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## Agencies Release Proposed Regulations Regarding Incentives for Nondiscriminatory Wellness Programs in Group Health Plans

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On November 20, 2012, the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (collectively, Departments) issued [proposed regulations](#) regarding nondiscriminatory wellness programs in group health coverage and reflecting changes made to wellness programs as part of the Patient Protection and Affordable Care Act (ACA).

The proposed regulations, which are intended to become effective for plan years beginning on or after January 1, 2014, amend the nondiscrimination regulations promulgated in 2006 under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The HIPAA nondiscrimination regulations generally prohibit group health plans from discriminating in eligibility, benefits, or premiums based on an individual's health status, but provide an exception for wellness programs that adhere to certain rules.

The proposed regulations closely follow the existing HIPAA wellness program regulations but do propose some substantial changes. Most significantly, the proposed regulations provide that, in order to be considered reasonably designed to promote health or prevent wellness, a wellness program that provides a reward related to a health factor (a health-contingent wellness program) would be required to offer a different, reasonable means of qualifying for the reward to any individual who does not meet the standard based on the measurement, test, or screening. It would appear that this would essentially require that wellness programs provide yet another way for participants to qualify for a reward in a health-contingent wellness program, bringing it closer to a pure participatory wellness program.

The separate status of wellness programs under the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 (Title VII), and the Genetic Information Nondiscrimination Act of 2008 (GINA) continues to be uncertain in some respects. The Equal Employment Opportunity Commission (EEOC) has been, and continues to be, unwilling to formally agree that HIPAA-compliant wellness programs shall be deemed to be compliant with the ADA, Title VII, or GINA. It is our understanding based on our conversations with regulators that the EEOC's position on these issues has not changed in connection with these proposed regulations. Thus, compliance with these independent legal strictures remains a distinct compliance issue in connection with offering wellness programs.

### **Types of Wellness Programs**

Like the existing HIPAA nondiscrimination regulations, the proposed regulations address two broad categories of wellness programs. The first category is "participatory" wellness programs—those that either do not require an individual to meet a standard related to a health factor in order to obtain a reward or that do not offer a reward at all. Examples of participatory wellness programs include reimbursements for a fitness center membership, rewards for attendance at a no-cost health education seminar, or rewards for completion of a health risk assessment without requiring an individual to take further action. Participatory wellness programs generally comply with the HIPAA nondiscrimination requirements so long as participation is made available to all similarly situated individuals.

The second category consists of "health-contingent" wellness programs—programs that require individuals to satisfy a standard relating to a health factor in order to obtain a reward. Wellness programs that fall within this category are more affected by the proposed regulations, because health-contingent wellness programs must satisfy a number of requirements in order to comply with the HIPAA nondiscrimination rules. Examples of health-contingent wellness programs include programs that provide a reward to those who do not use, or decrease their use of, tobacco, or programs that provide a reward to those who achieve a specified cholesterol level or weight as well as to those who fail to meet a biometric target but take certain additional required actions.

### **Amendments Made by the Affordable Care Act**

The ACA amended the nondiscrimination and wellness program provisions of the Public Health Service Act (PHSA). As amended, the nondiscrimination and wellness program provisions of the PHSA largely reflect the current wellness program regulations. However, the proposed regulations reflect certain changes not only in the statute, but also in the regulators' interpretation of the statute.

## **Application to Individual Market and Grandfathered Health Plans**

The ACA expands the application of the HIPAA nondiscrimination provisions to the individual health plan market; however, the proposed regulations do not address wellness program policy for the individual market. In addition, the preamble to the proposed regulations makes clear that the regulations would apply to grandfathered plans and non-grandfathered plans, whether insured or self-funded.

## **Requirements for Health-Contingent Wellness Programs**

The proposed regulations generally provide for the following with respect to health-contingent wellness programs:

### *(1) Frequency of Opportunity to Qualify*

Like the current regulations, the proposed regulations would require health-contingent wellness programs to offer individuals eligible for the program the opportunity to qualify for the reward at least once per year.

### *(2) Size of Reward*

The proposed regulations would limit the size of the reward to 30% of the total cost of employee-only coverage (meaning employer plus employee contributions) or, if dependents are eligible, 30% of the cost of coverage in which the employee and such dependents are actually enrolled. In the case of a program designed to reduce or prevent tobacco use, the limit on the reward is 50%. The 30% and 50% thresholds are increases from the flat 20% limit imposed by the current regulations.

### *(3) Uniform Availability and Reasonable Alternative Standards*

Like the current regulations, the proposed regulations provide that a health-contingent wellness program must be reasonably designed to be available to all similarly situated individuals. In addition, a reasonable alternative means of qualifying for the reward must be made available to individuals whose medical conditions make it unreasonably difficult, or for whom it is medically inadvisable, to meet the specified health-related standard.

The proposed regulations would implement new limits in terms of the costs that a plan sponsor or insurer may impose on wellness program participants with respect to a reasonable alternative standard:

- 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.

- If the reasonable alternative standard is a diet program, the plan or issuer is not required to pay for the cost of food but must pay any membership or participation fee.
- 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 medical professional'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 physician with regard to medical appropriateness. The plan or issuer may impose standard cost-sharing for medical items and services furnished in accordance with the physician's recommendations.

The current regulations allow a plan sponsor or insurer to require physician verification of the need for a reasonable alternative standard, without any specified limit. However, the proposed regulations would modify the physician verification provision to only allow a plan or issuer to require physician verification of the need for a reasonable alternative standard "if reasonable under the circumstances." The proposed regulations provide that it would not be reasonable for a plan 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, but a plan may seek verification where it is reasonable to determine that medical judgment is required to evaluate the validity of the claim.

#### *(4) Reasonable Design*

The proposed regulations would require a health-contingent wellness program to be reasonably designed to promote health or prevent disease and not be a "subterfuge for discrimination based on a health factor." To be considered reasonably designed to promote health or prevent disease, a program would have to offer a different, reasonable means of qualifying for the reward to any individual who does not meet the standard based on the measurement, test, or screening. Programs must have a reasonable chance of improving health or preventing disease and not be overly burdensome for individuals.

It appears that this could give a wellness program participant yet another opportunity to qualify for a reward in a health-contingent wellness program, which is a significant change from the current regulations. Practically speaking, this requirement could lead to health-contingent wellness programs more closely resembling participatory wellness programs.

*(5) Notice of Other Means of Qualifying for the Reward*

As with the current regulations, the proposed regulations would require that individuals be given notice of the opportunity to qualify for the same reward through other means. These proposed rules provide new sample language intended to be simpler for individuals to understand and to increase the likelihood that those who qualify for a different means of obtaining a reward will contact the plan or issuer to request it.

Click here for the [proposed regulations](#); here for a [fact sheet](#); and here for a [study relating to wellness programs](#). Comments relating to the proposed regulations are due on or before January 25, 2013.

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