January 25, 2013

Submitted electronically via 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, NW
Washington, DC 20210

Re: Notice of Proposed Rulemaking Regarding Wellness Programs

Dear Sir/Madam:

We write on behalf of the American Benefits Council ("Council") to provide comment regarding the notice of proposed rulemaking entitled "Incentives for Nondiscriminatory Wellness Programs in Group Health Plans," 77 Fed. Reg. 70,620 (Nov. 26, 2012) ("NPRM"), issued by the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (collectively, the "Departments"). The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to health and retirement plans that cover more than 100 million Americans.

The NPRM proposes amendments to the nondiscrimination regulations promulgated in 2006 under the purview of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") in light of the changes made to the HIPAA wellness program provisions by the Patient Protection and Affordable Care Act (the "PPACA"). The HIPAA nondiscrimination regulations generally prohibit group health plans from discriminating in eligibility, benefits, or premiums based on an individual's health factor, but provide an exception for wellness programs that adhere to certain rules. As modified by the PPACA, the relevant statutory provisions contain specific

rules regarding the requirements applicable to wellness programs. The NPRM closely adheres to many of the existing HIPAA wellness program regulations, but it does propose some significant changes with respect to health-contingent wellness programs – programs that require individuals to satisfy a standard relating to a health factor in order to obtain a reward. The purpose of the PPACA changes to the HIPAA wellness program provisions was to "codify and enhance" the provisions of the HIPAA regulations, and to specifically permit both participatory and health-contingent wellness programs, consistent with the HIPAA regulations, while increasing the amount of the reward that could be provided.[1]

We appreciate that the Departments have sought to strike a balance between employer flexibility in developing innovative and effective wellness programs and the need for participant protections. We are pleased that the NPRM generally tracks the HIPAA wellness program regulations (except as discussed below), and that the Departments have proposed to allow payment of a reward equal to up to 50% of the cost of coverage in cases where a participant ceases to use tobacco.

We are concerned, however, that the NPRM lacks clarity in many important respects and that the NPRM may go too far in imposing rules that are likely to reduce the effectiveness of employer-sponsored wellness plans or otherwise materially increase the costs and burdens to employers in sponsoring health-contingent wellness programs.

We respectfully submit the following comments for your review and consideration:

Clarify Language in NPRM that Appears to Confuse Participatory Wellness Programs and Health-Contingent Wellness Programs. The NPRM, like the existing HIPAA regulations, sets forth two types of wellness programs, which the NPRM labels health-contingent wellness programs and participatory wellness programs. Health-contingent programs are those programs that require an individual to satisfy a standard relating to a health factor in order to receive a reward, and participatory programs are those programs that either do not require an individual to meet a standard related to a health factor in order to obtain a reward or do not offer a reward at all.

Under the existing HIPAA regulations, participatory wellness programs do not have to satisfy the nondiscrimination rules that apply to health-contingent wellness programs, so long as participation in the program is made available to all similarly situated individuals. We read the NPRM to continue this treatment by not subjecting participatory wellness programs to the nondiscrimination rules.

Notwithstanding the above, certain provisions in the NPRM are unclear and could be read by some to indicate that participatory wellness programs may be subject to

[1] S. Rep. No. 111-89, at 117-19 (2009).

certain of the nondiscrimination rules that are intended only for health-contingent wellness programs. More specifically, with respect to the uniform availability and reasonable alternative standards requirements, the NPRM includes an example whereby participation in a walking program appears to be subject to the nondiscrimination rules. Requiring participation in a walking program in order to obtain a reward would not appear to us under the terms of the existing regulations or the NPRM to be contingent on an individual satisfying a factor related to a health standard; rather, it is merely participatory in nature. We urge the Departments to change the fact pattern in this example to eliminate any confusion that could result and to reinforce the Departments' intention that participatory wellness programs not be subject to the nondiscrimination rules.

In addition to the above, the NPRM also provides certain model language for use by programs in communicating to participants the availability of other means of qualifying for the wellness reward. Specifically, in relevant part, the model language reads as follows:

> Rewards for *participating* in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means.

(Emphasis added). The reference to "participating" in the model language is confusing and could be read (incorrectly) by some to suggest that participatory wellness programs are subject to the requirement that individuals be notified of the availability of other means of qualifying for a reward under such participatory wellness programs. Again, as noted above, such a conclusion would appear to be contrary to the plain language and intent of the NPRM. Accordingly, we recommend that the model language be revised to eliminate any inference that participatory programs are subject to the nondiscrimination rules.

Lastly, we recommend that the Departments consider utilizing different terminology when referring to participatory wellness programs and health-contingent wellness programs. The use of the phrase "participatory" is likely to be confusing to many persons given that all wellness programs require an individual to "participate" in order to obtain the reward. Accordingly, we recommend that the final rules utilize different terminology in this regard. For example, we would recommend referring to participatory programs as "participation-only programs" and referring to health contingent programs as "health goal-contingent programs".

Effective Date For the New Maximum Permissible Rewards Should Be January 1, 2014, Regardless of Plan Year. The NPRM provides that the increase in the maximum permissible awards will be effective for plan years beginning on or after January 1, 2014. However, many employers utilize non-calendar year plans and may seek to utilize the

increased wellness reward for the portion of their 2013 plan year that ends in 2014. Additionally, many employers that offer calendar year plans may engage in activities during open enrollment in the fall of 2013 that relate to their wellness programs and related medical plan coverage for 2014. Accordingly, we encourage the Departments to issue clarifying guidance that provides that the NPRM, including the rule allowing for the use of the increased 30% reward amount, shall be effective on and after January 1, 2014 regardless of plan year and shall apply to any activities associated with open enrollment for the 2014 plan year even if such activities occur prior to January 1, 2014.

We note that, in a similar context regarding the new $2,500 limitation on salary deferrals into a cafeteria plan, the Department of the Treasury ("Treasury") found sufficient authority to rule that the new limit applies on a plan-year basis rather than on a calendar-year basis (notwithstanding the express reference in the statute to a January 1, 2014 effective date). Specifically, Treasury officials informally indicated that, although Section 9005 of PPACA provides that the new limitation applies for "tax years" beginning with 2014, the rule will be interpreted to apply on a plan-year basis in light of policy goals. Moreover, in several parts of the preamble to the NPRM, the Departments note the importance of providing plans and issuers with "flexibility" to "encourage innovation." Permitting plans to use the new maximum permissible awards beginning on January 1, 2014 in all cases will facilitate this flexibility and innovation.

As noted above, with respect to wellness programs, the relevant time period for many plans is when annual open enrollment elections become effective. This is because many employers utilize open enrollment as a time to communicate wellness plan incentives for the upcoming calendar year plan year. Additionally, many employers use open enrollment as a time to determine an individual employee's eligibility for a wellness incentive for the start of the upcoming plan year (for example, based on the employee's completion of a health risk assessment ("HRA") or biometric screening – and these determinations may affect the quoted premiums for the employee with respect to the upcoming calendar year coverage).

Many employers also utilize non-calendar year plan years. These employers should be permitted to utilize the increased rewards in connection with the coverage provided to their employees beginning on January 1, 2014 through the close of their 2013 plan year. We note that prior guidance released as PPACA FAQ Part V[2] helpfully states that the 30% limitation is "effective in 2014" without reference to plan years."

In light of the foregoing, we encourage the Departments to issue guidance providing that the NPRM, including the increased 30% reward amount, shall be effective on and after January 1, 2014 regardless of plan year and shall apply to any activities associated with open enrollment for the 2014 plan year even if such activities occur prior to January 1, 2014.

[2] *Available at* http://www.dol.gov/ebsa/faqs/faq-aca.html.

Eliminate Additional Required Means of Satisfying Standard Based On Measurement, Test, or Screening. Under the HIPAA wellness program regulations, a health-contingent wellness program must be reasonably designed to promote health or prevent disease and not be a "subterfuge for discrimination based on a health factor."

While the Council fully supports the establishment of rules designed to ensure that wellness programs are not used to discriminate against individuals based on their individual health status, we are concerned that the NPRM includes new, additional requirements that would need to be complied with by health-contingent wellness programs, and that these rules may operate to invalidate common and successful program designs that are currently in use by employers today. We are also concerned that these new rules could discourage employers from establishing or maintaining wellness programs for their employees.

Based on our reading of the NPRM, it appears to require a health-contingent wellness program to offer "a different, reasonable means of qualifying for a reward" to any individual who does not meet a health-related standard based on the measurement, test, or screening, regardless of whether an individual has a medical condition that makes it unreasonably difficult to qualify for the reward or it is medically inadvisable for the individual to qualify for the reward.

Specifically, the preamble to the NPRM states:

> [T]o the extent a plan's initial standard for obtaining a reward (or a portion of a reward) is based on results of a measurement, test, or screening that is related to a health factor (such as a biometric examination or a health risk assessment), *the plan 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*.
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> 77 Fed. Reg. at 70,625 (Nov. 26, 2012) (emphasis added).

Additionally, to the extent that the "different, reasonable means" itself would be unreasonably difficult for an individual to achieve based on his or her medical condition, or doing so would be medically inadvisable, the NPRM appears to require the program to make available yet another reasonable alternative means for the individual to earn the reward.

For several reasons, we strongly urge the Departments to eliminate this requirement from any final rulemaking. First, a "reasonably designed" health-contingent wellness program should not be required to provide additional opportunities or alternative programs for participants who fail to achieve a reasonable health-related goal. This is because the existing regulations already provide sufficient protections by allowing individuals to opt out if participating is unreasonably difficult based on a medical condition or medically inadvisable.

Second, such a rule would be contrary to the generally accepted interpretation of the existing regulations, which permit employers to base rewards on a participant actually becoming healthier. Under this existing and widely-accepted interpretation, employers and issuers are permitted to design programs that make available rewards based not only on an individual engaging in an activity, but on an individual becoming healthier as measured against a reasonable and objective metric. The proposed rule would not merely modify this interpretation; it would effectively repudiate the interpretation. As a result, individuals would be permitted to side-step any requirement to actually become healthier, even if achieving the stated goal would not be unreasonably difficult or medically inadvisable.

Lastly, we are concerned that the requirement, to the extent it is retained in a final rule, could invalidate a very common program model currently in use by many employers.

Specifically, many employers sponsor health-contingent programs that provide a reward to employees who meet a specific standard related to a health factor at the start of the plan year (such as a body mass index below 30 or a cholesterol level of no more than 200) or at some point throughout the year. Pursuant to this model, participants are measured against the standard at the start of the plan year and, to the extent the participant achieves the standard, he or she is entitled to the reward. For those employees who do not meet the standard, the employer makes available meaningful resources to assist its employees in achieving the program's standard during the course of the plan year (for example, educational programming or nutritional counseling). The employee is generally encouraged by the employer to utilize these available resources, and the employer may even sponsor other wellness events to encourage utilization of these resources by its employees who have not yet met the standard. Employees are permitted to retest against the standard either at any time throughout the plan year or at a designated time (such as open enrollment for the next year's coverage). To the extent the employee meets the standard upon being retested, he or she receives the reward. If he or she does not meet the standard upon being retested, the employee receives no reward. To the extent that it is unreasonably difficult or medically inadvisable for an employee to achieve the standard, the employer makes available a reasonable, alternative standard.

Although the above-mentioned model is but one of many models currently in use by employers, it is a very common one. Given the prevalence of this type of program, as well as the provision of resources by employers to employees to assist such employees in meeting the requisite health standard, we urge the Departments to eliminate the above-referenced requirement from any final rule or, at minimum, clarify in the final rule that this type of program is nondiscriminatory. Doing so will help ensure the vitality of wellness programs, provide stronger, yet very reasonable, incentives for participants to become healthier, and help improve employee health and well-being.

Provide Examples Regarding How Maximum Permissible Rewards Are Determined When the Amount of the Reward Is Variable. As recognized by the Departments in the preamble to the NPRM, wellness plan rewards may take many forms, including cash, gift cards, merchandise, and travel. Additionally, as noted by the Departments, the nature and types of rewards being utilized by employers continue to evolve from perhaps the simplest and most common reward in the early days of wellness plan activity – the flat-dollar cash incentive – to a reward that may be related to an employee's use of health care coverage and that, as a result, may vary based on an employee's individual behavior. An increasingly common example of the latter is a reward that takes the form of reduced cost-sharing (such as reduced deductibles or copayments).

In general, the current HIPAA wellness program regulations and the NPRM provide minimal guidance for employers on how the maximum reward limits should apply with respect to variable rewards, such as cost-sharing (*e.g.*, reduced or waived deductibles or copayment amounts). Additionally, the existing regulations do not squarely address the ability of sponsors to offer different benefit packages as the reward so long as the difference in actuarial valuation meets the 30% threshold (assuming no additional employee costs are associated with a transition to, and use of, the different benefit package).

We are pleased that the Departments have recognized the need for clarification in this regard. Specifically, the Departments invite comments "as to whether additional rules or examples would be helpful to demonstrate compliance with the limitation on the size of the reward when the amount of the reward is variable and is not determinable at the time the reward is established." In particular, the Departments specifically point to a reward that is a waiver of copayments, where the frequency of such copayments is not predictable for any particular participant or beneficiary.

Regarding the specific request, we believe it would be very helpful for the Departments to provide additional clarifying guidance regarding how the rules set forth in the NPRM would apply to rewards (such as deductible or copayment reductions or waivers), that may vary among employees based on such employee's individual behavior. Specifically, we request clarifying guidance that would permit employers to use an "up-front" actuarial valuation of the variable reward to eliminate any uncertainty for employers in complying with these rules. Additionally, we request clarifying guidance that a permissible reward includes the offering of a different benefit package so long as the difference in actuarial value is within a 30% corridor.

Employers Should Not Be Subject to Mandated Apportionment of the Reward Where Dependent Coverage Exists. The NPRM requests comments on the apportionment of rewards in health-contingent wellness programs that allow dependents to participate. Specifically, the NPRM asks whether "the reward [should] be prorated if only one

family member fails to qualify for it." In response to this specific request, we encourage the Departments to not require mandatory apportionment of the wellness reward.

Of note, the specific statutory language provides that a program's compliance with the 30% threshold is based on an employee's cost of coverage, which "shall be determined based on the *total amount of employer and employee contributions for the benefit package under which the employee is (or the employee and any dependants are) receiving coverage*." 42 USC §300gg-4(j)(3)(A) (emphasis added).

Accordingly, requiring employers to apportion a wellness reward would be contrary to the express language of the statute. Moreover, it would introduce significant complexity into calculating a reward or penalty, as well as communicating the terms of a wellness program to participants. The imposition of required apportionment rules would likely create a material disincentive for employers to extend their wellness programs to employees' dependents. For these reasons, we urge the Departments to not impose mandatory apportionment. To the extent the Departments decide to the contrary, we strongly urge the Departments to fashion an apportionment rule that is easy to administer as well as easy to communicate to program participants and that will not burden employers with undue costs or administrative burdens.

Clarify that Employers Are Not Required to Provide Reasonable Alternative Standards Tailored to Each Participant's Specific Needs. Since the issuance of the NPRM, we have received many questions regarding whether a program must provide an individually-designed reasonable alternative standard for participants – specifically with respect to health-contingent wellness programs. We read the guidance to <u>not</u> require individually designed reasonable alternative standards. Of course, if the alternative standard itself is unreasonably difficult for a given participant to achieve because of a medical condition or it is medically inadvisable, the employer would be required to provide an alternative standard for use by such participant. Clarification regarding the foregoing would be helpful.

Clarify Circumstances in which Wellness Program "Tools" Must Be Provided at No Cost. The NPRM appears to require that employers bear certain programming costs with respect to their provision of a reasonable alternative standard. Specifically, the NPRM provides that, where an employer's program utilizes educational programming as the reasonable alternative, such programming must be made available to the participant at no cost. Additionally, the NPRM provides that, where the employer's plan uses a diet program as the reasonable alternative standard, the employer must fully bear the cost of any membership or participation fee associated with the diet program. The NPRM does not, however, clarify whether supplies or other items that are used to help achieve wellness plan rewards must also be provided at no cost. Significantly, many of the supplies and other items that are utilized by wellness

program participants in connection with their participation in such a program are covered benefits under the employer plan sponsor's group medical plan). Accordingly, we urge the Departments to issue guidance confirming that employer sponsors are not required to bear the costs associated with an employee's wellness program participation, including, but not limited to, the costs of related supplies and items, unless such costs are program fees (such as regarding diet or educational programming) or are otherwise a covered benefit under a related medical plan sponsored by the employer (subject to applicable cost-sharing rules under such plan(s)).

Allow Employers to Require Physician Verification of Need for Reasonable Alternative Standard. The existing HIPAA wellness program regulations provide that a reasonable alternative means of qualifying for a reward under a health-contingent wellness program must be made available to individuals whose medical conditions make it unreasonably difficult, or for whom it is medically inadvisable, to meet the specified health-related standard. To this end, the current regulations allow a plan sponsor or insurer to require physician verification of the need for a reasonable alternative standard.

The NPRM would modify the physician verification rules set forth in the existing regulations to only allow a plan or issuer to require physician verification of the need for a reasonable alternative standard "if reasonable under the circumstances." More specifically, the NPRM provides that it would not be reasonable for a plan to seek verification of a claim that is obviously valid based on the nature of the individual's medical condition that is known to the plan, but a plan may seek verification where it is reasonable to determine that medical judgment is required to evaluate the validity of the claim.

We urge the Departments to permit health-contingent wellness programs to require a physician verification of the need for a reasonable alternative standard without regard to whether doing so is "reasonable." Employers are not, and should not be, in the business of making medical judgments about their employees' health, and should not be required to make determinations as to whether a wellness program participant needs a reasonable alternative standard. Many employers are not comfortable making such an assessment and, in fact, employers could run afoul of applicable state and federal health, labor and employment laws for doing so. In light of these considerations, we urge the Departments to permit employers to require as a matter of course a physician verification of the need for a reasonable alternative standard.

Clarify that Program Documents May Govern the Definition of "Physician" When Outside Physicians Are Involved in Determining Reasonable Alternative Standard. The NPRM provides that even if the reasonable alternative standard is compliant with the recommendations of a medical professional who is an employee or agent of the plan, if an individual's personal "physician" states that the plan's recommendations are

not medically appropriate for that individual, the plan must provide a reasonable alternative standard that accommodates the recommendations of the individual's personal physician with regard to medical appropriateness. The NPRM does not provide a definition of "physician" for this purpose. Given the additional burden that may result in applying a revised alternative standard, we request clarifying guidance that "physician" means only that as set forth in the governing program documents (and if not set forth in such documents, as reasonably determined by the employer in good faith). Such a clarification will ensure that the program's criteria receive full consideration by an appropriately licensed and qualified medical professional and that all participants are treated equally under the program.

Limit Independent External Review to Review of Adverse Benefit Determinations and Do Not Extend it to Claims for Requests for Reasonable Alternatives. Per the interim final rules that were issued by the Departments on July 23, 2010, a group health plan must make available for external review to an independent review organization ("IRO") claims that the plan failed to provide a reasonable alternative to a given participant. As addressed by the Council in our earlier comments to the Departments regarding these rules,[3] we urge the Departments to not subject a program's reasonable alternative standard to external review by an IRO.

Subjecting these types of claims to external review is inappropriate for several reasons. First, external review is expensive, and allowing for IRO review of a plan's reasonable alternative standard will increase costs for employers as well as plan participants. Second, the use of external review for this purpose remains unproven. There is little evidence to suggest that external review is appropriate for the adjudication of such matters and that IROs possess sufficient knowledge and expertise to understand and properly resolve these matters. Third, but not last, only benefits claims that involve an exercise of medical judgment should be subject to external review, not matters where the question posed is the interpretation of plan terms or an issue of legal interpretation. Not only is this the standard for the use of external review programs in nearly all cases where states have established external review procedures for insured plans, it also makes practical sense. The resources of IROs should focus on issues related to reviewing the application of appropriate medical judgment in making coverage determinations, not matters solely determined by plan terms or where no medical judgment is involved. Allowing for external review of a plan's reasonable alternative standard is inappropriate, likely to increase costs for participants and employers alike, and remains unproven.

[3] *See* Council Letter dated July 25, 2011, *available at* http://www.americanbenefitscouncil.org/documents/hcr_claims-appeals_ebsa-cmts_072511.pdf.

Wellness Program Participation Should Be Taken into Account for Affordability and Minimum Value Tests. As we previously noted in comments submitted to the Department of Treasury,[4] in order to continue to promote the sponsorship of wellness programs in the workplace, we urged the agency to allow affordability and minimum value determinations to be made for purposes of Internal Revenue Code ("Code") Section 36B and Code Section 4980H based on the premium cost to the employee under the assumption that he or she obtains any incentive available under the wellness program. Doing so will encourage employers to continue to offer valuable and innovative wellness programs to employees and their families and will allow individuals and employers to anticipate eligibility for premium tax credits and liability for assessable payments, respectively. A contrary rule could result in a great many employers dropping or otherwise forgoing the sponsorship of wellness programs for their employees.

Expand 50% Reward Size to Wellness Activities Other than Tobacco Cessation. PPACA Section 1201 adds new Section 2705 to the Public Health Service Act ("PHSA"). Section 2705, in relevant part, provides for an increase in the permissible wellness reward under HIPAA from 20% to 30%. Additionally, the statute states that the Secretaries of Labor, Health and Human Services and the Treasury "may increase the reward available . . . up to 50 percent of the cost of coverage if the Secretaries determine that such an increase is appropriate." PPACA Section 1201 (in part, adding a new PHSA Section 2705).

The NPRM properly reflects the statutory requirement allowing for the use of wellness rewards of up to 30% of an employee's total cost of employee-only coverage (or, if dependents are eligible, 30% of the cost of coverage in which the employee and such dependents are actually enrolled). Additionally, the NPRM provides that, with respect to certain tobacco cessation programs, rewards of up to 50% of the cost of coverage would be permitted.

While we appreciate that the Secretaries have used their administrative authority to permit the use of increased rewards of up to 50% for certain tobacco cessation programs, we urge the Departments to allow for the use of such increased rewards with respect to other program types and arrangements.

As noted in the preamble to the NPRM, many employers' wellness plans currently utilize wellness rewards that are less than 20% of the total cost of employee-only coverage. Specifically, a Kaiser Family Foundation survey cited in the preamble to the NPRM provides that the average reward utilized by employers in 2010 ranged from 3%

[4] *See* Council Letter dated June 11, 2012, *available at* http://www.americanbenefitscouncil.org/documents2012/hcr_irs-n2012-31_council-comments061112.pdf.

to 11% of the average cost of individual coverage. While we agree that the that many employers currently utilize rewards that are likely below the 20% maximum – and thus below the new 30% maximum – such a statistic belies the fact that employers are, as a group, utilizing increasing reward amounts to foster employees' health and well-being and to help control health cost trends. Thus, it should be expected that employers may seek to utilize rewards in the near future that approach the 30% maximum and subsequently seek to go beyond the 30% maximum.

In light of the above, we request that the Departments establish a process that leads to the promulgation of guidance that allows for the use of rewards of up to 50% for a wider range of wellness plan arrangements, including effective programs that address specific conditions, such as, obesity and chronic disease, as well as those that are designed to promote an individual's -overall health or well-being, such as those that help individual understand how to make better health choices and lead a more active and balanced lifestyle. For example, the Council and its members would encourage the issuance of a series of safe harbors that set forth certain additional arrangements (and the rules that would apply to such) with respect to which plan sponsors may utilize rewards of up to 50%, developed in consultation with the employer community and other stakeholders.

Need for Consistent Federal Voice on Legality of Compliant Wellness Programs under Applicable Federal Laws. We very much appreciate the Departments' continued efforts to work together to put forth a single set of rules for purposes of new PHSA Section 2705 as well as the provisions that reside in the Employee Retirement Income Security Act of 1974 ("ERISA") and the Code. We note, however, that employer sponsors and issuers of HIPAA-compliant wellness programs continue to face uncertainty under certain federal laws with respect to their programs.

The Equal Employment Opportunity Commission ("EEOC"), which has certain enforcement authority over the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"), has not provided formal or informal guidance that a HIPAA-compliant wellness program shall be treated as complying with the ADA and GINA. This apparently remains the case notwithstanding that the only federal court to have considered the issue recently found that the employer defendant's compliant participatory wellness program did not violate the ADA.

Employers are, and continued to be, very concerned about possible enforcement actions by EEOC division offices with respect to their compliant programs. These actions, coupled with the continued general uncertainty of these programs under the ADA and GINA, are having a chilling effect on the establishment and utilization of some program designs, including the use of premium-based rewards and health-contingent wellness programs.

To ensure that employers have discretion to establish and design programs to the fullest extent allowed by the NPRM, and to ensure that employers are not subject to enforcement actions with respect to program that are compliant with the NPRM, we strongly urge the Departments and the EEOC to resolve the current legal uncertainty facing employers. Until this happens, employers will not be fully empowered to design effective and innovative wellness programs for the benefit of their employees without the fear of resulting litigation or enforcement actions.

* * *

Thank you for considering these comments related to the NPRM entitled "Incentives for Nondiscriminatory Wellness Programs in Group Health Plans." If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,

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