



August 21, 2012

*Submitted electronically via <http://www.regulations.gov>*

Internal Revenue Service  
CC:PA:LPD:PR (REG-131491-10)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044

**Re: Health Insurance Premium Tax Credit – Effect of Wellness Incentive Programs  
on Premium Affordability Determination (REG-131491-10)**

Sir or Madam:

We write on behalf of the American Benefits Council (“Council”) to provide comment in connection with the final regulations issued with respect to the health insurance premium tax credit available under section 36B of the Internal Revenue Code of 1986, as amended (“Code”), 77 Fed. Reg. 30,377 (May 23, 2012). Specifically, we write to provide our views regarding whether, and how, wellness incentive programs should affect the premium affordability determination.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either sponsor directly or provide services to health and retirement plans that cover more than 100 million Americans.

The Council appreciates the opportunity to provide comment on the important issue of whether, and how, wellness incentive programs should affect the premium affordability and minimum value determination.

## **THE GROWING IMPORTANCE OF WELLNESS PROGRAMS IN PROVIDING FOR A HEALTHY WORKFORCE AND MANAGING HEALTH CARE COSTS**

Wellness programs are becoming increasingly important and common vehicles for improving employees' health and controlling employers' health costs. In 2010, one-third of all private sector employees had access to a wellness program, defined to include two or more of the following benefits: smoking cessation programs; exercise or physical fitness programs; weight control programs; nutrition education; hypertension tests; periodic physical examinations; stress management programs; back-care courses; and lifestyle assessment tests.<sup>1</sup> The vast majority of these plans are designed to comply with the Health Insurance Portability and Accountability Act ("HIPAA"), which provides a series of rules governing wellness programs.

Pursuant to HIPAA's nondiscrimination requirements, employers are permitted to offer participation-based wellness programs (where simple participation is required to obtain a reward) or outcomes-based programs (where certain health outcomes must be attained to obtain a reward). Employers may provide incentives to employees to participate in wellness programs, which may take the form of lower premiums. Currently, in the case of outcomes-based wellness programs, the reward, coupled with the reward for other outcomes-based programs with respect to a plan, must not exceed 20% of the cost of employee-only coverage under the plan (or, if dependents are permitted to participate in the wellness program, 20% of the cost of coverage in which the employee and any dependents are enrolled).

Further evidence of the growing importance of wellness programs and related incentives can be seen in the Office of Personnel Management's adoption of, and expressed public support for, HIPAA-compliant wellness programs.<sup>2</sup> In addition, as part of the Patient Protection and Affordable Care Act ("Affordable Care Act"), Congress expressly called for an increase in the maximum allowable reward for an outcomes-based wellness program from 20% to 30%, demonstrating its continued

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<sup>1</sup> See U.S. Bureau of Labor Statistics, Bulletin 2752, National Compensation Survey: Employee Benefits in the United States, March 2010 (Sept. 2010), *available at* <http://www.bls.gov/ncs/ebs/benefits/2010/ebbl0046.pdf>.

<sup>2</sup> See Press Release, U.S. Office of Personnel Management, OPM, DOI, and GSA Launch Integrated WELLNESSWORKS Program for Washington, D.C. Employees (Sept. 29, 2010), *available at* <http://www.opm.gov/news/opm-doi-and-gsa-launch-integrated-wellnessworks-program-for-washington-dc-employees,1600.aspx>.

support of wellness programs.<sup>3</sup>

As discussed below, in order to continue to promote the sponsorship of wellness programs in the workplace, we urge the Internal Revenue Service and the Department of the Treasury (“Service”) to allow affordability and minimum value determinations to be made for purposes of Code section 36B and Code section 4980H based on the premium cost to the employee under the assumption that he or she obtains any incentive available under the wellness program. Doing so would encourage employers to continue to offer valuable and innovative wellness programs to employees and their families and would allow individuals and employers to anticipate eligibility for premium tax credits and liability for assessable payments, respectively.

#### **BACKGROUND REGARDING MINIMUM VALUE AND AFFORDABILITY TESTS APPLICABLE TO CODE SECTIONS 36B AND 4980H**

Code section 36B provides that certain individuals may claim a premium tax credit if certain conditions are satisfied. Among other things, an individual is not eligible for a premium tax credit for a month if he or she is eligible for “minimum essential coverage,” other than coverage offered through the individual market. Code section 36B generally provides that an individual will not be treated as eligible for minimum essential coverage for a month (and thus remains eligible for the premium tax credit for such month if other criteria are satisfied) if such coverage consists of an eligible employer-sponsored plan and the coverage is not affordable or does not provide minimum value.

With respect to affordability, Code section 36B provides that coverage is not affordable if the individual’s required premium contribution with respect to the plan exceeds 9.5% of the individual’s household income. With respect to minimum value, Code section 36B provides that coverage does not provide minimum value if the plan’s share of the total allowed costs of benefits provided under the plan is less than 60% of such costs.

Code section 4980H imposes assessable payments in certain circumstances on certain large employers whose employees enroll in a qualified health plan with respect to which a premium tax credit or cost sharing reduction is allowed or paid with respect to the employee. Since whether an individual is eligible for a premium tax credit is dependent on whether the relevant employer-sponsored plan is affordable and provides minimum value, the determination of affordability and minimum value is also relevant for purposes of Code section 4980H.

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<sup>3</sup> See Public Health Service Act section 2705, as added by the Affordable Care Act.

## WELLNESS INCENTIVES SHOULD BE TAKEN INTO ACCOUNT IN DETERMINING AFFORDABILITY AND MINIMUM VALUE

The affordability of, and minimum value provided by, employer-sponsored coverage is important not only for purposes of determining an employee's ability to claim a premium tax credit under Code section 36B, but also for purposes of determining whether an employer will become subject to an assessable payment under Code section 4980H. As discussed below, we recommend that the Service permit determinations of affordability and minimum value to be based on the premium costs to an employee after application of any potential wellness incentives.

Encouraging employers to offer wellness programs is sound public policy. Wellness programs are important not only for promoting better workforce health, but also for controlling health care costs by creating a more health-conscious workforce. By facilitating an employee's ability to recognize habits and practices that are adverse to good health, wellness programs enable the employee to make changes that improve health and well-being.

Incentives play an important role in encouraging wellness program participation and employee engagement. A recent national survey of large employer-sponsored health plans reported that average participation rates in wellness programs are significantly higher when incentives are offered. For example, with respect to employers offering lifestyle coaching, those providing incentives reported that 24% of employees had become actively engaged in the program, while those not offering incentives reported that only 12% of employees had become actively engaged.<sup>4</sup>

In addition to encouraging wellness program sponsorship and participation, we also believe it is important for employers and individuals to be able to determine, with certainty, prior to the end of the year whether they will be eligible for premium tax credits or subject to assessable payments. As a result, we recommend the Service allow employers and individuals to assume for purposes of Code sections 36B and 4980H that individuals eligible to participate in a wellness program that is compliant with federal law will, in fact, participate in the program and will obtain any rewards available thereunder in determining the affordability of, and minimum value provided by, coverage. This will allow individuals to more accurately determine whether they will be eligible for a premium tax credit and employers to similarly determine whether they will be subject to an assessable payment under Code section 4980H.

We believe the recommendations above are consistent with the sound public policy goals underlying employer-sponsored wellness programs and congressional support for such programs as evidenced by the Affordable Care Act.

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<sup>4</sup> See Mercer National Survey of Employer-Sponsored Health Plans: 2011 Survey Report.

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Thank you for considering these comments submitted in response to the request for comments set forth in the final premium tax credit regulations regarding whether, and how, wellness incentives should be taken into account for purposes of determining affordability. If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,



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Health Care Reform



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