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Congress of the United States
House of Representatives
Washington, DC 20515-1803

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Ms. Catherine Barre
Internal Revenue Service
1111 Constitution Avenue, NW, Room 3241
Washington, DC 20224-0001

Dear Ms. Barre:

As a retired heart surgeon who saw the consequences of unhealthy diets and physical inactivity, I write regarding the Internal Revenue Service's (IRS) decision to exclude nondiscriminatory wellness incentives, other than those relating to tobacco use, from the calculation of Minimum Value and affordability of employer-sponsored health plans. This decision appears at odds with the Obama Administration's other policies related to wellness, including parts of the 2010 health law.

On May 3, 2013, the IRS published a Notice of Proposed Rulemaking, "Minimum Value of Eligible Employer-Sponsored Plans and Other Rules Regarding the Health Insurance Premium Tax Credit" (Proposed Rule). The Proposed Rule addresses whether health coverage under an eligible employer-sponsored plan provides minimum value (MV) and how to determine affordability of an employer-sponsored plan. In particular, my interest focuses on how the IRS treats nondiscriminatory wellness program incentives with regard to these calculations.

The Proposed Rule provides that a plan's share of costs for MV purposes is determined without regard to reduced cost sharing available under a nondiscriminatory wellness program. However, for nondiscriminatory wellness programs designed to prevent or reduce tobacco use, MV may be calculated assuming that every eligible individual satisfies the terms of the program relating to prevention or reduction of tobacco use. Furthermore, the Proposed Rule provides that the affordability of an employer-sponsored plan is determined by assuming that each employee fails to satisfy the requirements of a wellness program, except the requirements of a nondiscriminatory wellness program related to tobacco use.

As a past author of resolutions recognizing the value of comprehensive workplace-wellness programs, I understand many employers currently offer wellness programs for risks other than tobacco use, and incentives foster voluntary employee engagement and participation in those programs. These programs may include lifestyle adjustments such as encouraging healthy eating and increased physical activity.

With regard to the Proposed Rule, I request the following clarification regarding consideration of nondiscriminatory wellness program incentives in MV and affordability calculations:

- (1) When making the decision to exclude nondiscriminatory wellness program incentives, other than those relating to tobacco use, from the MV and affordability calculations, did the IRS consider policy reflected in the 2010 health law, specifically Section 2705(j) of the Public Health Service Act that expanded HIPAA's wellness program exemption to allow employers to offer employees incentives of up to 30 percent and possibility 50 percent?
- (2) When making the decision to exclude nondiscriminatory wellness program incentives, other than those relating to tobacco use, from the MV and affordability calculations, did the IRS consider policy reflected in the 2010 health law, specifically Section 2718 of the Public Health Service Act, that includes reimbursement paid for activities that improve health care quality in the calculation for Medical Loss Ratio (MLR)? In addition, did the IRS consider the Department of Health and Human Services' (HHS) definition of "activities that improve health care quality" as outlined in HHS' Interim Final Rule, "Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the 2010 health law?"
- (3) Why did the IRS limit consideration of nondiscriminatory wellness program incentives to programs and related incentives tied to tobacco programs? How did the IRS determine that individual responsibility regarding tobacco use is different from or takes precedent over other lifestyle choices affecting health and wellness such as physical activity?
- (4) Failure to include nondiscriminatory wellness program incentives, other than those relating to tobacco use, in the MV and affordability calculations appears to discourage employers from continuing with existing wellness programs or implementing new programs. In addition, this position is inconsistent with other policies reflected in the 2010 health law, including expansions relating to HIPAA wellness program exemptions and how MLR is calculated. Was it the IRS' intent to discourage use of nondiscriminatory wellness programs?

Sincerely,



Charles W. Boustany, Jr., M.D.
Member of Congress