

SUBCHAPTER MM. Wellness Programs 28 TAC §§21.4701 - 21.4707

1. INTRODUCTION. The Commissioner of Insurance adopts new Subchapter MM, §§21.4701 – 21.4707, concerning standards for the establishment of, and requirements applicable to, wellness programs designed to promote disease prevention, wellness and health, and developed pursuant to applicable provisions of the Insurance Code Title 8, Chapters 1201 and 1501. The new sections are adopted without changes to the proposed text published in the October 3, 2008 issue of the *Texas Register* (33 TexReg 8288).

2. REASONED JUSTIFICATION. The adopted sections are necessary to implement House Bill (HB) 2252, 80th Legislature, Regular Session, which created the Insurance Code §1201.013 to provide that an insurer issuing an accident and health insurance policy may establish premium discounts, rebates, or a reduction in otherwise applicable copayments, coinsurance, or deductibles, or any combination of these incentives, in return for an insured's participation in programs promoting disease prevention, wellness and health. The Insurance Code §1201.006 authorizes the Commissioner to adopt rules as necessary to implement the purposes and provisions of Chapter 1201. HB 2252 also amended the Insurance Code §1501.107, to provide that a small or large employer health benefit plan issuer may establish premium discounts, rebates, or a reduction in otherwise applicable copayments, coinsurance, or deductibles or any

09-0154

TITLE 28. INSURANCE
Part I. Texas Department of Insurance
Chapter 21. Trade Practices

Adopted Sections
Page 2 of 19

combination of such incentives, in return for participation in programs promoting disease prevention, wellness and health. The Insurance Code §1501.010 requires the Commissioner to adopt rules as necessary to implement the Insurance Code Chapter 1501 and to meet the minimum requirements of federal law and regulations which, for small and large employer health carriers, are contained in the Health Insurance Portability and Availability Act (HIPAA). Federal agencies have adopted regulations implementing HIPAA as follows: Department of the Treasury, 26 CFR Part 54 (2006); Department of Labor, 29 CFR Part 2590 (2006); and Department of Health and Human Services, 45 CFR Parts 144 and 146 (2006). Accordingly, portions of the federal regulations are included in these rules as necessary to meet the minimum requirements of federal law. Because the Chapter 1201 and Chapter 1501 provisions authorizing establishment of rewards for participation in wellness programs are substantially identical, the adopted sections are necessary to achieve uniformity and consistency of application to the extent possible among products and programs subject to their provisions.

3. HOW THE SECTIONS WILL FUNCTION. The adopted sections are designed to facilitate wellness programs, potentially making health coverage more affordable and accessible than it might otherwise be and encouraging covered individuals to participate in programs designed to promote disease prevention, wellness and health. The adopted sections focus on wellness programs to promote educating and empowering covered persons to take charge of their own health, manage chronic conditions and

09-0154

adopt healthier behaviors. The adopted sections make available a means to help employees, group members, and other persons covered under group plans or individual policies to understand the state of their own health. The adopted sections permit development and implementation of initiatives by health plan issuers and group contract holders that are designed to improve or maintain personal health; additionally they permit incentives to help assure strong levels of participation in programs with strategies targeting the adoption of personal health behavior modification(s) supporting healthier lifestyles.

Adopted §21.4701 set out the applicability and scope of the new sections.

Adopted §21.4702 provides definitions for certain terms.

Adopted §21.4703 provides the statement of exception to federal and state statutory prohibitions against discriminating based on health status related factors in group health coverage products. The exception expressly permits incentives to be provided by issuers based on whether an individual has met the standards of a wellness program that satisfies the requirements of the subchapter.

Adopted §21.4704 sets out the purpose of the subchapter.

Adopted §21.4705 sets out baseline criteria that must be met in order for a program to be considered a wellness program that constitutes a permitted exception to the federal and state statutory prohibitions against discrimination based on a health status-related factor.

Adopted §21.4706 sets out provisions for wellness programs that predicate eligibility for rewards under the program solely on the basis of participation in the

program.

Adopted §21.4707 sets out provisions for wellness programs that base eligibility for rewards on satisfaction of a health status related standard.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: One commenter requests clarification that the new sections do not apply to or create a policy filing requirement for health plans that provide health-related services and/or information outside the terms of an issuer's health benefit plan. The commenter asks that the clarification recognize the distinction between Section 1, and Sections 2 and 3, of HB 2252. The commenter notes that HB 2252 Section 1 provides that it is a permitted practice for issuers to provide, in addition to benefits under the terms of the contract, health-related services or health related-information, or to disclose the availability of those additional services and information to prospective policy or certificate holders. The commenter also notes that HB 2252 Sections 2 and 3 permit a carrier issuing health benefit coverage to establish premium discounts, rebates, or a reduction in otherwise applicable copayments, coinsurance, or deductibles, or any combination of them, in return for participation in programs promoting disease prevention, wellness and health.

Agency Response: The department believes the referenced sections of HB 2252 are clear in terms of their provisions, but agrees that Section 1 of HB 2252 addresses practices that are not to be considered discrimination or inducement under the Insurance Code §541.058, when offered outside the terms of a policy. Amended

09-0154

TITLE 28. INSURANCE
Part I. Texas Department of Insurance
Chapter 21. Trade Practices

Adopted Sections
Page 5 of 19

§541.058 permits issuers to provide, in addition to benefits under the terms of the contract, health-related services or health related-information or to disclose the availability of those additional services and information to prospective policy or certificate holders, without first having to file new policy language with the Department. It provides express definitions for the terms “health-related services” and “health related-information” in §541.058(a). However, the amendments to §541.058 in Section 1 of the bill do not reference or address “wellness programs.” Conversely, Sections 2 and 3 of HB 2252 permit a carrier issuing health benefit coverage to establish premium discounts, rebates, or a reduction in otherwise applicable copayments, coinsurance, or deductibles, or any combination of them, in return for participation in programs promoting disease prevention, wellness and health. Because changes to premiums, copayments, coinsurance and deductibles are changes to the insurance policy, the proposed and adopted sections of Title 28, Chapter 21, Subchapter MM address wellness programs and rewards offered within insurance policies. Such changes to policy provisions will require a policy filing with the Department. Section 21.4701 of the adopted sections sets out the applicability and scope of the subchapter, providing that it applies to issuers and insurers with respect to policies and plans that establish certain rewards in return for participation in wellness or disease prevention programs. The Department believes that the provisions of Subchapter MM are clear with respect to their scope and applicability.

09-0154

Comment: One commenter recommends that paragraphs (1), (4), (5) and (6) of §21.4707 be deleted from the rules as adopted. The commenter supported deletion of the four paragraphs on the basis that HB 2252 contains no reference to the standards, limitations or requirements that are set out in the respective paragraphs. Section 21.4707(1) provides that a wellness program that requires satisfaction of a standard associated with a health status related factor may not have a reward that exceeds in total value 20 percent of the cost of the employee-only, or member-only coverage under the plan. Section 21.4707(4) requires that the reward under the program be available to all similarly situated individuals and further sets out criteria pursuant to which that requirement is met. Section 21.4707(5) sets out disclosure requirements for plan materials describing the terms of the wellness program, and §21.4707(6) sets out recommended language that may be used to satisfy the requirement of paragraph (5) of the section.

Agency Response: The Department disagrees that any of paragraphs (1), (4), (5) and (6) of §21.4707 should be deleted from the rules as adopted. As set out in the statement of statutory authority for this subchapter, the Insurance Code §1501.010 authorizes the Commissioner of Insurance to adopt rules as necessary to implement Chapter 1501, relating to the Health Insurance Portability and Availability Act (HIPAA). Federal agencies have adopted regulations that implement HIPAA group health insurance market reforms and that are applicable to Texas issuers of employer plans as follows: Department of the Treasury, 26 CFR Part 54; Department of Labor, 29 CFR Part 2590; and Department of Health and Human Services, 45 CFR Parts 144 and 146.

09-0154

Accordingly, portions of the Federal Regulations are included in these rules as necessary to meet the minimum requirements of federal law. The provisions in paragraphs (1), (4), (5) and (6) of §21.4707 very closely parallel the provisions of federal regulations addressing the same subject matter and setting out the same standards, limitations, and requirements. In addition, as set out in the statement of statutory authority for this subchapter, the Insurance Code §1201.006 authorizes the Commissioner to adopt rules as necessary to implement the purposes and provisions of Chapter 1201. Because the Chapter 1201 and Chapter 1501 provisions authorizing establishment of rewards for participation in wellness programs are substantially identical, the adopted sections are set out to achieve uniformity and consistency of application to the extent possible among products and programs subject to their provisions. For these reasons, the provisions of these paragraphs are essential to these rules and are retained in the adopted sections.

Comment: One commenter raises questions about the proposed subchapter in conjunction with provisions relating to noninsurance benefits, authorization for which resulted from enactment of HB 1847 by the 80th Legislature, and which created the Insurance Code §1701.061. The commenter states that wellness programs contemplated by HB 2252 would be within the scope of HB 1847, which permits an insurer to include in its policy form a noninsurance benefit that is reasonably related to the policy. The commenter also states that inclusion of wellness programs in insurance policies is not mandatory and adds that the proposed sections appear to take the

09-0154

position that a wellness program must be included within the terms of an insurance policy to be legally permissible. The commenter discusses the Insurance Code §541.058(b)(5) and its permissive provisions concerning health-related services or information as well as disclosure of the availability of such services and information. The commenter asserts that language in the proposed sections that appear to the commenter to require inclusion of “wellness services” within the terms of an insurance policy is inconsistent with the language of §541.058(b)(5). The commenter also urges that agents should be entitled to “rely on the wellness program exception,” once again focusing on the Insurance Code §541.058(b). The commenter states that the “exception provided in §541.058(b) should also be interpreted to be available to agents.” The commenter requests a clarifying provision be added to §21.4705 to indicate that the provisions of the sections apply not only to health benefit plan issuers and accident and health insurers, but also to their agents and representatives.

Agency Response: The Department appreciates the comment and offers the following in response to the questions, concerns, and request. As a preliminary matter, the Department incorporates its response to the first comment requesting clarification and recognition of the distinction between the “health related services” provisions addressed in HB 2252, Section 1, and the “wellness program” provisions in Sections 2 and 3.

The Department also emphasizes that the adopted sections of Subchapter MM implement the provisions of HB 2252 which create the Insurance Code §1201.013 and which amend §1501.107. Both of these statutory provisions apply to carriers that are

09-0154

issuing plans or coverage that establish premium discounts, rebates, or a reduction in otherwise applicable copayments, coinsurance, or deductibles. The applicability-and-scope provisions of the adopted sections in §21.4701 are set out to clearly state both the scope of the subject matter of the sections as well as the regulated entities to which the sections apply. Because the rewards established involve premium discounts, rebates, or reductions in otherwise applicable cost sharing financial requirements, they must be addressed within the plan or policy.

Next, with respect to the commenter's statement that wellness programs contemplated by HB 2252 would be within the scope of HB 1847 (which created the Insurance Code §1701.061, permitting an insurer to include in its policy form a noninsurance benefit that is reasonably related to the policy), the Department acknowledges that some wellness programs may involve noninsurance benefits, but does not believe that the noninsurance benefits contemplated in HB 1847 include wellness programs associated with premium discounts or the other rewards contemplated in HB 2252. Section 21.4705(c) acknowledges the possibility of a wellness program that would meet both the §21.4702(2) definition as well as the §21.4705(a) and (b) criteria, and also that would constitute "a good or service provided or disclosed as part of a policy or certificate of insurance that is reasonably related to the type of policy or certificate being issued" as provided in §1701.061. However, since not every wellness program will meet the dual criteria set out in the preceding sentence, the qualifying language "as applicable" is part of §21.4705(c) to indicate the circumstances under which a wellness program would have to comply both with the

09-0154

adopted sections and with §1701.061. The Department also intends to adopt rules to implement HB 1847 pursuant to the Insurance Code §1701.061(f), and initiated the process by posting a draft informal rule for comment in September 2008.

Finally, with respect to the request that §21.4705 be changed to indicate that the sections apply not only to health benefit plan issuers and accident and health insurers but also to their agents and representatives, the Department again emphasizes that the statutory provisions implemented by this adoption are Insurance Code §1201.013 and §1501.107. These Code sections apply to carriers that are issuing plans or coverage that establish premium discounts, rebates, or a reduction in otherwise applicable copayments, coinsurance, or deductibles. Agents and their representatives are not authorized to establish premium discounts, rebates, or a reduction in otherwise applicable copayments, coinsurance, or deductibles. For these reasons, the Department makes no change to the sections as adopted.

5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

For: None.

Against: None.

Neither for nor against, with changes: Texas Association of Life and Health Insurers; Texas Association of Health Plans; and Thompson, Coe, Cousins & Irons, L.L.P.

6. STATUTORY AUTHORITY. The new sections are adopted under the Insurance Code §§1201.006, 1501.010, and 36.001. Section 1201.006 authorizes the

09-0154

TITLE 28. INSURANCE
Part I. Texas Department of Insurance
Chapter 21. Trade Practices

Adopted Sections
Page 11 of 19

Commissioner to adopt reasonable rules as necessary to implement the purposes and provisions of Chapter 1201, relating to the regulation of Accident and Health Insurance. Section 1501.010 authorizes the Commissioner of Insurance to adopt rules as necessary to implement Chapter 1501, relating to the Health Insurance Portability and Availability Act (HIPAA). Federal agencies have adopted regulations implementing HIPAA as follows: Department of the Treasury, 26 CFR Part 54 (2006); Department of Labor, 29 CFR Part 2590 (2006); and Department of Health and Human Services, 45 CFR Parts 144 and 146 (2006). Accordingly, portions of the federal regulations are included in these rules as necessary to meet the minimum requirements of federal law. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

7. TEXT.

§21.4701. Applicability and Scope. This subchapter applies to any small employer health benefit plan issuer, any large employer health benefit plan issuer, and any insurer issuing an accident and health insurance policy, with respect to a policy or plan that establishes premium discounts, rebates, or reductions in otherwise applicable copayments, coinsurance, or deductibles, or any combination of these incentives, in return for participation in programs designed to promote disease prevention, wellness and health.

09-0154

§21.4702. Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Health status related factor--Health status; medical condition, including both physical and mental illnesses; claims experience; receipt of health care; medical history; genetic information; evidence of insurability, including conditions arising out of acts of domestic violence; and disability.

(2) Wellness Program--Any program designed to promote disease prevention, wellness and health.

§21.4703. Wellness Programs Exception.

(a) Notwithstanding the provisions of the Insurance Code Chapter 1501, §541.056(a) and §544.052, and the provisions of Chapter 26, Subchapter A of this title (relating to Small Employer Health Insurance Portability and Availability Act Regulations), a group health benefit plan issuer or an accident and health insurance issuer may vary the amount of premium or contribution it requires similarly situated individuals to pay, and/or vary benefits, including cost-sharing mechanisms such as a deductible, copayment, or coinsurance, based on whether an individual has met the standards of a wellness program that satisfies the requirements of §21.4706 or §21.4707 of this subchapter (relating to Wellness Programs With Participation as Sole Basis for Reward Eligibility and Wellness Programs With Reward Eligibility Based on Satisfying a Health Status Related Standard).

(b) Notwithstanding the provisions of the Insurance Code §541.056(a) and

09-0154

§544.052, an insurer issuing an accident and health insurance policy may vary the amount of premium or contribution it requires similarly situated individuals or individuals of the same class and of essentially the same hazard to pay, and/or vary benefits, including cost-sharing mechanisms such as a deductible, copayment, or coinsurance, based on whether an individual has met the standards of a wellness program that satisfies the requirements of §21.4706 or §21.4707 of this subchapter.

§21.4704. Purposes. The purposes of this subchapter are to provide for the circumstances under which, and the constraints within which, a group health benefit plan issuer or an accident and health insurance issuer may:

(1) vary benefits, including cost-sharing mechanisms such as a deductible, copayment, or coinsurance, based on whether an individual has met the standards of a wellness program that satisfies the requirements of §21.4706 or §21.4707 of this subchapter (relating to Wellness Programs With Participation as Sole Basis for Reward Eligibility and Wellness Programs With Reward Eligibility Based on Satisfying a Health Status Related Standard); and/or

(2) vary the amount of premium or contribution it requires similarly situated individuals to pay based on whether an individual has met the standards of a wellness program that satisfies the requirements of §21.4706 or §21.4707 of this subchapter.

§21.4705. General Provisions Applicable to Wellness Programs.

(a) Wellness programs as set out in this subchapter are excepted from the general prohibitions against discrimination based on a health status related factor for plan provisions that vary benefits, including cost-sharing mechanisms, or the premium or contribution for individuals eligible for plan coverage, in connection with participation in such a wellness program.

(b) A wellness program must be reasonably designed to promote disease prevention, wellness and health. A program satisfies this standard if it:

(1) has a reasonable probability of improving the health of, or preventing disease in, participating individuals;

(2) is not overly burdensome;

(3) is not a subterfuge for otherwise prohibited discrimination based on a health status related factor; and

(4) is not highly suspect in the method chosen to promote disease prevention, wellness and health.

(c) A wellness program must comply, as applicable, with the Insurance Code §1701.061 and provisions of rules codified in this title relating to the Insurance Code §1701.061 and the administration of noninsurance benefits.

§21.4706. Wellness Programs With Participation as Sole Basis for Reward Eligibility.

(a) A wellness program which contains no condition for obtaining a reward that is premised on an individual satisfying a standard that is associated with a health status

09-0154

related factor does not violate this subchapter so long as participation in the program is made available to all individuals eligible for coverage under the plan.

(b) Wellness programs meeting the description of this section would include the following program types:

(1) a program that reimburses all or part of the cost for membership in a fitness center;

(2) a diagnostic testing program that provides a reward for participation and does not base any part of the reward on testing outcomes;

(3) a program that encourages preventive care through the waiver of the copayment or deductible requirement under a group health plan or individual policy for the costs of a particular preventive care item or items;

(4) a program that reimburses covered individuals for the costs of smoking cessation programs without regard to whether the individual quits smoking; or

(5) a program that provides a reward to covered individuals for attending a monthly health education seminar.

§21.4707. Wellness Programs With Reward Eligibility Based on Satisfying a Health Status Related Standard. A wellness program which contains any condition for obtaining a reward that is premised on an individual satisfying a standard that is associated with a health status related factor does not violate this subchapter so long as the requirements of paragraphs (1) - (6) of this section are met.

(1) For a group health benefit plan, the reward for the wellness program,

coupled with the reward for other wellness programs offered under the same plan and which also require satisfaction of a standard associated with a health status related factor, must not exceed in total value 20 percent of the cost of employee-only, or member-only, coverage under the plan. However, if, in addition to employees or members, any class of dependents--such as spouses or spouses and dependent children--may participate in the wellness program, the reward must not exceed 20 percent of the cost of the coverage in which an employee, or member, and any dependents are enrolled.

(A) For purposes of this section, the cost of coverage is determined based on the total amount of employer and employee contributions, or member contributions, for the benefit package under which the employee or member is, or the employee, or member, and any dependents are, receiving coverage.

(B) A reward can 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) The program must meet the criteria set out in §21.4705 of this subchapter (relating to Wellness Programs General Provisions).

(3) The program must give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year.

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

09-0154

(A) A reward under this subchapter is available to all similarly situated individuals for a period so long as the program allows, at a minimum:

(i) 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 or other health status related factor to satisfy the otherwise applicable standard; and

(ii) 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 medical condition or other health status related factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy or attempt to satisfy the otherwise applicable standard.

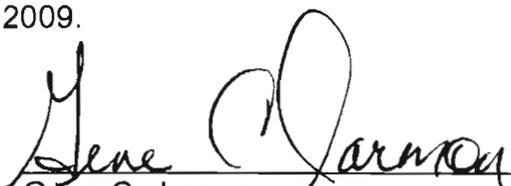
(5) The health benefit plan or policy, or health benefit plan or policy issuer, must disclose, in all plan materials describing the terms of the program, the availability of a reasonable alternative standard or the possibility of waiver of the otherwise applicable standard required under paragraph (4) of this section. However, if plan materials merely mention that a program is available, without describing its terms, this disclosure is not required.

(6) The following language, or substantially similar language, can be used to satisfy the requirement of paragraph (5) of this section: "If it is unreasonably difficult

the reward under this program, call us at (insert telephone number) and we will work with you to develop another way to qualify for the reward."

CERTIFICATION. This agency hereby certifies that §§21.4701 - 21.4707 as adopted have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on March 6th, 2009.

A handwritten signature in black ink that reads "Gene C. Jarmon". The signature is written in a cursive style with a large, looped initial "G".

Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance

09-0154

TITLE 28. INSURANCE
Part I. Texas Department of Insurance
Chapter 21. Trade Practices

Adopted Sections
Page 19 of 19

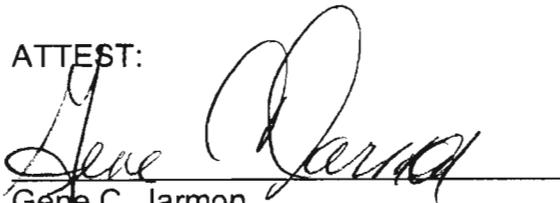
IT IS THEREFORE THE ORDER of the Commissioner of Insurance that §§21.4701 - 21.4707 specified herein, concerning standards for the establishment of, and requirements applicable to, wellness programs designed to promote disease prevention, wellness and health, and developed pursuant to applicable provisions of the Insurance Code, Title 8, Chapters 1201 and 1501, are adopted.

AND IT IS SO ORDERED.



MIKE GEESLIN
COMMISSIONER OF INSURANCE

ATTEST:



Gene C. Jarmon
General Counsel and Chief Clerk

COMMISSIONER'S ORDER NO. **09-0154**

MAR 10 2009