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1ST SESSION

S. 2806

To codify and enhance existing regulations designed to encourage individuals to adopt healthy behaviors through voluntary participation in programs of health promotion and disease prevention.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 19, 2009

Mr. ENSIGN (for himself and Mr. CARPER) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To codify and enhance existing regulations designed to encourage individuals to adopt healthy behaviors through voluntary participation in programs of health promotion and disease prevention.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Building Efforts for
5 Wellness and Encouraging Longer Lives Act” or the “BE
6 WELL Act”.

1 **SEC. 2. PROGRAMS OF HEALTH PROMOTION AND DISEASE**
 2 **PREVENTION.**

3 (a) INTERNAL REVENUE CODE OF 1986.—Section
 4 9802 of the Internal Revenue Code of 1986 is amended—

5 (1) by redesignating the second subsection (f)
 6 as subsection (g); and

7 (2) by adding at the end the following:

8 “(h) PROGRAMS OF HEALTH PROMOTION AND DIS-
 9 EASE PREVENTION.—

10 “(1) APPLICABILITY.—The following shall apply
 11 with respect to a program of health promotion or
 12 disease prevention for purposes of subsection
 13 (b)(2)(B). Such programs shall be referred to as
 14 ‘wellness programs’.

15 “(2) DEFINITION AND GENERAL RULE.—

16 “(A) DEFINITION.—For purposes of this
 17 subsection, a wellness program is any program
 18 designed to promote health or prevent disease,
 19 including a program designed to encourage in-
 20 dividuals to adopt healthy behaviors.

21 “(B) GENERAL RULE.—For purposes of
 22 subsections (a)(2) and (b)(2) (which provide ex-
 23 ceptions to the general prohibitions against dis-
 24 crimination based on a health factor for group
 25 health plan provisions that vary benefits (in-
 26 cluding cost-sharing mechanisms) or the pre-

1 mium or contribution for similarly situated indi-
2 viduals in connection with a wellness program
3 that satisfies the requirements of this sub-
4 section), if none of the conditions for obtaining
5 a reward under a wellness program are based
6 on an individual satisfying a standard that is
7 related to a health factor, under this subsection,
8 such wellness program does not violate this sec-
9 tion if participation in the program is made
10 available to all similarly situated individuals. If
11 any of the conditions for obtaining a reward
12 under such a wellness program is based on an
13 individual satisfying a standard that is related
14 to a health factor, the wellness program shall
15 not violate this section if the requirements of
16 paragraph (4) of this section are satisfied.

17 “(3) WELLNESS PROGRAMS NOT SUBJECT TO
18 REQUIREMENTS.—If none of the conditions for ob-
19 taining a reward under a wellness program are
20 based on an individual satisfying a standard that is
21 related to a health factor (or if a wellness program
22 does not provide a reward), the wellness program
23 shall not violate this section, if participation in the
24 program is made available to all similarly situated
25 individuals. Such programs need not satisfy the re-

1 requirements of paragraph (4), if participation in the
2 program is made available to all similarly situated
3 individuals. Wellness programs described in this
4 paragraph include the following:

5 “(A) A program that reimburses all or
6 part of the cost for memberships in a fitness
7 center.

8 “(B) A diagnostic testing program that
9 provides a reward for participation and does
10 not base any part of the reward on outcomes.

11 “(C) A program that encourages preven-
12 tive care through the waiver of the copayment
13 or deductible requirement under a group health
14 plan for the costs of, for example, prenatal care
15 or well-baby visits.

16 “(D) A program that reimburses employ-
17 ees for the costs of smoking cessation programs
18 without regard to whether the employee quits
19 smoking.

20 “(E) A program that provides a reward to
21 employees for attending a monthly health edu-
22 cation seminar.

23 “(4) WELLNESS PROGRAMS SUBJECT TO RE-
24 QUIREMENTS.—If any of the conditions for obtaining
25 a reward under a wellness program is based on an

1 individual satisfying a standard that is related to a
2 health factor, the wellness program shall not violate
3 this section if the requirements of this paragraph
4 are satisfied.

5 “(A) The reward for the wellness program,
6 coupled with the reward for other wellness pro-
7 grams with respect to the plan that require sat-
8 isfaction of a standard related to a health fac-
9 tor, shall not exceed 30 percent of the cost of
10 employee-only coverage under the plan. How-
11 ever, if, in addition to employees, any class of
12 dependents (such as spouses or spouses and de-
13 pendent children) may participate in the
14 wellness program, the reward shall not exceed
15 30 percent of the cost of the coverage in which
16 an employee and any dependents are enrolled.
17 For purposes of this paragraph, the cost of cov-
18 erage shall be determined based on the total
19 amount of employer and employee contributions
20 for the benefit package under which the em-
21 ployee is (or the employee and any dependents
22 are) receiving coverage. A reward may be in the
23 form of a discount or rebate of a premium or
24 contribution, a waiver of all or part of a cost-
25 sharing mechanism (such as deductibles, copay-

1 ments, or coinsurance), the absence of a sur-
2 charge, or the value of a benefit that would oth-
3 erwise not be provided under the plan. The Sec-
4 retaries of Labor, Health and Human Services,
5 and the Treasury may increase the reward
6 available under this subparagraph to up to 50
7 percent of the cost of coverage under the plan
8 if such Secretaries determine that such an in-
9 crease is appropriate.

10 “(B) The wellness program shall be rea-
11 sonably designed to promote health or prevent
12 disease. A program satisfies this subparagraph
13 if it has a reasonable chance of improving the
14 health of or preventing disease in participating
15 individuals and it is not overly burdensome, is
16 not a subterfuge for discriminating based on a
17 health factor, and is not highly suspect in the
18 method chosen to promote health or prevent
19 disease. At least once per year, each plan or
20 issuer offering a wellness program shall evalu-
21 ate the reasonableness of such program.

22 “(C) The program shall give individuals el-
23 igible for the program the opportunity to qual-
24 ify for the reward under the program at least
25 once per year.

1 “(D)(i) The reward under the program
2 shall be available to all similarly situated indi-
3 viduals.

4 “(ii) For purposes of clause (i), a reward
5 is not available to all similarly situated individ-
6 uals for a period unless the program allows—

7 “(I) a reasonable alternative standard
8 (or waiver of the otherwise applicable
9 standard) for obtaining the reward for any
10 individual for whom, for that period, it is
11 unreasonably difficult due to a medical
12 condition to satisfy the otherwise applica-
13 ble standard; and

14 “(II) a reasonable alternative stand-
15 ard (or waiver of the otherwise applicable
16 standard) for obtaining the reward for any
17 individual for whom, for that period, it is
18 medically inadvisable to attempt to satisfy
19 the otherwise applicable standard.

20 “(iii) A plan or issuer may seek
21 verification, such as a statement from an indi-
22 vidual’s physician, that a health factor makes it
23 unreasonably difficult or medically inadvisable
24 for the individual to satisfy or attempt to sat-
25 isfy the otherwise applicable standard.

1 “(E)(i) The plan or issuer shall disclose in
2 all plan materials describing the terms of the
3 program the availability of a reasonable alter-
4 native standard (or the possibility of waiver of
5 the otherwise applicable standard) required
6 under subparagraph (D). If plan materials
7 merely mention that a program is available,
8 without describing its terms, such disclosure is
9 not required.

10 “(ii) The following language, or similar
11 language, may be used to satisfy the require-
12 ment of this subparagraph: ‘If it is unreason-
13 ably difficult due to a medical condition for you
14 to achieve the standards for the reward under
15 this program, or if it is medically inadvisable
16 for you to attempt to achieve the standards for
17 the reward under this program, call us at [in-
18 sert telephone number] and we will work with
19 you to develop another way to qualify for the
20 reward.’.

21 “(5) REGULATIONS.—The Secretaries of Labor,
22 Health and Human Services, and the Treasury may
23 promulgate regulations, as appropriate, to carry out
24 this subsection.

1 “(6) EFFECTIVE DATE.—This subsection shall
2 take effect on the date of enactment of the BE
3 WELL Act.

4 “(7) EXISTING WELLNESS PROGRAMS.—During
5 the period of time between the date of enactment of
6 the BE WELL Act and the date on which the Secre-
7 taries of Labor, Health and Human Services, and
8 the Treasury establish regulations to effectuate this
9 subsection, a wellness program that was established
10 prior to the date of enactment of the BE WELL Act
11 may continue to operate in accordance with the re-
12 quirements in effect on the day before such date of
13 enactment.”.

14 (b) PHSA GROUP MARKET.—Section 2702(b) of the
15 Public Health Service Act (42 U.S.C. 300gg–1(b)) is
16 amended by adding at the end the following:

17 “(4) PROGRAMS OF HEALTH PROMOTION AND
18 DISEASE PREVENTION.—The provisions of section
19 9802(h) of the Internal Revenue Code of 1986 shall
20 apply to programs of health promotion and disease
21 prevention offered through a group health plan or a
22 health insurance issuer offering group health insur-
23 ance coverage.”.

1 (c) ERISA.—Section 702(b) of the Employee Retirement
2 ment Income Security Act of 1974 (29 U.S.C. 1182(b))
3 is amended by adding at the end the following:

4 “(4) PROGRAMS OF HEALTH PROMOTION AND
5 DISEASE PREVENTION.—The provisions of section
6 9802(h) of the Internal Revenue Code of 1986 shall
7 apply to programs of health promotion and disease
8 prevention offered through a group health plan or a
9 health insurance issuer offering group health insur-
10 ance coverage.”.

11 (d) APPLICATION OF WELLNESS PROGRAMS PROVI-
12 SIONS TO CARRIERS PROVIDING FEDERAL EMPLOYEE
13 HEALTH BENEFITS PLANS.—

14 (1) IN GENERAL.—Notwithstanding section
15 8906 of title 5, United States Code (including sub-
16 sections (b)(1) and (b)(2) of such section), sub-
17 sections (a), (b), and (c) of this section, including
18 the amendments made by those subsections (relating
19 to wellness programs), shall apply to carriers enter-
20 ing into contracts under section 8902 of title 5,
21 United States Code.

22 (2) PROPOSALS.—Carriers may submit separate
23 proposals relating to voluntary wellness program of-
24 ferings as part of the annual call for benefit and

1 rate proposals to the Office of Personnel Manage-
2 ment.

3 (3) EFFECTIVE DATE.—This subsection shall
4 take effect on the date of enactment of this Act and
5 shall apply to contracts entered into under section
6 8902 of title 5, United States Code, that take effect
7 with respect to calendar years that begin more than
8 1 year after that date.

9 (e) STATE DEMONSTRATION PROJECT.—Subpart 1
10 of part B of title XXVII of the Public Health Service Act
11 (42 U.S.C. 300gg–41 et seq.) is amended by adding at
12 the end the following:

13 **“SEC. 2746. WELLNESS PROGRAM DEMONSTRATION**
14 **PROJECT.**

15 “(a) IN GENERAL.—Not later than July 1, 2014, the
16 Secretary of Health and Human Services, in consultation
17 with the Secretary of the Treasury, shall establish a 10-
18 State demonstration project under which participating
19 States shall apply the provisions of 9802(h) of the Internal
20 Revenue Code of 1986 to programs of health promotion
21 offered by a health insurance issuer that offers health in-
22 surance coverage in the individual market in such State.

23 “(b) EXPANSION OF DEMONSTRATION PROJECT.—If
24 the Secretary of Health and Human Services, in consulta-
25 tion with the Secretary of the Treasury, determines that

1 the demonstration project described in subsection (a) is
2 effective, such Secretaries may, beginning on July 1,
3 2017, expand such demonstration project to include addi-
4 tional participating States.

5 “(c) REQUIREMENTS.—States that participate in the
6 demonstration project under this section shall—

7 “(1) ensure that requirements of consumer pro-
8 tection are met in programs of health promotion in
9 the individual market;

10 “(2) require verification from health insurance
11 issuers that offer health insurance coverage in the
12 individual market of such State that premium dis-
13 counts—

14 “(A) do not create undue burdens for indi-
15 viduals insured in the individual market;

16 “(B) do not lead to cost shifting; and

17 “(C) are not a subterfuge for discrimina-
18 tion; and

19 “(3) ensure that consumer data is protected in
20 accordance with the requirements of section 264(c)
21 of the Health Insurance Portability and Account-
22 ability Act of 1996.

23 “(d) EXISTING PROGRAMS OF HEALTH PROMOTION
24 OR DISEASE PREVENTION.—Nothing in this section shall
25 preempt any State law related to programs of health pro-

1 motion offered by a health insurance issuer that offers
2 health insurance coverage in the individual market in such
3 State that was established or adopted by State law on or
4 after the date of enactment of the BE WELL Act.

5 “(e) REGULATIONS.—The Secretaries of Health and
6 Human Services and the Treasury may promulgate regu-
7 lations, as appropriate, to carry out this section.”.

8 (f) REPORT.—

9 (1) IN GENERAL.—Not later than 3 years after
10 the date of enactment of this Act, the Secretary of
11 Health and Human Services, in consultation with
12 the Secretary of the Treasury and the Secretary of
13 Labor, shall submit a report to the appropriate com-
14 mittees of Congress concerning—

15 (A) the effectiveness of wellness programs
16 (as defined in section 9802(h)(2) of the Inter-
17 nal Revenue Code of 1986, as added by sub-
18 section (a)) in promoting health and preventing
19 disease;

20 (B) the impact of such wellness programs
21 on the access to care and affordability of cov-
22 erage for participants and non-participants of
23 such programs;

24 (C) the impact of premium-based and cost-
25 sharing incentives on participant behavior and

1 the role of such programs in changing behavior;
2 and

3 (D) the effectiveness of different types of
4 rewards.

5 (2) DATA COLLECTION.—In preparing the re-
6 port described in paragraph (1), the Secretaries
7 shall gather relevant information from employers
8 who provide employees with access to wellness pro-
9 grams, including State and Federal agencies.

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