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

Submitted via website:
http://www.regulations.gov

The Retail Industry Leaders Association (RILA) welcomes the opportunity to provide comments to the U.S. Departments of Labor, the Treasury, and Health and Human Services in regards to the Notice of Proposed Rulemaking on Incentives for Nondiscriminatory Wellness Programs in Group Health Plans. RILA also appreciates the White House's and Departments' willingness to engage in discussions about wellness program design and implementation with us and our member companies as the regulatory process unfolds.

RILA, the trade association of the world's largest and most innovative retail companies, product manufacturers, and service suppliers, promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

Retailers offer quality and affordable health care to their employees and families, and are leaders in benefits design by customizing plans to meet their workforces' specific needs. Many retail employers encourage their employees to participate in voluntary wellness programs, and appreciate that a foundation of healthy habits can last a lifetime. Retailers have embraced the idea that investing in a healthy workforce today not only lays the foundation for a healthier society but also ensures the development of a more productive workforce which is able to enjoy a higher quality of life. Retail employers already offer employees robust wellness benefits that include programs such as: weight loss; smoking cessation; incentives to see a primary care physician; diabetes control; nutritional/healthy eating; store discounts on healthy foods; gym discounts; group counseling sessions; and store gift card incentives for enrolling and participating in wellness programs.

The development and implementation of wellness programs by employers encourage healthier lifestyles for employees and their families, and provide important outreach to individuals whose health conditions may make them more likely to experience significant health events and related

expenses. Additionally, through improved health and a focus on healthy behaviors, overall healthcare expenses can be reduced.

One component of a wellness program that is common to many employer-sponsored plans is a health risk assessment completed by the plan participant. The health risk assessment asks a series of questions aimed at discovering information regarding the plan participant's lifestyle and habits. Based on the results of the health risk assessment, the participant may be paired with a health coach, who works with him/her periodically to address a specific health area. In return for completing the health risk assessment and participating in the coaching, the participant may receive a discounted premium, lower co-pays or other reduced expenses. The health risk assessment is often enhanced to require a medical examination and/or biometric screening. Reduced expenses are based on the results of those examinations or screenings, or on a participant achieving a particular result (e.g. a particular BMI range).

Other programs include both participation and/or outcomes-related goal achievement for rewards, incentives, disincentives, or access to higher levels of benefit coverage. These programs are designed to engage employees and their adult family members in regular activities focused on health, wellness, and consumerism in order to maintain or improve the quality and cost of their healthcare.

Because of an uncertain legal landscape, the shape taken by these programs depends in large part on an employer's legal risk tolerance. Among the laws impacting this issue are the Health Insurance Portability and Accountability Act (HIPAA), the Americans with Disabilities Act (ADA), and the Genetic Information Non-Discrimination Act (GINA). The HIPAA requirements regarding wellness programs are relatively well-understood; however, little guidance has been provided under the ADA, and that which has been provided under GINA is very restrictive.

In order to ensure that employers are able to continue to provide comprehensive wellness programs, as well as incentivize employers to establish new wellness offerings, it is critical that the requirements of the ADA, GINA, and HIPAA all be interpreted in a consistent manner. In other words, if an employer complies with HIPAA's standards- or participation-based requirements, it should also be deemed to comply with the ADA's prohibition on disability related inquiries and GINA's prohibition on obtaining genetic information.

- The purpose and intention of the ADA and GINA were primarily to protect individuals with a disability or genetic-related health conditions from discrimination in employment – not to prohibit health plans from obtaining information necessary to underwriting, classifying, or administering risks, or from providing employees with incentives for better health.
- Interpreting the ADA and GINA in a manner consistent with HIPAA benefits both plan sponsors and participants.
- Wellness programs and related incentives that comply with HIPAA should be deemed to comply with the ADA's and GINA's wellness program provisions (subject to any reasonable accommodation requirement).

- Additional guidance, presumably from the Equal Employment Opportunity Commission (EEOC), confirming this interpretation is necessary to give employers confidence that their wellness programs will not subject them to undue legal jeopardy.

Various instruments (health risk assessments, medical or biometric examinations) are used to gather health information regarding plan and program participants. The EEOC takes the position that a participant may not be required to answer any health question or submit to any medical test that might elicit information regarding "genetic information" (and presumably regarding a disability). In other words, the employer must permit participants to skip any question or forego any examination that might elicit genetic or disability-related information without any penalty even if the penalty complies with HIPAA.

- The ADA Amendments Act (ADAAA) and the regulations under the ADAAA expanded the universe of individuals who are protected under the ADA. Failure to completely answer all questions not only prevents underwriting, classification and administration of the program, but essentially destroys the entire integrity of the program itself, substantially distorts the reporting, and completely invalidates the measurement of the program's success.

While the EEOC view effectively weakens both kinds of wellness programs, it poses a special threat to a standards-based program on several grounds:

- By definition, the program necessitates both identification of and verification that an individual meets certain standards related to a health factor, or has achieved particular health outcomes.
- If an individual does not meet a certain standard related to a health factor, or does not participate in the program, a loss of incentive or penalty can be imposed.

The interpretation of the laws by the EEOC and burdensome and complicated regulations may be a fundamental reason why some employers are reluctant to expand voluntary wellness programs and take full advantage of the premium and cost sharing discounts or rebates permissible under the law. Conversely, while this reluctance exists, it has not dissuaded many employers from including some sort of a wellness component into benefits packages or incorporating wellness programs into their workforce culture. The regulations note several times that the Departments do not have tangible evidence of wide-spread use of wellness programs in the employer community because they do not see a lot of employers taking advantage of the already permissible 20 percent premium or cost sharing discounts or rebates. While there may not be a clearinghouse of data currently in existence for the Departments to access, we do not believe that this translates into a lack of interest by employers in establishing or expanding wellness programs.

In addition, this proposed expansion of the "reasonably designed" requirement is at cross purposes with and significantly undermines the Congressional intent behind the wellness program provisions as adopted by the ACA and codified in the Public Health Service Act. The ACA wellness program provision has its roots in HIPAA, which generally prohibits discrimination under health plans based on health status. However, the HIPAA

nondiscrimination provisions, as originally enacted, did not prevent a group health plan from establishing premium discounts or rebates or modifying otherwise applicable copayments or deductibles in return for adherence to programs of health promotion and disease prevention. The 2006 HIPAA regulations also required that a program must allow a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom, for that period, it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard. However, by requiring an alternative in all cases, these proposed regulations that the Departments are seeking comment on are in stark contrast to the 2006 nondiscrimination regulations, and we believe will negatively impact employer attempts to positively influence the health of their employees.

The Departments requested feedback on several questions on specific issues such as apportionment of awards, the calculation of awards, and reasonable alternatives. RILA surveyed its members on these issues. Please find below feedback we received in response.

Apportionment of Awards in Health-Contingent Wellness Programs – Employers want to retain the ability to design and determine awards based on their workforce's unique needs. This includes the ability to positively incent both employees and their families towards better health. There have been numerous studies showing that when families participate in activities together the likelihood of success is vastly improved. Notwithstanding this important fact, it will be a complex challenge for most payroll systems to attempt to apportion the reward down to each covered family member, especially since not every employee's coverage includes the same number of family members. Should there be a necessity to establish such rules, the rules should be as simple and flexible as possible.

Examples of Calculating Applicable Percentage to Meet Award – Employers would like the Departments to provide additional examples regarding: coverage categories of employee + 1, employee + 2, employee + family; a variable plan design reward (waiver of co-payment, reduced deductible, reduced or free prescriptions); the difference between a participatory program and a health-contingent program; and programs that would not suffice the requirement for receiving an award. RILA believes it could be more effective to provide employers with additional examples in supplement documents such as FAQs or bulletins. Such documents could be periodically updated and expanded throughout the implementation process. Providing stringent examples in final regulations may dissuade employers from being innovative in their program design.

Uniform Availability and Reasonable Alternative Standards – Employers would like further explanation or examples as to program elements that would meet an "alternative standard," as well as clarification of the phrase "known to the plan." This clarification should not be provided through inflexible or complicated regulations but by guidance or preamble discussion of these terms.

Reasonably Designed Standard – Employers support the idea of having a database of evidence or practice based research available to assist in the design of programs but do not support the establishment of a mandated, rigid set of standards. Much like medical care, wellness programs are constantly evolving and improving. Mandated or rigid standards in final regulations have the potential to discourage employers from taking advantage of new and improved programs that

would be more beneficial for employees. Any regulations must be flexible to accommodate program evolution and improvement. The reference to the CDC website is helpful.

Notice of Other Means of Qualifying for Rewards – While employers believe the sample language in the regulatory text is an improvement over the previous language, employers would like the language to state that an alternative standard is available only if it is unreasonably difficult or medically inadvisable to participate in the standard program.

Reasonable Alternatives – The current 2006 HIPAA regulations already provide a great deal of consumer protection for employees, while at the same time create a noteworthy amount of administrative overhead for employers who invest in health improvement opportunities for their employees. There may be employer apprehension in establishing a health-contingent wellness program because of the fear of added programmatic and administrative costs and burdens associated with meeting the requirement of establishing reasonable alternatives. Many employers struggle with what "reasonable alternatives" may constitute. Many employers may not have the human resources staff needed to develop and administer reasonable alternatives on top of the work that is required for the administration of the wellness programs themselves. Employers would like clarity on what it means to meet the standard of a reasonable alternative as opposed to waiving the requirements. Employers also suggest that for high risk individuals, condition or disease management coaching or counseling should be listed as reasonable under the wellness definition, and a reasonable alternative must include a doctor visit.

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As our nation's healthcare delivery system continues to evolve, we believe wellness programs will become an increasingly important component of the workforce environment. Retailers have a vested interest in encouraging healthy lifestyles among their workforces and support efforts to establish and expand wellness programs. It is important that federal regulations, and the interpretation and enforcement of the laws, do not stifle employers' ability to continue to be innovative and forward-thinking in plan design and implementation. RILA looks forward to continuing the dialogue on wellness programs with the White House, the Departments, and lawmakers on Capitol Hill.

Please direct questions or requests for further information about this comment letter to Christine Pollack, Vice President of Government Affairs, with the Retail Industry Leaders Association (RILA) at Christine.pollack@rila.org or 703-600-2021.