Congress of the United States
House of Representatives
Washington, D.C. 20515

January 25, 2013

The Honorable Timothy F. Geithner
Secretary of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

The Honorable Seth D. Harris
Acting Secretary of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

The Honorable Kathleen Sebelius
Secretary of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Secretary Geithner, Mr. Harris, and Secretary Sebelius,

We submit the following comments in response to the proposed rule on nondiscriminatory wellness programs offered by group health plans issued on November 26, 2012 by the Departments of Treasury, Labor, and Health and Human Services. The Affordable Care Act (the ACA) was designed to expand access to healthcare and promote a culture of health for all Americans. Employer wellness programs that help employees and their families remain or get fit and healthy meet these goals. At the same time, we remain concerned about sanctioning certain employer wellness programs that could give rise to discrimination of employees based on health status or disability, thereby erecting new and unintended barriers to health coverage.

The ACA (and related laws) not only expanded coverage to 30 million Americans, it established new and critical consumer protections in response to common insurer abuses. No longer will a person face discrimination such as a higher premium or lesser coverage, or a denial for health insurance because of a pre-existing condition, health status, or genetic predisposition. These proposed regulations on employer wellness programs need to be limited or at a minimum include additional structural safeguards to ensure that employees and families with employer sponsored coverage will be equally protected from discrimination that is prohibited in other markets. Practices that are illegal in the insurance market generally should not be legal for employers.

The employer wellness proposed regulations build on 2006 regulations that established two categories of employer wellness programs, "participatory wellness programs" and "health-

contingent wellness programs." We support expansion of participatory wellness programs that offer incentives and rewards to encourage participation in healthy activities, education sessions, smoking cessation programs, or to engage in diagnostic testing to help a person understand their current health status and improve it over time. It is important to note that the vast majority of employer wellness programs in place today are such programs according to the Kaiser Family Foundation HRET survey of employer health plans.

Our primary concern with the proposed rules relates to "health-contingent wellness programs". As proposed in the rule, such programs allow differential rewards based on health status factors including a person's cholesterol, blood pressure, weight or body mass index. Although permitted in 2006 regulations, the health insurance marketplace is significantly changing in response to a host of new insurance market rules that will take effect in 2014. Gone will be the power of insurer to charge higher premiums or provide lesser coverage because of a pre-existing condition, health status, or genetic predisposition. These new rules are structurally incompatible with open-ended "health-contingent wellness programs," regardless of built-in protections, which ironically could give rise to new discrimination and abuses in the employer market that will be eradicated in other markets starting in 2014. Already, the Genetic Information Nondiscrimination Act (GINA) bans employer and plan requests for certain health information.

In addition, creating a system that leaves the door cracked open to discrimination in 2014 would leave employees of large employers reliant on a system of federal enforcement that may lack the resources to oversee or respond to problems. Certain populations groups, including racial and ethnic minorities such as Hispanics, African Americans, and some Asian groups have a higher proportion of known genetic predisposition for certain diseases that are screened through biometric measurements such as cholesterol or blood sugar levels. "Health-contingent wellness programs" can thus unintentionally establish a higher burden for certain ethnic groups seeking health insurance through their employers. We strongly urge the Departments to significantly narrow the application of this vestige of the current broken system to complement the new insurance rules in 2014.

Because of these overarching concerns, we urge that the regulations for premium variation based on meeting certain health status factors or biometric measures for "health-contingent wellness programs" in the employer market be made to match the rules for health status variation that will be allowed in other marketplaces in 2014. The only health status premium variation specified by the ACA in 2014 in the individual and small group markets is based on tobacco use; rates can vary by 1.5 to 1 based on this factor. We also must be mindful that the ACA's mandated health coverage, including wellness programs, should not be unaffordable for workers and their families.

If the Departments choose not to narrow the application of "health-contingent wellness programs" to those aimed at reducing tobacco use, significant structural protections must be added to help minimize the potential for discriminatory results.

1. The rule requires the program to be "reasonably designed," but does not require a scientific basis. However, when new barriers are erected to access to health insurance and benefits for the individual and family based on biometric tests results, there should be an evidentiary basis to the program design. For example, if a person with a high body mass index is going to be offered a reward for health insurance, there should be some evidence behind the classification and testing protocol. There has been considerable research since 2006 documenting the types of effective and ineffective wellness programs. HHS should make available on its website these new studies.

2. The rule requires that a "reasonable alternative" be available to meet the outcome requirements of the employer wellness program. However, the rule does not specify the types of alternatives, it merely gives examples. A reasonable alternative should be based on participation – something everyone can achieve and should be available without request by a specific employee. Given that employer wellness programs are most common in large-employer settings, it is likely that alternatives would be needed and should be developed and designed with the wellness program itself.

3. The proposed rule requires the program to not be "overly burdensome" and not be "a subterfuge for discriminating" based on health factor. These critical terms are used in the proposed regulation but are not clearly defined. A "know it when you see it" standard when it comes to thousands of employers designing programs will surely lead to disparate results and arbitrary enforcement. Both these terms need clear and consistent definitions.

4. Employer wellness programs, both "health-contingent and participatory wellness programs" that allow for greater or lesser premiums or cost sharing should have strong notice and appeals rights. There should be notices when a person qualifies for the program, what the requirements are, if they have met the requirements, and the reasonable alternative options. There should also be external independent appeals permitted.

5. "Health-contingent wellness programs" should be reviewed and certified before employers can use them. These programs have the ability to change a person's premium by 30 to 50 percent. Such drastic premium increases could make it difficult for individuals and their families to access healthcare, preventive care, primary care, and emergency room care – this is contrary to the goals of the ACA. That type of discrimination will no longer be permitted in the individual and small group market. Because these "health-contingent wellness programs" could result in such discrimination in the employer market, these programs should only be allowed when they are certified as meeting all the requirements of the rule – including not being burdensome, have a reasonable alternative, having a scientific basis, and not have discriminatory results. This

would provide for an upfront check alleviating the pressure on a complaint-driven system or on notices and appeals processes.

The Affordable Care Act expands access to quality affordable healthcare to tens of millions of new people and improves and protects the healthcare Americans already have. It does so through shared responsibility by employers, individuals, and the government. Employer wellness programs can help provide the tools necessary for greater individual responsibility over one's health and improve health outcomes. When they work, they improve the health of employees and their families, create a more productive workforce, and reduce overall health spending. Unfortunately, they may also lead to undesired results such as undermining the risk pooling in group health plans, or making group coverage harder to access for older and sicker individuals. We therefore urge the Departments to implement this rule in a manner that prohibits discrimination against workers, spouses, and dependents based on health and risk status.

We thank the Departments for working hard to implement the ACA – specifically the goal to extend quality affordable health coverage to millions of Americans.

Sincerely,

Henry A. Waxman
Ranking Member
Committee on Energy and Commerce

Sander M. Levin
Ranking Member
Committee on Ways and Means

George Miller
Ranking Member
Committee on Education and the Workforce

Frank Pallone, Jr.
Ranking Member
Subcommittee on Health

Jim McDermott
Ranking Member
Subcommittee on Health

Robert E. Andrews
Ranking Member
Subcommittee on Health, Employment, Labor, and Pensions