April 12, 2011

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

Secretary Hilda Solis
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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

Re: Proposed changes to 71 FR 75014: Nondiscrimination Based on a Health Factor and Wellness Programs

Dear Secretary Geithner, Secretary Solis and Secretary Sebelius:

We are writing on behalf of the millions of consumers that AARP represents to comment on proposed revisions to final rules issued on December 13, 2006, related to Nondiscrimination and Wellness Programs in Health Coverage in the Group Market. These rules were promulgated by the Department of Treasury, the Department of Labor, and the Department of Health and Human Services (referred to here as the Departments).

A recent FAQ issued by the Department of Labor, entitled, "About Affordable Care Act Implementation"[1] noted that the Affordable Care Act (ACA) added a new section 2705 to the Public Health Service Act regarding nondiscrimination and wellness that largely incorporated the provisions of the Departments' existing regulations with some modifications. One such change, effective in 2014, increased the maximum reward that can be provided under a health-contingent wellness program from 20 percent to 30 percent.

[1]FAQs About Affordable Care Act Implementation Part V and Mental Health Parity Implementation, U.S., Department of Labor, http://www.dol.gov/ebsa/faqs/faq-aca5.html

The Departments announced that they intend to propose regulations that use their existing regulatory authority to raise the percentage for the maximum reward to 30 percent before the year 2014. The Departments also stated that they will consider including new consumer protections in the regulations to prevent the program from being used as a subterfuge for discrimination based on health status. AARP welcomes this opportunity to inform the regulatory process.

AARP is a strong supporter of wellness programs as long as the appropriate consumer safeguards are in place and incentives do not create barriers to care and are not discriminatory. We recognize that prevention and wellness can be very beneficial and we support the Administration's goals of using promising workplace strategies to help people achieve healthy lifestyles and behaviors. However, it is important to guard against strategies that are punitive, unfair, or that might have unintended consequences. Our comments propose ways for the Departments to incorporate these necessary protections into the regulations.

Criteria for Penalties Related to Achievement of a Health Goal

The ACA outlines criteria that must be met in order for wellness programs to condition penalties or rewards[2] on achieving a standard related to a health factor. AARP would like to comment on four of the criteria where we believe it is essential to build strong consumer protections into the implementing regulations.

1. **The wellness program must be "reasonably designed" to promote health or prevent disease**.

The gold standard for any intervention should be a robust scientific evidence base. However, AARP is aware that wellness program interventions may not be required to be based on a *scientific record*. Therefore, we urge the Departments to interpret *reasonably designed* as requiring a reasonable expectation that the wellness intervention will achieve its stated purpose. This can be demonstrated by adoption or acknowledgement of the intervention in guidelines of national professional associations, or other evidence that the intervention is recognized by experts in the field as a prevailing and effective practice. The wellness program should be required to disclose the basis upon which a specific intervention was selected to program participants.

2. **The wellness program cannot be "overly burdensome**.**"**

AARP assumes that this requirement applies to *employee* burden. This should be stated explicitly in the regulation. We believe a program is *overly burdensome* if the penalties associated with the failure to achieve a health goal result in financial hardship for an

[2] PHSA section 2705(j)(3)(A) states that "a reward may be in the form of a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism (such as deductibles, copayments, or coinsurance), the absence of a surcharge, or the value of a benefit that would otherwise not be provided under the plan."

individual. In defining financial hardship, we urge the Departments to link the assessment of penalties in wellness programs to the affordability standards associated with premium credits and cost-sharing subsidies created by the ACA.[3]

Primary goals of the ACA are to expand coverage to the uninsured and improve the affordability of health insurance coverage. Another key improvement in the law assures those with health conditions have access to coverage by ending the use of health status as a rating factor. The provision allowing wellness programs to condition penalties and/or rewards on a health status factor should not be allowed to undermine these important improvements.

Although current law gives employers the right to levy penalties up to 30 percent as of 2014, the implementing regulations should prohibit them from doing so if they violate the affordability standard and/or effectively undermine access to coverage. The regulations should assure that the burdens of the wellness program do not increase employee cost burdens in relation to income, and do not become de facto barriers to enrolling in health coverage and/or accessing covered care.

Another aspect of *overly burdensome* relates to the time and expense to the employee in participating in wellness program activities. For example, an intervention should be considered *overly burdensome* if employees are expected to pay more than a nominal amount to participate in a wellness activity. It would be *overly burdensome* if participants were asked to travel great distances to participate in such activities, would incur greater than minimal travel costs, and/or would incur greater than nominal child care or other type of care giving expenses. We recommend that the Departments use the nominal cost-sharing standards of Title XIX as a guiding principle when implementing the *overly burdensome* provisions. We also recommend that wellness programs be required to provide enabling services—like transportation and child care—when low-wage workers are required to use their own time and/or travel significant distances to access wellness activities. Employees should not be required to bear the cost of providing enabling services.

3. **The wellness program cannot be a "subterfuge" for discrimination based on a health status factor**.

AARP believes that a wellness program is a *subterfuge* for discrimination based on a health status factor if an individual fully participates in a prescribed intervention and is unable to achieve the desired health status outcome. In these situations, we urge the Departments to interpret the intervention as a *subterfuge* because it clearly is not an effective intervention for the individual. We believe the burden must be on the employer to implement effective programs designed to address the unique needs of all participants. Thus, any individual who faithfully adheres to the protocols of the intervention who does not achieve expected milestones should not be subject to any type of penalty.

[3] Sections 1401 and 1402 of the ACA.

Other issues that the Departments should consider when defining *subterfuge* include failure to disclose the purposes of the wellness protocol to program participants; failure to disclose the consequences of not achieving a health status factor; failure to give an individual a *reasonable* opportunity to complete the recommended intervention *prior to* imposing a penalty or withholding a reward; failure to allow a participant to show proof that a certain intervention has not worked for him/her in the past and to request another type of intervention; failure to allow an individual to use an alternative measure to determine whether they have achieved a health target when appropriate (e.g., waist-to-hip ratio instead of body mass index as a measure of overweight); and failure to inform participants that they can take advantage of waivers and/or request alternative interventions.

Finally, a program would be a *subterfuge* if the combined effect of multiple rewards and/or penalties associated with the wellness intervention exceeds the allowed limit even though they may not individually exceed such limits. A final example of *subterfuge* is when program participants are required to achieve multiple health outcomes at the same time. For example, an individual who smokes, is overweight, and has uncontrolled hypertension, may be set up to fail if required to address all of those conditions within the same time period.

4. **The wellness program cannot be "highly suspect" in the method chosen to promote health or prevent disease**.

We believe that there is a close relationship between the *reasonably designed* standard and the *highly suspect* standard. In the absence of a strong, independent, scientific evidence basis for a wellness intervention, we would consider a program *highly suspect* if its interventions do not have broad-based support in the professional community most closely linked to the intervention. For example, we would expect that a smoking cessation intervention would have broad-based support among tobacco control experts and was well recognized as a reasonable strategy.

Criteria for Increasing the Amount of Penalties and/or Rewards

Beginning in 2014, the ACA allows penalties/rewards tied to wellness programs to increase to 30 percent and gives the Secretaries of Health and Human Services, Labor, and Treasury discretion to increase the penalty/reward to up to 50 percent. AARP believes that increasing the limit to 50 percent should not be automatic. The Departments should identify rigorous criteria for allowing increases in penalties/ rewards with the primary objective of preventing individuals from losing affordable access to employer-sponsored insurance coverage. We recognize that a strong scientific basis is not required for going to a 30 percent penalty/reward. However, AARP believes that the Departments have the discretion to tie any further increases in penalties/rewards to scientific evidence and we urge you interpret the regulation in a way that allows you to impose more

stringent requirements, the larger the penalty. The applicable standard should be *strong scientific evidence* that the intervention is effective for most people.[4]

The Scope of Health Risk Assessments

In developing criteria related to health risk assessments, the Departments should adopt a requirement that employer-initiated health risk assessments should assess factors that are reasonably related to *the planned* interventions. In other words, employers should not be allowed to use health risk assessments as fishing expeditions into people's personal health status if they are not making interventions available that are reasonably designed to help people address health issues being asked about on the assessment tool.

Other Consumer Protections

Other consumer protections that AARP asks the Departments to consider include:

- The regulations should include *hardship* exemptions that are not related to health status. One example of a *hardship* is where a single mother is unable to find or afford child care in order to participate in a wellness activity. Another is where an individual is a primary caregiver for an older adult.

- In cases where there is a reward, the regulation should make it clear that the effect of offering rewards should not overly disadvantage the individual who does not qualify for the reward (e.g., reward a person with a 50 percent discount in their premium and pass the 50 percent on to a person who could not achieve a health status factor).

- The regulations need to include a robust appeals process that is accessible and transparent for employees and protects them from employer retaliation. Wellness program managers should be required to provide easily understandable written information about the appeals process in plan materials and should have independent agents help people navigate the appeals process. Information about the appeals process should be required to be culturally and linguistically appropriate.

- The regulations should ensure that wellness interventions are culturally sensitive and linguistically appropriate for the target population.

- The regulations should ensure that wellness programs develop meaningful and reliable ways to track program participation.

- The regulations need to ensure a strong firewall between the personal health information collected for purposes of the wellness program and employers.

[4] Section 7190 of the ACA requires the Centers for Disease Control and Prevention (CDC) to study and evaluate employer-based wellness programs. The Departments should consider the CDC findings when determining whether it is appropriate to increase a penalty/reward.

- The regulations should ensure that individual privacy rights are fully protected in accordance with Title 11 of the Health Insurance Portability and Accountability Act of 1996. In addition, the regulations need to ensure that wellness programs are not designed and do not operate in ways that violate individual rights under other laws, particularly civil rights laws such as the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, and Title VII of the Civil Rights Act of 1964. Before developing proposals, AARP encourages the Departments to seek input from the Equal Employment Opportunity Commission, which has issued regulations and other guidance on appropriate parameters for wellness programs, as well as the Civil Rights Division of the Department of Justice.

- If family members are subject to penalties and/or rewards by a wellness program requirement because they are covered dependents, they should receive all of the protections set forth in the regulations.

Finally, we suggest that you 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.

Thank you for the opportunity to comment on this important issue. If you have any questions, please feel free to contact Leah Cohen Hirsch of our Federal Government Relations staff at (202) 434-3778.

Sincerely,

David Certner
Legislative Counsel and Legislative Policy Director
Government Relations and Advocacy