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Wellness Programs:
Addressing the Impact of the
December 2006 Final HIPAA
Wellness Rules

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Background

- HIPAA enacted 08/21/1996
- A veritable font of Code, ERISA and Public Health Service Act requirements and complications:
 - Nondiscrimination rules
 - Special enrollment provisions
 - Portability rules
 - Pre-existing condition exclusion limitations
 - Privacy rules
 - Security rules
 - EDI rules.....etc. etc. etc.

Final Rules Issued December 2006

- Interim final nondiscrimination regulations published in 2001 along with proposed wellness regulations
- Final nondiscrimination rules and wellness program rules published 12/13/2006
- Final rules effective for plan years beginning on and after 7/1/2007
- Rules a joint effort of Treasury, Labor and HHS (which was, in part, why it took so long)

Fundamental Principles

- Group health plans and insurers cannot discriminate against participants on the basis of any health factors
- Discrimination encompasses:
 - Eligibility
 - *Enrollment, effective date, waiting periods, benefits*
 - Premiums or contributions
 - *Including discounts, rebates or differential mechanisms*
- But wellness plans are an exception.....

Fundamental Principles (cont.)

- Violations of HIPAA nondiscrimination rules can result in:
 - Code-based excise taxes of \$100 per day per person per failure
 - DOL audit and civil action to enforce rules
 - Private right of action under ERISA section 502 to enforce rules

Wellness Parameters: No Requirements

- Wellness programs that do not require satisfying a standard related to a health factor or do not provide a reward are O.K. if available to all similarly situated individuals
 - Fitness center costs
 - Diagnostic program where reward not based on outcomes
 - Waiving copay or deductible for prenatal care
 - Smoking cessation (even if not successful)
 - Reward for monthly health education seminar

Wellness Parameters: Requirements

- If reward is based on satisfying a standard related to a health factor:
 - Reward capped at 20% of cost
 - Reasonable designed and not a subterfuge
 - Qualify once a year
 - Reward must be available to all
 - *Must have reasonable alternative standard if unreasonable difficult or medically inadvisable*
 - Must disclose alternative standard

Common Designs v. Final Regulations

- Health risk assessment
 - Typically meets the “no requirement” wellness test
- Screenings for various conditions
- Paying for smoking cessation classes
- Exercise classes
- Smoker surcharge/discount
 - Will have to provide reasonable alternative and limit surcharge to 20% of cost
 - *Query—is 20% enough to drive behavior?*

Failings of Common Designs

- Programs that do not have a reasonable alternative standard
- Disease management that increases co-pay for failure to participate
 - Cannot guarantee that extra costs for disease-related expenses will remain under 20% of premium
 - Must limit increased co-pay to disease related costs
- Stacking of multiple incentives/penalties that together exceed 20% of cost

Loopholes and Creative Opportunities

- HIPAA nondiscrimination rules apply to “group health plans”
- What is a group health plan?
- Does HIPAA apply to:
 - Cafeteria plan price tags and cashable credits?
 - Wage differentials?
 - Employment actions, suspensions or termination?

Loopholes and Creative Opportunities

- “Laddering” benefits by maintaining different levels of coverage based on merely participating in evaluations or physicals
- Refusing to hire (or retain) individuals based on behaviors or characteristics
- Shift to DC/HDHP designs and reward/punish through pay (resulting in varying funds to make individual HSA contributions)

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Other Complications

- Are wellness rewards taxable?
 - Yes unless exempted or part of a cafeteria plan.
- Does the wellness program violate the ADA?
 - Cannot discriminate against disabled individuals in terms of employment
 - *Includes wellness programs*
 - *Must be voluntary*
 - *Results must remain confidential*
- Does the wellness program violate state law?

Will HIPAA Need to Evolve?

- 20% is too low to drive behavior or deal with individuals with multiple unhealthy behaviors.
- Need to become increasingly punitive to gain attention of and modify behavior for unhealthiest individuals (who drive most of the cost).
- Creative employers will find ways around HIPAA rules to contain costs

Thanks!



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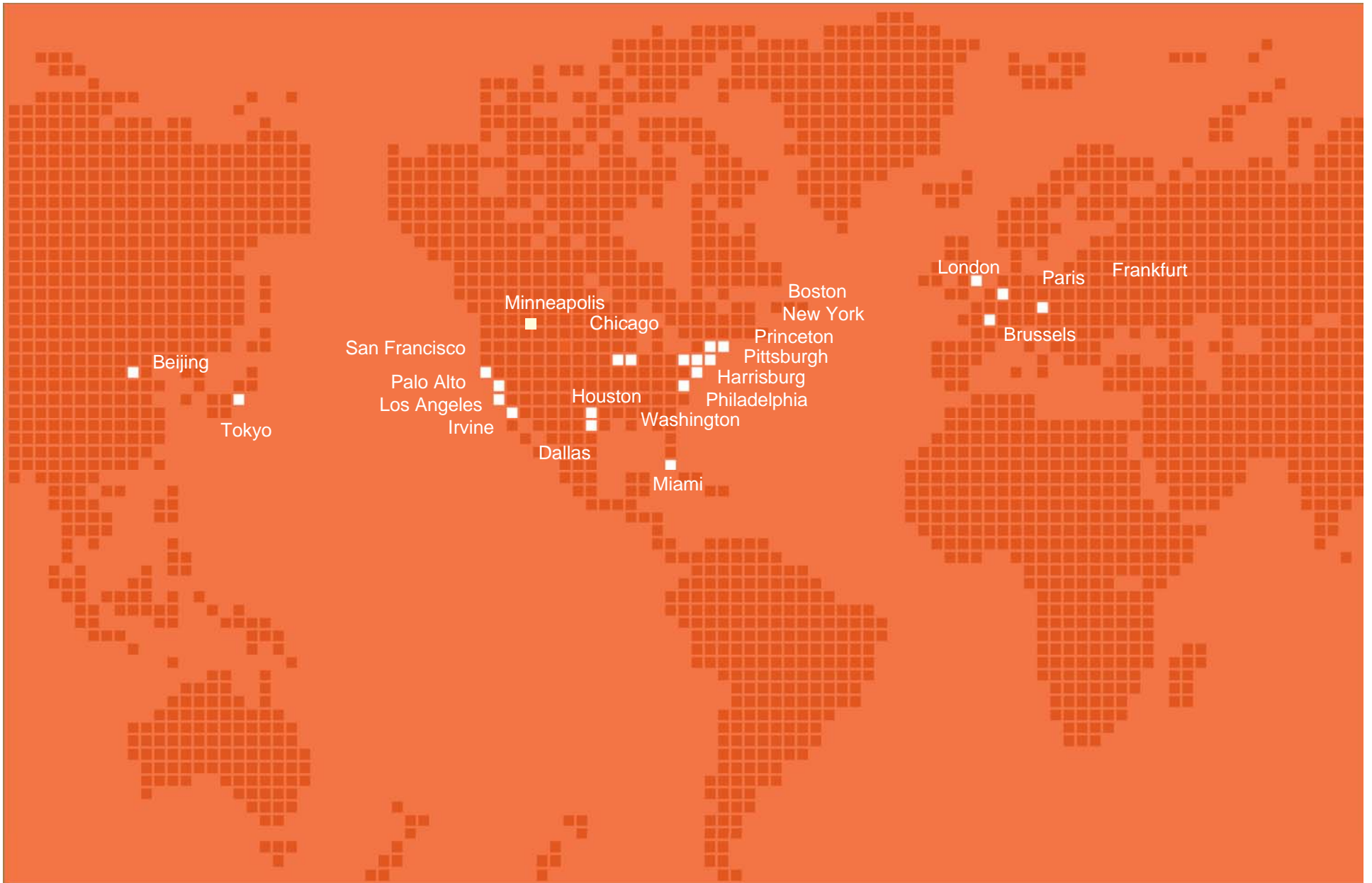
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