TOWERS WATSON

# Health Care Reform

## Wellness Program Final Rules Increase Maximum Rewards, but Include Significant New Requirements


## Summary

A final regulation published in the June 3, 2013 *Federal Register* increases the maximum permissible reward (or penalty) under a "health contingent" wellness program offered in connection with an employer group health plan (insured or self-insured). Specifically, the maximum rewards (or penalties) may total up to 30% of the total cost of coverage (including both employer and employee contributions), up from 20% under current law. In addition, the final regulation increases the maximum permissible reward (or penalty) to 50% for wellness program incentives designed to prevent or reduce tobacco use.

The final regulation, which implements provisions of the Patient Protection and Affordable Care Act of 1996 (PPACA) and amends guidance previously issued under the Health Insurance Portability and Accountability Act (HIPAA), also includes other significant clarifications and modifications regarding the design of health-contingent wellness programs and the reasonable alternative standards employer plan sponsors must offer in order to implement compliant wellness programs and avoid prohibited discrimination based on health status factors.


## Key Action Items

- The final regulation paves the way for employers to significantly expand the financial incentives offered as part of a wellness program to encourage plan participants and beneficiaries to maintain, or to pursue changes in, their health status and health-related behaviors.
- Employer plan sponsors will need to incorporate into any health-contingent wellness programs the revised requirements for maintaining legal compliance. For example, employers sponsoring an "outcome-based" wellness program will be required to offer a reasonable alternative way to qualify for the reward to all individuals who fail to satisfy the healthy standard identified in the initial measurement, test or screening, regardless of whether an individual has a medical condition that made it unreasonably difficult to satisfy the standard or medically inadvisable to attempt to satisfy the standard. Similarly, employers should review the new sample language provided in the final regulation that can be used to satisfy the requirement that the availability of a reasonable alternative standard to qualify for the reward (or avoid the penalty) must be disclosed in all plan materials describing the terms of a health-contingent wellness program.
- Employers are reminded that compliance with the wellness program final regulation is not determinative of compliance with any other provision of ERISA, or any other federal law that may impact wellness program designs, including but not limited to, the Americans With Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, the IRC Section 105(h) self-insured heath plan nondiscrimination rules, the Genetic Information Nondiscrimination Act of 2008, and the Family and Medical Leave Act.

## Timing

The final regulation, and the opportunity to increase wellness financial rewards (and penalties), applies for plan or policy years beginning on and after January 1, 2014. Current HIPAA health status nondiscrimination rules that limit wellness rewards (and penalties) to 20% of total cost of coverage will still apply to the 2013 plan year.

## Background

HIPAA generally prohibits group health plans (insured or self-insured) from discriminating against participants and beneficiaries with respect to eligibility, benefits, and premiums or contributions based on eight specified "health factors" (i.e., health status, medical condition, claim experience, receipt of health care, medical history, genetic information, evidence of insurability and disability). However, HIPAA includes an exception to the general prohibition against discrimination based on a health factor for plan provisions that vary benefits (including copayments, deductibles or coinsurance) or the premium or contributions for similarly situated individuals in connection with HIPAA-compliant programs of health promotion or disease prevention (i.e., wellness programs). The PPACA includes a provision extending the HIPAA nondiscrimination protections to the individual market and also increasing the permissible wellness-related financial rewards from the amount previously established under HIPAA rules. Proposed regulations were issued in November 2012 to implement the PPACA provision and amend prior HIPAA guidance.

Now the Departments of Treasury, Labor, and Health and Human Services (the Departments) have finalized the regulation, effective for plan or policy years beginning on and after January 1, 2014. Pursuant to this final regulation, group health plans (insured and self-insured) will have expanded authority to offer rewards (or penalties) for participation in health-contingent wellness programs. Specifically, rewards (or penalties) may have a value of up to 30% (or up to 50% for programs to prevent or reduce tobacco use) of the total cost of coverage, as explained further below.

The final regulation revises and restates the five special requirements for health-contingent wellness programs, as provided for under the current HIPAA health status nondiscrimination rules, which must be satisfied in order for a group health plan to offer these enhanced rewards (or penalties). The final regulation also newly divides health-contingent wellness programs into two categories — "activity-only wellness programs" and "outcome-based wellness programs" — and imposes different requirements for each category.

## Providing Notice to Employees

Employers must provide a notice of coverage options to each employee, regardless of plan enrollment status (if applicable), or of part-time or full-time status. Employers are *not* required to provide a separate notice to dependents or other individuals who are or may become eligible for coverage under the plan but who are not employees.

### Reward or Penalty – Does it Matter?

For purposes of the wellness program final regulation (and this memo), except where expressly provided otherwise, references to an individual obtaining a reward (or a plan providing a reward), include both:

- An individual obtaining (or a plan providing) a reward, such as a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism, an additional benefit, or any financial or other incentive
- An individual avoiding (or a plan imposing) a penalty, such as the absence of a premium surcharge or other financial or nonfinancial disincentive

As a result, solely for purposes of complying with the wellness program final regulation, an employer plan sponsor or insurer is allowed to characterize its wellness programs as either providing rewards (or incentives) or imposing penalties (or surcharges). The employer's or insurer's choice of terminology should not be detrimental from a HIPAA wellness program legal perspective. That said, other laws (such as the ADA) *may* influence employer plan sponsors and insurers toward utilizing positive

descriptors and motivators (e.g., rewards/incentives), as opposed to negative descriptors and motivators (e.g., penalties/surcharges), in describing the terms of its wellness program.

## Types of Wellness Programs

The final regulation continues to divide wellness programs into two categories, and newly divides health-contingent wellness programs into two subcategories:

- Participatory wellness programs
- Health-contingent wellness programs
  - Activity-only wellness programs
  - Outcome-based wellness programs

### Participatory wellness programs

Participatory wellness programs are programs that either: (i) do not provide a reward or (ii) do not include any conditions for obtaining a reward that are based on an individual satisfying a standard that is related to a health factor. In addition, participatory wellness programs must be made available to all similarly situated individuals, regardless of health status.

Examples of participatory wellness programs include:

- A program that reimburses all or part of the cost of membership in a fitness center
- A diagnostic testing program that provides a reward for participation in the program and does not base any part of the reward on outcomes, for example, a wellness program that provides a reward for merely taking a series of biometric tests (without regard to the results)
- 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 (reminder: the PPACA's preventive services mandate requires non-grandfathered plans to provide certain preventive health services without participant cost sharing)
- 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
- A program that provides a reward to employees for attending a monthly, no-cost health education seminar
- 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

Importantly, participatory wellness programs are not required to meet the five special requirements applicable to health-contingent wellness programs (see below). Therefore, any rewards provided in connection with a participatory wellness program do not count toward the 30%/50% maximum permissible reward thresholds. Furthermore, reasonable alternative standards need not be made available under participatory wellness programs.

### Health-contingent wellness programs

In contrast, health-contingent wellness programs require an individual to satisfy a standard related to a health factor to obtain a reward or require an individual to undertake more than a similarly situated individual based on a health factor in order to obtain the same reward. This standard may be performing or completing an activity relating to a health factor, or it may be attaining or maintaining a specific health outcome. Ostensibly, this represents discrimination among plan participants and beneficiaries based on their health status, which is generally prohibited under current HIPAA rules and the PPACA. However, if a group health plan or insurer complies with the five special (and revised) requirements for health-contingent wellness programs (as described below), the final regulation continues to permit such rewards, similar to the permissibility of such wellness program rewards under current HIPAA rules.

The final regulation subdivides the category of health-contingent wellness programs into two new subcategories: (i) activity-only wellness programs and (ii) outcome-based wellness programs. As described below, the final regulation

imposes significant differences in how the wellness program rules apply to each of these types of programs, particularly with respect to the reasonable alternative standard requirement.

**Activity-only wellness programs**

Under an activity-only wellness program, an individual is merely required to perform or complete an activity related to a health factor in order to obtain a reward. Activity-only wellness programs do not require an individual to attain or maintain a specific health outcome. Examples of activity-only wellness programs include:

- Walking programs
- Diet programs
- Exercise programs

Some individuals may be unable to participate in an activity-only wellness program due to a health factor. For example, an individual may be unable to participate in a walking program due to a recent surgery or pregnancy, or may have difficulty participating due to severe asthma. As described further below, the final regulation, therefore, provide safeguards to ensure these individuals are given a reasonable opportunity (i.e., a reasonable alternative standard) to qualify for the reward.

**Outcome-based wellness programs**

Alternatively, under an outcome-based wellness program, an individual must attain or maintain a specific health outcome (such as not smoking or attaining certain results on biometric screenings) in order to obtain a reward. Generally, in order for outcome-based wellness programs to comply with the final regulation, the program generally has two tiers:

- *Tier 1:* A measurement, test, or screening as part of an initial standard
- *Tier 2:* A program that targets individuals who do not meet the initial (healthy) standard in Tier 1 with required follow-up wellness activities, for example, for individuals who do not attain or maintain the specific healthy outcome in Tier 1, compliance with an educational program or another activity may be offered as an alternative to achieve the same reward as Tier 1 healthy individuals

However, the availability of an activity-based Tier 2 pathway to obtain the reward does not mean that the overall wellness program, which has an outcome-based initial standard (Tier 1), is not an outcome-based wellness program. That is, if a measurement, test or screening is used as part of an initial standard and individuals who meet the Tier 1 standard are granted the reward, the overall program is considered an outcome-based wellness program. This is important because, as described below, outcome-based wellness programs are subject to different (and more stringent) standards than activity-only wellness programs (for example, the application of a reasonable alternative standard).

Examples of outcome-based wellness programs include a biometric screening that tests individuals for specified medical conditions or risk factors (such as high cholesterol, high blood pressure, abnormal BMI or high glucose level) and provides a reward to employees identified as within a normal or healthy range (or at low risk for certain medical conditions), while requiring employees who are identified as outside the normal or healthy range (or at high 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.

## Five Special Requirements for Health-Contingent Wellness Programs

As under current HIPAA rules, health-contingent wellness programs will be permitted in a group health plan only if they satisfy *all* five special requirements, as restated and revised in the final regulation. The five special requirements are:

1. Frequency of opportunity to qualify
2. Size of reward
3. Reasonable design

4. Uniform availability and reasonable alternative standards

5. Notice of availability of reasonable alternative standards

These five requirements will generally be familiar from the current HIPAA health status nondiscrimination rules. However, some of the five requirements, in particular, the size of the reward and the uniform availability and reasonable alternative standard, have been modified in the final regulation in several important ways. The five requirements apply only to wellness programs that are health-contingent programs (i.e., a wellness program that both provides a reward and conditions the reward on satisfying a standard that is related to a health factor). As a reminder, participatory wellness programs are not required to comply with any of the above-referenced five requirements.

## 1. Frequency of Opportunity to Qualify

The final regulation retains the current requirement, for both activity-only and outcome-based wellness programs, that individuals eligible for the health-contingent wellness program be given the opportunity to qualify for the reward at least once per year. The once-per-year requirement is a bright-line standard for determining the minimum frequency that is consistent with a reasonable design for promoting good health or preventing disease, and is consistent with current HIPAA rules.

## 2. Size of Reward

The final regulation continues to limit the total amount of the reward for health-contingent wellness programs (both activity-only and outcome-based) with respect to a group health plan, whether offered alone or coupled with the reward for other health-contingent wellness programs under the group health plan. Specifically, the total reward offered to a participant or beneficiary under all health-contingent wellness programs with respect to a group health plan cannot exceed a specified percentage (referred to as an "applicable percentage," explained below) of the total cost of employee-only coverage under the plan. If, in addition to employees, any class of dependents (such as spouses, or spouses and dependent children) may participate in the health-contingent wellness program, the reward cannot exceed the applicable percentage of the total cost of the coverage in which the employee and any dependents are enrolled (such as family coverage or employee-plus-one coverage). For this purpose, the total cost of coverage is determined based on the total amount of employer and employee contributions toward the cost of coverage for the benefit package under which the employee is (or the employee and any dependents are) receiving coverage. From a practical perspective, this will generally be the plan's COBRA rate (minus the COBRA-permitted 2% administration fee) or the plan's premium equivalent rate. As a reminder, any rewards offered in connection with participatory wellness programs do not count toward the maximum permissible reward, and as such, may be provided over and above the 30%/50% maximum permissible rewards, as described below.

Under the wellness program proposed regulation issued in November 2012, the Departments invited comments on the apportionment of rewards in health-contingent wellness programs (which may involve tobacco use and/or other health factors). For example, the Departments requested comment on whether the reward should be prorated if only one family member fails to qualify for it. Although the Departments received comments on this issue, the final regulation does not set forth detailed rules governing apportionment of the reward under a health-contingent wellness program that allows dependents to participate (e.g., the rules do not provide rules on what portion of the reward should be attributable to each participating dependent). Instead, the Departments state that plans and issuers have flexibility to determine apportionment of the reward among family members, as long as the method is reasonable. Additional sub-regulatory guidance may be provided by the Departments if questions persist or if the Departments become aware of apportionment designs that seem unreasonable.

*Applicable percentage*

Current HIPAA rules set 20% as the maximum permissible reward for participation in a health-contingent wellness program. Effective for plan years beginning on or after

January 1, 2014, PPACA increases the maximum reward to 30%. PPACA also authorizes the Departments to increase the maximum reward to as much as 50% if the Departments determine that such an increase is appropriate. In the final regulation, as in the proposed regulation, the Departments have determined that an increase of an additional 20 percentage points (to 50%) is warranted for health-contingent wellness programs designed to prevent or reduce tobacco use.

*Examples*

The final regulation includes the following examples to illustrate the calculation of the maximum permissible rewards:

**Example 1**

- *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 with several components, focused on exercise, blood sugar, weight, cholesterol and blood pressure. The reward for compliance is an annual premium rebate of $600.
- *Conclusion.* In this example, the reward for the wellness program, $600, does not exceed the applicable percentage of 30% of the total annual cost of employee-only coverage, $1,800 ($6,000 × 30% = $1,800).

**Example 2**

- *Facts.* Same facts as Example 1, except the wellness program is exclusively a tobacco prevention program. Employees who have used tobacco in the previous 12 months and who are not enrolled in the plan's tobacco-cessation program are charged a $1,000 premium surcharge (in addition to the employee contribution toward the coverage). Those who participate in the plan's tobacco-cessation program are not assessed the $1,000 surcharge.
- *Conclusion.* In this example, the reward for the wellness program (absence of a $1,000 surcharge), does not exceed the applicable percentage of 50% of the total annual cost of employee-only coverage, $3,000 ($6,000 × 50% = $3,000).

**Example 3**

- *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 previous 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.
- *Conclusion.* In this example, 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 the applicable percentage of 50% 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 the applicable percentage of 30% of the total annual cost of employee-only coverage ($1,800).

**Example 4**

- *Facts.* An employer sponsors a group health plan. The total annual premium for employee-only coverage (including both employer and employee contributions toward 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, with an opportunity to earn a $1,500 reward.
- *Conclusion.* In this example, even though the total reward for all wellness programs under the plan is $1,750 ($250 + $1,500 = $1,750, which exceeds the applicable percentage of 30% of the cost of the annual premium for employee-only coverage ($5,000 × 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 regarding the size of the reward are met. (The $250 reward is offered in connection with a participatory wellness program and therefore is not taken into account.) Accordingly, the health-contingent wellness program offers a reward that does not exceed the applicable percentage of 30% of the total annual cost of employee-only coverage.

## 3. Reasonable Design

The final regulation continues to require that health-contingent wellness programs be reasonably designed to promote health or prevent disease, whether activity-only or outcome-based. This reasonable design requirement is designed to prevent abuse and, according to the Departments, is otherwise ‘‘intended to be an easy standard to satisfy." The final regulation states that a wellness program is reasonably designed if it has a reasonable chance of improving the health of, or preventing disease in, participating individuals, and is not overly burdensome, is not a subterfuge for discrimination based on a health factor and is not highly suspect in the method chosen to promote health or prevent disease. The determination of whether a health-contingent wellness program is reasonably designed is based on all the relevant facts and circumstances. The Departments note that wellness programs are not required to be accredited or based on particular evidence-based clinical standards, and continue to provide plans and issuers flexibility, and encourage innovation. There does not need to be a scientific record, for example, that a particular method promotes wellness to satisfy this reasonableness standard. The standard is intended to allow experimentation with diverse ways of promoting wellness.

In addition, the Departments state that nothing in the final regulation prevents a plan or issuer from establishing more favorable rules for eligibility or premium rates (including rewards for adherence to certain wellness programs) for individuals with an adverse health factor than for individuals without the adverse health factor. This is sometimes referred to as benign discrimination (which is permissible).

Finally, as described in further detail below, to ensure that an outcome-based wellness program is reasonably designed to improve health and does not act as a subterfuge for underwriting or reducing benefits based on a health factor, a reasonable alternative standard to qualify for the reward must be provided to *any individual* who does not meet the initial (healthy) standard based on a measurement, test or screening that is related to a health factor (such as not smoking or attaining certain results on biometric screenings). In this regard, the final regulation includes a new requirement not present under current HIPAA rules, namely that*all individuals*, not just those for whom meeting the initial standard is unreasonably difficult due to a medical condition to satisfy (or medically inadvisable to attempt to satisfy), must be provided with a reasonable alternative standard to qualify for the reward.

## 4. Uniform Availability and Reasonable Alternative Standards

### *a. Activity-only wellness programs*

Activity-only wellness programs, such as walking programs, diet programs and/or exercise programs, must make the full reward available to all similarly situated individuals. A reward under an activity-based wellness program is not available to all similarly situated individuals for a period unless 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 either: (i) unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard or (ii) medically inadvisable to attempt to satisfy the otherwise applicable standard. For example, if it is unreasonably difficult due to a medical condition to participate in a walking, diet or exercise program (or if it is medically inadvisable to attempt to participate in a walking, diet or exercise program), the plan or issuer must allow the individual to obtain the reward by providing such individual a reasonable alternative standard, or alternatively, simply waiving the requirement to participate in the wellness program to obtain the reward.

The final regulation does not require plans and issuers to determine a particular reasonable alternative standard in

advance of an individual's request for one; however, 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:

- If the reasonable alternative standard is completion of an educational program, the plan or issuer must make the educational program available or assist the employee in finding such a program (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. Thus, the additional costs associated with providing educational programs must be borne by the plan or issuer.
- The time commitment required must be reasonable (for example, requiring attendance nightly at a one-hour class would be unreasonable).
- 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 an individual's personal physician states that a plan standard (including, if applicable, the recommendations of the plan's medical professional) is 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.

To the extent that a reasonable alternative standard under an activity-only wellness program is, itself, another activity-only wellness program, that activity-only reasonable alternative standard must comply with all five special requirements for activity-only health-contingent wellness programs in the same manner as if it were an initial program standard. For example, if a plan or issuer provides a walking program as a reasonable alternative standard to a running program, individuals for whom it is unreasonably difficult due to a medical condition to complete the walking program (or for whom it is medically inadvisable to attempt to complete the walking program) must be provided another reasonable alternative standard to the walking program. To the extent that a reasonable alternative standard under an activity-only wellness program is, itself, an outcome-based wellness program, that outcome-based reasonable alternative standard must comply with all five special requirements for outcome-based health-contingent wellness programs.

Finally, under an activity-only wellness program, as under current HIPAA rules, it is permissible for a plan or issuer to seek verification, such as a statement from the 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 in an activity-only wellness program, *if reasonable under the circumstances.* Plans and issuers are permitted to seek verification with respect to an individual's request for a reasonable alternative standard for which it is reasonable to determine that medical judgment is required to evaluate the validity of the request. However, as described in more detail below, the final regulation clarifies that, with respect to outcome-based wellness programs, plans and issuers cannot require verification by the individual's 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 as a condition of providing a reasonable alternative to the initial standard.

***b. Outcome-based wellness programs***

Outcome-based wellness programs allow plans and issuers to conduct screenings and employ measurement techniques in order to target wellness programs effectively. For example, plans and issuers are able to target only individuals with high cholesterol for participation in

cholesterol-reduction programs, or individuals who use tobacco for participation in tobacco-cessation programs, rather than the entire population of participants and beneficiaries, with the reward based on health outcomes or participation in reasonable alternatives.

In order for outcome-based wellness programs to meet the requirement that the reward be available to all similarly situated individuals, the final regulation requires that the program allow a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for *any individual* who does not meet the initial (healthy) standard based on a measurement, test or screening. Therefore, if an individual does not meet a plan's target biometrics (or other, similar outcome-based initial standards, such being a non-tobacco user), that individual must be provided with a reasonable alternative standard *regardless of any medical condition or other health status factor,* to ensure that outcome-based initial standards are not a subterfuge for discrimination or underwriting based on a health factor.

In a significant departure from the current HIPAA rules, a plan or issuer is not permitted to seek verification, such as a statement from the individual's personal physician, under an outcome-based wellness program, 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. Instead, an individual is allowed to request a reasonable alternative standard even if it would not be unreasonably difficult due to a medical condition to meet the otherwise applicable standard or would not be medically inadvisable to attempt to satisfy the otherwise applicable standard. For example, a plan must offer a tobacco user a reasonable alternative standard (for example, participation in a tobacco-cessation program), and is not allowed to first require that such individual get a statement from his or her physician that a health factor (e.g., addiction to nicotine) makes it unreasonably difficult for the individual to satisfy the nonsmoker standard.

However, if a plan or issuer provides a reasonable alternative standard to the otherwise applicable measurement, test or screening that involves an *activity* (as opposed to an outcome) that is related to a health factor, then the rules for activity-only wellness programs apply to that component of the wellness program, and the plan or issuer may, if reasonable under the circumstances, seek verification that it is unreasonably difficult due to a medical condition for an individual to perform or complete the activity (or it is medically inadvisable to attempt to perform or complete the activity). For example, if an outcome-based wellness program requires participants to maintain a certain healthy weight and provides, as a reasonable alternative standard, a diet and exercise program for individuals who do not meet the targeted weight, a plan or issuer may seek verification, if reasonable under the circumstances, that a second reasonable alternative standard is needed for certain individuals because, for those individuals, it would be unreasonably difficult due to a medical condition to comply, or medically inadvisable to attempt to comply, with the diet and exercise program (i.e., the first reasonable alternative standard) due to a medical condition.

As with activity-only wellness programs, the final regulation does not require plans and issuers to determine a particular reasonable alternative standard in advance of an individual's request for one. However, 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.

In addition, as with activity-only wellness programs, all the facts and circumstances are taken into account in determining whether a plan or issuer has furnished a reasonable alternative standard, including the specific factors identified above.

To the extent a reasonable alternative standard under an outcome-based wellness program is, itself, an activity-only wellness program, the activity-only reasonable alternative standard must comply with the requirements for activity-only programs as if it were an initial program standard. Therefore, for example, if a plan or issuer provides a walking program as an alternative to a running program, the plan must provide reasonable alternatives to individuals who cannot complete the walking program because of a medical condition. Moreover, to the extent that a reasonable

alternative standard under an outcome-based wellness program is, itself, another outcome-based wellness program, the outcome-based reasonable alternative standard must generally comply with the requirements for outcome-based wellness programs, subject to the following special rules:

- The reasonable alternative standard cannot be a requirement to meet a different level of the same standard without additional time to comply that takes into account the individual's circumstances. For example, if the initial standard is to achieve a BMI less than 30, the reasonable alternative standard cannot be to achieve a BMI less than 31 on that same date. However, if the initial standard is to achieve a BMI less than 30, a reasonable alternative standard for the individual could be to reduce the individual's BMI by a small amount or small percentage, over a realistic period of time, such as within a year.
- An individual must be given the opportunity to comply with the recommendations of the individual's personal physician as a second reasonable alternative standard to meeting the reasonable alternative standard defined by the plan or issuer, but only if the physician joins in the request. The individual can make a request to involve a personal physician's recommendations at any time, and the personal physician can adjust the physician's recommendations at any time, consistent with medical appropriateness.

## 5. Notice of Availability of Reasonable Alternative Standard

The final regulation requires plans and issuers to disclose the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of a waiver of the otherwise applicable standard) in all plan materials describing the terms of a health-contingent wellness program (for both activity-only and outcome-based wellness programs). The final regulation clarifies that a disclosure of the availability of a reasonable alternative standard includes contact information for obtaining the alternative and a statement that recommendations of an individual's personal physician will be accommodated. For outcome-based wellness programs, this notice must also be included in any disclosure that an individual did not satisfy an initial outcome-based standard.

For all health-contingent wellness programs (both activity-only and outcome-based), if plan materials merely mention that such a program is available, without describing its terms, this disclosure is not required. For example, a Summary of Benefits and Coverage (SBC) that notes that cost sharing may vary based on participation in a diabetes wellness program, without describing the standards of the program, would not trigger this disclosure. In contrast, a plan disclosure that references a premium differential based on tobacco use, or based on the results of a biometric exam, is a disclosure describing the terms of a health-contingent wellness program and, therefore, must include this disclosure.

The final regulation provides the following sample language:

*"Your health plan is committed to helping you achieve your best health. 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 (and if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status."*

Two other approved sample statements included in examples provide:

*"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 total 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 and your doctor to find a Health Smart program that is right for you."*

*"Fitness Is Easy! Start Walking! Your health plan cares about your health. If you are considered overweight because you have a BMI of over 26, 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 work with you [and, if you wish, your own doctor] to develop a wellness program that is.)"*

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