Business Roundtable℠

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Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N–5653
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210,
Attention: Wellness Programs

Re: Notice of Proposed Rulemaking—Incentives for Nondiscriminatory Wellness Programs in Group Health Plans

Dear Sir or Madam:

The Business Roundtable (BRT) is an association of chief executive officers of leading U.S. Companies. Together, our members' companies employ more than 16 million individuals and provide health care coverage to nearly 40 million American workers, retirees, and their families. BRT is invested in addressing health care costs that hamper essential economic growth. For that reason, BRT has been critically engaged on the issue of health care reform and has an interest in seeing an implementation of the Affordable Care Act (ACA) that provides employers with the flexibility they need to continue providing critical benefits to employees and their families.

The Department of the Treasury ("Treasury"), the Department of Labor ("DOL"), and the Department of Health and Human Services ("HHS") (collectively, the Departments) have requested comment on the notice of proposed rulemaking dated November 26, 2012, regarding incentives for nondiscriminatory wellness programs in group health plans. The proposal would, consistent with the ACA, as amended:

- Increase the maximum permissible reward under a health-contingent wellness program offered in connection with a group health plan (and any related health insurance coverage) from 20 percent to 30 percent of the cost of coverage;
- Further increase the maximum permissible reward to 50 percent for wellness programs designed to prevent or reduce tobacco use;
- Refine the definition of tobacco use;

- Clarify the rules regarding the reasonable design of health-contingent wellness programs and the reasonable alternatives they must offer in order to avoid prohibited discrimination; and
- Permit greater flexibility for employers by removing the requirement of apportionment of rewards.

BRT appreciates the opportunity to submit comments in response to the Departments' proposed regulations (the "Guidance"). BRT strongly supports the direction of the proposals contained within the Guidance and applauds the Departments for their coordinated efforts and recognition of the crucial need for employer flexibility. BRT encourages the Departments to incorporate into any final rule or future guidance the recommendations presented below.

Clarification of Requirement that Wellness Program be Reasonably Designed

It appears to be the intent of the Departments to maintain the five requirements for health-contingent wellness programs, with the only significant modification relating to the size of the reward. These five requirements are:

- The frequency of the availability to qualify for the reward;
- The size of the reward;
- The uniform availability and reasonable alternative standards;
- The requirement that the program be reasonably designed; and
- Notice of other means of qualifying for the reward.

From the BRT's review of the Guidance, there appears to be a conflict between the rules regarding the requirement that plans offer a "reasonable alternative" and the requirement that "the program be reasonably designed." We recommend that this conflict be resolved in favor of the rules that apply under the "reasonable alternative" standard.

Under the "reasonable alternative" standard, a plan must offer a participant or beneficiary a "reasonable alternative" to the applicable standard for obtaining a reward in a health-contingent wellness program only in the event that satisfaction of the otherwise applicable standard is unreasonably difficult or medically inadvisable due to a medical condition. The Guidance states as follows:

> A ''reasonable alternative standard'' (or waiver of the otherwise applicable standard) for obtaining the reward must be provided for any individual for whom, for that period, it is either *unreasonably difficult due to a medical condition* to meet the otherwise applicable standard, or for whom it is *medically inadvisable* to attempt to satisfy the otherwise applicable standard. (Emphasis added.)

Under the Guidance, therefore, the obligation to offer a reasonable alternative is contingent on the presence of a medical condition that prevents the participant from satisfying the initial standard. In contrast, the requirement that the plan be reasonably designed does not appear to take into account a participant's medical condition in the event of failure to satisfy the otherwise applicable standard. Under the proposed regulations, the determination of whether a health-contingent wellness program is reasonably designed is based on all the relevant facts and circumstances. The Departments note the following:

> 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. (Emphasis added.)

According to the Guidance, a plan would not be "reasonably designed" unless it offered another means of qualifying for the reward to every individual who failed the initial standard, regardless of the reason for the individual's failure to meet the standard. This interpretation, if adopted, would essentially eliminate the reasonable alternative standard, which is only triggered in the event a medical condition prevents satisfaction of the initial standard.

BRT supports the Departments' goal of providing reasonable alternative standards that can accommodate an employees' medical condition if the condition prevents the employee from achieving the initial standard. In addressing the need for the advice of a physician in determining the need for an alternative, the BRT urges the Departments to consider the need for a precise definition of "physician."

BRT also suggests that, in order to protect employee dignity and privacy, the Departments consider placing the onus of establishing a medical condition on the employee rather than on the employer. For many employers with thousands of employees, many of whom rarely meet face-to-face, an employee's medical condition might not be obvious to a plan administrator. It is also important to avoid any situations where a plan administrator is forced under regulations to make judgments about an employee's medical condition based only on incomplete information and subjective observations. Moreover, the Departments should not issue any regulation that encourages employers or issuers to review employee medical records to obtain protected health information. Such a regulation would create an atmosphere of suspicion and distrust regarding the administration of wellness programs. On the other hand, empowering employees to reveal any disqualifying medical conditions to their employers gives employees control of the process and permits the employee to weigh the benefits of a reward with the disclosure of the employee's protected health information.

BRT suggests, therefore, that the "reasonably designed" standard be revised as follows:

> To the extent a plan's initial standard for obtaining a reward (including a portion of a reward) is either (1) 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), or (2) is based on any incentive design that includes requirements for either receiving a medical exemption if appropriate based on a temporary or permanent medical condition or having reasonable alternatives when otherwise healthy, but not reaching a biometric target, then in either event the plan must make available to any individual who, *due to a medical condition*, does not meet the standard based on the measurement, test, or screening a different, reasonable means of qualifying for the reward. The employer shall have no obligation to provide an alternative based on the presence of such medical condition unless and until the employee establishes the existence of such medical condition.

Expansion of Conditions Entitled to the 50% Wellness Reward

The Departments are authorized under law to increase the maximum reward under a wellness program from 30% of the applicable cost of coverage to as much as 50% if the Departments determine that such

an increase is appropriate. The BRT applauds the Departments' decision to increase the maximum reward to 50% for health-contingent wellness programs designed to prevent or reduce tobacco use. BRT recommends that the 50% maximum reward also apply to programs that are designed to prevent or reduce obesity.

Obesity in adults and children has become a national concern. A recent survey in The Economist noted that two-thirds of Americans are overweight, defined as having a body mass index ("BMI") of 25 or more; 36% of adults and 17% of children are classified as obese with a BMI above 30, creating the risk that, if current trends continue, nearly half of American adults could be obese by 2030.[1] As noted in The Economist:

> [O]besity has costs. It lowers workers' productivity and in the longer term raises the risks of myriad ailments, including diabetes, heart disease, strokes, and some cancers; it also affects mental health. In America, obesity-related illness accounted for one-fifth of total health-care spending in 2005. A new global health study led by Christopher Murray of the University of Washington shows that since 1990 obesity has grown faster that any other cause of disease. For women, a high BMI is now the third highest driver of illness.[2]

We recognize that there continues to be debate and discussion around the obesity issue and that medical data and studies regularly provide additional insights on the issue. For example, according to a meta-study published in the January 2013 issue of the Journal of the American Medical Association, "overall obesity (combining all grades) and higher levels of obesity were both associated with a significantly higher all-cause risk of death, while overweight was associated with significantly lower all-cause mortality."[3] The meta-study also notes that overweight or somewhat obese people might have a lower mortality risk because these people are receiving medical treatment for other conditions associated with weight gain, such as high cholesterol or diabetes.[4]

It is also important to note that the analysis in the meta-study, while noteworthy, is limited to analysis of increased mortality risk from obesity, not to analysis of the higher risk of developing chronic conditions from obesity. Toward that end, a study by the World Health Organization found that obesity is a major factor in the development of chronic medical conditions, with obesity being a major cause of 44% of diabetes cases, 23% of cases of coronary heart disease, and over 40% of various cancers.[5]

BRT and its member companies recognize that the obstacles in combating obesity are much more challenging than the obstacles found in reducing the incidence of smoking. In contrast to tobacco cessation programs, the fight against obesity involves many changes in an individual's daily habits, such as adoption of a regimen of frequent exercise and consumption of a different and more varied diet, along with greater access to nutritional information. As a result, the fight against obesity should involve a variety of private and public policies designed to encourage healthier choices. The expansion of chronic conditions that would be subject to the increased wellness reward of 50% of the cost of medical coverage would be one such policy that employers could use in conjunction with others to reduce the incidence of obesity in their populations.

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[1] Charlotte Howard, "The Big Picture", The Economist, December 15th 2012, page 3.
[2] *Id*., page 4.
[3] "Higher Levels of Obesity Associated With Increased Risk of Death; Being Overweight Associated With Lower Risk of Death", The JAMA Network, January 1, 2013, http://www.digitalnewsrelease.com/?q=jama_3867
[4] *Id.*
[5] Howard, p. 7.

BRT, therefore, recommends that the increased 50% wellness reward apply to programs that target prevention and reduction of obesity as well as obesity-related illnesses.

Refine the definition of tobacco use

The Guidance requests comments on the definition of tobacco use. BRT does not recommend a specific definition of tobacco use. Instead, BRT urges the Departments to permit employers the flexibility to design innovative programs that broadly define "tobacco use" and the period of time over which such use is measured as they design wellness programs meant to prevent or reduce tobacco use in their unique employee population.

Apportionment of Rewards

We believe it is not necessary to apply rules on apportionment of awards and that it will constrain employer flexibility in designing otherwise compliant wellness programs. For example, an apportionment rule will introduce unnecessary complexity into calculating a reward or penalty as well as communicating the terms of a wellness program to participants. We believe that the use of the coverage tier could be the attachment point for the maximum on rewards/penalties based on whether dependents are eligible for the wellness program.

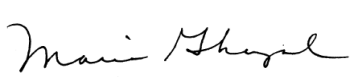
Additional Technical Issues

Additionally, BRT would request that HHS provide a technical clarification to proposed § 146.121(f), regarding nondiscriminatory wellness programs in general. Specifically, we would encourage the Departments to clarify that nothing in paragraph (f) prohibits a health insurance issuer from providing a reward to an employer or group health plan sponsor for its employees' participation in a workplace wellness program. Including such clarifying language will ensure that insurance issuers retain the ability to incentivize both employers' and plan sponsors' incorporation of workplace wellness programs into their offered plans and their continued support for employees' ongoing participation in these programs. BRT recommends that the wellness program regulations clarify that rewards paid to employers for achieving workforce participation goals in wellness programs and for completion of those programs be permissible under the regulations, both with respect to the program itself and the alternative reward, and not be counted toward the maximum permissible wellness reward.

Conclusion

BRT applauds the efforts of the Departments to create workable, flexible rules that encourage the design, establishment and operation of employer-provided wellness programs that help employers, employees, and their families identify and manage chronic medical conditions and reduce the cost and burden of these medical conditions on individuals, government, employers, and society. BRT believes that the above recommendations will facilitate these objectives and help achieve the goal of affordable health care for all Americans. I am available at your convenience to discuss any of these matters further.

Sincerely,



Maria Ghazal
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