January 25, 2013

Submitted Via Federal Rulemaking Portal: http://www.regulations.gov

Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Attention: Wellness Programs

RE: Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, Notice of Proposed Rulemaking

To Whom It May Concern:

The U.S. Chamber of Commerce (the "Chamber") submits these comments in response to the Proposed Rule on the Incentives for Nondiscriminatory Wellness Programs in Group Health Plans ("Proposed Rule"), published in the Federal Register on November 26, 2012, and issued by the Department of the Treasury ("Treasury"), the Department of Labor ("Labor") and the Department of Health and Human Services ("HHS"), collectively referred to as "the Departments."[1] The Proposed Rule proposes amendments to regulations, consistent with the Patient Protection and Affordable Care Act, as amended by the Health Care and Education and Reconciliation Act of 2010, ("PPACA"), regarding nondiscriminatory wellness programs in group health coverage.[2]

The Chamber has long championed the adoption, expansion and diversification of workplace wellness programs. In addition to publishing several reports chronicling successful employer wellness initiatives and holding annual workplace wellness events, the Chamber - as a leader in the U.S. Workplace Wellness Alliance - was instrumental in passing accompanying resolutions

[1] Proposed Rule on Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 77 Fed. Reg. 70,620-370,642 (November 26, 2012). (to be codified at 26 C.F.R. pt 54) [hereinafter referred to as "Proposed Rule"]. http://www.gpo.gov/fdsys/pkg/FR-2012-11-26/pdf/2012-28361.pdf

[2] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1201(1), 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. (2010). [hereinafter referred to as "PPACA"]

in the House and Senate in 2008 recognizing the importance of workplace wellness which designated the first week of April as "National Workplace Wellness Week." To quote President Obama from his letter on April 9, 2009, "By working to improve safety and health in the workplace, we can reduce costs, increase productivity, and implement best practices that further citizen's well-being."[3] In fact, as the Departments acknowledged in the Proposed Rule[4], we already are. According to a recent study published in the preeminent journal, Health Affairs, authors Katherine Baicker, David Cutler, and Zurui Song, calculated a return of investment of $3.27 for medical cost savings and $2.73 for absenteeism reduction.[5]

The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region, with substantial membership in all 50 States. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. Therefore, we are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance – is represented. These comments have been developed with the input of member companies with an interest in improving the health care system.

OVERVIEW

The Chamber and our member companies want quality health care to be readily available at an affordable price. The Chamber continues to advocate for health care reform that builds on the current employer-sponsored system and uses market-based solutions to lower costs, improve quality, and protect American jobs and the employers who create them. Employer-sponsored insurance remains a crucial element of our health care system – providing the most stable, innovative, and affordable health care coverage to Americans. "Of the 218 million Americans under age 65 who had health coverage of any sort in 2010, 157 million (or more than 70 percent) were covered through an employer"[6] even though PPACA's employer mandate does not go into effect until 2014. Many employers who offer health care coverage to their employees also provide voluntary workplace wellness programs as an additional way to improve health and reduce costs. Given our commitment to employer-sponsored insurance in general and wellness programs in particular, the Chamber and our members urge the Departments to promulgate rules

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[3] http://www.uswwa.org/files/2010/11/WorkPlaceWellnessMessage.pdf

[4] Proposed Rule, 77 Fed. Reg. at 70,627.

[5] Workplace Wellness Programs Can Generate Savings. http://bishop.hul.harvard.edu/bitstream/handle/1/5345879/Workplace%20Wellness%20Programs.pdf?sequence=1) https://tmk-webapp.trustmarkins.com/apps/VoluntaryBenefits/etoolkit_producer/pdfs/TAHP%20Meta-Evaluation%20Article%202012.pdf

[6] Employer-Sponsored Healthcare: What Happens Now? The 2012 Survey On Employer Health Benefit Plans and Preferences Conducted by the Oliver Wyman Health & Life Sciences Practice, by Mindy Kairey and John Rudoy http://www.oliverwyman.com/media/OW_EN_HLS_PUBL_2012_Employer_Sponsored_Healthcare_What_Happens_Now.pdf

that will further strengthen and expand the positive health impact that these programs have on employees.

The Chamber is concerned about several substantive components of the Proposed Rule including: (1) the requirement that employers provide essentially personalized wellness programs based on each individual employee's exacting circumstances; (2) the unwarranted level of customization that the proposed rule requires regarding the offering of a reasonable alternative reward; and (3) the regulatory proposal to improperly link of the definition of "tobacco use" under carrier rating requirements and wellness programs. We urge the Departments in the final rule to: provide employers with the discretion to increase the size of the reward from 30 percent to 50 percent; revise the Notice language to more properly reflect the statutory requirements; and finally grant employers a mechanism for refuting an employee's physician note or recommendation.

Additionally, the Chamber has several procedural concerns with the Proposed Rule. We take issue with the content of the economic impact analysis included (or rather omitted) from the Proposed Rule and question the reasoning for the delayed publication in the Federal Register.

Our overarching concern remains that, in demanding personalized and individualized programs on the front end and requiring customized alternative rewards for any individual regardless of the reason on the back end, the proposed rule will negate the ability of wellness programs to improve health and instead usurp the ability of these programs to motivate employees to take responsibility for their lifestyle choices and to reward those who do.

SUBSTANTIVE CONCERNS

I. Requirement that the Health-Contingent Wellness Program Be "Reasonably Designed"

Under §1201, PPACA amends the Public Health Service Act at §2705(j)(3) and lists five requirements (A)-(E) that a wellness program which conditions a reward on an individual satisfying a standard related to a health status factor ("a health-contingent wellness program") must satisfy for the program to be nondiscriminatory. Under §2705(j)(3)(B) a health-contingent wellness program must be reasonably designed, which is met under the statute if "the program has a reasonable chance of improving the health of, or preventing disease in, participating individuals and it is not overly burdensome, is not a subterfuge for discriminating based on a health status factor, and is not highly suspect in the method chosen to promote health or prevent disease."[7] However, this statutory provision is problematically rewritten by the Proposed Rule. Despite reference to the flexibility afforded in the 2006 regulation regarding HIPAA nondiscrimination and wellness provisions, the Proposed Rule will undermine any future efficacy and success of these programs by mandating extensive, pervasive individualized accommodation.

As the Proposed Rule states "the 'reasonably designed' standard [in the 2006 regulations] was designed to prevent abuse, but otherwise was 'intended to be an easy standard to satisfy… to

[7] PPACA, at 47.

allow experimentation in diverse ways of promoting wellness.'"[8] Although the preamble continues by saying that this Proposed Rule will "continue to provide plans and issuers flexibility and encourage innovation"[9] we find the subsequent sentence in the preamble and proposed language in the code itself very troubling. Immediately after referencing the preamble of the 2006 regulations, which wanted plans and issuers to "feel free to consider innovative programs for motivating individuals to make efforts to improve their health,''[10] the preamble of this Proposed Rule asks: "whether certain standards, including evidence- or practice-based standards, are needed to ensure that wellness programs are reasonably designed to promote health or prevent disease."[11] After posing this question, the Departments continue in the Proposed Rule to state that a health contingent wellness program is not "reasonably designed unless "it makes available to all individuals who do not meet the standard based on the measurement, test, or screening a different, reasonable means of qualifying for the reward."

Please note the very stark difference between the reasonably designed definition in the proposed rule as opposed to the reasonably designed definition in the statute:

> Proposed Rule: A health contingent wellness program is not "reasonably designed unless it makes available to all individuals (who do not meet the standard based on the measurement, test, or screening) a different, reasonable means of qualifying for the reward."
>
> PPACA: A health-contingent "wellness program shall be reasonably designed [if the program] has a reasonable chance of improving the health of, or preventing disease in participating individuals and it is not overly burdensome."[12]

In other words, the "unless" clause in the Proposed Rule requires that such programs impose a standard that no individual can fail to meet, or that there be a "backdoor" through which any individual may pass. We recommend that the Departments revise the section codifying the reasonably designed definition to accurately reflect the language in the statute and conform to the authority granted by law. The reasonably designed provision is intended to ensure that the wellness program has – in the words of the law – "a reasonable chance of improving the health of, or preventing the disease in participating individuals."[13] It is not intended to ensure that all participating employees necessarily obtain the reward which would negate the very goal of rewarding individuals for improving their health. Wellness programs should not be required to coddle apathetic participants and the Proposed Rule's pursuit of an "everybody wins" approach will thwart the very motivation that a rewards based program is designed to create.

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[8] Proposed Rule 77 Fed. Reg. at 70,625.
[9] Proposed Rule 77 Fed. Reg. at 70,625.
[10] Ibid.
[11] Ibid.
[12] PPACA, at 47
[13] PPACA, at 47

II. "Reasonable Alternative Standard" Requirement

Under §1201, PPACA amends the Public Health Service Act at §2705(j)(3)(D) and states that a health-continent wellness program must also make the full reward available to all similarly situated individuals. In two instances, a health-contingent wellness program must provide reasonable alternative standards for obtaining the reward. The program must make available a reasonable alternative standard for obtaining the reward, if:

1. It is unreasonably difficult for an individual due to a medical condition to satisfy the otherwise applicable standard; and
2. It is medically unadvisable for an individual to attempt to satisfy the otherwise applicable standard,

The Proposed Rule improperly expands on these two narrowly defined exceptions by requiring a health-contingent wellness program to accommodate the recommendations of an individual's personal physician and by using an individualized approach to reviewing each scenario based on the specific facts and circumstances. This cumbersome review and burdensome approach will discourage employers from offering these wellness programs and subsequently harm the ability of legitimate and meaningful programs to improve health. Rather than accommodate unusual circumstances and provide narrow necessary exceptions, this Proposed Rule undermines the structure and strength of these programs.

III. Definition of "Tobacco Use"

Although there is no single statutory definition for "tobacco use" in the PPACA, the Proposed Rule improperly suggests using the same definition of tobacco use for purposes of two very different provisions. Under the PPACA, carriers are prohibited from varying premiums based on tobacco use by a rate of more than 1.5 to 1. According to §2701 (a)(1), this provision applies to health insurance issuers offering coverage in the individual or small group market and is designed to ensure that issuers in the individual and small group markets charge fair premiums that vary only based on four criteria and only within a certain range. The definition for tobacco use here will need to be uniform so that all carriers can uniformly attribute the same premium variation to similarly designated individuals – those using tobacco. This definition will be used to substantiate underwriting decisions and rate determinations.

Under §2705(j), PPACA increases the rewards that may be provided under employer sponsored wellness programs for eligible individuals who either participate in a program or meet a program's goal. Tobacco use is included in this provision as is unhealthy behavior which –like others – the wellness programs are designed to modify. For this provision, we believe a more flexible approach is warranted to encourage employers and plans to create innovative plans that reflect the needs of their eligible participants.

We urge the Departments to provide flexibility for employers and plans to define "tobacco use" as they choose for the purpose of this provision and as it relates to wellness programs.

IV. Size of Reward

We urge the Secretaries to defer the discretion to increase the premium variation from 30 percent to 50 percent for wellness programs to the employers who offer them. Under §2705 (j)(3), the statute provides that "the Secretaries of Labor, HHS and Treasury may increase the reward available to up to 50 percent of the cost of coverage if the Secretaries determine that such an increase is appropriate." Given the tremendous value of these wellness programs to improve the health and productivity, and the critical goal of reducing the onset of chronic disease and mitigating the harm of worsening chronic conditions among populations, we urge the Secretaries to fully acknowledge the value of these programs by permitting employers to increase the reward to 50 percent for those eligible plan participants to whom they make these programs available.

Employers understand their workforce and in developing these programs are more mindful of the specific wellness programs that are likely to be more meaningful for and beneficial to the health of their workers. Employers are better able to assess which wellness programs would benefit from greater participation as a result of higher rewards as the statute permits of 50 percent and should therefore have the discretion to make these reward modifications.

V. Improper Sample Notice Language

The sample notice language is improper and suggests that the wellness program reward is available to "all employees."[14] Instead, clearly an employee must at the very least participate in the wellness program. Merely being an employee does not mean that an individual is automatically eligible for the program's reward. Rather, the employee must participate in the program and meet the standard or the alternative reasonable standard to be eligible for the reward. Therefore, the sample notice language instead should be revised as follows: "Rewards for participating in a wellness program are available to all eligible plan participants that meet the standards or alternative standards as specified by the wellness program."

VI. Employer Protections

Despite comments and inquiries in the Proposed Rule, additional consumer protections and program standards are <u>not</u> necessary.[15] However, there must be some employer or issuer protections included to prevent improper and unfounded manipulation of these programs and abuse of the nondiscrimination protection afforded under the statute. For those wellness programs administered by an employer, an employer must have some means of determining the reasonableness and evidence based validity of an employee's physician determination. We request that the rule not limit or discourage existing wellness programs and practices that employers use to help design and administer wellness programs. Doing so will undermine the critical need to address the underlying cost drivers in the health care system.

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[14] Proposed Rule, 77 Fed. Reg. at 70,634.
[15] Proposed Rule, 77 Fed. Reg. at 70,625.

VII. Unwarranted Cynicism

With health care costs continuing to rise and rates of obesity and other chronic diseases and conditions on the rise, wellness programs have provided a meaningful mechanism to reward positive behavior and healthy life-style choices. As the health reform law intended to do, we need to encourage individuals to assume meaningful personal responsibility and improve their health and reduce or mitigate the onset of manageable chronic diseases. We find it concerning that, instead of finding ways to encourage individuals to participate in meaningful wellness programs, the Departments are viewing altruistic wellness program efforts nefariously.

Despite the single statutory mention in this provision of the need to protect against discrimination in workplace wellness programs, the Proposed Rule relentlessly repeats the general message of the following phrase nine times: wellness programs may not be overly burdensome, "not be a subterfuge for discrimination based on a health factor, and not be highly suspect in the method" chosen to promote health or prevent disease.[16] We find this harping to be unnecessary, cynical and disparaging to programs that are altruistically offered and provide win-win outcomes for employers and employees alike.

PROCEDURAL CONCERNS

I. Insufficient Economic Impact Analysis

Lack of Needed Data

In the preamble, the Departments pose a number of questions to the public, especially regarding issues related to assessment of the economic impact of the Proposed Rule. The comments below respond to some of these information requests. The Departments also repeatedly cite the lack of empirical evidence as a limitation to the analysis that they have been able to conduct to inform their regulatory decision process. For example, the Departments state:

> Currently, insufficient broad-based evidence makes it difficult to definitively assess the impact of workplace wellness programs on health outcomes and cost, although, overall, employers largely report that workplace wellness programs in general (participatory programs and health-contingent programs) are delivering on their intended benefit of improving health and reducing costs.[17]

These statements regarding data limitations and the numerous requests to the public for information within the preamble suggest that the Departments have rushed to make preliminary regulatory decisions and to publish a Proposed Rule without adequate preparation. While it is laudable for the Departments to solicit and consider the public's input on the regulatory process (and required by the Administrative Procedure Act), such solicitation does not excuse the Departments from their duty under Executive Orders 12866 and 13563. The Executive Orders make abundantly clear the requirement that agencies conduct a bono fide analysis of the costs

[16] Proposed Rule, 77 Fed. Reg. at 70,621, 70,624, 70,624, 70,652, 70,625, 70,626, 70,634, 70638, 70,641.
[17] Proposed Rule, 77 Fed. Reg. at 70,626.

and benefits of alternative regulatory strategies (including the strategy of no regulation) prior to publishing a Proposed Rule for public comment.

If an agency finds that it does not have in hand sufficient information to inform its preliminary regulatory decision making, it must conduct its own research, surveys, experiments and information collections (including stakeholder meetings with potentially affected parties) in order to develop the information needed to make informed policy decisions proposals that reflect serious consideration of the costs and benefits of alternative approaches. The Departments have at their disposal the enormous resources of the Federal government to accomplish these research tasks. In this instance, as in many others that we have observed for regulations to implement the PPACA, the Departments appear to have made arbitrary regulatory policy decisions without the benefit of essential data and information. In this proposal, they attempt to shift to the public the burden of providing information that the Departments could have, and should have, developed themselves.

Given the extent of specific information requests included in the preamble, and if the Departments truly lacked the resources to compile needed data, a better approach would have been for the Departments to have published an Advance Notice of Proposed Rulemaking (ANPRM). An ANPRM could have reasonably outlined various alternative policies under consideration, identified unmet information needed to make decisions among the alternatives and requested public input prior to the making of specific regulatory policy decisions. Instead, the Departments have presented the public with a near fait-accompli: a fully formed Proposed Rule with key decisions proposed arbitrarily and admittedly without adequate factual basis. This approach makes a travesty of the intent of the controlling Executive Orders and of the spirit of the Administrative Procedure Act.

Unfounded Conclusion that the "Benefits of the Proposed Rule Will Justify Costs"

This Proposed Rule raises the ceilings for premium reductions associated with nondiscriminatory health-contingent wellness programs to the maximums allowed by statute: 30 percent for general programs and 50 percent for tobacco-use cessation programs. While it is laudable that the Departments did not exercise discretion under the statute to set the ceilings lower (or to maintain the ceilings set under the 2006 regulation), there is no economic justification in theory or empirical evidence for setting any ceiling on premium reductions that group plan sponsors or issuers of coverage may offer, and it is unfortunate and counter-productive to the economic efficiency of the health care system that the Secretaries fail to permit employers and plans to extend such ceilings to the full 50 percent as they deem appropriate.

Rational economic choice will lead plan issuers in the individual and group markets to set discounts for each of various potential contingent wellness outcomes at levels that balance the actuarially expected marginal reduction in a plan costs associated with each wellness outcome with the marginal premium revenue reduction offered. Recognizing this economic principle, the Departments correctly state that "employers will create or expand their wellness program and provide reasonable alternatives only if the expected benefits exceed the proposed costs."[18] Therefore, the Departments are correct in their conclusion (with regard to raising the ceilings)

[18] PPACA, 77 Fed. Reg. at 70,626.

that "the benefits of the Proposed Rule will justify the costs."[19] This statement demonstrates that the Department understands that there is no market failure or other economic basis to justify regulation. Also, there is no evidence that limitations on wellness program premium reductions per se promote nondiscrimination: That social policy object is effectively achieved by other regulatory prescriptions, such as the requirement for a reasonable alternative means of qualifying for the reward. (Issues related to the putative costs and benefits of the proposed formulation of the reasonable alternative standard are discussed in a subsequent section of these comments.)

While the extensions of the reward ceilings to the statutory maximums would contribute toward improved economic efficiency, the existence of the ceilings may prevent achievement of optimum efficiency. Issuers and plan sponsors should be permitted to extend their programs whenever the discounted present value of the marginal benefit that they expect to realize in terms of reduced health care claims in the future exceed the discounted present value of the marginal premium revenue foregone and attendant wellness program operating costs. In many cases, the realities of the circumstances for a plan may result in a level of wellness program rewards below the proposed ceiling, and that outcome is both reasonable and efficient because it reflects an equilibration of marginal program benefits with marginal program costs: Any further incremental benefits would be exceeded by incremental cost.

The fact that the levels of rewards as a proportion of premium are on average below current or proposed ceilings does not imply that there is not potential advantage from raising or removing ceilings. Averages can be deceptive as a basis for policy assessment. The fact that the average reward across a multitude of wellness programs is X does not imply for some subset of programs the optimum reward level (maximizing the excess of total benefits compared to total costs) is not many times X. The existence of a ceiling on the reward proportion creates the risk that some existing or future program will be constrained from achieving the optimum level of health improvement.

Improper Prohibition on Stacking Rewards

The Proposed Rule prohibits stacking premium differentials which would permit wellness program participants the ability to combine rewards from separate wellness programs. In principle and under the statute, a plan *could* offer a combined discount of up to 80 percent by combining a 50 percent tobacco cessation program reward and a 30 percent reward for satisfying the requirements of a general contingent-health program (subject to the 30 percent ceiling). The Departments in their discussion of this regulatory alternative acknowledge that allowing stacking would be within their discretion for interpretation of the underlying statute. No analysis of the costs and benefits of stacking versus non-stacking have been conducted, nor is there any reason to presume that, under at least some circumstances, stacking could result in net gains in health improvement and overall health care cost saving compared to the prohibition of stacking. Gains in overall social benefit are particularly likely since under the allowance of stacking, issuers or plan sponsors would choose to do so and use that approach to increase rewards only to the extent that an issuer or sponsor expected the resulting cost savings or other private benefits to exceed the forgone premium and other costs. There is no economic basis for the government to interject

[19] Ibid.

itself into the matter of stacking rewards. It should be left as a matter of private choice to issuers and plan sponsors.

The only reason offered by the Departments for the decision to prohibit stacking is to maintain what the Departments deems "consistency" between the individual market and small group plans covered by the Proposed Rule and large or self-insured plans not covered by the rule:

> Allowing such a substantial difference between what was permissible in the small group market and the large group market was not in line with the Departments' policy goal of providing consistency in flexibility for plans.[20]

No justification for the arbitrary adoption of "consistency" as regulatory decision criteria is offered by the Departments. At the very least, the Departments should comply with Executive Orders 12866 and 13563 by providing an analysis of the comparative costs and benefits to the health care system and the public welfare as a whole of "consistency" versus non-consistency in this matter. What harm would be caused by a policy that allows flexibility even when it creates, in some contexts, the appearance of inconsistency? The Departments have not addressed this question either quantitatively or qualitatively.

Definition of Small Entity

For the purposes of this rule the Departments have chosen to define a small entity for purposes of the Regulatory Flexibility Act as a small plan that covers fewer than 100 participants. This definition is different from the small entity definitions commonly used by the Small Business Administration, and the Departments have requested comment on this variation. The definition used here seems reasonable and relevant to the context of the regulation. It likely includes within its scope small businesses as defined by employment size or revenue, while also including some larger entities that operate multiple small group plans for their employees.

II. Unexplained Delay in Publication of the Proposed Rule

The Chamber notes that the Proposed Rule was signed by Labor on August 1, 2012 and by the Centers for Medicare and Medicaid Services ("CMS") on August 7, 2012. It is curious that the Internal Revenue Service didn't approve the Proposed Rule until November 8, 2012 and that even then the Proposed Rule wasn't published until over two weeks later. We are interested in understanding why the Proposed Rule was not approved in a more timely manner by the IRS and the reason for the nearly three and a half month delay in publication following Labor and CMS approval.

CONCLUSION

The U.S. Chamber of Commerce would like to thank the Department for requesting comments regarding the "affordability" of employer sponsored coverage generally as well as the impact that financial incentives provided by employers for participation in workplace wellness programs. We urge the Department to continue to work carefully, pragmatically, and

[20] Proposed Rule, 77 Fed. Reg. at 70,627.

cooperatively with the business community to minimize burdens placed on employers as employers work to comply with the law.

We continue to be committed to the employer-sponsored system and hope the Department will consider the effects that various implementation choices will have on employers and their ability to continue to offer the coverage that their employees value. We look forward to continuing to work together in the future.

Sincerely,

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