

Update on Wellness:
Final HIPAA Wellness Rules
& Other Compliance Issues

American Benefits Council
Christy Tinnes, Groom Law Group
June 4, 2013

Update on Wellness

- Final HIPAA Wellness Rules – Issued 6/3/13
- Proposed IRS Minimum Value / Affordability Rules – Issued 5/3/13
- Other Compliance Issues – ERISA, ADA, GINA, Tax, Privacy

Final HIPAA Wellness Rules Background

- HIPAA nondiscrimination rules prohibit discrimination against individuals based on health status
- Exception for benign discrimination in favor of individual with adverse health status
- Exception if meet HIPAA wellness rules
- ACA codified most of wellness program rules and increased allowed incentive limit from 20% to 30% of cost of coverage (and gave Secretary discretion to increase to 50%)
- Proposed wellness rules issued 11/26/12

Participatory v. Health-Contingent Wellness Program

Participatory

- Reward Not Based on Health Factor
- HIPAA Wellness Rules N/A
- But Other Laws May Apply – ERISA, ADA, GINA, ADA, Tax, Privacy

Health-Contingent

- Reward Based on Health Factor
- HIPAA Wellness Rules Apply
- **NEW!** Broken Down into Two New Subcategories:
 - Activity-Only Wellness Programs
 - Outcome-Based Wellness Programs

Participatory Wellness Program (HIPAA Wellness Rules N/A)

None of the conditions for obtaining reward based on individual satisfying standard related to health factor.

Examples:

- Reimburse fitness center membership cost
- Reward to participate in diagnostic testing, not based on outcome
- Deductible or copayment waiver to encourage preventive care, such as prenatal care or well-baby visit
- Reward or reimbursement for smoking cessation program, regardless of whether employee quits
- Reward to attend monthly, no-cost health education seminar
- Reward to complete health risk assessment without further action required with respect to health issues identified

Health-Contingent Wellness Program (HIPAA Wellness Rules Apply)

Activity-Based

- Individual required to complete activity related to health factor to obtain reward, but not required to attain specific health outcome
- Examples: Walking, diet, or exercise program where some individuals may be unable to or have difficulty participating or completing due to health factor (for example, such as asthma, pregnancy, or recent surgery)

Outcome-Based

- Individual required to attain or maintain specific health outcome in order to obtain reward
- Example: Reward for not smoking
- Example: Reward for certain result on biometric screening
- Example: Reward for favorable BMI, while requiring those outside of healthy range to meet with health coach to earn reward

Real Life Example: Health-Contingent Program (Activity-Based)

- Program: Exercise twice a week and earn premium credit
 - If plan designates exercise, appears to be Health-Contingent Wellness Program (Activity-Based). Example: Must walk twice a week.
 - Due to health factor, some individuals may have difficulty meeting.
 - If plan allows any exercise, may be able to argue Participatory Wellness Program because individuals should not have difficulty meeting for health reasons, since can choose any.

Real Life Example: Health-Contingent Program (Outcome-Based)

- Program: Take health risk assessment. If identified as “at risk” based on responses, subject to premium surcharge unless participate in 3 coaching calls.
 - Some had argued that this was “Participatory” because all activities were participation-only (taking HRA, participating in coaching calls)
 - Final rules clarify that this is Health-Contingent Wellness Program (Outcome-Based)
 - Rationale: Unhealthy group must do more than healthy group to earn same reward

Overview

- Standards that apply to the three types of programs:
 - Participation-only
 - Activity-only
 - Outcome-based
- Health-Contingent

Participation-Only Standards

- Only requirement is that the participation-only program be available to all similarly situated individuals regardless of health status

Health-Contingent Standards

- Same over-arching standards apply to both activity-only and outcome-based programs
- HOWEVER, the final rules impose material differences in how these standards must be **administered** for activity-only versus outcome-based programs (*e.g.*, how to provide a reasonable alternative standard)
- Thus, there are some VERY important differences in how activity-only and outcome-based programs must be implemented

Health-Contingent Standards

- 1. Must give individuals an opportunity to qualify for the FULL reward at least once per year**

Activity-Only	Outcome-Based
	

Health-Contingent Standards

2. The reward for all health-contingent programs with respect to a given individual may not exceed 30%

- Based on total cost (including employer and employee premium share) of self-only coverage
 - If, however, spouses and dependents may participate in the wellness program, then based on total cost of coverage in which dependents and spouse are enrolled
- BUT.... If smoking cessation program, can go as high as 50%

Activity-Only	Outcome-Based
	

Health-Contingent Standards

3. The program must be reasonably designed to promote health or prevent disease

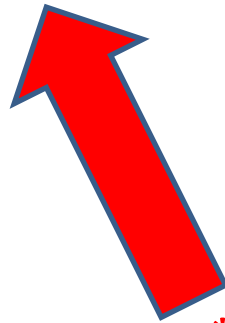
- Must have “reasonable chance” of improving health or preventing disease
- Must not be overly burdensome
- Must not be a subterfuge for discriminating based on a health factor
- Must not be highly suspect in the method chosen to promote health or prevent disease

Activity-Only	Outcome-Based
	

Health-Contingent Standards

4. The reward must be available to all similarly situated employees
 - This is accomplished by providing a reasonable alternative standard (RAS)

Activity-Only	Outcome-Based
	



**** Note: This is where most of the differences arise between the two types of health-contingent programs**

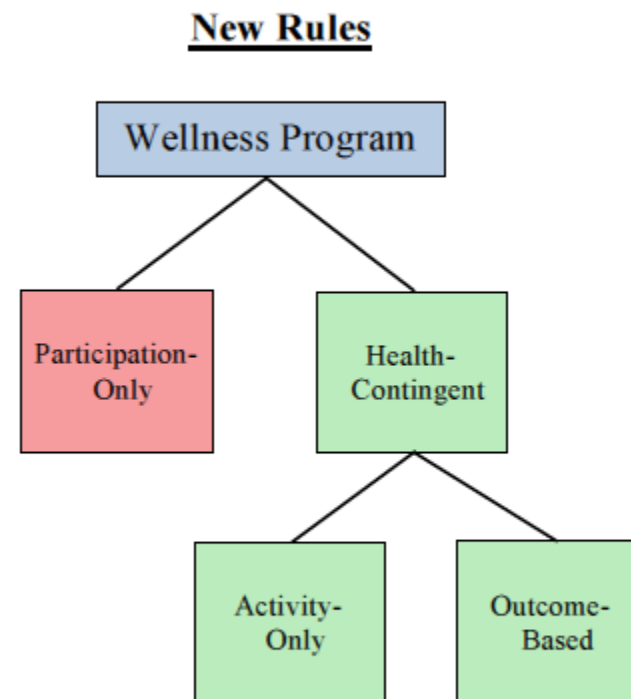
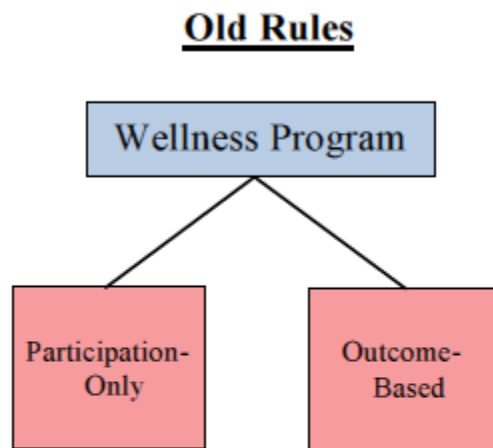
Health-Contingent Standards

5. Must provide adequate notice of availability of reasonable alternative standard

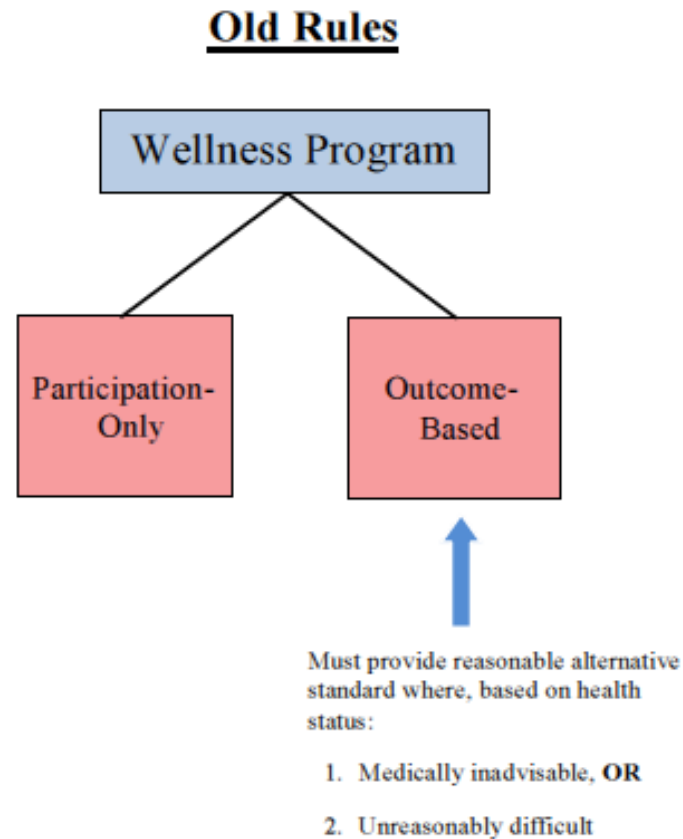
- Must disclose availability of RAS in all plan materials describing wellness program terms
- Must include contact information for obtaining a RAS
- Must include statement that the recommendations of an individual's physician will be accommodated

Activity-Only	Outcome-Based
	

Reasonable Alternative Standards

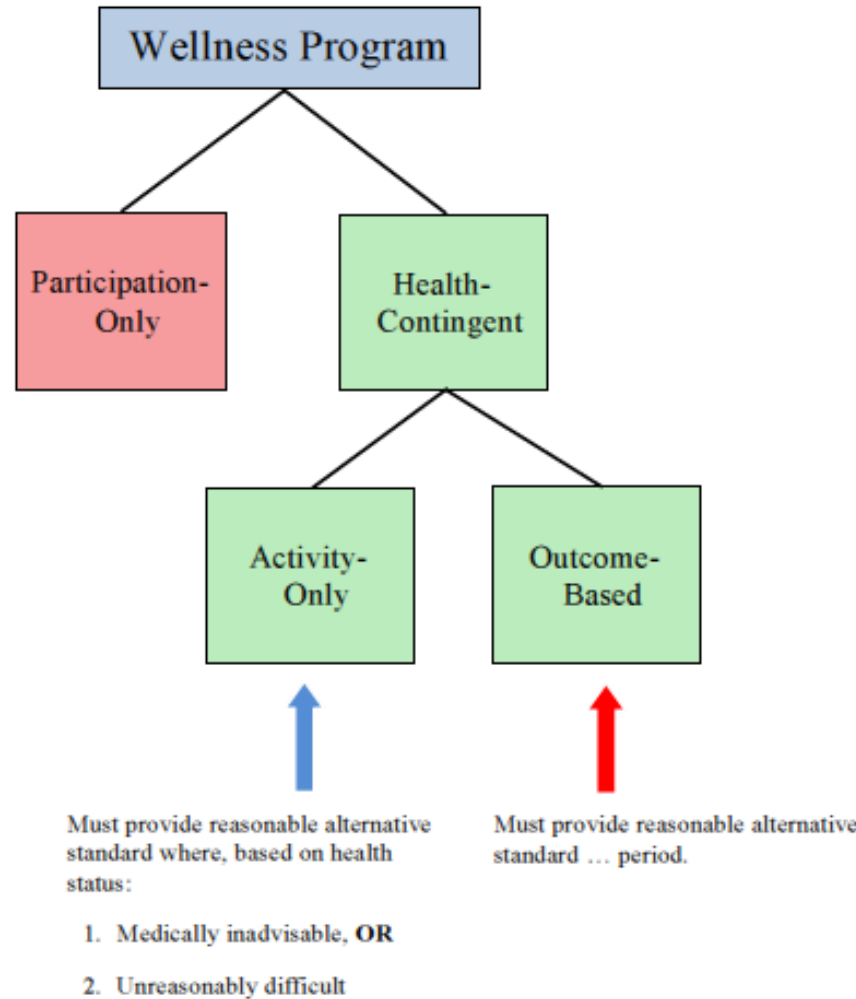


Reasonable Alternative Standards



Reasonable Alternative Standards

New Rules



Reasonable Alternative Standards

- For Activity-Only:
 - The plan must provide a RAS if:
 1. It is medically inadvisable for the individual to attempt to satisfy the plan standard; **OR**
 2. It is unreasonably difficult due to a medical condition for the individual to obtain the reward
 - The plan is not required to determine a RAS in advance of request, but a RAS must be furnished upon request
 - “If reasonable under the circumstances,” the plan may require physician verification that RAS is needed

Reasonable Alternative Standards

- For Activity-Only:

- Facts and Circumstances test on reasonableness of RAS, including:

- **Whether required time commitment is reasonable**

- If the RAS is an education program, must make such program available or assist individual in finding program – and may not require individual to bear the cost of the program

- If the RAS is a diet program, must pay cost of membership or participation fee, but not food

- **If individual's physician states that a plan standard is not medically appropriate, must provide RAS that "accommodates" the recommendations of the physician**

**** NEW ****

Reasonable Alternative Standards

- For Activity-Only:

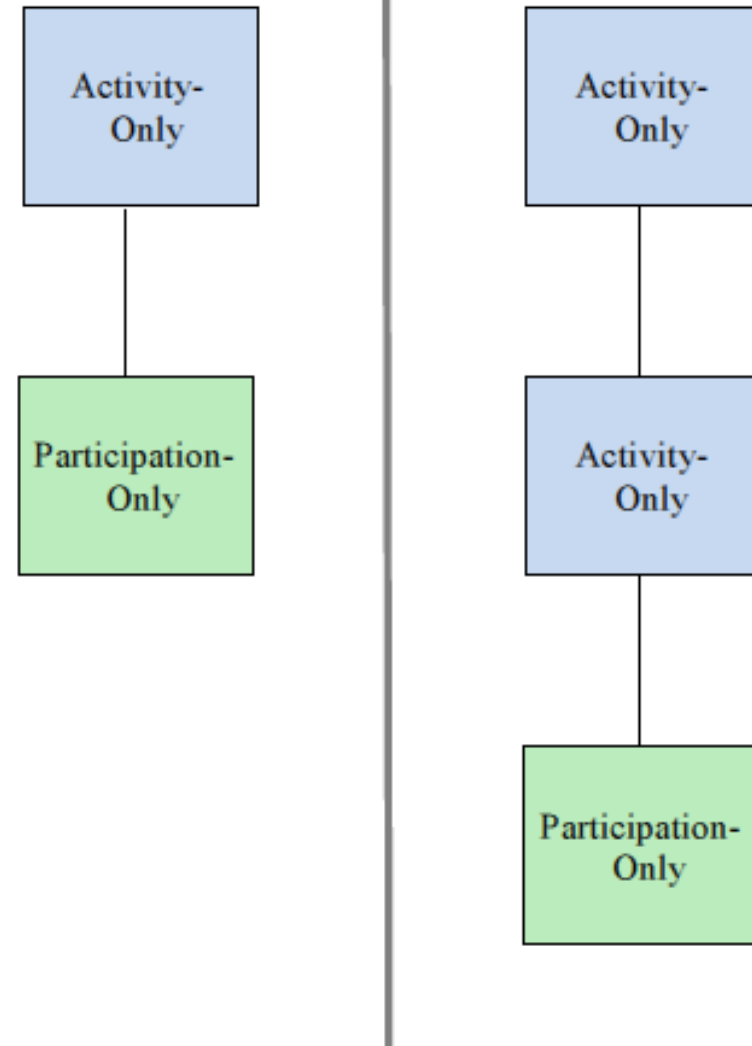
- RAS may be participation-only, activity-only OR outcome-based program

- If RAS₁ is participation-only, then participant either participates or does not. No requirement under HIPAA to do anything more
- If RAS₁ is another activity-only program, then need to provide RAS₂ to RAS₁, BUT only if the activity-only RAS₁ is medically inadvisable or unreasonably difficult
- If RAS₁ is an outcome-based program, need to comply with rules for outcome-based programs (by providing, in part, RAS₂)

Reasonable Alternative Standards

- **Example:**

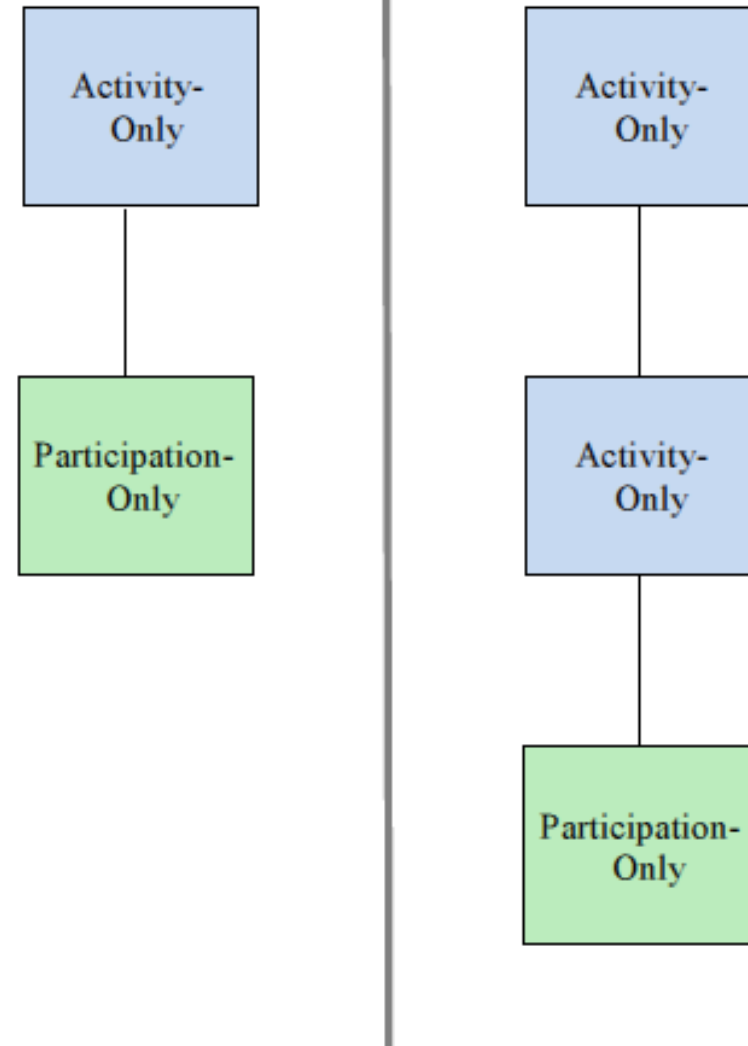
Plan requires individuals to walk one mile once a week



Reasonable Alternative Standards

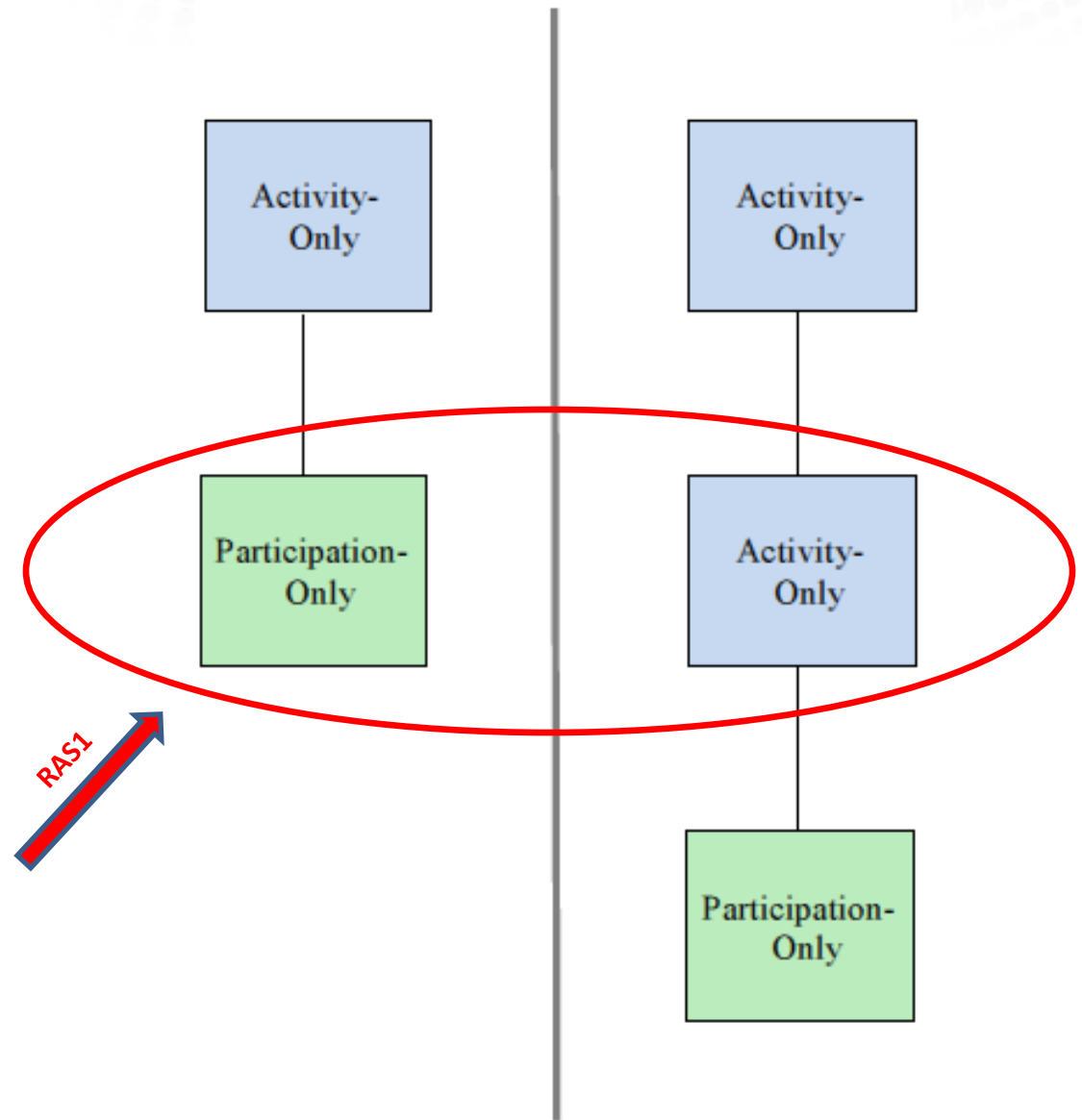
- Example:

Individual says they can't meet the standard. What next? Depends...



Reasonable Alternative Standards

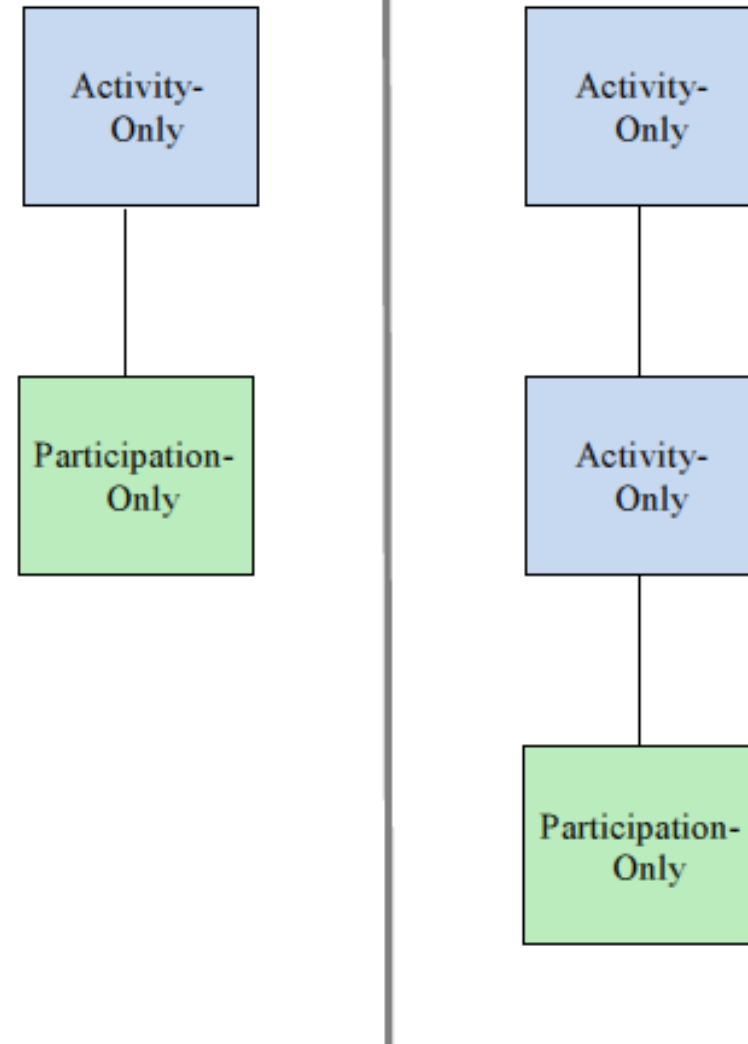
- Example:



Reasonable Alternative Standards

- Example:

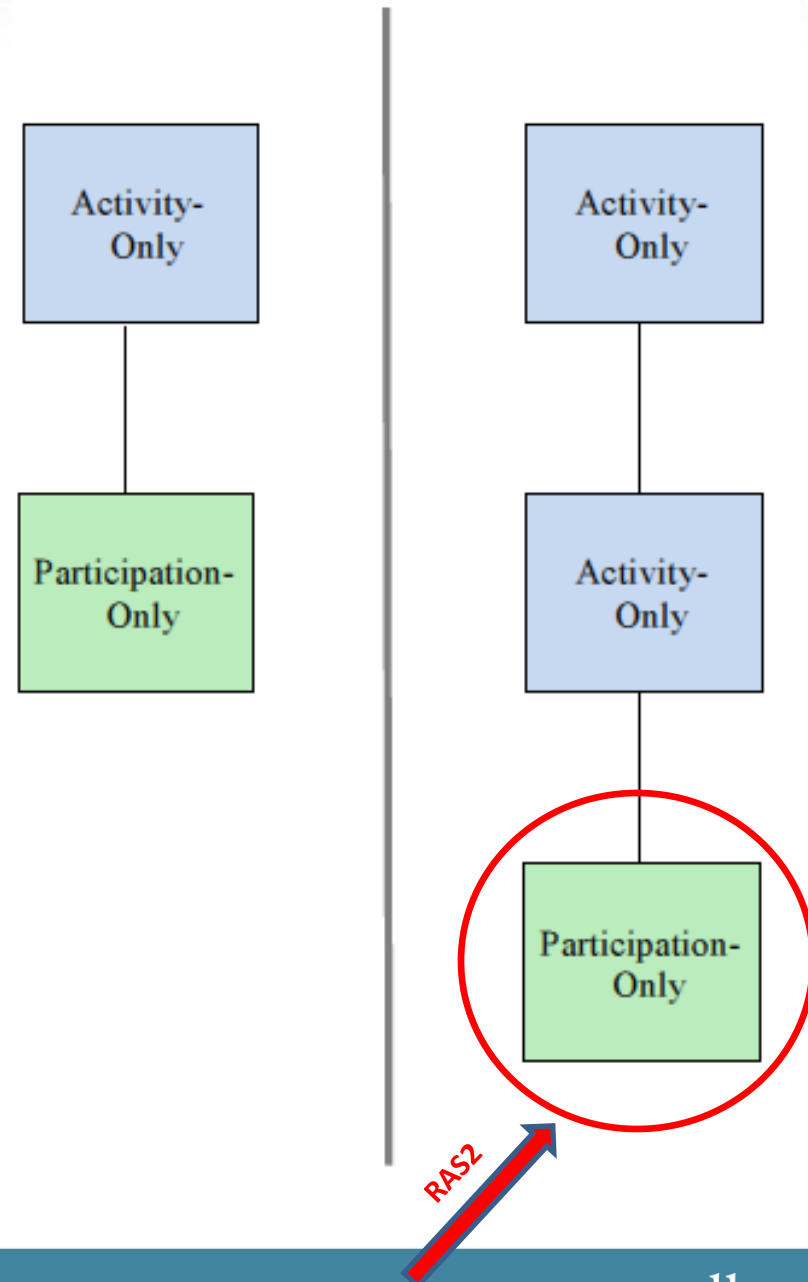
Assume the plan chooses the activity-only RAS (i.e., moderate exercise once weekly of any type), but individual still says he or she can't do it. What next? Depends...



Reasonable Alternative Standards

- Example:

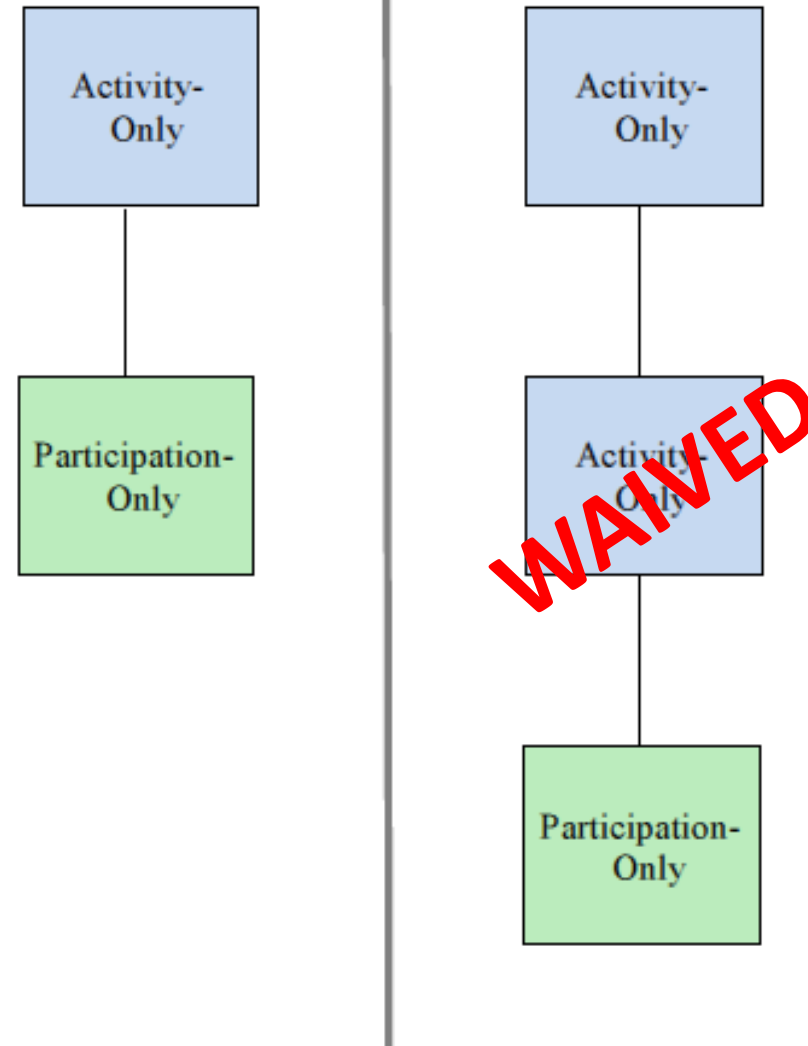
Assume the plan chooses the activity-only RAS (i.e., moderate exercise once weekly of any type), but individual still says he or she can't do it. What next? Depends...



Reasonable Alternative Standards

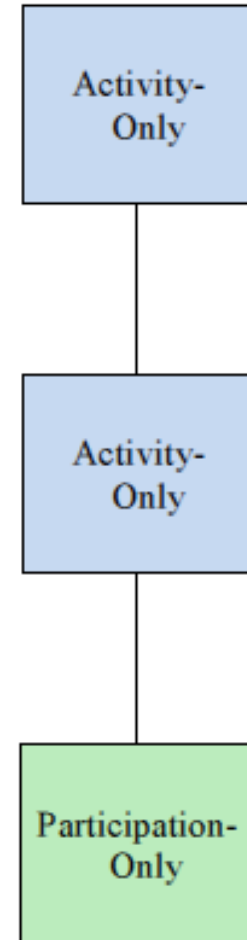
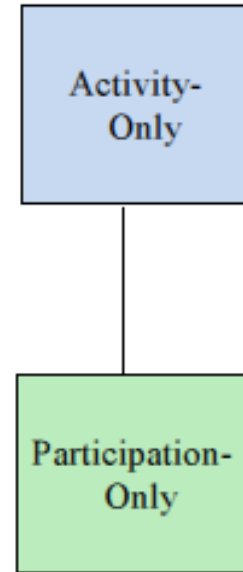
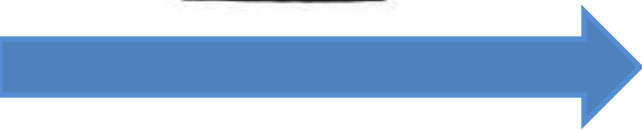
- Example:

Of course, the plan can always waive an initial standard or RAS ...



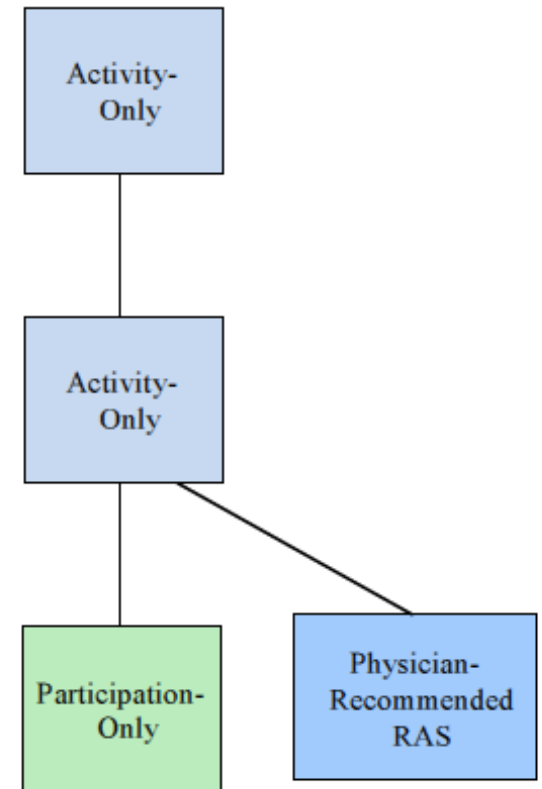
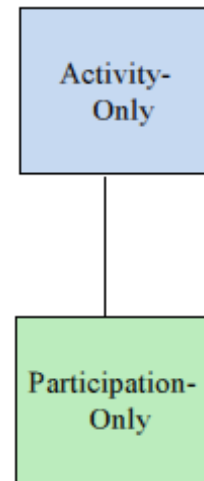
Reasonable Alternative Standards

- Example:



Reasonable Alternative Standards

- Example:



Reasonable Alternative Standards

- For Outcome-Based:

- If eligibility for reward is based on initial screening or test (such as BMI, cholesterol, blood pressure), then:

- **MUST provide a RAS REGARDLESS of whether it is unreasonably difficult or medically inadvisable to achieve the outcome**

**** NEW ****

- **Thus, CANNOT require physician verification**

- The plan is not required to determine a RAS in advance of request, but a RAS must be furnished upon request

Reasonable Alternative Standards

- **For Outcome-Based:**
 - Facts and Circumstances test on reasonableness of RAS, including:
 - Whether required time commitment is reasonable
 - If the RAS is an education program, must make such program available or assist individual in finding program – and may not require individual to bear the cost of the program
 - If the RAS is a diet program, must pay cost of membership or participation fee, but not food
 - If individual’s physician states that a plan standard is not medically appropriate, must provide RAS that “accommodates” the recommendations of the physician

Reasonable Alternative Standards

- For Outcome-Based:
 - Facts and circumstances test on reasonableness of RAS, including:
 - Whether required time commitment is reasonable
 - If the RAS is an education program, must make such program available or assist individual in finding program – and may not require individual to bear the cost of the program
 - If the RAS is a diet program, must pay cost of membership or participation fee, but not food
 - If individual's physician states that a plan standard is not medically appropriate, must provide RAS that "accommodates" the recommendations of the physician


Reasonable Alternative Standards

- For Outcome-Based:
 - RAS may be participation-only, activity-only OR outcome-based program
 - If RAS₁ is participation-only, then participant either participates or does not. No further action is required.
 - If RAS₁ is another activity-only program, then need to provide RAS₂ to RAS₁, BUT only if the activity-only RAS₁ is medically inadvisable or unreasonably difficult

Reasonable Alternative Standards

- For Outcome-Based: (Cont'd)

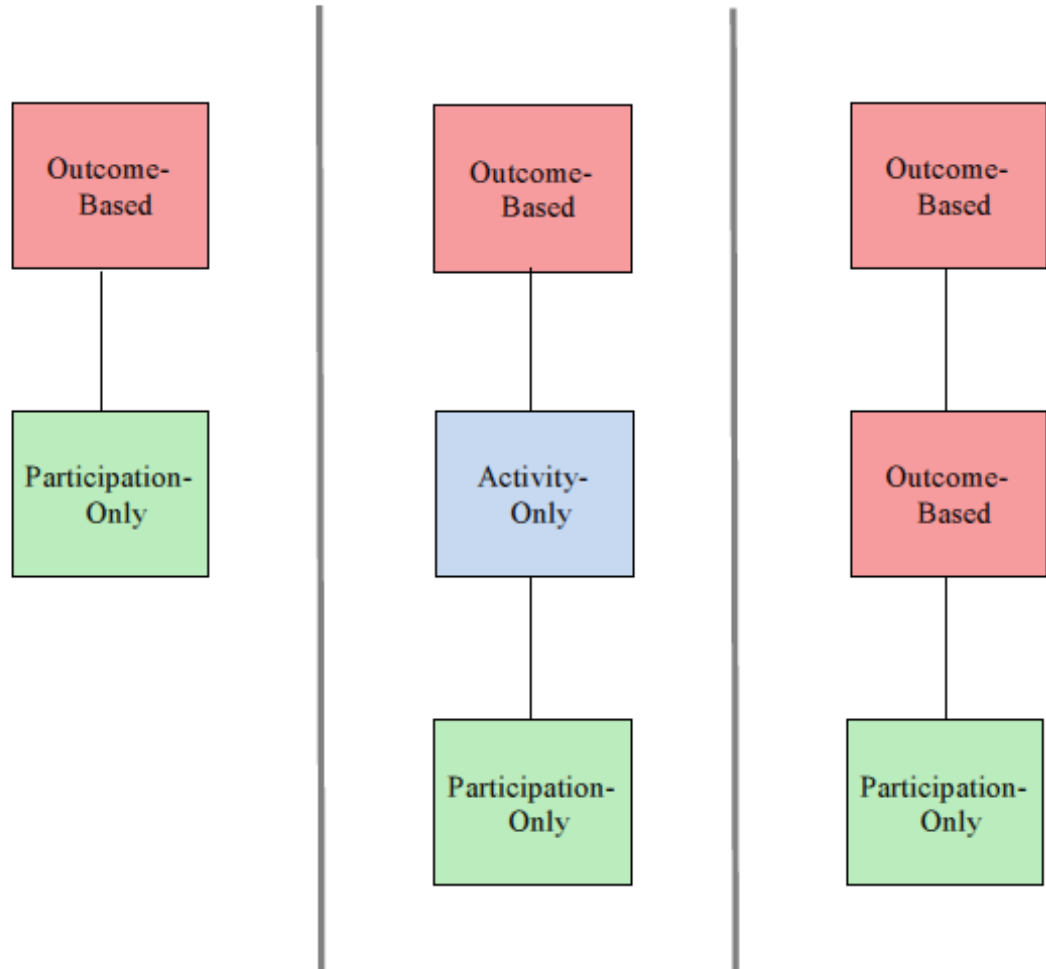
- RAS may be participation-only, activity-only OR outcome-based program

- 
- If RAS₁ is an outcome-based program, then the outcome-based RAS₁ must comply with final rules as if it were the initial standard, i.e., the plan must provide a RAS₂ to the RAS₁
 - Additionally, it must adhere to two “special rules”
 1. The RAS cannot be a requirement to meet a different level of the same standard without additional time to comply and that takes into account individual’s circumstances
 - *E.g.*, if initial standard is BMI < 30, then cannot be required to achieve BMI <31 on same date; however, could have standard be “small amount or small percentage” of BMI reduction over a realistic period of time, such as within a year
 2. An individual must be given the opportunity to comply with the recommendations of the individual’s physician as a second RAS
 - Physician must “join[] in the request” for this second RAS?
 - The individual can make a request to involve his personal physician at any time and the physician can adjust the physician’s recommendations at any time “consistent with medical appropriateness”

Reasonable Alternative Standards

- Example:

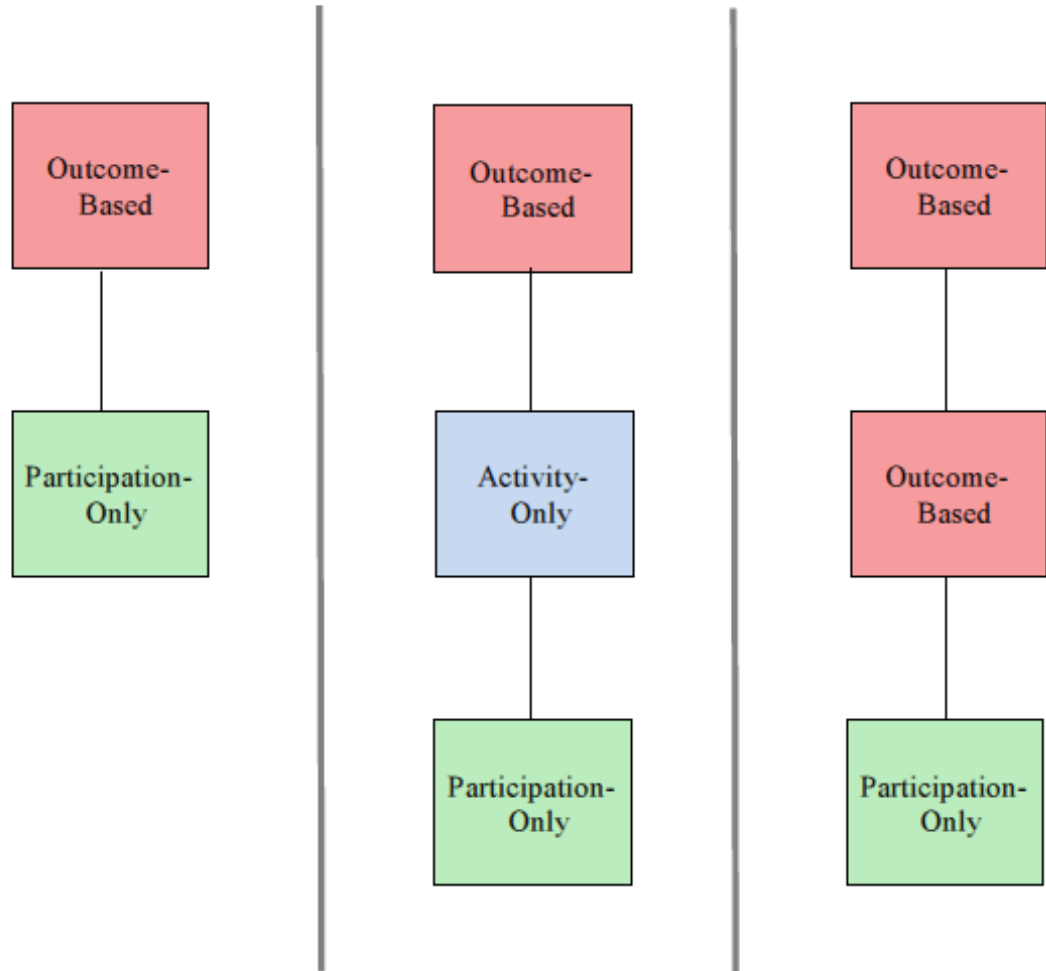
Initial Standard is a BMI < 30



Reasonable Alternative Standards

- Example:

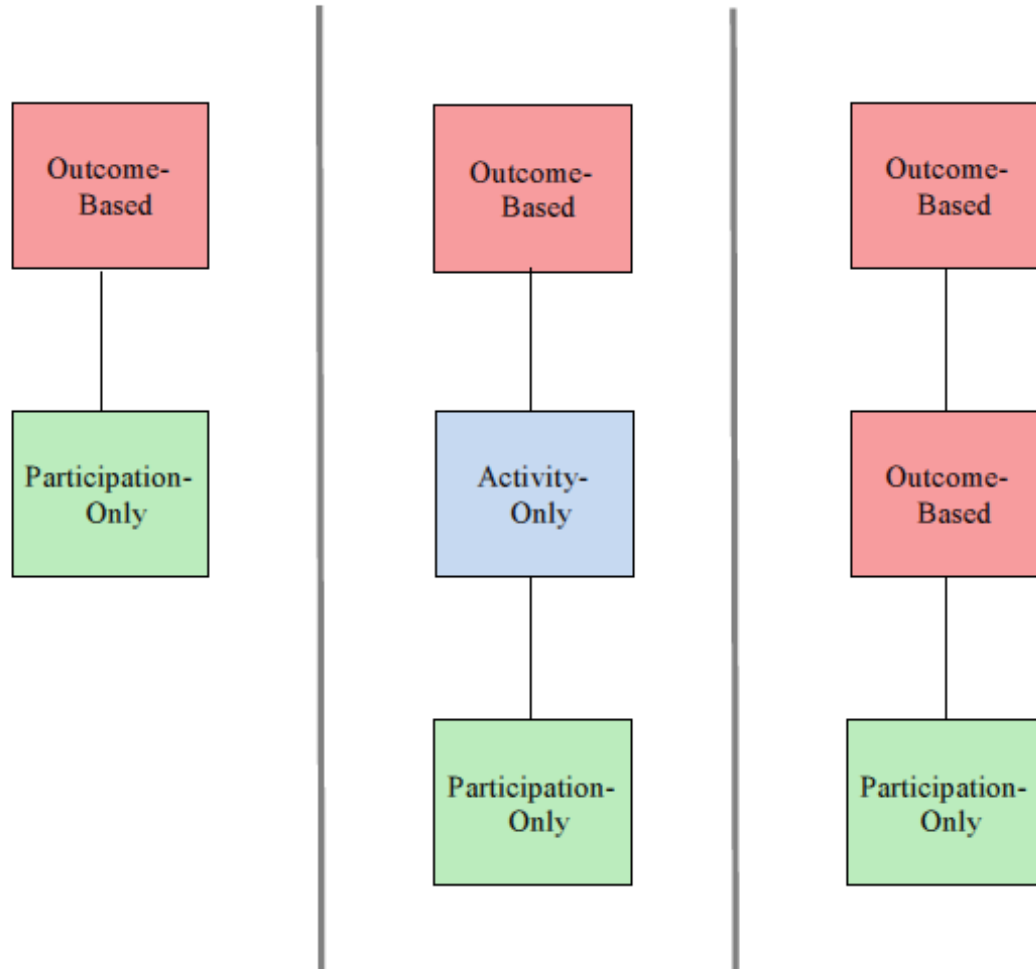
It's not medically inadvisable or unreasonably difficult for Bob to reduce his BMI to 30 ...



Reasonable Alternative Standards

- Example:

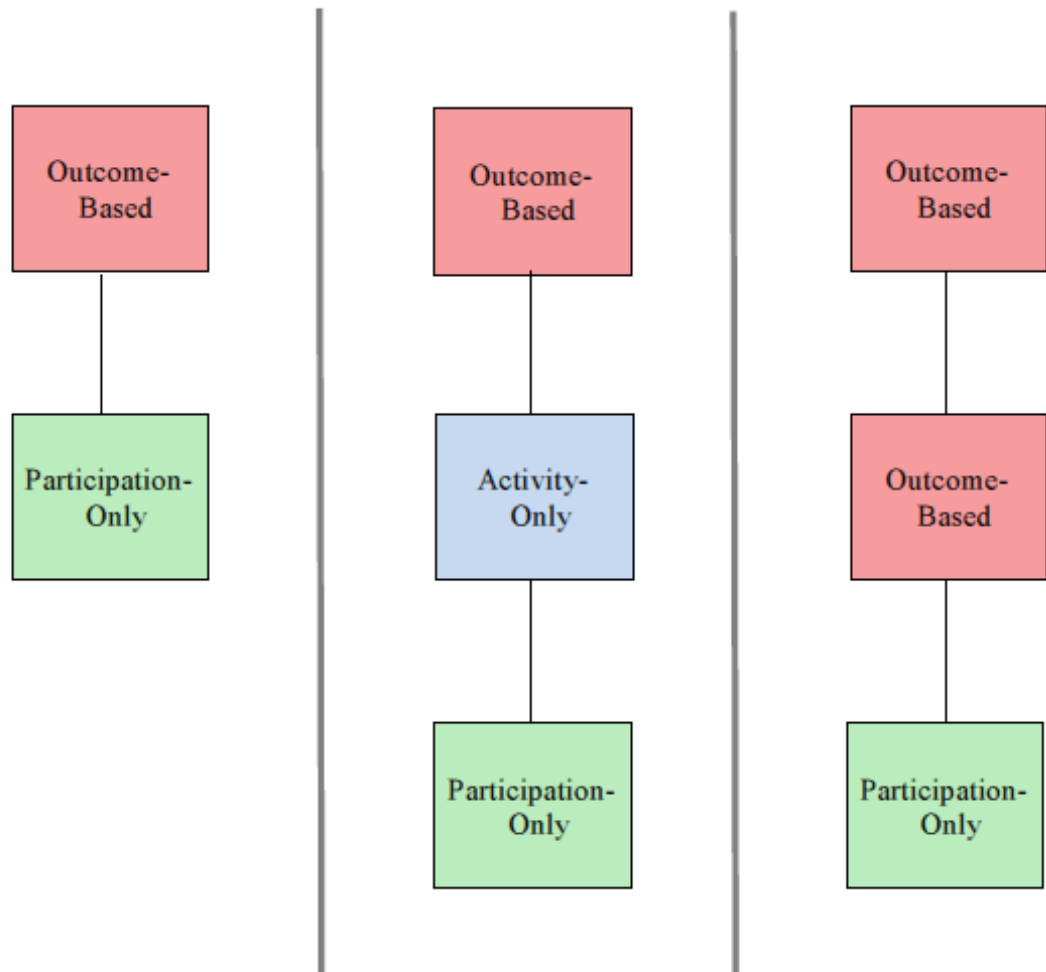
Doesn't matter. The new final rules require the plan to make available a RAS ...



Reasonable Alternative Standards

- Example:

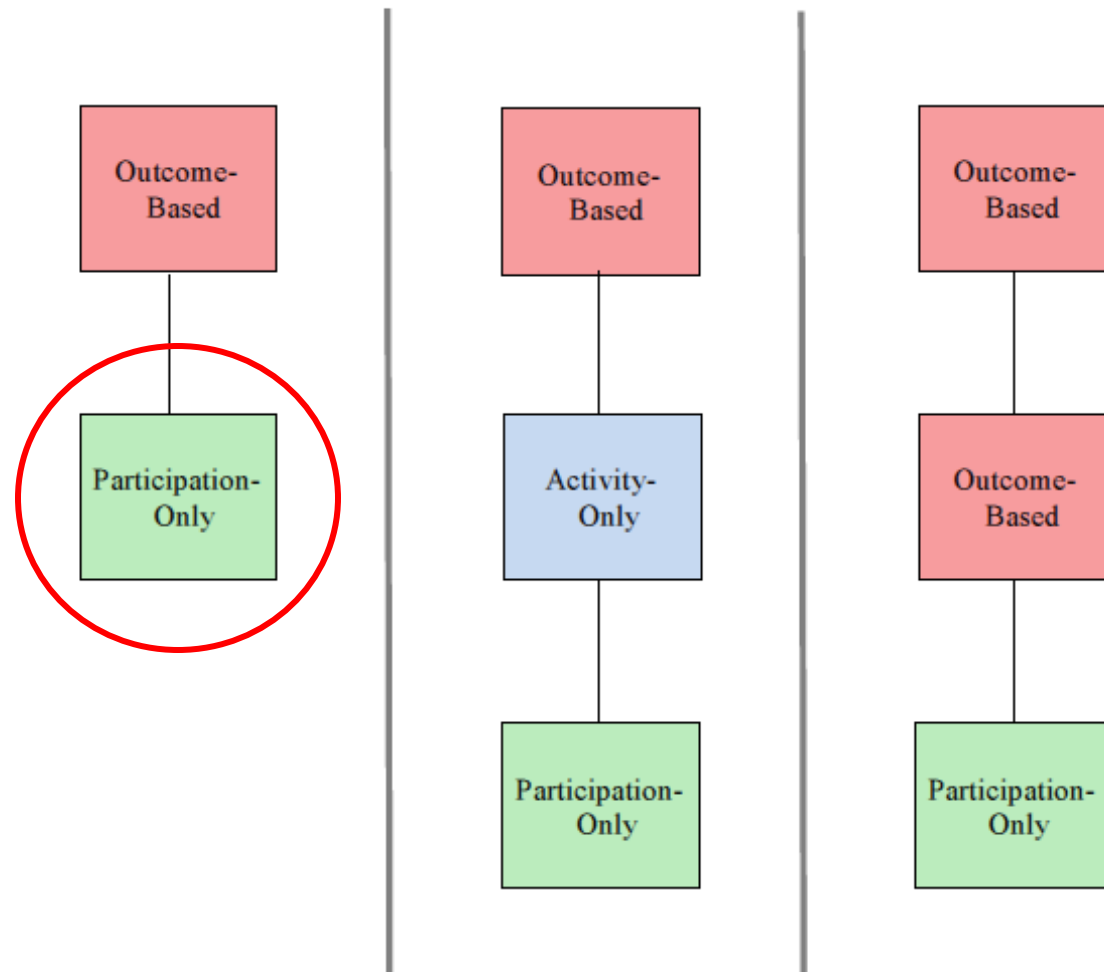
Plan could offer a RAS that is participation-only, activity-only or outcome-based



Reasonable Alternative Standards

- Example:

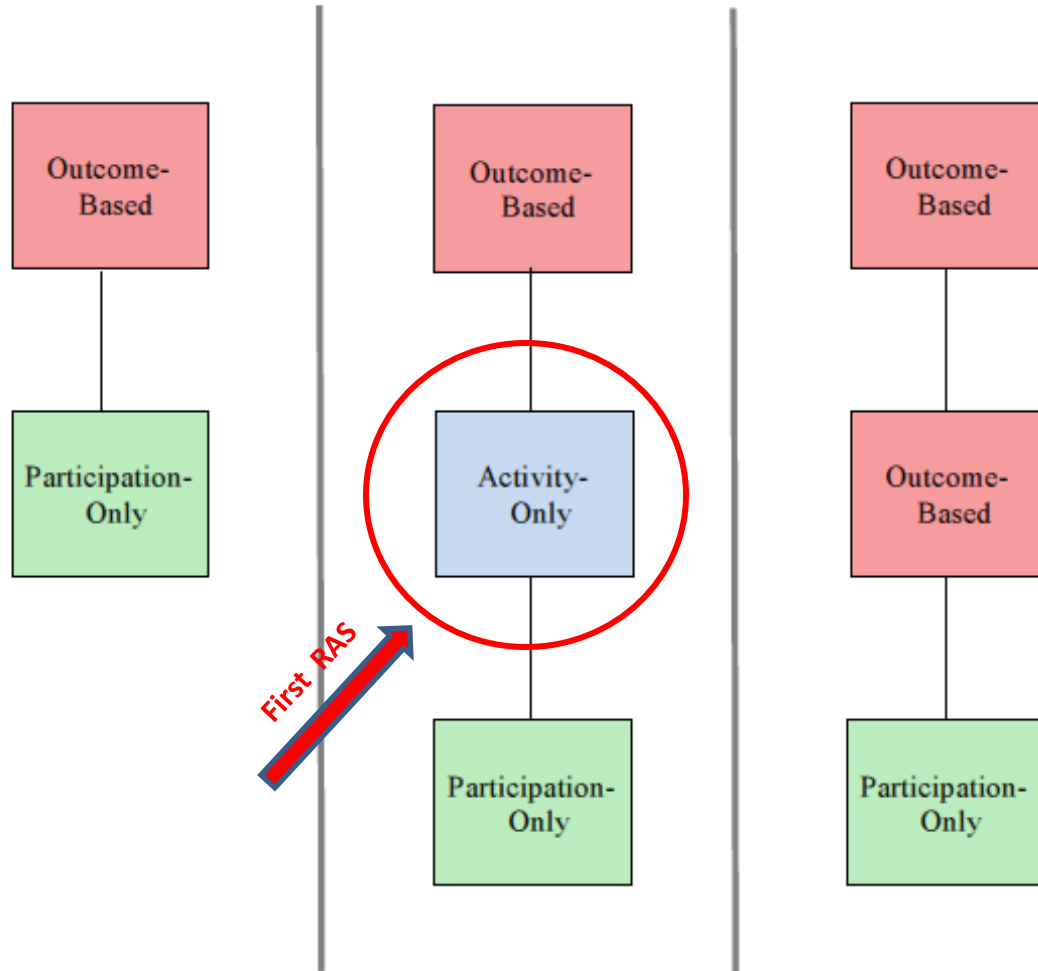
If choose participation-only RAS...



Reasonable Alternative Standards

- Example:

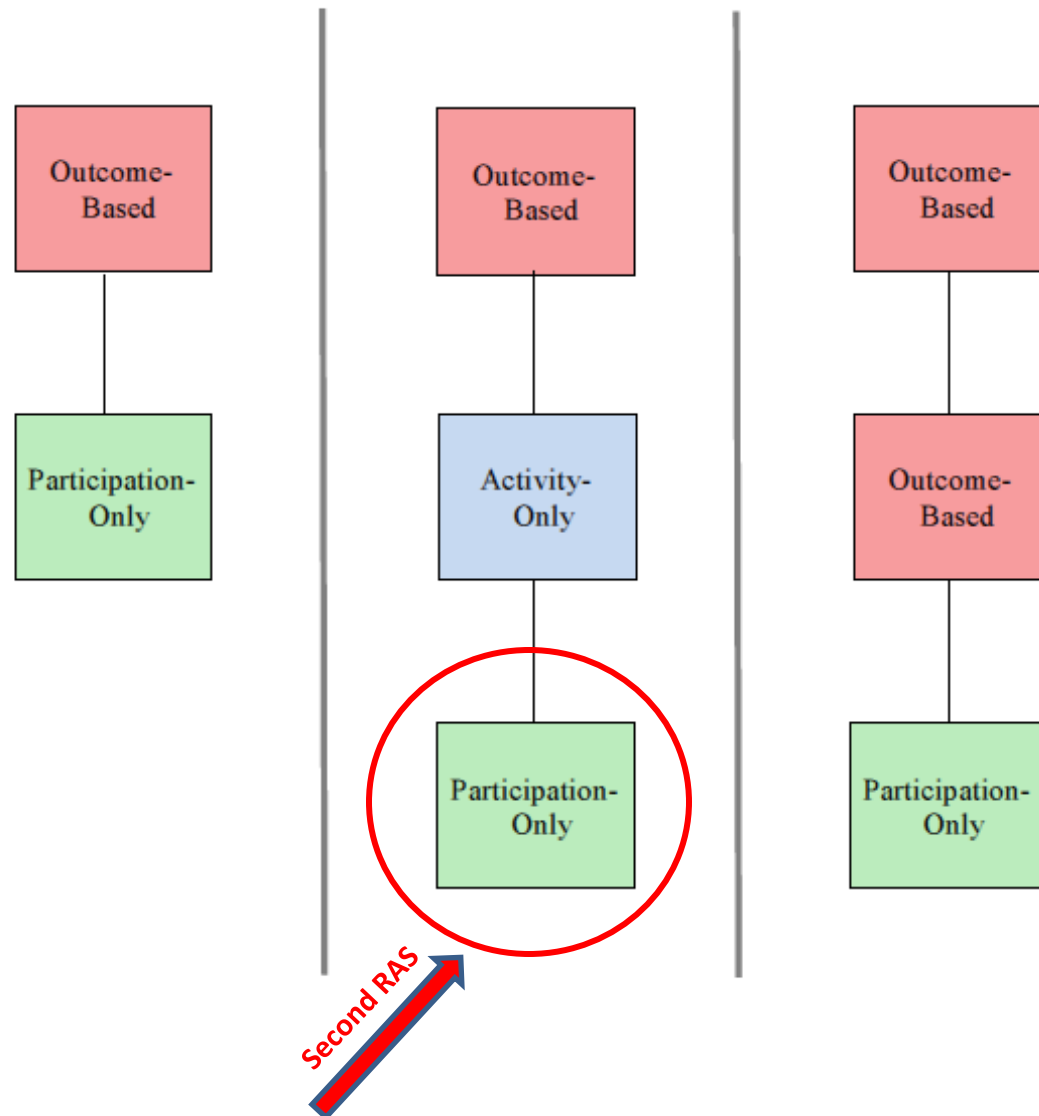
If choose activity-only RAS ...



Reasonable Alternative Standards

- Example:

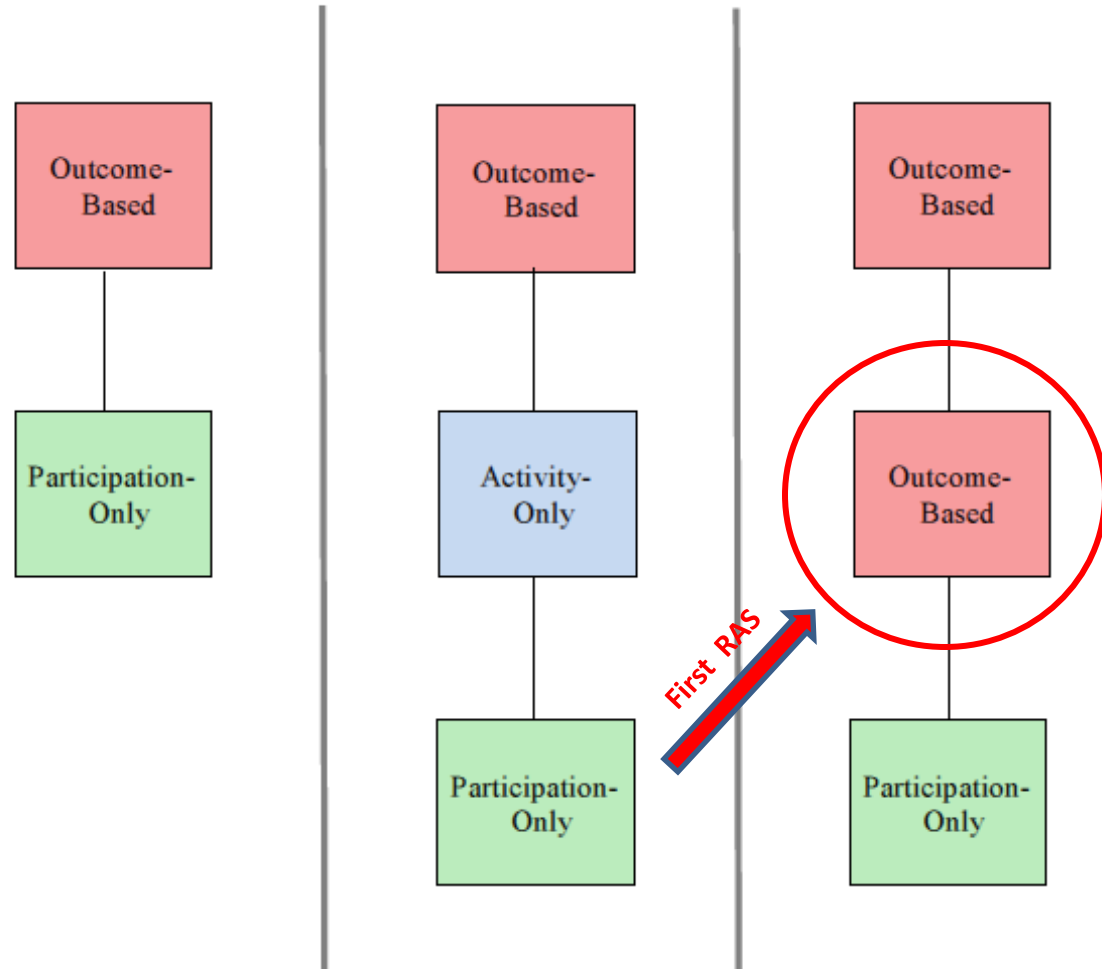
If choose activity-only RAS ...



Reasonable Alternative Standards

- Example:

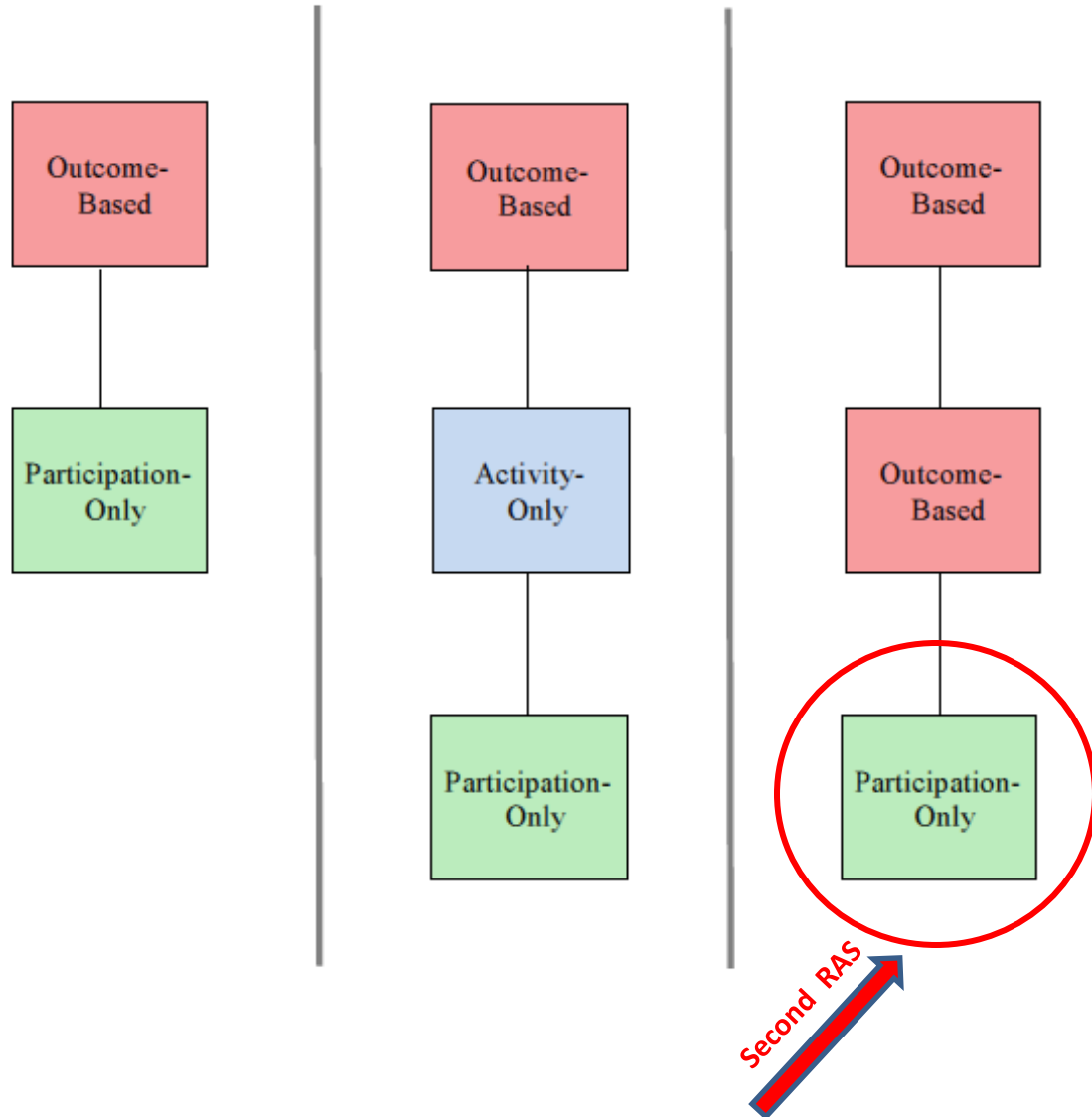
If choose outcome-based RAS ...



Reasonable Alternative Standards

- Example:

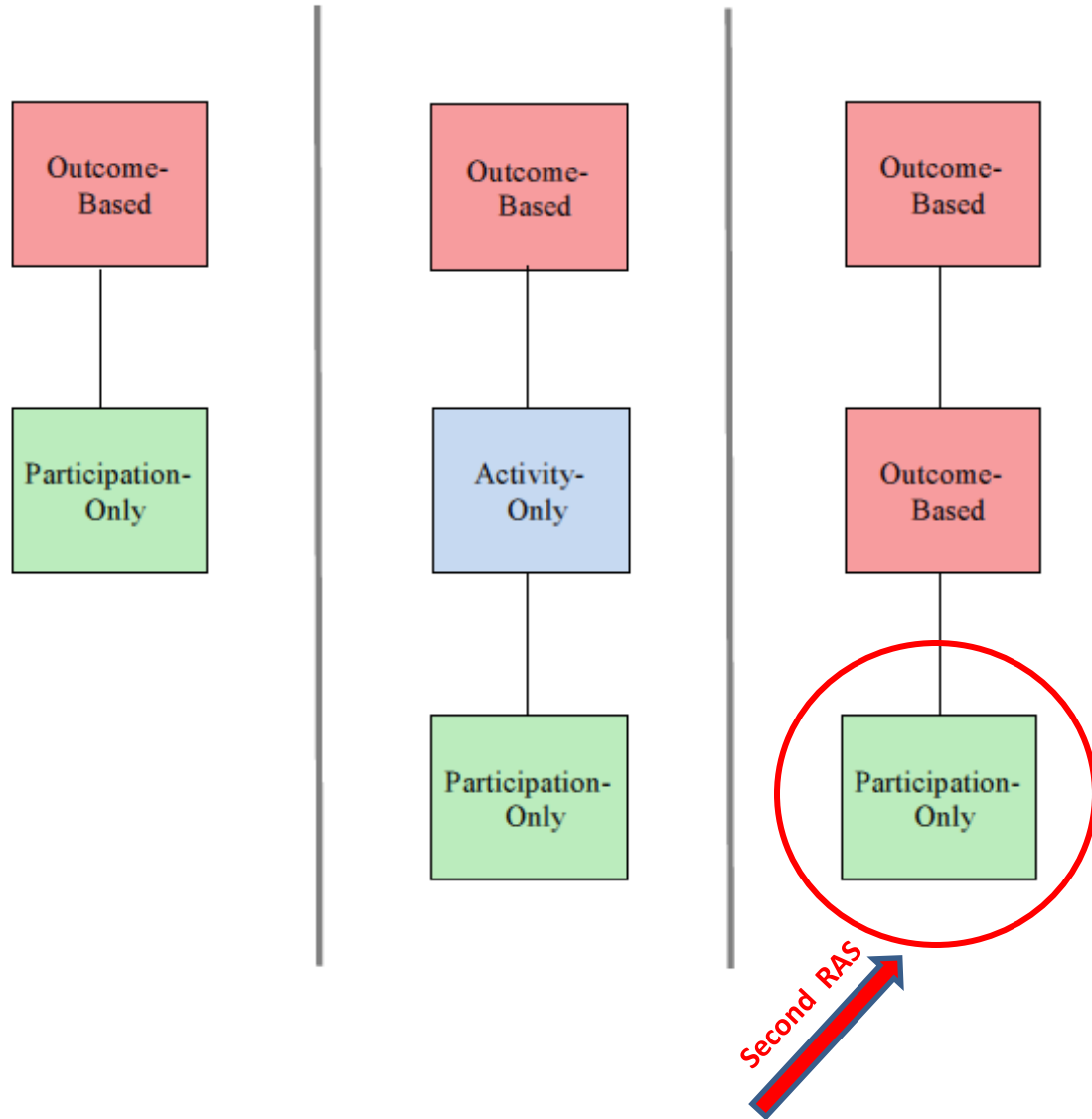
If choose outcome-based RAS ...



Reasonable Alternative Standards

- Example:

If choose outcome-based RAS ...



Reasonable Alternative Standards

- So when/how does the plan “turn off the spigot to RAS”?



- If offer participation-only program
- If activity-only initial standard or activity-only RAS and either (i) standard/RAS is not medically inadvisable or unreasonably difficult, or (ii) individual fails to get doctor verification
- If waive initial standard or waive RAS
- If individual joins with personal physician to recommend an alternative and the plan accommodates such recommendations

- BUT, is there ever a time when the plan can put the onus on the participant to tailor the RAS?
- Remember: Need reasonable design!

QUESTIONS?

Seth Perretta
sperretta@crowell.com
(202) 624-2525

Proposed Minimum Value / Affordability Rules (IRS)

- Under ACA “play or pay” rules, if employer offers coverage, but coverage does not meet affordability and minimum value tests; and
- An employee receives premium assistance under Exchange -
- Must pay annual fee that is the lesser of:
 - \$3,000 for each full-time employee receiving premium assistance; or
 - \$2,000 for each full-time employee, minus first 30 employees.

Proposed Minimum Value / Affordability Rules (IRS)

- Safe harbor from penalty if employer offers affordable, minimum value coverage to at least 95% of full-time employees and dependents
- Affordability Test
 - If employee cost for self-only coverage in lowest-cost minimum value plan is no more than 9.5% of household income
- Minimum Value (MV) Test
 - Plan's share of costs must be at least 60% (generally measures cost-sharing)

Proposed Minimum Value / Affordability Rules (IRS)

- Proposed Rule addresses how to calculate for wellness incentives – 78 Fed. Reg. 25909 (May 3, 2013)
- If wellness incentive is premium credit, may be able to count toward affordability test
- If wellness incentive affects deductible, copayment, cost sharing, may be able to count toward minimum value test

MV / Affordability - General Rule Tobacco Use Programs

- Employer allowed to count tobacco use incentives, but must disregard other incentives
- Allowed to count for all employees, regardless of whether earned incentive
- Example: Premium is \$1,000. Employer offers \$300 premium credit for meeting BMI standard and \$200 premium credit for not smoking.
- For affordability, employer can count tobacco incentive so can consider employee premium to be \$800 (\$1,000 - \$200 tobacco credit). Can count even for employees who did not earn credit.

MV / Affordability - Transition Rule Other Programs (2014 Only)

- For 2014 only, may count other (non-tobacco) programs, but only:
 - (1) To extent of reward in place as of 5/3/13 (date of regulation);
 - (2) Under terms of wellness program as of 5/3/13; and
 - (3) With respect to eligible classification of employees as of 5/3/13.
- Example: In 2013, wellness program offered 20% incentive for favorable BMI. In 2014, wellness program increased incentive to 30%, as allowed under HIPAA wellness rules.
- For 2014 only, transition rule allows employer to count 20% incentive for affordability or minimum value (to extent of reward in place as of 5/3/13), as long as rest of program remains unchanged. Some question about how much program can change and still fall under transition rule.

Other Wellness Compliance Issues

- ERISA
- ADA
- GINA
- Tax & Cafeteria Plan
- Privacy

Is program an ERISA plan?

- If employer is involved and program provides “medical care,” program likely is an ERISA plan
- “Medical care” if individualized and provided by trained professionals
- Not “medical care” if general education (for example, articles about risk factors, health condition, nutrition)
- If an ERISA plan, must comply with HIPAA wellness rules, SPD & SBC requirements, COBRA & some provisions of ACA

Where is the “ERISA” line?

- Probably Not ERISA Benefit

- Health Newsletter
- Email Appointment Reminders
- Weight Watchers Class
- Fitness Center
- Subsidy for Healthy Options in Cafeteria
- Pedometers

- Probably ERISA Benefit

- Traditional Employee Assistance Program
- Comprehensive, Individualized Coaching
- Disease Management
- Flu Shot?
- Biometric Screenings?
- Smoking Cessation? (Smoking cessation is medical care for tax purposes.)

Americans With Disabilities Act (ADA)

- ADA prohibits “medical examinations and inquiries” unless voluntary
- For example, a biometric screening or Health Risk Assessment may trigger this rule
- Could make a difference if structure as “carrot” or “stick” (EEOC has said carrot may be ok because voluntary)
- EEOC has said compliance with HIPAA wellness rules does not mean compliance with ADA (it is separate law)
- Safe harbor for bona fide plans (but EEOC may not recognize)
- Recent caselaw supports safe harbor (good news for plans)
- EEOC recently held hearing on issue

Genetic Information Nondiscrimination Act (GINA)

- Two Parts
 - Enforced by DOL, IRS, HHS (for health plans)
 - Enforced by EEOC (for employers)
- Plan cannot offer any type of incentive (even a t-shirt) for completion of a Health Risk Assessment that asks family history.
- Plan cannot collect genetic information prior to or in connection with enrollment.
- Some question on whether can collect spouse's information (is that genetic information?)

Is reward taxable?

- Cash reward is taxable
- Gift certificates / gift cards are taxable
- Gifts are taxable (unless below de minimus)
- Premium holidays, lower deductibles, contribution to HRA/HSA not taxable

HIPAA Privacy

- May need privacy procedures to safeguard information
- May need business associate contract with wellness program vendors
- May need authorization to disclose PHI (for example, to employer to pay incentive)
- Also watch out for rules related to marketing if wellness program is promoting a product or service

Update on Wellness

QUESTIONS?