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Secretary Timothy Geithner
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Acting Secretary Seth D. Harris
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Secretary Kathleen Sebelius
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Re: Incentives for Nondiscriminatory Wellness Programs in Group Health Plans
(Notice of Proposed Rulemaking RIN 1545-BL07)

Introduction and Framework for Analysis

AARP is pleased to submit comments on the notice of proposed rulemaking (NPRM) regarding nondiscriminatory wellness programs in group health insurance coverage. AARP supports promising strategies to promote wellness as a means of helping individuals to pursue healthy behaviors and thereby help reduce health care expenditures. However, as a general principle, AARP opposes discrimination based on a person’s health status, lifestyle, or health behaviors. AARP believes that regulations concerning employer-sponsored wellness programs must strike an appropriate balance between nondiscrimination and health promotion. We therefore urge caution that policies – such as imposing higher premiums, increased cost sharing, or other charges based on a beneficiary’s health status or failure to achieve specified outcomes – not have the effect of denying access to care or unfairly discriminating against those with health conditions.

Employer-sponsored wellness programs should not conflict with the Affordable Care Act’s (ACA) goals of expanding access to health care and preventing unfair discrimination. In determining whether a program design meets these goals there is little practical difference between rewards and penalties – as those who do not receive the rewards are being penalized by having to pay more. Whatever the structure of the incentives/disincentives, the use of rewards/penalties should not discriminate or reach a level that serves as a barrier to affordability and accessibility of health insurance coverage for employees. To avoid the risk of both discrimination and unaffordability, the imposition of incentives/disincentives should be carefully drawn and within reasonable limits. AARP is pleased to offer the following recommendations to strengthen the proposed regulations.
Privacy

As a preliminary matter, AARP observes that the regulations do not address the importance of maintaining employees' medical privacy. Information on individual health status or other personal health information that is collected through a wellness program should be maintained confidentially and securely. A strong firewall should be in place between personal health information collected for the purpose of the wellness program and the employer. The final rule should ensure that individual privacy rights are fully protected in accordance with Title 11 of the Health Insurance Portability and Accountability Act of 1996.

Categories of Wellness Programs

The proposed rule continues and clarifies the distinction between “participatory” and “health-contingent” wellness programs. Because they allow incentives tied to measures of health status, more requirements apply to health-contingent wellness programs, and the proposed rule is focused on amending these requirements. AARP agrees that standards for health-contingent wellness programs are especially important in protecting against discriminatory practices. However, AARP is concerned about the potential overlap between participatory and health-contingent wellness programs. For example, can an employer operate a participatory wellness program that offers incentives to employees for undergoing a diagnostic test in order to identify which employees should be subject to incentives under a health-contingent wellness program? We recommend that the final rule address the relationship between the two types of programs and provide clarification to ensure that neither approach, administered solely or together, is designed in a way that may be discriminatory on the basis of health status-related factors.

Size of the Incentives

AARP notes that the NPRM is silent on the treatment of premium surcharges resulting from wellness programs in determining the affordability of employer-sponsored coverage. Incentives tied to wellness programs should not reach levels that make coverage unaffordable for employees, and if they do, employees should be permitted to obtain affordable coverage elsewhere. Specifically, it is unclear whether the surcharge would be considered in determining whether an employee has reached the 9.5 percent of income threshold for receiving subsidized coverage through a health insurance exchange. AARP urges the Secretaries to make it clear that such surcharges will count in determining whether employer-sponsored coverage meets the affordability standard set forth in statute.

- Size of Incentive - AARP recognizes that the statute permits health-contingent wellness program incentives of up to 30 percent of the total cost of plan coverage and we appreciate that the proposed rule does not use the authority provided under the statute to increase the maximum to 50 percent, with the exception of wellness programs designed to prevent or reduce tobacco use (discussed below). We urge that this authority not be applied in any future rulemaking because it could result in
employees not being able to afford needed health insurance coverage. Moreover, the final rule should emphasize that although the maximum incentive for health-contingent wellness programs is 30 percent of the total cost of coverage under the plan, employers may elect to provide smaller incentives. In our view, smaller incentives are more appropriate, while larger incentives run the risk of making insurance unaffordable and, despite the proposed requirements, unfairly punishing employees based on health status. We acknowledge the Departments’ proposal to apply a 50 percent maximum with respect to workplace wellness programs designed to prevent or reduce tobacco use. In this context, the small group employee who is a tobacco user has the potential opportunity to eliminate the premium surcharge that may apply under the new insurance market rating rules which allow for the tobacco use surcharge.

HHS should reconsider the extent to which tobacco rating is linked to wellness programs. Every tobacco user should be given the opportunity to offset the surcharge by participating in a tobacco cessation program, rather than being reliant on an employer’s offer of a tobacco-cessation wellness program as the sole means of avoiding the surcharge. An individual, who attests to participation in any evidence-based cessation program, including programs offered by insurers, employers or others, should not have the surcharge applied or it should be fully offset. Tobacco users should be permitted to continue or repeat the same cessation program – or choose an alternative program – in multiple years and still qualify for the surcharge abatement, since tobacco users often find it difficult to quit and may require several attempts to end a tobacco addiction.

• **Variable Incentive** - The NPRM is silent on whether employers and insurers can vary wellness incentives by age. We urge the Secretaries to make clear in the final rule that no such variation is permissible. In any case, AARP believes that variability in wellness program incentives that result, or could result, in a less than even-handed application of the incentive should not be permitted at this time. Because the NPRM does not include examples of cases where the dollar amount of the incentive is variable, it is difficult, if not impossible, to predict how it will be applied and what the potential impact might be. For these reasons, we urge the Secretaries to specifically disallow variation until this approach can be better understood.

• **Apportionment in Family Coverage** - AARP believes that where health-contingent wellness programs apply to dependents as well as employees, the total amount of the incentive linked to the total family premium should be prorated in proportion to the number of individuals covered by the family policy. For example, if the employer imposes a 30 percent incentive for increased cholesterol levels and only one member of a three-person family has high cholesterol and refuses to take advantage of a targeted wellness program, then the family premium should only be increased by 10 percent of the cost of the family premium. The final rulemaking should include examples of this approach.
Reasonable Alternative Standards

AARP supports the proposal that in the case of an individual for whom a medical condition makes it unreasonably difficult to meet a reasonable program health standard or for whom it is medically inadvisable to attempt to satisfy the standard, an alternative standard must be provided under which the individual may qualify for the incentive. The proposed rule notes that all facts and circumstances must be taken into account in determining whether the plan has furnished a reasonable alternative standard. One example offered is that if the alternative is an education program, the individual should not be required to locate such a program or pay the costs of the program.

AARP believes that determining a reasonable alternative standard should further take into consideration the indirect costs of the alternative, such as any travel requirements, or care giver expenses if employees are expected to participate on their own time in a wellness activity. Finally, AARP believes that these factors should be taken into account as part of the overall standards for a reasonable program design, discussed below.

Reasonableness of Program Design

Existing regulations require that a health-contingent wellness program be reasonably designed to promote health or prevent disease. The standard is met if the program has a reasonable chance of preventing disease or improving the health of participating individuals, is not overly burdensome, is not a subterfuge for discriminating based on a health factor, and is not highly suspect in the method chosen to promote health or prevent disease.

Affordability and accessibility should be broadly defined in relationship to the direct (e.g., program participation fees) and indirect costs (e.g., costs associated with transportation, child care, and elder care) of participating in the program. We consider these types of additional costs an important consideration in assessing whether a wellness program is reasonably designed and ask that the final rulemaking explicitly address the issue.

AARP is concerned that the NPRM does not provide definitions or examples of overly burdensome, subterfuge, or highly suspect. Without such guidance, employees, consumers, and consumer advocates have no independent standards or reference points against which to measure whether a program is reasonably designed. We urge the Secretaries to include definitions and examples of these important terms in the final rulemaking.

- **Use of Reliable Health Status Measures** - A health-contingent wellness program should not be considered reasonably designed if it is based on an unreliable measure of health. For example, the scientific literature has found that the Body Mass Index (BMI) is not a reliable measure of overweight, especially among women and older adults. Thus, in our view, a wellness program that ties incentives to an
individual’s BMI score is not reasonably designed. Unless a particular intervention’s chances of success are based on strong, independent, scientific evidence, the program should not be considered reasonably designed.

- **Evidentiary Basis for Increasing Award/Premium Amount** - The Secretaries are given the discretion to allow employers to increase the size of the incentive from 30 to 50 percent. Beyond the comments mentioned above, AARP urges that the Secretaries tie any further increases in the size of the incentive to a strong evidentiary basis.

- **Data Collection** - To underscore the need for a strong evidentiary basis for health-contingent wellness programs going forward, the standard for “reasonably designed” program should include a requirement that data be collected on program performance. These data should be required to be considered when determining the effectiveness of the program in meeting the specific health improvement or disease prevention objectives. Employers should be required to work with representatives from the Departments to determine what and how much data to collect and data collection methods (including consistency across employer programs and frequency of collection). Program data should be auditable and accessible to the Departments for the purpose of determining compliance with the regulatory requirements and information on wellness program compliance should be publicly available. Employers must be required to comply with all relevant consumer protections, including privacy.

- **Overly Burdensome Program Design** - In determining whether a health-contingent wellness program is overly burdensome, the final rulemaking should also take into account non-medical factors that affect employees’ ability to participate. For example, it would be unreasonable if employees were asked to travel great distances to participate in wellness program activities, or incur greater than minimal travel costs or greater than nominal care giver expenses. Nominal cost sharing standards of Title XIX should be used for this purpose. The program design should include providing support services, such as transportation and child care, when low-wage workers are required to use their own time or to travel great distances to participate in wellness activities. At this juncture, we do not believe that data exist to help determine when an incentive—in combination with other associated costs—are so burdensome that they create incentives for employees to drop coverage. We believe that those most likely to discontinue coverage due to surcharges are low-wage workers whose salaries make them less able to absorb the extra costs. Therefore, AARP urges the Secretary to begin to collect and analyze such data so that over time these data may be used to inform public policy related to whether an employer wellness program is overly burdensome.

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• Not a Subterfuge for Discrimination - There are many conceivable ways in which a program could be considered a subterfuge for discrimination. Certainly, some of the other factors that are relevant to reasonable design are relevant here. However, a wellness program should be considered a subterfuge for discrimination based on health status if there is evidence that the program was designed with a discriminatory intent or if the program has a discriminatory impact on employees with a health factor or who fail to meet a health-based outcome. For instance, if a program bases incentives on a biometric measure such as blood glucose levels and requires employees who are diabetic or pre-diabetic to pay hundreds or even thousands of dollars more per year for their coverage than other employees, that program should be considered a subterfuge for discrimination based on health status.

Relationship to Other Laws

The ACA and these proposed regulations are focused on discrimination based on a health factor or health condition. However, there are other types of discrimination – such as workplace discrimination based on age, disability, race, sex, and other protected bases – that are also implicated in the context of employer-sponsored wellness programs. We encourage the Secretaries take a comprehensive approach that recognizes how a range of features can impact access to care and determine whether or not the wellness program truly meets the needs of vulnerable populations and is nondiscriminatory. For example, diagnostic procedures for routine health conditions and risks more common among certain populations frequently yield information that could trigger greater penalties and higher costs for health care coverage. The HIPAA regulations include a provision\(^2\) clarifying that compliance with those regulations “is not determinative of compliance with any provision of ERISA (including the COBRA continuation provisions) or any other State or Federal law, such as the Americans with Disabilities Act.” There should be a similar provision included in these regulations as well. Compliance with the wellness program regulations does not relieve employers from having to comply with other laws, including the civil rights laws, nor should compliance with the wellness regulations be construed as a safe harbor under other laws.

Language Access and Cultural Sensitivity

Wellness programs should be designed in ways that are easily understandable, linguistically appropriate and culturally sensitive to the target population. This includes both the design and conduct of the intervention and the written notices and plan materials that are provided to employees.

Enforcement

Safe Harbor - AARP recommends that the Secretaries consider offering an employer a safe-harbor wherein the wellness program would be subject to less stringent regulatory review if penalties for failure to participate in a wellness program do not exceed a threshold percentage such as 5 percent. This provides employees with a definite ceiling that is de

\(^2\) See e.g., 45 C.F.R. §146.121(h).
minimis, employers with certainty over the efficacy of their wellness programs, and the government with less need to police.

Confidential Reporting Process - The Secretaries should require employers that offer wellness programs to provide participants with information on the federal requirements for these programs and their rights as employees in these programs. This information must be written in a way that is easily understood in plain language that is both culturally and linguistically appropriate. Furthermore, the nature of the employer-employee relationship does not lend itself to employees reporting employers who may be operating wellness programs that do not comply with the regulations and may be discriminatory. Therefore, we urge the Secretaries to establish a procedure whereby employees can confidentially report programs that they believe are not being operated in accordance with the law to the proper federal authorities. Employers should provide information on the confidential reporting process to all employees who are subject to employer wellness programs. Such information should also be required to be provided in plain language that is both culturally and linguistically appropriate.

Appeals - The final rule should describe a robust, impartial process through which employees can appeal issues such as whether an employer wellness program design comports with the requirements of the final rulemaking and whether an employee believes that he/she has been unfairly determined as failing to meet the standard for a health-contingent wellness program. The appeals process should be accessible and transparent for employees and should protect them from employer retaliation. If a claim is appealed to a court, it should be reviewed de novo. Materials on the appeals process should be easily understandable, and linguistically and culturally appropriate.

Thank you for the opportunity to provide comments on these important implementing regulations. If you have any questions, please do not hesitate to contact KJ Hertz on our Government Affairs staff at (202) 434-3732 or khertz@aarp.org.

Sincerely,

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs