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January 25, 2013

VIA U.S. MAIL & FEDERAL eRULEMAKING PORTAL
HTTP://WWW.REGULATIONS.GOV

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: Comments on Proposed Regulations Relating to Incentives for
Nondiscriminatory Wellness Programs in Group Health Plans

Dear Ladies and Gentlemen:

On behalf of the Section of Taxation of the State Bar of Texas, I am pleased to submit the enclosed response to the request of the Department of Labor, Department of Health & Human Services and the Department of the Treasury for comments concerning the proposed regulations relating to incentives for nondiscriminatory wellness programs in group health plans under Treasury Regulations section 54.9802-1(f) prohibiting discrimination against participants and beneficiaries based on a health factor with respect to wellness programs.

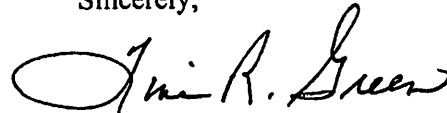
THE REQUEST FOR ADDITIONAL GUIDANCE AND ACCOMPANYING COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE SECTION OF TAXATION OF THE STATE BAR OF TEXAS. THIS REQUEST AND THESE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE SECTION

1414 Colorado Street, Austin, TX 78701
(512) 427-1463 or (800) 204-2222

OF TAXATION, WHICH HAS SUBMITTED THESE COMMENTS, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW. THE REQUEST FOR THE ISSUANCE OF ADDITIONAL GUIDANCE AND ACCOMPANYING COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENT SUBMISSION OF THE SECTION OF TAXATION AND PURSUANT TO THE PROCEDURES ADOPTED BY THE COUNCIL OF THE SECTION OF TAXATION, WHICH IS THE GOVERNING BODY OF THAT SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED FOR THIS REQUEST FOR ADDITIONAL GUIDANCE AND ACCOMPANYING COMMENTS AND THIS REQUEST AND THESE COMMENTS REPRESENT THE VIEWS OF THE MEMBERS OF THE SECTION OF TAXATION WHO PREPARED THEM.

We commend the (i) Employee Benefits Security Administration, Department of Labor, (ii) Internal Revenue Service, Department of the Treasury, and (iii) Centers for Medicare & Medicaid Services, Department of Health and Human Services, for permitting us to submit this request for additional guidance, and we appreciate being extended the opportunity to participate in this process.

Sincerely,

A handwritten signature in black ink that reads "Tina R. Green". The signature is written in a cursive style with a large, looped initial "T".

Tina R. Green
Chair, Section of Taxation
State Bar of Texas

cc: Ms. Amy Turner
Senior Advisor
Employee Benefits Security Administration
Department of Labor
turner.amy@dol.gov

**REQUEST FOR ADDITIONAL GUIDANCE WITH RESPECT TO
PROPOSED REGULATIONS RELATING TO INCENTIVES FOR NONDISCRIMINATORY
WELLNESS PROGRAMS IN GROUP HEALTH PLANS**

This request for additional guidance with respect to the application of the proposed rules relating to incentives for nondiscriminatory wellness programs in group health plans under section 9802 of the Internal Revenue Code of 1986, as amended (“Code”) and section 54.9802-1(f) of the Treasury Regulations (as published in 77 Federal Register 70620 (November 26, 2012) (“Proposed Treasury Regulations”), and supporting comments are presented on behalf of the Section of Taxation of the State Bar of Texas. The principal drafter of these comments was Henry Talavera, Vice-Chair of the Compensation and Employee Benefits Committee of the Section of Taxation of the State Bar of Texas. The Committee on Government Submissions (COGS) of the Section of Taxation of the State Bar of Texas has approved these comments. Stephanie Schroepfer is the Chair of COGS. Substantive comments were provided by Stephanie M. Schroepfer, Susan A. Wetzel, David D’Alessandro and Josephine Stewart Harvey. Mark Bodron reviewed this request for additional guidance on behalf of COGS.

Although many of the people who participated in preparing, reviewing and approving these comments have clients who will be affected by the federal tax law principles addressed by these comments and frequently advise clients on the application of such principles, none of the participants (or the firms or organizations to which such participants belong) has been engaged by a client to make a government submission with respect to, or otherwise influence the development or outcome of, the subject matter of these comments.

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Date: January 25, 2013

I. EXECUTIVE SUMMARY

The following submission contains a request for additional guidance with respect to the future application of the Proposed Treasury Regulations relating to incentives for nondiscriminatory wellness programs in group health plans under Code section 9802¹ which are intended to modify Treasury Regulations section 54.9802-1(f).²

The following is a summary of our request:

- A. We respectfully request that the (i) Employee Benefits Security Administration, Department of Labor, (ii) Internal Revenue Service, Department of the Treasury and (iii) the Centers for Medicare & Medicaid Services, Department of Health and Human Services (collectively, the “Department”) eliminate their proposed clarification of the additional reasonable alternatives which an employer must offer in order to avoid prohibited discrimination under a wellness program, except in the case when it would be:
- (i) “unreasonably difficult” for an individual to satisfy the otherwise applicable standard “due to a medical condition;” or
 - (ii) “medically inadvisable” for an individual to attempt to satisfy the otherwise applicable standard.

We respectfully suggest that requiring an employer to provide other different, reasonable alternatives in situations (other than in the medical situations as described immediately above) substantially limits an employer’s ability to effect meaningful change in the overall health of its employees, to promote the health of its employees and to prevent disease. Without holding employees accountable for meaningful change in their behavior, employers will likely be unable to materially and substantially create a healthier workforce, thereby limiting the overall effectiveness of wellness programs. At a minimum, we request that the Department delay the effective date for this proposed clarification in order to give additional time for employers and third-party administrators to further comment on and address this new requirement.

- B. Although we commend the Department for generally suggesting that the wellness program documents will generally control, we also respectfully request that the Department clarify whether there are any limits or restrictions regarding when any reward/award must be restored (or penalty abated) (collectively “Reward”) to any participant who initially fails to meet an established goal pursuant to a wellness program, but later satisfies the established goal or a reasonable alternative standard for the Reward. We respectfully suggest that any Reward be provided during a wellness program year (generally a 12 month period) if the employee subsequently meets the conditions to qualify for the Reward prior to open enrollment for the next following year after the employee initially fails to meet the condition of any Reward.

¹Except as otherwise specified, all section references herein are references to the applicable sections of the Internal Revenue Code of 1986, as amended (“Code”).

² Section 54.9802-1(f) of the Treasury Regulations (as published in 77 Federal Register 70620 (November 26, 2012)).

We recommend that any Reward restored during such year should be paid out or credited to the wellness program participant no later than two and one-half months after the end of such year. If an employee later meets the conditions to have a Reward restored, we recommend, with some exceptions, that employers should only be required to provide any restored Reward on a prospective basis in accordance with the applicable wellness program once a goal has been met, as it would be administratively burdensome to track any Reward restored in a later calendar year. We also recommend that the terms of any restoration of any Reward should be explained by an employer during the open enrollment period of the preceding year (during which such Reward could have been earned initially) or, if later, by the date the wellness program is established.

II. BACKGROUND

A. Certain Key Facts Relating to Wellness Programs

Health care costs are expected to continue to grow at an average of 5.9% in 2012.³ In 2009, 36% of all employers were offering Rewards for participating in a wellness program, with 61% in 2012, and over 80% projected for 2013.⁴

Furthermore:

- (i) About 90% of all companies with achievement-based wellness programs include a weight/obesity threshold as a requirement under the wellness program (measured by either the body mass index (“BMI”), waist-to-hip or body fat measures);
- (ii) About 75% of all companies with achievement-based wellness programs include blood pressure, cholesterol and tobacco use; and
- (iii) About 59% of all companies with achievement-based wellness programs include glucose levels.⁵

Employers have historically used financial penalties such as premium surcharges or higher deductibles to incentivize their employees, with 9% of such employers using such penalties in 2009 and 20% in 2012.⁶ There is also increasing interest among employers in pinpointing specific outcomes for weight control and cholesterol levels.⁷ In one recent survey, almost 60% of employers indicated that their programs were designed mainly to improve the overall health of their employees.⁸ In addition, employers generally believe that offering a wellness program is an effective way to reduce health care costs (68% of large employers [200 or more workers] vs. 51% of small firms).⁹

³ Towers, Watson, *Performance in an Era of Uncertainty, 2012, 17th Annual Towers Watson/National Business Group on Health Employer Survey on Purchasing Value in Health Care* (“Towers Study”) at 3, <http://www.towerswatson.com/assets/pdf/6556/Towers-Watson-NBGH-2012.pdf> (last visited Jan. 22, 2013).

⁴ Towers Study at 25.

⁵ Towers Study at 26.

⁶ Towers Study at 27.

⁷ *Id.*

⁸ Matt Dunning, *Few Employers Focus on Savings Participation Rate Key Success Measure*, 6 Business Insurance 47 (December 10, 2012).

⁹ Kaiser Family Foundation and Health Research & Educational Trust, *Employer Health Benefits 2012 Annual Survey*,

B. New Alternative Set Forth in the Proposed Treasury Regulations

The PPACA¹⁰ amended section 2705(j) of the PHSA¹¹, but did not actually amend the Code or ERISA¹². The PHSA generally applies to health insurance coverage and nonfederal governmental plans.¹³ The PHSA does not apply to self-insured health plans of private employers, which plans are generally subject to ERISA and the Code.

PHSA section 2705(j) largely reflects the requirements set forth by the current, final Treasury Regulations section 54.9802-1 (as adopted on December 13, 2006, with minor modifications since) (“Treasury Regulations”) and extends nondiscrimination protections to the individual market.¹⁴ Any Reward provided under a wellness program currently has to be, among other requirements, available to all similarly situated individuals, as follows:

(iv) The reward under the program must be available to all similarly situated individuals.

(A) A reward is not available to all similarly situated individuals for a period unless the program allows—

(1) 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 unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard; and

(2) 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 medically inadvisable to attempt to satisfy the otherwise applicable standard.

(B) A plan or issuer may seek verification, such as a statement from an individual's physician, that a health factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy or attempt to satisfy the otherwise applicable standard.¹⁵

We find nothing in the Treasury Regulations or the legislative history to the PPACA to suggest that a different, reasonable alternative has to be provided in circumstances other than those

at 179, <http://ehbs.kff.org/pdf/2012/8345.pdf>.

¹⁰Patient Protection and Affordable Care Act, as amended (the “PPACA”), Public Law 111-148 (2010).

¹¹Public Health Services Act, as amended (the “PHSA”).

¹²Employee Retirement Income Security Act of 1974, as amended (“ERISA”).

¹³See Gary Cohen, Acting Director, Office of Oversight, Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Application of Individual and Group Market Requirements under Title XXVII of the Public Health Services Act when Insurance Coverage Is Sold to, or through Associations*, September 1, 2011, http://cciio.cms.gov/resources/files/association_coverage_9_1_2011.pdf.pdf.

¹⁴Preamble to the Proposed Treasury Regulations, 77 Federal Register 70620 at 70621.

¹⁵Treasury Regulation section 54.9802-1(f)(2)(iv); see also PPACA section 1201(f)(3)(D), which is substantively identical to the above except for the italicized language which follows: (“The *full* reward under the *wellness* program shall be made available to all similarly situated individuals. For such purpose, among other things, ...” [Emphasis Added]).

outlined in Treasury Regulations section 54.9802-1(f)(2)(iv) (“Current Alternative Regulation”). The only change by the PPACA potentially affecting the Current Alternative Regulation relates to a wellness program demonstration project.¹⁶ Because of the PPACA changes, however, the Proposed Treasury Regulations will affect most wellness programs, as the Department intended that the Proposed Treasury Regulations will apply to both grandfathered and non-grandfathered health plans, along with those non-federal governmental wellness programs newly affected by the PPACA changes.¹⁷

The Proposed Treasury Regulations reiterate the requirements set forth above under the Current Alternative Regulation, with certain clarifications.¹⁸ First, a plan or issuer may waive an otherwise applicable standard and provide a Reward. Second, the Proposed Treasury Regulations require that a “reasonable alternative standard” be provided upon a specific request by those individuals who either have a medical condition or for whom it is medically inadvisable to meet such standards as provided in Treasury Regulation section 54.9802-1(f)(2)(iv) set forth above (collectively “medical conditions”). In such circumstances, the Department provides that an individual with a medical condition could ask for an alternative standard, citing the Preamble to the Current Alternative Regulation relating to overcoming tobacco addiction, as follows:

All the facts and circumstances would be taken into account in determining whether a plan or issuer has provided a reasonable alternative standard, including but not limited to the following proposed factors:

- If the reasonable alternative standard is completion of an educational program, the plan or issuer must make the educational program available 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.
- 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 the reasonable alternative standard is compliance with the recommendations of a medical professional who is an employee or agent of the plan or issuer, and an individual’s personal physician states that the medical professional’s recommendations are not medically appropriate for that individual, the plan or issuer must provide a reasonable alternative standard that accommodates the recommendations of the individual’s physician with regard to medical appropriateness.¹⁹

Furthermore, and most significantly, the Proposed Treasury Regulations provide that a program cannot be designed as subterfuge for discrimination or underwriting, as follows:

To ensure that programs are not a subterfuge for discrimination or underwriting based on health factors such as weight, blood pressure, glucose levels, cholesterol levels, or tobacco use with no or insufficient support to improve individuals’ health, the Departments propose that, to the extent a plan’s initial standard for

¹⁶ PPACA section 1201(l).

¹⁷ See Preamble to Proposed Treasury Regulations, 77 Federal Register 70620 at 70622.

¹⁸ See Preamble to Proposed Treasury Regulations, 77 Federal Register 70620 at 70624.

¹⁹ Preamble to Proposed Treasury Regulation, 77 Federal Register 70620 at 70624.

obtaining a reward (or a portion of a reward) is based on results of a measurement, test, or screening that is related to a health factor (such as a biometric examination or a health risk assessment), the plan is not reasonably designed unless it makes available to all individuals who do not meet the standard based on the measurement, test, or screening a different, reasonable means of qualifying for the reward.²⁰

The Department added the rule discussed in the immediately preceding paragraph at the end of Proposed Treasury Regulation section 54.9802-1(f)(3)(iv) (“Proposed Alternative Regulation”),²¹ as follows:

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.

The Department explained the reason for the changes discussed above, as follows:

The Departments intend that these clarifications with respect to offering reasonable alternative standards will help prevent health-contingent wellness programs that provide little to no support to enrollees to improve individuals’ health. In addition, as explained later in this Preamble to the Proposed Regulations, clarifications were proposed to ensure that a health-contingent wellness program is reasonably designed to improve health and is not a subterfuge for underwriting or reducing benefits based on health status.”²²

The Department invited comments on what facts and circumstances should be specifically addressed by the alternatives offered and specifically asked for comments on any additional rules or clarifications that might be appropriate, particularly as it relates to what the Department sees as a “one-size-fits-all” approach to designing different means of qualifying for a Reward. Specifically, the Department asked for comments “on whether any other consumer protections are needed to ensure that wellness programs are reasonably designed to promote health or prevent disease.”²³

C. Discussion of When a Reward Must Be Reinstated/Waiver of any Penalty

We did not find any significant discussion in the Proposed Treasury Regulations relating to how or when a Reward had to be provided under a wellness program, except that a Reward must be provided in accordance with the terms of the applicable wellness program documents and each employee must be provided an opportunity to qualify for the Reward “at least once per year.”²⁴

²⁰ Preamble to Proposed Treasury Regulation, 77 Federal Register 70620 at 70625.

²¹ Note that similar parallel proposed provisions are found under proposed 29C.F.R. section 2590.702(f)(3) and 45 C.F.R. section 146.121, but for ease of reference we only refer to the Proposed Treasury Regulations in this Comment.

²² Preamble to Proposed Treasury Regulation, 77 Federal Register 70620 at 70624-25.

²³ Preamble to Proposed Treasury Regulation, 77 Federal Register 70620 at 70625.

²⁴ Proposed Treasury Regulation section 54.9802-1(f)(3)(i).

The Proposed Treasury Regulations do make it clear that the wellness program “rewards” that are at issue can be provided in a wide variety of forms.²⁵

The Proposed Treasury Regulations also do not apparently address the practical interaction of Reward pay-outs in the case of participants satisfying a primary standard based on the results of a measurement, test, or screening relating to a health factor compared to/versus those participants satisfying the “different, reasonable means of qualifying” that must be legally established for that same Reward.

On the other hand, based on the “Examples” set forth in the Proposed Treasury Regulations, the Department suggested that it may take some additional time for an employee to meet any established alternative standard at least in some cases. The following are examples provided at the end of the Proposed Treasury Regulations which implicitly have time frames for completion and giving a Reward to an employee who does not initially qualify:

1. Exercise and diet regimen. Example 2.
2. Following the advice of doctor regarding medication and blood testing. Example 3.
3. Following doctor’s recommendations under a wellness program. Example 4 (participant must complete walking program “within the plan’s timeframe,” and if not, the participant must follow a doctor’s recommendation).
4. Completing a smoking cessation program. Example 5.

The four examples above are clearly contrasted with examples in the Proposed Treasury Regulations addressing whether an individual meets any primary/initial standard set forth in the wellness program based upon any initial test or screening.²⁶

III. REQUEST FOR ADDITIONAL GUIDANCE

A. We Respectfully Request that the Department Reconsider and Ideally Eliminate the Proposed Alternative Regulations

Based upon the above statistics and anecdotal evidence, wellness programs have been embraced by employers and their popularity is expected to increase over time. We suggest that the increase in wellness programs among employers reflects a widespread understanding and acceptance of the Current Alternative Regulation and a desire by employers for those rules to continue essentially unchanged. We understand the Department’s concern regarding consumer protection and providing assistance to employees, but nowhere in the preamble of the current Treasury Regulations (or otherwise in the current Treasury Regulations) does such guidance provide that consumer protection or employee assistance is to be considered as an objective in all circumstances. We believe that the current Treasury Regulations properly balance an employer’s

²⁵ See Proposed Treasury Regulation section 54.9802-1(f) (“Except where expressly provided otherwise, references in this section to an individual obtaining a reward include both obtaining a reward (such as a premium discount or rebate, a waiver of all or part of a cost-sharing mechanism, an additional benefit, or any financial or other incentive) and avoiding a penalty (such as the absence of a premium surcharge, or other financial or nonfinancial disincentive”). *Emphasis added.*

²⁶ See Examples 2 through 5 of section 54.9802-1(f)(4) of the Proposed Treasury Regulations where any initial determination of whether a participant meets a standard appears to be accomplished in a snapshot-type determination (particularly BMI, cholesterol level, non-smoker, etc.). See also Preamble to the Proposed Treasury Regulations, 77 Federal Register 70620 at 70621.

desire to hold employees accountable, while at the same time protecting employees in the case of certain medical conditions.

We agree that wellness programs should not be designed as a “subterfuge for discriminating based on a health factor,” but we would respectfully suggest that the Department reconsider whether it is appropriate to require a different, reasonable alternative any time a Reward is based upon the results of measurement, test or screening relating to a health factor results. The Department provides, without exception, that an employer must offer a different, reasonable alternative when a Reward is based on the achievement of results on certain tests. In our view, it is difficult to conceive how the failure of a plan sponsor to offer a different, reasonable alternative in such circumstances would constitute a “subterfuge,” using the common understanding of “subterfuge,” as a “deception by artifice or stratagem in order to conceal, escape, or evade.”²⁷ Tests are typically the basis for most well-designed wellness programs.

If a different alternative is generally required to be provided to an employee under a wellness program, there appears to be no standard that an employer can use to incentivize otherwise healthy employees to change their behavior if the program is based upon, among other things, biometric screenings and tests. We respectfully suggest that the Department balance any employee participant considerations against the employer’s need for certainty in the application of the rules and personal accountability on behalf of employees. We anticipate that if it is not permissible to require employees to be personally accountable for their own behavior, wellness programs will be much less successful in the future than they are today.

We respectfully suggest that the Department reconsider the proposition that otherwise healthy employees should always be provided with additional support to become healthier employees simply because any wellness Rewards are based upon certain objective tests and standards. To avoid uncertainty, the only reasonable response by an employer to the Proposed Alternative Regulation would be to provide the employee with an alternative that has no real likelihood to change unhealthy behavior. We respectfully suggest that the Department consider whether it should be the employee’s responsibility to change his or her own behavior, without the employer having to modify its program for each participant. We suggest that the Department reconsider how far employers should be required to move away from a “one-size-fits-all” approach. We respectfully suggest that the Department’s current position would introduce unduly burdensome and costly requirements on employers to individually tailor a wellness program to the needs of each employee.

Further, we suggest that the Department consider whether the new rule in the Proposed Alternative Regulation introduces uncertainty when none existed previously. We respectfully request that the Department reconsider the introduction of the concept of “a different, reasonable means of qualifying for the reward.” We are concerned that, if implemented, the Proposed Alternative Regulation will invite litigation relating to the proposed requirement that employers provide a “different, reasonable” alternative for all employees, regardless of whether such employees are healthy and could otherwise cooperate and participate in any wellness programs. If employees cannot be expected to achieve any meaningful health results, we believe that many employers will not implement wellness programs, and, since wellness programs are voluntary, many employers will decide to cancel any such programs rather than be subjected to litigation on what it means to provide a different, reasonable alternative to an otherwise healthy employee who fails to meet certain standard measurements.

²⁷ Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/subterfuge>.

The Proposed Alternative Regulation also arguably imposes an additional standard that mostly replaces existing guidelines, as Proposed Treasury Regulation section 54.9802-1(f)(3)(iii) already provides alternatives upon request for those with medical conditions (i.e., those who can demonstrate that it would be “unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard” or “medically inadvisable to attempt to satisfy the otherwise applicable standard.”) We respectfully recommend that the Department reconsider its apparent position that it is necessary to provide all other employees (i.e., including employees for whom it would not be medically inadvisable or unreasonably difficult to satisfy the primary Reward criteria) with similar, if not greater, protection through the implementation of the Proposed Alternative Regulation.

We respectfully suggest that the protections added by the new Proposed Alternative Regulation are already addressed if such plans are subject to the Americans with Disabilities Act of 1990 (“ADA”). The courts should be able to determine whether such wellness programs are subject to the ADA, and whether an employer has engaged in any conduct in violation of the ADA. In our experience, the ADA prevents most employers from imposing onerous conditions on employees. While the recent 11th Circuit Court of Appeals decision in *Seff v. Broward County, Florida*²⁸ which was published on August 20, 2012 (“*Seff*”), concludes that the ADA does not apply to a wellness program that is part of a group health plan, we believe that the Proposed Alternative Regulation essentially moots *Seff*, because there would almost never be a potential ADA issue if a different, reasonable alternative must be provided in most circumstances. We respectfully suggest that the ADA issues should be addressed by the courts and not by implementation of the Proposed Alternative Regulation.

For the reasons discussed above, we respectfully request that the Department eliminate the requirement of “a different, reasonable means of qualifying for the reward.” The implementation of the new requirement does not appear to have any basis under the PPACA, the legislative history of the PPACA or the Current Alternative Regulation.

Alternatively, we respectfully request that, at a minimum, the Department postpone the implementation of the Proposed Alternative Regulation pending the issuance of certain standards regarding alternatives which must be provided. The Proposed Alternative Regulation (unlike the alternatives provided in cases of a medical condition) would completely change the rules that have been relied upon by employers in the past. The Proposed Alternative Regulation would require an employer to make an alternative available even when not requested by an employee and regardless of whether an employee can demonstrate any sort of medical justification for the provision of alternative. Employers have been given little time to respond and determine what rules should be implemented, given that such a drastic change from the current Treasury Regulations was not expected. We would respectfully suggest that additional time for comment on this very important issue might lead to the development of an appropriate safe harbor with respect to the Proposed Alternative Regulation after careful consideration and comment by the Department and other interested parties.

²⁸ 691 F3d. 221(11th Cir. 2012).

B. Standards should be Implemented Clarifying When a Reward Must be Provided After Failing to Meet Any Initial Standard

We recommend that the Department specify the period over which any “earn-back”/waiver of imposing a penalty (i.e., “a Reward”) should be measured. Logically, it would seem that the plan year would be the proper measuring period for purposes of determining when the Reward should be reinstated if an employee meets the conditions for receipt of the Reward and the employer complies with the Treasury Regulations. Like other guidance under the PPACA, we respectfully recommend that employers be given some leeway in determining the period over which a Reward can be earned again. We believe it would be reasonable for the Department to defer to the terms of the wellness program, but additional guidance would be welcome.

We respectfully recommend that the Department consider implementing the following proposal. If an employee satisfies a standard at some point during a plan year that he or she previously failed to initially meet for such plan year, any resulting Reward should apply only prospectively. It would be administratively burdensome to retroactively credit a Reward to an employee late in the year in most cases, particularly with respect to a past plan year. Under the proposal, exceptions would be provided when an employee meets the conditions to earn a Reward during the plan year before open enrollment for the next following plan year. Under the proposal, if an employee would meet the conditions to receive the Reward prior to open enrollment for the next year, the employer would be required to provide the Reward during such year in which the conditions for the Reward are satisfied, but no later than two and one-half months after the end of such year, consistent with short-term deferral exception of Code section 409A and proposed guidance applicable to flexible spending accounts under the Code. Under the proposal, in any event, the employer would be granted some discretion to make employees whole with respect to the payment of any Reward which is earned during the year.

We also recommend that the Department consider requiring employers to explain to employees the period for determining a Reward during the immediately preceding open enrollment period prior to the beginning of the applicable program year (or if later, on or before the first day that the wellness program is implemented during such year). The following is an example, with three possible alternative outcomes that we would recommend the Department accept based upon the proposal set forth above.

Proposed Facts: Under the company “X” wellness plan, if an employee has a BMI of less than or equal to 30 during testing provided by “X” during open enrollment in November 2012 for the 2013 plan year, an employee is notified that he or she will be eligible to receive a Reward for the 2013 plan year beginning on the first payroll period of “X” during the 2013 plan year, which is the calendar year. The Reward equals \$5 per pay period if the employee’s BMI is 30 or less. The employee is tested in November 2012 and has a BMI of 31. If the employee has a BMI higher than 30, the employee could sign up and complete a six week weight loss program during the 2013 plan year. The next open enrollment begins on November 1, 2013. Upon completion of the program, when would the employee receive his or her Reward for the alternative goal?

- **Proposed Option 1:** The employee would receive the full Reward for the entire plan year (a gift card or other cash payment in a lump sum) within a reasonable period after completion during such year before

November 1, 2013, but no later than two and one-half months after the end of such year.

- **Proposed Option 2:** The Reward would be provided retroactively back to the beginning of the plan year if the Reward is earned and reinstated timely. For example, the program could provide for reinstatement of a Reward if the employee completed the program by the end of the first quarter of 2013. The employee would then receive the Reward (a reduction of \$5 per pay period of his or her employee contribution for health coverage) retroactive to the beginning of the plan year.
- **Proposed Option 3:** If the employee completed the program after November 1, 2013 and before 2014, the Reward would be a reduction of \$5 per pay period beginning as soon as administratively practicable after completion of the program.