American Heart Association | American Stroke Association

July 1, 2013

Mr. Steven T. Miller
Deputy Commissioner for Services and Enforcement
Internal Revenue Service
CC:PA:LPD PR (REG-125398-12)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Submitted electronically via www.Regulations.gov

RE: Notice of Proposed Rulemaking, Minimum Value of Eligible Employer-Sponsored Plans

Dear Deputy Commissioner Miller:

On behalf of the American Heart Association (AHA), including its American Stroke Association (ASA) division, and more than 22 million volunteers and supporters, we appreciate the opportunity to offer our comments on key issues related to determining whether an employer-sponsored health plan provides minimum value, as provided for under the Patient Protection and Affordable Care Act (ACA).

The ACA is intended to increase access to affordable, comprehensive health coverage, a goal that the AHA/ASA strongly supports. Under the law, employees, or members of an employee's family, are not eligible for premium tax credits to purchase health insurance through a state-based health insurance exchange unless the coverage offered by their employer is either unaffordable or does not provide minimum value. To satisfy the minimum value requirement, a plan must have an actuarial value of at least 60 percent. It is important that the methods for calculating affordability and minimum value not overstate the value of an employer plan because the consequences for workers and their families are significant – potentially preventing them from accessing more affordable and comprehensive coverage with greater consumer protections through the insurance exchanges.

Wellness Program Incentives

The fundamental goal of any wellness program should be to provide opportunities for individuals to improve their health and wellness. A wellness program should not be used in a way that threatens an employee's ability to maintain health insurance and any resulting decrease in access to care, which would be in direct conflict with the primary objective of improving employee health. This is especially important for low-income or blue collar employees who may have more barriers to participating in these programs and are more likely to have chronic conditions or poor health. The AHA supports comprehensive worksite wellness programs that engage all members of the workforce to improve employee health, and we maintain that these programs should not create unaffordable coverage or other barriers to access for employees.

Consequently, the highest possible cost-sharing or premium that an employee could pay under a wellness program that uses incentives or penalties in the plan design should be assumed when calculating minimum value.

We applaud the IRS proposal to always treat wellness incentives that affect an employee's premium or cost-sharing and that do not relate to tobacco (non-tobacco related incentives) as unearned for the purpose of employer-sponsored coverage affordability and minimum value determinations. This policy is vital in order to protect consumers' access to an affordable coverage option, regardless of whether they are able to meet an employer's wellness program requirements. Furthermore, for most employers that already use wellness incentives, this policy is unlikely to alter whether their coverage meets affordability and minimum value criteria, based on the average size incentives used today. As such, this rule is unlikely to penalize the majority of employers who are already offering comprehensive coverage alongside wellness incentives. However, it provides an essential protection for consumers whose employers decide to adopt incentives that could undermine the affordability or comprehensiveness of their offer of coverage. **We strongly recommend that this proposal be maintained and certain provisions be clarified. In addition, we recommend that the final rule extend this policy to tobacco-related wellness incentives and treat tobacco-related wellness incentives as unearned as well. This will ensure that all individuals have equal access to affordable coverage**.

The proposal to treat non-tobacco related incentives as unearned is critical to ensuring that insurance-based wellness incentives do not undermine the primary intent of the ACA -- ensuring that all individuals have access to an affordable and comprehensive health coverage option, regardless of health status or income. While the final regulations on Nondiscriminatory Wellness Incentives in Group Health Plans include important new requirements for health-contingent wellness programs that will help ensure that obtaining a wellness incentive in these programs is more achievable for all eligible individuals, there may still be instances where individuals face barriers to meeting wellness incentive requirements and obtaining affordable coverage. For example, the preamble to the final workplace wellness rules specifies that plans have flexibility in deciding when to provide an incentive to individuals who are in the process of completing an alternative wellness activity supplied by their employer. This means individuals may be required to pay an additional wellness premium surcharge upfront for the months prior to their actually completing a program, in order to obtain coverage through their employer. This upfront cost may be simply unaffordable for many workers, and could force them to forgo coverage altogether.

The final rules on wellness programs also did not provide clear definitions of what constitutes a plan being overly burdensome, and we have concerns that low-income workers may be unable to receive an incentive because of socioeconomic barriers. In light of these concerns and the fact that wellness incentives that vary employees' health insurance premiums or cost-sharing requirements have the potential to make health coverage and care significantly less affordable for those individuals who are unable to obtain the incentives, [1] we strongly support the IRS proposal that employer coverage affordability and minimum value determinations must consistently treat non-tobacco related wellness incentives as unearned. This policy is necessary to ensure that all individuals have access to an affordable coverage option, either through their employer or through a qualified health plan on the exchange.

[1] Lydia Mitts, *Wellness Programs: Evaluating the Promises and Pitfalls* (Washington: Families USA, June 2012), available online at, http://familiesusa2.org/assets/pdfs/health-reform/Wellness-Programs.pdf.

Definition of Incentive
We support the language in the proposed rule that wellness incentives must be treated as "not earned." We interpret this as meaning that, in a situation where a wellness incentive is designed as an absence of an additional surcharge (such as a premium or deductible surcharge), the cost of the additional surcharge is included in any employer coverage affordability or minimum value determination. The final rule should clarify that this is the intent of the rule. To resolve any ambiguity, we strongly recommend that the final rule apply the definition of "reward" used in the final rule on Nondiscriminatory Wellness Programs in Group Health Plans, at § 2590.702(f)(1)(i). This definition clarifies that the term incentive (or reward) includes both providing a reward and imposing a penalty. We also recommend that the final rule include an example of a wellness incentive that is designed as the absence of a surcharge to illustrate that this additional surcharge cost must be included in any calculations.

Tobacco-Related Wellness Incentives
We strongly recommend that the final rule broaden the scope of wellness incentives that will be treated as unearned for employer coverage affordability and minimum value determinations to include wellness incentives related to tobacco use (tobacco-related incentives). The proposed rule sets a double standard, protecting individuals with other pre-existing conditions and health risk factors, while punishing individuals with the health condition of nicotine addiction. This policy threatens tobacco-users' and their families' access to an affordable health coverage option and may make it more difficult for these individuals to obtain evidence-based clinical tobacco cessation and primary care services that can help them successfully quit.

Starting in 2014, the maximum permitted incentive for tobacco-related wellness incentives will increase to 50% of the total cost of coverage. We have serious concerns that a surcharge of this magnitude will be unaffordable for many workers and their families and could price them out of coverage altogether. While programs will be required to give tobacco users an opportunity earn the full incentive by completing an alternative cessation program, as mentioned earlier, we have persisting concerns that the final rule on Nondiscriminatory Wellness Incentives in Group Health Plans does not clearly define what constitutes tobacco use, what cessation resources must be available within the plan to help users quit and how tobacco use will be assessed, thus creating the opportunity for the program to be overly burdensome or discriminatory toward lower-income workers who have higher smoking rates and the need for cessation resources.

In addition, individuals may be required to pay the full additional premium surcharge upfront for the months prior to their actually completing the alternative program in order to obtain coverage through their employer. Paying a 50 percent premium surcharge upfront will be simply unaffordable for many consumers. If these individuals are locked out of a more affordable coverage option through the Exchange, they may go without essential coverage altogether. Such an outcome will actually make it more difficult for these individuals to quit smoking. While there is no evidence that insurance surcharges lead smokers to quit, research shows that the clinical tobacco cessation services that must be covered with no cost-sharing by all non-grandfathered plans can lead to successful cessation.

We recognize that most consumers who would be subject to upfront penalties under a tobacco-related employer wellness program would also likely face additional premium costs in Exchange coverage, through tobacco-rating. However, there are numerous situations where partially subsidized exchange coverage may still be more affordable for tobacco-users and their families than employer coverage with a 50 percent tobacco-related wellness program premium increase. And in states that have decided to ban or further restrict tobacco-rating in the individual market, exchange coverage will be significantly more affordable for these consumers and their families. We

therefore believe it is critical that consumers have the option to "cross the firewall" and enter the exchange, if they choose, when a tobacco-related wellness incentive causes their employer coverage to be unaffordable or below the minimum value threshold, as defined by the ACA.

Furthermore, treating all wellness incentives as unearned, whether tobacco- or non-tobacco related, will simplify the premium tax credit eligibility determination process and minimize consumer and employer errors when determining the appropriate premium and benefit design to use for affordability and minimum value determinations. For all of these reasons, we recommend that the final rule treat all wellness incentives, including tobacco-related incentives, as unearned for all employer coverage affordability and minimum value determinations.

If the final rule maintains the proposed policy to treat any tobacco-related incentive as earned for employer coverage affordability and minimum value determinations, it is imperative that certain additional protective policies are put in place:

- Future guidance must be issued regarding permissible methods to administer incentives to individuals who are in the process of completing an alternative standard. This guidance must require plans to furnish an incentive upfront to individuals as soon as they agree to participate in an alternative activity. This will ensure that individuals can truly afford coverage and care throughout the time required to complete an alternative cessation program. Further, such a policy will give tobacco-users a more meaningful incentive to participate in the program, as participation will truly secure them affordable coverage. If individuals cannot afford higher premiums up front and therefore cannot enroll in their employer's plan, there is little incentive to participate in the employer's cessation program at all.
- Family members of tobacco users must maintain access to coverage. The final regulations should treat tobacco-related incentives as unearned for affordability and minimum value determinations for related individuals.
- At the very minimum, final regulations on Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage must treat all wellness incentives, including tobacco-related wellness incentives, as unearned for the purpose of determining an affordability exemption from the requirement for individuals to maintain minimum essential coverage. Failure to treat tobacco-related incentives this way would mean that tobacco users would be hit not once, but twice, with penalties for smoking— they would be priced out of coverage, and then subsequently fined for being uninsured. If tobacco-users are truly unable to obtain affordable coverage as defined by the ACA due to a tobacco surcharge, they should not be subject to a tax penalty under Shared Responsibility rules.

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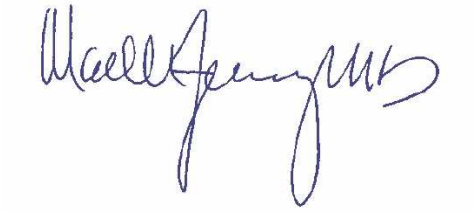
Thank you again for the opportunity to share our comments on these issues related to the calculation of minimum value and affordability for employer-sponsored health plans. If you have any questions, please feel free to contact Stephanie Mohl, Senior Government Relations Advisor, at Stephanie.Mohl@heart.org or 202-785-7909.

Sincerely,



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President