

FAQs ABOUT AFFORDABLE CARE ACT AND HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT IMPLEMENTATION

PART 74

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Set out below are Frequently Asked Questions (FAQs) regarding implementation of certain provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Affordable Care Act. These FAQs have been prepared jointly by the Departments of Labor, Health and Human Services (HHS), and the Treasury (collectively, the Departments). Like previously issued FAQs (available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs> and <https://www.cms.gov/marketplace/resources/fact-sheets-faqs>), these FAQs answer questions from stakeholders to help people understand the law and promote compliance.

Nondiscrimination and Wellness Programs: Health-Contingent Programs and Retroactivity of the “Full Reward” Requirement, Including Tobacco Cessation Programs

HIPAA amended the Internal Revenue Code (Code), the Employee Retirement Income Security Act (ERISA), and the Public Health Service Act (PHS Act) to add, among other things, provisions prohibiting discrimination in eligibility, benefits, or premiums based on a health factor in group health insurance and group health plan coverage. An exception to the general prohibition allows premium discounts or rebates or modification to otherwise applicable cost sharing (including copayments, deductibles, or coinsurance) or benefits in return for adherence to certain programs of health promotion and disease prevention, commonly referred to as wellness programs.¹

In 2006, the Departments published final regulations implementing these nondiscrimination and wellness provisions (the 2006 final rules).² The 2006 final rules generally divided wellness programs into two categories: participatory wellness programs and health-contingent wellness programs. A participatory wellness program is a program under which none of the conditions for obtaining a reward is based on an individual satisfying a standard related to a health factor or under which no reward is offered. A health-contingent wellness program is a program under which any of the conditions for obtaining a reward is based on an individual satisfying a standard related to a health factor (such as not smoking, attaining certain results on biometric screenings, or meeting targets for exercise).^{3, 4}

¹ See PHS Act section 2705(j)(3)(A) (“A reward may be in the form of a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism (such as deductibles, copayments, or coinsurance), the absence of a surcharge, or the value of a benefit that would otherwise not be provided under the plan.”).

² 71 FR 75014 (Dec. 13, 2006).

³ *Id.*; see also 78 FR 33158, 33159 & nn.5–6 (June 3, 2013).

⁴ Examples of participatory wellness programs in the regulations include a fitness center reimbursement program, a diagnostic testing program that does not base rewards on test outcomes, a program that waives cost-sharing for prenatal or well-baby visits, a program that reimburses employees for the cost of smoking cessation aids regardless

PHS Act section 2705, as added by the Affordable Care Act and incorporated into ERISA section 715 and Code section 9815, amended the HIPAA nondiscrimination and wellness provisions and extended them to non-grandfathered individual health insurance coverage.⁵ The nondiscrimination and wellness provisions of PHS Act section 2705 largely codified into statute the 2006 final rules, with some notable differences. Among the differences, the Affordable Care Act specified that the *full* reward under the wellness program must be made available to all similarly situated individuals. However, the Affordable Care Act did not specify whether the “full reward” refers to the reward that is provided to individuals who meet the initial standard for the plan year, or the reward for the portion of the plan year after the reasonable alternative standard is satisfied.

On June 3, 2013, the Departments issued final rules⁶ implementing PHS Act section 2705 and amending the 2006 final rules regarding nondiscriminatory wellness programs in group health coverage (2013 final rules). The 2013 final rules retained the two main categories of wellness programs (i.e., participatory and health-contingent wellness programs).⁷ Under the 2013 final rules, health-contingent wellness programs may take the form of an activity-only⁸ or outcome-based wellness program.⁹ The 2013 final rules outlined the following requirements for outcome-based wellness programs¹⁰:

1. The program must give eligible individuals an opportunity to qualify for the reward at least once per year.
2. The total reward for such wellness programs, together with the reward for other health-contingent wellness programs with respect to the plan, must not exceed 30 percent of the total cost of employee-only coverage under the plan.¹¹ The maximum permissible reward is 50 percent for wellness programs designed to prevent or reduce tobacco use.

of whether the employee quits smoking, and a program that provides rewards for attending health education seminars.

⁵ Affordable Care Act section 1201 also moved those provisions from PHS Act section 2702 to PHS Act section 2705. The wellness program exception applies to group health coverage, but not individual market coverage. However, as stated in the preamble to the 2013 final rules, “it is HHS’s belief that participatory wellness programs in the individual market do not violate the nondiscrimination provisions provided that such programs are consistent with State law and available to all similarly situated individuals enrolled in the individual health insurance coverage.” 78 FR 33157, 33167 (June 3, 2013). In addition, PHS Act section 2705(l) authorizes a 10-State wellness program demonstration project in the individual market. *See* Centers for Medicare & Medicaid Services, Bulletin: Opportunity for States to Participate in a Wellness Program Demonstration Project to Implement Health-Contingent Wellness Programs in the Individual Market (Sept. 30, 2019), available at <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/wellness-program-demonstration-project-bulletin.pdf>. No States have applied to participate in the demonstration project as of the publication of this guidance.

⁶ 78 FR 33158 (June 3, 2013).

⁷ *See* 26 CFR 54.9802-1(f)(1), 29 CFR 2590.702(f)(1), and 45 CFR 146.121(f)(1).

⁸ Activity-only wellness programs require individuals to perform or complete an activity related to a health factor in order to obtain a reward.

⁹ Outcome-based wellness programs require an individual to attain or maintain a specific health outcome in order to obtain a reward.

¹⁰ Requirements pertaining to activity-only wellness programs are set forth at 26 CFR 54.9802-1(f)(3), 29 CFR 2590.702(f)(3), and 45 CFR 146.121(f)(3). They are similar but not identical to the requirements for outcome-based wellness programs.

¹¹ However, if any class of dependents can participate in the program, the limit on the reward is 30 percent of the total cost of coverage in which the employee and any dependents are enrolled.

3. The program must be reasonably designed to promote health or prevent disease.¹²
4. The full reward under the program must be available to all similarly situated individuals. For this purpose, a reward under an outcome-based wellness program is not available to all similarly situated individuals unless the program allows a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual who does not meet the initial standard based on the measurement, test, or screening.
5. In all plan materials describing the terms of the program, and in any disclosure that an individual did not satisfy an initial outcome-based standard, the plan or issuer must disclose the availability of a reasonable alternative standard (or waiver of the original standard), including contact information for obtaining a reasonable alternative standard and a statement that recommendations of an individual's personal physician will be accommodated. If plan materials merely mention that such a program is available, without describing its terms, this disclosure is not required.¹³

With respect to the requirement that the full reward under an outcome-based wellness program must be available to all similarly situated individuals, the preamble to the 2013 final rules provided that “[w]hile an individual may take some time to request, establish, and satisfy a reasonable alternative standard, the same, full reward must be provided to that individual as is provided to individuals who meet the initial standard for that plan year.”¹⁴ As an example, the preamble provided that “if a calendar year plan offers a health-contingent wellness program with a premium discount and an individual who qualifies for a reasonable alternative standard satisfies that alternative on April 1, the plan or issuer must provide the premium discounts for January, February, and March to that individual.”¹⁵ The preamble also indicated that “plans and issuers have flexibility to determine how to provide the portion of the reward corresponding to the period before an alternative was satisfied (*e.g.*, payment for the retroactive period or pro rata over the remainder of the year) as long as the method is reasonable and the individual receives the full amount of the reward.”¹⁶ These statements in the preamble were not incorporated into the regulatory text of the 2013 final rules.

On January 9, 2014, the Departments issued FAQs Part XVIII to address several wellness program issues that had been raised since the publication of the 2013 final rules.¹⁷ The FAQs describe a wellness program that charges participants a tobacco premium surcharge but also provides an opportunity to avoid the surcharge if, at the time of enrollment or annual re-enrollment, the participant agrees to participate in (and subsequently completes within the plan year) a tobacco cessation educational program. The FAQs clarify that if a participant is provided

¹² For this purpose, the outcome-based wellness program 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. To ensure that an outcome-based wellness program is reasonably designed to improve health, a reasonable alternative standard to qualify for the reward must be provided to any individual who does not meet the initial standard based on a measurement, test, or screening that is related to a health factor.

¹³ See 26 CFR 54.9802-1(f)(4), 29 CFR 2590.702(f)(4), and 45 CFR 146.121(f)(4).

¹⁴ 78 FR 33158, 33163 (June 3, 2013).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ FAQs about Affordable Care Act Implementation (Part XVIII) and Mental Health Parity Implementation (Jan. 9, 2014), Q8, available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-18.pdf> and https://www.cms.gov/ccio/resources/fact-sheets-and-faqs/aca_implementation_faqs18.

a reasonable opportunity to enroll in the tobacco cessation program (a reasonable alternative standard) at the beginning of the plan year and qualify for the reward (i.e., avoiding the tobacco premium surcharge) under the program, the plan is not required (but is permitted) to provide another opportunity to qualify for the reward until renewal or reenrollment for coverage for the next plan year. The FAQs state that nothing, however, prevents a plan or issuer from allowing rewards (including pro-rated rewards) for mid-year enrollment in a wellness program for that plan year.

Since issuing the 2013 final rules and FAQs Part XVIII, the Departments have continued to receive questions from stakeholders about the requirement that the full reward under an outcome-based wellness program must be available to all similarly situated individuals. Specifically, plans and issuers have requested clarification on whether an individual who satisfies a reasonable alternative standard partway through the plan year must be provided the reward retroactive to the beginning of the plan year or from the time the individual satisfies the reasonable alternative standard required for the reward. The Departments have also received requests for clarification on the scope of the requirement for plans and issuers to disclose the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of waiver of the otherwise applicable standard) in all plan materials describing the terms of a health-contingent wellness program.¹⁸

The Departments are committed to ensuring that plans and issuers have the flexibility to promote health through wellness programs in a nondiscriminatory manner. The Departments are of the view that plans and issuers should have the freedom to establish innovative programs that motivate individuals to make efforts to improve their health.¹⁹ In light of stakeholders' questions about the meaning of full reward due to the differences between the regulatory text and preamble language, and requests for clarification on the scope of relevant disclosure requirements, the Departments recognize enforcement relief and additional clarification may be necessary to mitigate uncertainty for wellness programs that provide a reward to increase healthy choices and behaviors and lower healthcare costs.

Q1. How will the Departments enforce the requirement to provide the full reward for eligible individuals completing a reasonable alternative standard under a health-contingent wellness program partway through the plan year?

The Departments indicated in the preamble to the 2013 final rules that they may provide additional subregulatory guidance if questions persist regarding the uniform availability and reasonable alternatives standards, or if the Departments become aware of payment designs that seem unreasonable with respect to individuals who satisfy the reasonable alternative standard.²⁰ In light of the requests for clarifications from plans and issuers, until further guidance or regulations are issued, the Departments will not take enforcement action against a plan or issuer for failure to provide a reward for satisfying a reasonable alternative standard under a health-contingent wellness program retroactively to the beginning of the plan year where the plan or issuer provides the reward corresponding to the period after the reasonable alternative standard is satisfied, and otherwise satisfies the requirements under 26 CFR 54.9802-1(f), 29 CFR 2590.702(f), and 45 CFR 146.121(f). While the preamble to the 2013 final rules indicated that,

¹⁸ See 26 CFR 54.9802-1(f)(3)(v) and (f)(4)(v), 29 CFR 2590.702(f)(3)(v) and (f)(4)(v), and 45 CFR 146.121(f)(3)(v) and (f)(4)(v).

¹⁹ See generally 78 FR 33158, 33162-3 n.18.

²⁰ See 78 FR 33158, 33163 (June 3, 2013).

with respect to an individual who satisfies a reasonable alternative standard partway through the plan year, the full reward must be provided to that individual as is provided to individuals who meet the initial standard for that plan year, the regulatory text of the 2013 final rules does not clearly require retroactive application of the reward. Accordingly, the Departments are exercising such enforcement discretion.

The Departments reiterate, however, that such exercise of enforcement discretion does not change the requirement that any wellness program must be reasonably designed, based on all the relevant facts and circumstances, to promote health or prevent disease, and that plans and issuers must ensure that the program is not a subterfuge for discrimination or underwriting based on a health factor, or any of the other requirements for wellness programs.²¹ Further, with respect to health-contingent wellness programs, all the facts and circumstances must also be taken into account in determining whether a plan or issuer has furnished a reasonable alternative standard.²² Under this exercise of enforcement discretion, the wellness program must still provide sufficient time for individuals to complete the alternative standard and receive a reward under the program.

HHS encourages States that have primary enforcement authority over PHS Act section 2705 with respect to issuers to adopt a similar approach to enforcement. HHS will not consider a State to have failed to substantially enforce the applicable provisions of title XXVII of the PHS Act because it takes such an approach.

Q2. Which disclosures are required to include the availability of a reasonable alternative standard for participants eligible for a health-contingent wellness program?

Under the 2013 final rules, the plan or issuer must disclose the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of waiver of the otherwise applicable standard) in all plan materials describing a health-contingent wellness program. This notice must be included in all plan materials describing the terms of the health-contingent wellness program and, for outcome based-wellness programs, in any disclosure that an individual did not satisfy an initial outcome-based standard. The notice for health-contingent wellness programs must contain contact information for obtaining a reasonable alternative standard and a statement that recommendations of an individual's personal physician will be accommodated.²³

The 2013 final rules also clarify that 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 required under PHS Act section 2715 that notes that cost sharing may vary based on participation in an outcome-based wellness program, without describing the standards of the program, would not trigger this disclosure.

The Departments' implementing regulations provide sample language that can be used to satisfy the notice requirement,²⁴ as well as examples illustrating the 2013 final rules' requirements.

²¹ See 26 CFR 54.9802-1(f)(4)(iii), 29 CFR 2590.702(f)(4)(iii), and 45 CFR 146.121(f)(4)(iii).

²² See 26 CFR 54.9802-1(f)(3)(iv)(C) and (f)(4)(iv)(C), 29 CFR 2590.702(f)(3)(iv)(C), and (f)(4)(iv)(C) and 45 CFR 146.121(f)(3)(iv)(C) and (f)(4)(iv)(C).

²³ See 26 CFR 54.9802-1(f)(3)(v) and (4)(v), 29 CFR 2590.702(f)(3)(v) and (4)(v), and 45 CFR 146.121(f)(3) and (4)(v).

²⁴ See 26 CFR 54.9802-1(f)(6), 29 CFR 2590.702(f)(6), and 45 CFR 146.121(f)(6).