includes numerous examples, is included as an Attachment.

I. Background

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) (P.L. 104-191) added provisions to the Internal Revenue Code (IRC), the Employee Retirement and Income Security Act (ERISA) and Public Health Service (PHS) Act regarding nondiscrimination and wellness programs. Specifically, group health plans (including self-insured plans) and group health insurance issuers are generally prohibited from discriminating against individual participants in eligibility, benefits, or premiums based on a health factor.¹ However, an exception is provided that allows premium discounts or rebates and modification to cost sharing in return for adherence to certain health promotion and disease prevention programs (wellness programs).

Under the implementing regulations finalized by the Departments in 2006, wellness programs are divided into two general categories. Included in the first category are programs that do not require an individual to meet a standard related to a health factor in order to obtain a reward, or do not offer any reward. If such a program is made available to all similarly situated individuals, it meets the nondiscrimination requirements without having to meet any additional standards. Examples of such programs provided in the 2006 regulations include a fitness center reimbursement program, a program that reimburses individuals for the cost of a smoking cessation program regardless of whether the individual quits smoking, a program that waives cost sharing for prenatal or well-baby visits.

¹ Prior regulations define the term *health factor*, in relation to an individual, to include health status, medical condition (including both physical and mental illnesses); claims experience; receipt of health care; medical history; genetic information, evidence of insurability; or disability.

The second category of wellness program – those that require an individual to meet a standard related to a health factor in order to obtain a reward – is subject to additional requirements in order to meet the nondiscrimination rules. Examples of these programs offered in the proposed rule include a program that imposes a premium surcharge based on tobacco use, a program that provides a reward to employees identified at low risk for certain medical conditions through a biometric screening and requires employees at risk to take additional steps to obtain the same reward. Under the 2006 regulations, in order to meet the nondiscrimination requirements, this type of wellness program must meet a series of consumer protection conditions involving the size of the reward, reasonable design, frequency of opportunity to qualify, reasonable alternative standards, and notice of alternative means of qualifying for reward.

The ACA amended the nondiscrimination rules under the PHS Act but not the other two laws. The amendments moved the provisions from section 2702 of the PHS Act to section 2705, maintaining the wellness exception for group coverage and extending the nondiscrimination rules to also apply to the individual market. The wellness program exception does not apply to the individual market, however, and the proposed wellness program regulations would not apply to the individual market. The Departments note that the ACA provides for a 10-state wellness demonstration project in the individual market to begin no later than July 1, 2014.

The Departments propose that these proposed rules regarding wellness programs will apply to both grandfathered plans and non-grandfathered plans. The provisions of section 2705 as added by the ACA apply only to non-grandfathered plans, and as a result, the previous HIPAA requirements regarding nondiscrimination and the wellness program exception continue to apply to grandfathered plans. However, for the most part, the proposed rules adopt the 2006 regulations, and the Departments believe the statutory authority permits them to apply the proposed new rules consistently across grandfathered and non-grandfathered plans.

II. Provisions of the Proposed Rule

The proposed rule would maintain the general approach of the 2006 regulations, with the key changes summarized below. (The proposed revised rules would appear at 45 CFR 146.121(f) and 45 CFR 147.110; 29 CFR 2490.702 (f) and section 54.9801-1(f) of the Internal Revenue Code.)

- A. The two categories of wellness programs would be identified as “participatory wellness programs” and “health-contingent wellness programs” and the Departments intend that the proposed rules clarify that only health-contingent wellness programs must meet the specified additional requirements. In addition, the revised regulatory language adds an additional example of a participatory wellness program as one that provides a reward to employees who complete a health risk assessment regarding current health status without requiring any further action by the employee with regard to any health issues identified by the assessment. The proposed rules include a cross-reference to other regulations prohibiting collection of genetic information. Specific examples of health-contingent wellness programs are also added.
- B. The Departments propose that unless specified otherwise, references in the regulations to an individual receiving a reward include both obtaining a reward and avoiding a penalty. A

reward may include a premium discount or rebate, a waiver of some or all cost sharing, an additional benefit, or another financial or nonfinancial incentive. Avoiding a penalty would include a avoiding a premium surcharge or other financial or other disincentive.

- C. The five requirements that health-contingent wellness programs must meet in order to satisfy the nondiscrimination requirements would be continued with modifications.
1. Frequency of opportunity to qualify. Continuing the 2006 regulations, a wellness program would have to give eligible individuals an opportunity to qualify for the reward at least once per year.
 2. Size of reward. The ACA requires a change in the size of the reward from the amount provided under the 2006 regulations, which limit the total reward for such wellness programs offered by a plan sponsor to no more than 20 percent of the total cost (employer and employee contributions) of employee-only coverage under the plan. (If dependents are allowed to participate in the program, the reward limit applies to the cost of coverage for the category of coverage in which they are enrolled.) Under the proposed rule, the limit is generally raised to 30 percent, except with respect to programs designed to prevent or use tobacco use, for which the limit is raised to 50 percent. The proposed regulatory text includes specific examples of how the limit would be applied. The Departments invite comments on whether additional examples would be helpful, particularly with respect to demonstrating compliance in cases whether the amount of the reward is variable, such as when it is tied to waiving copayments.

The Departments discuss questions that have been raised regarding apportionment of rewards in the case of dependent participation in health-contingent wellness programs, and specifically invite comments on this issue, such as whether the reward should be prorated if only one family member fails to qualify. They note that in the separate proposed rule implementing the premium rating requirements under section 2701 of the PHS Act (which allow insurers to vary premiums by as much as 50 percent to account for tobacco use), the premium variation would be applied to the portion of premium attributable to each family member.

Noting that the ACA requires an increase in the limit to 30 percent but provides authority to the Secretaries to impose a limit as high as 50 percent, the Departments propose to use the flexibility provided in the ACA to implement a 50 percent limit with respect to wellness programs related to tobacco use in order to apply a consistent standard across markets. They describe the proposed rule to implement section 2701, as only allowing a health issuer in the small group market to implement the tobacco use surcharge in connection with a wellness program that meets the standards set forth in this proposed rule. Comments are solicited in that proposed rule with respect to possible definitions of “tobacco use” that would apply in both the rules.

3. Uniform availability and reasonable alternative standards. The Departments propose to continue the 2006 regulations that require that the reward be available to all

similarly situated individuals, with clarifications. The existing rules provide that a reasonable alternative standard (or waiver of the standard) must be made available to any individual for whom it is unreasonably difficult due to a medical condition to satisfy the standard for a period or for whom it is medically inadvisable to attempt to satisfy the standard. The proposed rule clarifies that plans and issuers are not required to determine a particular alternative standard in advance of an individual's request for one, but a reasonable alternative standard must be furnished upon the individual's request. A plan or issuer may always waive the applicable standard and provide the reward in lieu of developing an alternative standard for an individual. If a plan proceeds with furnishing an alternative, all facts and circumstances would be taken into account in determining whether the reasonable alternative standard requirement has been met by the plan or issuer, and some specific facts and circumstances are described in the regulatory text pertaining to alternative standards involving completion of an educational program, diet programs and compliance with recommendations of a plan's medical professional. In the preamble, the Departments state that plans and issuers may not fail to provide a reasonable alternative standard simply because one was not successful before.

In inviting comments on reasonable alternative standards, the Departments note the importance of ensuring that a health-contingent wellness program is not a subterfuge for underwriting or reducing benefits based on health status.

The proposed rule would also clarify that a plan or issuer may seek verification that a medical condition makes it unreasonably difficult or medically inadvisable for an individual to attempt to satisfy a standard only when it is "reasonable under the circumstances" and states that it would not be reasonable to seek verification of a medical condition that is obviously valid based on information already known to the plan or issuer, but would be reasonable to do so in the case of claims that reasonably require medical judgment to evaluate the validity of a claim.

4. Reasonable design. A wellness program would need to be reasonably designed to promote health or prevent disease, as under the 2006 regulations. They specify that programs must have a reasonable chance of improving health or preventing disease, not be overly burdensome, not be a subterfuge for discriminating based on a health factor, and not be highly suspect in method.

In a proposed modification to the current regulations, the Departments would clarify that the determination of whether the reasonable design requirement is met would be based on all relevant facts and circumstances. The rule proposed to further specify that to the extent a plan's initial standard is based on a measurement test or screening, the plan would have to make available to any individual who does not meet the standard a reasonable means of qualifying for the reward. That is, a plan could target a wellness program to individuals with high cholesterol, if other individuals are provided a different, reasonable means of qualifying for the same reward.

The Departments welcome comments on additional consumer protections and discuss the intention of balancing requirements on wellness programs with offering sufficient flexibility to encourage innovation. Comments are specifically sought on whether evidence or practice-based standards are needed to ensure that wellness programs are reasonably designed to promote health or prevent disease. In addition, comments on best practices guidance aimed at increasing the likelihood of wellness program success are welcomed.

5. Notice of availability of other means of qualifying for the reward. The Departments proposed to continue the 2006 requirement that in all plan materials describing the terms of the wellness program, the availability of a reasonable alternative standard (or the possibility of waiver of the otherwise applicable standard) is disclosed. If plan materials simply mention that a program is available, but do not describe its terms, the availability of a reasonable alternative need not be disclosed. The sample language provided in regulatory text would be changed in response to feedback on the existing language.

The rule also proposes to codify in regulations at 45 CFR 147.110 the ACA provision that extends the HIPAA nondiscrimination requirements to non-grandfathered individual health insurance coverage effective for policy years beginning January 1, 2014.

III. Economic Impact Analysis and other Regulatory Review Requirements

After reviewing literature and studies regarding wellness programs, the Departments conclude that the impact of the proposed rule on benefits, costs and transfers would be minimal. This is largely because few health-contingent wellness programs currently have rewards that come close to the 20 percent limit, and therefore raising that limit to 30 percent (and 50 percent in the case of programs involving tobacco use), the most significant change proposed in the regulations, is not expected to be used much. The Departments expect that requirements regarding alternative standards permit plan sponsors sufficient flexibility to minimize the net costs of compliance. Collection of information burden is expected to be negligible and achieved through existing requirements. Because the vast majority of states already have laws that meet or exceed HIPAA nondiscrimination standards, the regulations are not expected to require additional oversight of states by HHS.

In reviewing of the literature on current use of wellness programs, HHS and DOL note that 63 percent of employers who offer health benefits offer at least one wellness program; this is most common among large employers. These include gym memberships or onsite exercise facilities, weight loss programs and smoking cessation resources. Limited data on participation suggest that it is low, however, with less than 20 percent of eligible employees taking part. Despite the limited evaluations of these programs, a majority of employers believed the programs they offered improved employee health and reduced health costs.

The review reports that according to surveys, only a minority of employer wellness programs involve financial incentives for employee participation. Completion of a health risk assessment was the most commonly incentivized, with 42 percent of large employers and 10 percent of firms

overall providing an incentive for completing the assessment. This most commonly includes cash, gift cards or merchandise or travel and reduced premiums or lower cost sharing.

Information on the value of incentives suggests they vary widely, and the Departments conclude companies are not typically close to reaching the 20 percent limit in the 2006 (current) regulations. The Departments do not have sufficient data to provide aggregate estimates of the effects.

Attachment: Proposed Regulatory Text

(Note: identical text is proposed for the Internal Revenue Code and for DOL regulations)

PART 146—REQUIREMENTS FOR THE GROUP HEALTH INSURANCE MARKET

1. The authority citation for Part 146 continues to read as follows:

Authority: Secs. 2702 through 2705, 2711 through 2723, 2791, and 2792 of the PHS Act (42 U.S.C. 300gg-1 through 300gg-5, 300gg-11 through 300gg-23, 300gg-91, and 300gg-92) (1996).

Section 146.121 is also issued under secs. 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg-63, 300gg-91, and 300gg-92), as amended (2010).

2. In § 146.121, paragraph (f) is revised to read as follows:

§ 146.121 Prohibiting discrimination against participants and beneficiaries based on a health factor.

* * * * *

(f) *Nondiscriminatory wellness programs – in general.* A wellness program is a program of health promotion or disease prevention. Paragraphs (b)(2)(ii) and (c)(3) of this section provide exceptions to the general prohibitions against discrimination based on a health factor for plan provisions that vary benefits (including cost-sharing mechanisms) or the premium or contribution for similarly situated individuals in connection with a wellness program that satisfies the requirements of this paragraph (f). If a wellness program is a participatory wellness program, as defined in paragraph (f)(1) of this section, that paragraph also makes clear that the wellness program does not violate this section if participation in the program is made available to all similarly situated individuals. If a wellness program is a health-contingent wellness program, as defined in paragraph (f)(2) of this section, the wellness program does not violate this section if the requirements of paragraph (f)(3) of this section are met. Except where expressly provided otherwise, references in this section to an individual obtaining a reward include both obtaining a reward (such as a premium discount or rebate, a waiver of all or part of a cost-sharing mechanism, an additional benefit, or any financial or other incentive) and avoiding a penalty (such as the absence of a premium surcharge, or other financial or nonfinancial disincentive). References in this section to a plan providing a reward include both providing a reward (such as a premium discount or rebate, a waiver of all or part of a cost-sharing mechanism, an additional benefit, or any financial or other incentive) and imposing a penalty (such as a surcharge or other financial or nonfinancial disincentive).

(1) *Participatory wellness programs defined.* If none of the conditions for obtaining a reward under a wellness program is based on an individual satisfying a standard that is related to a health factor (or if a wellness program does not provide a reward), the wellness program is a participatory wellness program and, if participation in the program is made available to all

similarly situated individuals, does not violate this section. Examples of participatory wellness programs are:

- (i) A program that reimburses all or part of the cost for membership in a fitness center.
- (ii) A diagnostic testing program that provides a reward for participation and does not base any part of the reward on outcomes.
- (iii) A program that encourages preventive care through the waiver of the copayment or deductible requirement under a group health plan for the costs of, for example, prenatal care or well-baby visits. (Note that, with respect to non-grandfathered plans, §147.130 of this subchapter requires benefits for certain preventive health services without the imposition of cost sharing.)
- (iv) A program that reimburses employees for the costs of participating, or that otherwise provides a reward for participating, in a smoking cessation program without regard to whether the employee quits smoking.
- (v) A program that provides a reward to employees for attending a monthly no-cost health education seminar.
- (vi) A program that provides a reward to employees who complete a health risk assessment regarding current health status, without any further action (educational or otherwise) required by the employee with regard to the health issues identified as part of the assessment.

(See also §146.122 for rules prohibiting collection of genetic information).

(2) *Health-contingent wellness programs defined.* If any of the conditions for obtaining a reward under a wellness program is based on an individual satisfying a standard that is related to a health factor, the wellness program is a health-contingent wellness program and the program is permissible under this section only if all of the requirements of paragraph (f)(3) of this section are satisfied. Examples of health-contingent wellness programs are:

- (i) A program that imposes a premium surcharge based on tobacco use.
- (ii) A program that uses a biometric screening or a health risk assessment to identify employees with specified medical conditions or risk factors (such as high cholesterol, high blood pressure, unhealthy body mass index, or high glucose level) and provides a reward to employees identified as within a normal or healthy range for biometrics (or at low risk for certain medical conditions), while requiring employees who are identified as outside the normal or healthy range (or at risk) to take additional steps (such as meeting with a health coach, taking a health or fitness course, adhering to a health improvement action plan, or complying with a health care provider's plan of care) to obtain the same reward.

(3) *Requirements for health-contingent wellness programs.* A health-contingent wellness program does not violate this section if all of the following requirements are satisfied:

- (i) *Frequency of opportunity to qualify.* The program must give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year.
- (ii) *Size of reward.* The reward for a health-contingent wellness program, together with the reward for other health-contingent wellness programs with respect to the plan, must not exceed the applicable percentage of the total cost of employee-only coverage under the plan, as defined in this paragraph (f)(3)(ii). However, if, in addition to employees, any class of dependents (such as spouses, or spouses and dependent children) may participate in the wellness program, the reward must not exceed the applicable percentage of the total cost of the coverage

in which an employee and any dependents are enrolled. For purposes of this paragraph (f)(3)(ii), the cost of coverage is determined based on the total amount of employer and employee contributions for the benefit package under which the employee is (or the employee and any dependents are) receiving coverage.

(A) *Applicable percentage.* For purposes of this paragraph (f)(3)(ii), the applicable percentage is 30 percent, except that the applicable percentage is increased an additional 20 percentage points (to 50 percent) to the extent that the additional percentage is in connection with a program designed to prevent or reduce tobacco use.

(B) *Examples.* The rules of this paragraph (f)(3)(ii) are illustrated by the following examples:

Example 1. (i) Facts. An employer sponsors a group health plan. The annual premium for employee-only coverage is \$6,000 (of which the employer pays \$4,500 per year and the employee pays \$1,500 per year). The plan offers employees a health-contingent wellness program focused on exercise, blood sugar, weight, cholesterol, and blood pressure. The reward for compliance is an annual premium rebate of \$600.

(ii) *Conclusion.* In this Example 1, the program satisfies the requirements of this paragraph (f)(3)(ii) because the reward for the wellness program, \$600, does not exceed 30 percent of the total annual cost of employee-only coverage, \$1,800. ($\$6,000 \times 30\% = \$1,800$.)

Example 2. (i) Facts. Same facts as Example 1, except the wellness program is exclusively a tobacco prevention program. Employees who have used tobacco in the last 12 months and who are not enrolled in the plan's tobacco cessation program are charged a \$1,000 premium surcharge (in addition to their employee contribution towards the coverage). (Those who participate in the plan's tobacco cessation program are not assessed the \$1,000 surcharge.)

(ii) *Conclusion.* In this Example 2, the program satisfies the requirements of this paragraph (f)(3)(ii) because the reward for the wellness program (absence of a \$1,000 surcharge), does not exceed 50 percent of the total annual cost of employee-only coverage, \$3,000. ($\$6,000 \times 50\% = \$3,000$.)

Example 3. (i) Facts. Same facts as Example 1, except that, in addition to the \$600 reward for compliance with the health-contingent wellness program, the plan also imposes an additional \$2,000 tobacco premium surcharge on employees who have used tobacco in the last 12 months and who are not enrolled in the plan's tobacco cessation program. (Those who participate in the plan's tobacco cessation program are not assessed the \$2,000 surcharge.)

(ii) *Conclusion.* In this Example 3, the program satisfies the requirements of this paragraph (f)(3)(ii) because both: the total of all rewards (including absence of a surcharge for participating in the tobacco program) is \$2,600 ($\$600 + \$2,000 = \$2,600$), which does not exceed 50 percent of the total annual cost of employee-only coverage (\$3,000); and, tested separately, the \$600 reward for the wellness program unrelated to tobacco use does not exceed 30 percent of the total annual cost of employee-only coverage, \$1,800.

Example 4. (i) Facts. An employer sponsors a group health plan. The total annual premium for employee-only coverage (including both employer and employee contributions towards the coverage) is \$5,000. The plan provides a \$250 reward to employees who complete a health risk

assessment, without regard to the health issues identified as part of the assessment. The plan also offers a Healthy Heart program, which is a health-contingent wellness program under paragraph (f)(2) of this section, with an opportunity to earn a \$1,500 reward.

(ii) *Conclusion.* In this Example 4, the plan satisfies the requirements of this paragraph (f)(3)(ii). Even though the total reward for all wellness programs under the plan is \$1,750 (\$250 + \$1,500 = \$1,750, which exceeds 30 percent of the cost of the annual premium for employee only coverage (\$5,000 x 30% = \$1,500)), only the reward offered for compliance with the health- contingent wellness program (\$1,500) is taken into account in determining whether the rules of this paragraph (f)(3)(ii) are met. (The \$250 reward is offered in connection with a participatory wellness program and therefore is not taken into account under this paragraph (f)(3)(ii)). The health-contingent wellness program offers a reward that does not exceed 30 percent of the total annual cost of employee-only coverage.

(iii) *Uniform availability and reasonable alternative standards.* The reward under the program must be available to all similarly situated individuals.

(A) Under this paragraph (f)(3)(iii), a reward under a program is not available to all similarly situated individuals for a period unless the program meets both of the following requirements:

- (1) The program allows a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom, for that period, it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard; and
- (2) The program allows a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom, for that period, it is medically inadvisable to attempt to satisfy the otherwise applicable standard.

(B) While plans and issuers are not required to determine a particular alternative standard in advance of an individual's request for one, if an individual is described in either paragraph (f)(3)(iii)(A)(1) or (2) of this section, a reasonable alternative standard must be furnished by the plan or issuer upon the individual's request or the condition for obtaining the reward must be waived. All the facts and circumstances are taken into account in determining whether a plan or issuer has furnished a reasonable alternative standard, including but not limited to the following:

- (1) If the reasonable alternative standard is completion of an educational program, the plan or issuer must make the educational program available instead of requiring an individual to find such a program unassisted, and may not require an individual to pay for the cost of the program.
- (2) If the reasonable alternative standard is a diet program, plans and issuers are not required to pay for the cost of food but must pay any membership or participation fee.
- (3) If the reasonable alternative standard is compliance with the recommendations of a medical professional who is an employee or agent of the plan or issuer, and an individual's personal physician states that the plan's recommendations are not medically appropriate for that individual, the plan or issuer must provide a reasonable alternative standard that accommodates the recommendations of the individual's personal physician with regard to medical appropriateness. Plans and issuers may

impose standard cost sharing under the plan or coverage for medical items and services furnished pursuant to the physician's recommendations.

(C) If reasonable under the circumstances, a plan or issuer may seek verification, such as a statement from an individual's personal physician, that a health factor makes it unreasonably difficult for the individual to satisfy, or medically inadvisable for the individual to attempt to satisfy, the otherwise applicable standard. It would not be reasonable, for example, for a plan and issuer to seek verification of a claim that is obviously valid based on the nature of the individual's medical condition that is known to the plan or issuer. However, plans and issuers may seek verification in the case of claims for which it is reasonable to determine that medical judgment is required to evaluate the validity of the claim.

(iv) *Reasonable design.* The program must be reasonably designed to promote health or prevent disease. A program satisfies this standard if it has a reasonable chance of improving the health of, or preventing disease in, participating individuals and it is not overly burdensome, is not a subterfuge for discriminating based on a health factor, and is not highly suspect in the method chosen to promote health or prevent disease. This determination is based on all the relevant facts and circumstances. To the extent a plan's initial standard for obtaining a reward (including a portion of a reward) is based on the results of a measurement, test, or screening relating to a health factor (such as a biometric examination or a health risk assessment), the plan must make available to any individual who does not meet the standard based on the measurement, test, or screening a different, reasonable means of qualifying for the reward.

(v) *Notice of availability of other means of qualifying for the reward.*

(A) The plan or issuer must disclose in all plan materials describing the terms of the program the availability of other means of qualifying for the reward or the possibility of waiver of the otherwise applicable standard. If plan materials merely mention that a program is available, without describing its terms, this disclosure is not required.

(B) The following language, or substantially similar language, can be used to satisfy the notice requirement of this paragraph (f)(3)(v): "Your health plan is committed to helping you achieve your best health status. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you to find a wellness program with the same reward that is right for you in light of your health status." Additional sample language is provided in the examples of paragraph (f)(4) of this section.

(4) *Examples.* The rules of paragraphs (f)(3)(iii), (iv), and (v) of this section are illustrated by the following examples:

Example 1. (i) *Facts.* A group health plan provides a reward to individuals who participate in a reasonable specified walking program. If it is unreasonably difficult due to a medical condition for an individual to participate (or if it is medically inadvisable for an individual to participate), the plan will waive the walking program requirement and provide the reward. All materials describing the terms of the walking program disclose the availability of the waiver.

(ii) *Conclusion.* The program satisfies the requirements of paragraph (f)(3)(iii) of this section because the reward under the program is available to all similarly situated individuals because it accommodates individuals who cannot participate in the walking program due to a medical condition (or for whom it would be medically inadvisable to attempt to participate) by providing them the reward even if they do not participate in the walking program (that is, by waiving the condition). The program satisfies the requirements of paragraph (f)(3)(iv) of this section because the walking program is reasonably designed to promote health and prevent disease. Last, the plan complies with the disclosure requirement of paragraph (f)(3)(v) of this section. Thus, the plan satisfies paragraphs (f)(3)(iii), (iv), and (v) of this section.

Example 2. (i) *Facts.* A group health plan offers a reward to individuals who achieve a count under 200 on a cholesterol test. If a participant does not achieve the targeted cholesterol count, the plan will make available a different, reasonable means of qualifying for the reward. In addition, all plan materials describing the terms of the program include the following statement: “Your health plan wants to help you take charge of your health. Rewards are available to all employees who participate in our Cholesterol Awareness Wellness Program. If your cholesterol count is under 200, you will receive the reward. If not, you will still have an opportunity to qualify for the reward. We will work with you to find a Health Smart program that is right for you.” Individual D is identified as having a cholesterol count above 200. The plan partners D with a nurse who makes recommendations regarding diet and exercise, with which it is not unreasonably difficult due to a medical condition of D or medically inadvisable for D to comply, and which is otherwise reasonably designed, based on all the relevant facts and circumstances. In addition, the plan makes available to all other individuals who do not meet the cholesterol standard a different, reasonable means of qualifying for the reward which is not unreasonably burdensome or impractical. D will qualify for the discount if D follows the recommendations regardless of whether D achieves a cholesterol count that is under 200.

(ii) *Conclusion.* In this Example 2, the program satisfies the requirements of paragraphs (f)(3)(iii), (iv), and (v) of this section. The program’s initial standard for obtaining a reward is dependent on the results of a cholesterol screening, which is related to a health factor. However, the program is reasonably designed under paragraphs (f)(3)(iii) and (iv) of this section because the plan makes available to all individuals who do not meet the cholesterol standard a different, reasonable means of qualifying for the reward and because the program is otherwise reasonably designed based on all the relevant facts and circumstances. The plan also discloses in all materials describing the terms of the program the opportunity to qualify for the reward through other means. Thus, the program satisfies paragraphs (f)(3)(iii), (iv), and (v) of this section.

Example 3. (i) *Facts.* Same facts as Example 2, except that, following diet and exercise, D again fails to achieve a cholesterol count that is under 200, and the program requires D to visit a doctor and follow any additional recommendations of D’s doctor with respect to D’s cholesterol. The program permits D to select D’s own doctor for this purpose. D visits D’s doctor, who determines D should take a prescription medication for cholesterol. In addition, the doctor determines that D must be monitored through periodic blood tests to continually reevaluate D’s health status. The plan accommodates D by making the discount available to D, but only if D actually follows the advice of D’s doctor’s regarding medication and blood tests.

(ii) *Conclusion.* In this Example 3, the program’s requirements to follow up with, and follow the recommendations of, D’s doctor do not make the program unreasonable under paragraphs (f)(3)(iii) or (iv) of this section. The program continues to satisfy the conditions of paragraphs (f)(3)(iii), (iv), and (v) of this section.

Example 4. (i) Facts. A group health plan will provide a reward to participants who have a body mass index (BMI) that is 26 or lower, determined shortly before the beginning of the year. Any participant who does not meet the target BMI is given the same discount if the participant complies with an exercise program that consists of walking 150 minutes a week. Any participant for whom it is unreasonably difficult due to a medical condition to comply with this walking program (and any participant for whom it is medically inadvisable to attempt to comply with the walking program) during the year is given the same discount if the individual satisfies an alternative standard that is reasonable taking into consideration the individual's medical situation, is not unreasonably burdensome or impractical to comply with, and is otherwise reasonably designed based on all the relevant facts and circumstances. All plan materials describing the terms of the wellness program include the following statement: "Fitness is Easy! Start Walking! Your health plan cares about your health. If you are overweight, our Start Walking program will help you lose weight and feel better. We will help you enroll. (**If your doctor says that walking isn't right for you, that's okay too. We will develop a wellness program that is.)" Individual E is unable to achieve a BMI that is 26 or lower within the plan's timeframe and is also not reasonably able to comply with the walking program. E proposes a program based on the recommendations of E's physician. The plan agrees to make the discount available to E, but only if E actually follows the physician's recommendations.

(ii) *Conclusion.* In this Example 4, the program satisfies the requirements of paragraphs (f)(3)(iii), (iv), and (v) of this section. The program's initial standard for obtaining a reward is dependent on the results of a BMI screening, which is related to a health factor. However, the plan complies with the requirements of paragraph (f)(3)(iv) of this section because it makes available to all individuals who do not satisfy the BMI standard a different reasonable means of qualifying for the reward (a walking program that is not unreasonably burdensome or impractical for individuals to comply with and that is otherwise reasonably designed based on all the relevant facts and circumstances). In addition, the plan complies with the requirements of paragraph (f)(3)(iii) of this section because, if there are individuals for whom it is unreasonably difficult due to a medical condition to comply, or for whom it is medically inadvisable to attempt to comply, with the walking program, the plan provides a reasonable alternative to those individuals. Moreover, the plan satisfies the requirements of paragraph (f)(3)(v) of this section because it discloses, in all materials describing the terms of the program, the availability of other means of qualifying for the reward or the possibility of waiver of the otherwise applicable standard. Thus, the plan satisfies paragraphs (f)(3)(iii), (iv), and (v) of this section.

Example 5. (i) Facts. In conjunction with an annual open enrollment period, a group health plan provides a premium differential based on tobacco use, determined using a health risk assessment. The following statement is included in all plan materials describing the tobacco premium differential: "Stop smoking today! We can help! If you are a smoker, we offer a smoking cessation program. If you complete the program, you can avoid this surcharge." The plan accommodates participants who smoke by facilitating their enrollment in a smoking cessation program that requires participation at a time and place that are not unreasonably burdensome or impractical for participants, and that is otherwise reasonably designed based on all the relevant facts and circumstances. The plan pays the cost of the program. Any participant can avoid the surcharge by participating in the program, regardless of whether the participant stops smoking.

(ii) *Conclusion.* In this Example 5, the premium differential satisfies the requirements of paragraphs (f)(3)(iii), (iv), and (v) of this section. The program's initial standard for obtaining a reward is dependent on the results of a health risk assessment, which is a screening. However, the plan is reasonably designed under paragraph (f)(3)(iv) because the plan provides a different, reasonable means of qualifying for the reward to all tobacco users. The plan discloses, in all materials describing the terms of the program, the availability of other means of qualifying for the reward. Thus, the plan satisfies paragraphs (f)(3)(iii), (iv), and (v) of this section.

Example 6. (i) Facts. Same facts as Example 5, except the plan does not facilitate F's enrollment in any program. Instead the plan advises F to find a program, pay for it, and provide a certificate of completion to the plan.

(ii) Conclusion. In this Example 6, the requirement for F to find and pay for F's own smoking cessation program means that the alternative program is not reasonable. Accordingly, the plan has not offered a reasonable alternative standard that complies with paragraphs (f)(3)(iii) and (iv) of this section and the premium differential violates paragraph (c) of this section.

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