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OF THE
UNITED STATES OF AMERICA

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June 19, 2015

Ms. Bernadette B. Wilson
Acting Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M. St, NE
Washington, D.C. 20507

**Re: RIN 3046–AB01; Notice of Proposed Rulemaking Regarding How the
Americans with Disabilities Act Relates To Employer Wellness Programs**

Dear Ms. Wilson:

The U.S. Chamber of Commerce (the “Chamber”) is pleased to provide these comments in response to the Notice of Proposed Rulemaking (the “Proposed Rule”) that the U.S. Equal Employment Opportunity Commission (“EEOC” or the “Commission”) published in the April 20, 2015 edition of the Federal Register. The Proposed Rule purports to set forth obligations and restrictions upon employers who offer wellness program incentives to their employees under the Americans With Disabilities Act (“ADA”).

The Chamber is the world’s largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber’s members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, many of the nation’s largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business – manufacturing, retailing, services, construction, wholesaling, and finance – is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber has long championed the adoption, expansion, innovation, and diversification of workplace wellness programs. For example, the Chamber – as a leader in the U.S. Workplace Wellness Alliance – was instrumental in passing accompanying resolutions in the House and Senate in 2008 recognizing the importance of workplace wellness and which designated the first week of April as “National Workplace Wellness Week.” Additionally, during the first full week of April, in commemoration of “National Workplace Wellness Week,” the Chamber hosts an annual event highlighting innovations in workplace and community wellness. Our most recent event – held on

April 7, 2015 – emphasized innovative workplace wellness programs and strategies to influence positive behavior change, among other workplace wellness-related topics. The Chamber has also issued several publications which promote workplace wellness programs, and such programs were featured in our 2013 report, “Health Care Solutions from America’s Business Community: The Path Forward for U.S. Health Reform.”

Simply put, wellness programs are both effective and popular. Indeed, we are already seeing how wellness programs provide positive benefits for both employers and employees. According to a recent study published in the preeminent journal, *Health Affairs*, authors Katherine Baicker, David Cutler, and Zurui Song calculated a return on investment of \$3.27 for medical cost savings and \$2.73 for absentee reduction for every dollar spent on wellness programs.¹

I. Overview

For more than six years, the EEOC has sent confusing signals regarding workplace wellness program incentives. In early 2009, the EEOC indicated that it would follow the HIPAA standard for determining voluntariness under the ADA.² Roughly three months later, the EEOC rescinded that letter without any explanation.³ Since then, the Commission has remained largely silent on what it views as “voluntary” workplace wellness program incentives under the ADA and GINA, while at the same time it has filed high-profile lawsuits against employers challenging such incentives. Currently, the EEOC relies on a guidance document issued in 2000, which states that a workplace wellness program is voluntary as long as an employer “neither requires participation, nor penalizes employees who do not participate.”⁴ The EEOC’s “for it before it was against it” treatment of and litigation against workplace wellness program incentives has only created more confusion for employers and employees alike.

Now, amidst significant criticism from the employer community and Congress for its recent litigious actions, EEOC has issued a regulatory proposal on workplace wellness programs.⁵ According to the Proposed Rule, “the Commission believes that it has a responsibility to interpret the ADA in a manner that reflects both the ADA’s goal of limiting employer access to medical

¹ See *Workplace Wellness Programs Can Generate Savings*, available at <http://content.healthaffairs.org/content/29/2/304.full.pdf+html>.

² See January 6, 2009 letter, “ADA: Disability Related Inquiries and Medical Exams/Mandatory Clinical Health Risk Assessment” available at <http://pdfserver.amlaw.com/cc/WellnessEEOC2009.pdf>.

³ See March 2, 2009 letter, “ADA: Disability-Related Inquiries and Medical Examinations; Health Risk Assessment” available at http://www.eeoc.gov/eeoc/foia/letters/2009/ada_disability_medexam_healthrisk.html (last visited March 16, 2015).

⁴ U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* at Q. 22 (last visited March 16, 2015).

⁵ On January 29, 2015, the Senate Committee on Health Labor and Pensions held a hearing entitled, “Employer Wellness Programs: Better Health Outcomes and Lower Costs,” and on March 24, 2015, the House Subcommittee on Workforce Protections held a legislative hearing on, among other bills, H.R. 1189, “Preserving Employee Wellness Programs Act.”

information and HIPAA's and the [ACA]'s provisions promoting wellness programs." These goals do not conflict with the underlying statutory authority of the ACA and are consistent with previously unified federal policy supporting these programs, as recently articulated by the June 3, 2013 Final Rules issued by the Departments of Treasury, Labor and Health and Human Services ("Tri-Agency Regulations").⁶ However, several provisions within this Proposed Rule do not achieve these stated goals and will instead significantly hinder the promotion and successes of workplace wellness programs.

As set forth in detail below, the Chamber believes that the EEOC's approach to restricting workplace wellness program incentives is fundamentally flawed. The Proposed Rule, if promulgated, will discourage employers from instituting or sponsoring workplace wellness programs – a tool authorized by Congress in amending the Health Insurance Portability and Accountability Act ("HIPAA") through the Patient Protection and Affordable Care Act ("ACA") – to improve employees' health and lower employees' health care costs. With this Proposed Rule, the EEOC not only exceeds its jurisdiction and authority under the ADA, but the Commission also contradicts both the text of the ACA and the Tri-Agency Regulations.

In addition, the Proposed Rule disregards a longstanding statutory safe harbor provision, adopts an unprecedented position limiting the incentives available to employees and their families, and potentially unlawfully imposes an unrelated "affordability" requirement onto the ADA. The EEOC's choice to take a piecemeal approach in promulgating rules regarding the possible application of ADA, GINA, Title VII and ADEA to elements of workplace wellness programs yields an unworkable regulatory scheme. Not only does this type of segmented approach fail to address wellness programs incentives in a holistic manner, it also prolongs the confusion for employers as to what compliance requires. Accordingly, the Chamber requests that this rulemaking be held in abeyance until the GINA notice of proposed rulemaking ("GINA NPRM") is issued, followed by a re-opening of the comment period for both proposals that runs for 90 days after the issuance of the GINA NPRM.⁷

The EEOC's jurisdiction over this issue is restricted to its statutory mandates under the ADA and GINA. Specific to the ADA, the EEOC's jurisdiction only covers inquiries and disclosures of medical information to employers. Otherwise, the EEOC does not have the statutory authority – nor the health care expertise – to implement various provisions of this Proposed Rule. The authority to establish health care policy belongs to Congress and the agencies designated by the underlying statutes. We strongly contest the EEOC's attempt to simply disregard the statutory framework and assert authority where it has none.

⁶ 78 Fed. Reg. 33158 (June 3, 2013).

⁷ Notably, at her Senate testimony on May 19, 2015, Chair Yang indicated that the EEOC expected to release the GINA NPRM in July 2015. Certainly, delaying this rulemaking for another couple of months to allow the regulated community the opportunity to comment on a more comprehensive regulatory scheme addressing wellness program incentives holistically should not raise concerns for the EEOC, given its extensive delay.

The Proposed Rule will have a chilling effect on the development and implementation of innovative workplace wellness programs, contrary to the intent of Congress, the text of the ACA, the Tri-Agency Regulations, the ADA, and the Administration's stated position. While the ACA strengthens and promotes employer-sponsored wellness programs, this Proposed Rule weakens them and impermissibly allows the EEOC's interpretation of the ADA to override the lawfulness of legitimate programs and dismiss statutory language enacted by Congress and promulgated by Cabinet-level agencies.

With health care costs continuing to rise, along with rates for obesity and other chronic diseases, workplace wellness programs have served as a meaningful mechanism to encourage and reward positive behavior and healthy life choices. Congress was clear in the ACA. The Administration was clear in the Tri-Agency Regulations promulgated to implement that law. And the White House has again reiterated its support for these programs.⁸ But apparently these endorsements are not enough for the EEOC. Whether through litigation not authorized by the Commission or through the Proposed Rule, the EEOC continues to send a confusing message to employers: reliance on the text of the ACA or the Tri-Agency Regulations does not insulate employers from potentially massive investigations and litigation for offering ACA-compliant wellness programs that provide monetary rewards. This is not appropriate and the result is untenable. Accordingly, we insist that any final rule adopted by the EEOC relating to workplace wellness programs be harmonized with the existing federal standards under ACA, HIPAA and the Tri-Agency Regulations.

II. Several Provisions of the Proposed Rule are Outside the Scope of the EEOC's Limited Jurisdiction and Rulemaking Power

The "exercise of regulatory authority by agencies must be rooted in a grant of such power by the Congress." See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). Congress authorized the EEOC to promulgate substantive regulations under the ADA.⁹ Under the ADA, medical examinations and/or inquiries (including biometric screening) are not permitted unless such inquiries are voluntary.¹⁰ Specifically, the ADA provides:

A covered entity may conduct *voluntary medical examinations*, including *voluntary medical histories*, which are part of an employee

⁸ At a White House press briefing on December 3, 2014, Press Secretary Josh Earnest stated that, with regard to the Honeywell case, "as a general matter, . . . the administration, and particularly the White House, is concerned that this... could be inconsistent with what we know about wellness programs and the fact that we know that wellness programs are good for both employers and employees." See <http://www.whitehouse.gov/the-press-office/2014/12/03/press-briefing-press-secretary-josh-earnest-1232014>.

⁹ 42 U.S.C. § 12116. Congress only granted the EEOC the authority to promulgate procedural regulations, and did not grant it authority to promulgate substantive regulations under Title VII. 42 U.S.C. § 2000e-12(a).

¹⁰ 42 U.S.C. § 12112(d)(4).

health program available to employees at that work site.¹¹ (emphasis added.)

The ADA does not define the term “voluntary.”¹² The sole issue for the EEOC to address under the ADA in this instance is limited: do certain incentives permitted by the ACA and HIPAA, which are tied to a medical examination or inquiry, violate the ADA’s requirement that such medical examinations or inquiries be voluntary? Instead of limiting its analysis to that isolated question, EEOC attempts to regulate several components of workplace wellness programs that go well beyond EEOC’s mandate and jurisdiction. As described more fully below, the EEOC should limit any final regulation to issues within its authority.

A. The Proposed Rule That States An “Employee Health Program” Must Be “Voluntary” Misreads The ADA

The Proposed Rule confuses the ADA’s statutory text and attempts to shift the proper analysis for whether a medical examination is voluntary to whether an employee health program that includes medical examinations is voluntary. That position misstates the ADA, and as described above, the EEOC has no authority to redraft the statute in such a manner.

The Proposed Rule’s Preamble provides:

[B]ased on the language of the ADA, that *employee health programs* that include disability-related inquiries or medical examinations (including inquiries or medical examinations that are part of a HRA or medical history) *must be voluntary* and clarifies the application of that rule in light of the amendments made to HIPAA by the Affordable Care Act.¹³ (emphasis added.)

To illustrate that this confusion was not a drafting error, the Proposed Rule throughout the Preamble, proposed regulatory text and interpretive guidance, repeatedly states the EEOC’s position that an employee health program must be voluntary. Specifically, Section 1614(d)(2) provides:

An employee health program that includes disability-related inquiries or medical examinations (including disability-related inquiries or medical examinations that are part of a health risk assessment) is voluntary as long as...¹⁴

¹¹ 42 U.S.C. § 12112(d)(4)(B).

¹² Nor does GINA.

¹³ Proposed Rule, 80 Fed. Reg. at 21,663.

¹⁴ Proposed Rule, 80 Fed. Reg. at 21,667.

In the Proposed Rule, “voluntary” modifies “employee health programs” while in the ADA, “voluntary” modifies “medical examinations.” Indeed, the concept of a “voluntary employee health program” is nowhere to be found in the ADA’s statutory language. Simply put, the concept is wholly distinct from the ADA’s statutory language. Similarly, the term “voluntary wellness program” is not contained in GINA, either.¹⁵ This overreach is emblematic of the Proposed Rule as a whole; as EEOC proceeds through the rulemaking process it must limit itself to the narrow inquiry of whether a medical exam or inquiry is indeed voluntary.

B. The EEOC Has No Authority to Examine Whether A Wellness Program Is “Reasonably Designed”

The Proposed Rule defines a previously undefined term – “employee health program” – while importing certain requirements related to health-contingent wellness program contained in the ACA and the Tri-Agency Regulations promulgated by agencies that actually have the authority and expertise necessary to interpret such a term. Yet, even the proposed definition strays from the requirements adopted by the ACA and the Tri-Agency Regulations. Under the ACA, a wellness program is a “program of health promotion or disease prevention.”¹⁶ Per the ACA and HIPAA, only a health-contingent wellness program must be “reasonably designed,” which means:

The program has a reasonable chance of improving the health of, or preventing disease in, participating individuals and it is not overly burdensome, is not subterfuge for discriminating based on a health status factor, and is not highly suspect in the method chosen to promote health or prevent disease.¹⁷

Conversely, Section 1630.14(d)(1) of the Proposed Rule provides the following:

Employee health program. An employee health program, including any disability-related inquiries or medical examinations that are part of such program, must be reasonably designed to promote health or

¹⁵ 42 U.S.C. § 2000ff-1(b)(2)(B). Under GINA, an employer may collect genetic information as part of a wellness plan where the employee provides prior, knowing, voluntary, and written authorization, among other requirements. Regardless, the EEOC steadfastly refused to address GINA specifically in the Proposed Rule. See Proposed Rule at Footnote 3.

¹⁶ 42 U.S.C. § 300gg-4(j)(1)(A). See also 26 C.F.R. § 54.9802-1(f) ; 29 C.F.R. § 2590.702(f); 45 C.F.R. § 146.121(f)(2). Participatory wellness programs are those programs where none of the conditions for obtaining a premium discount or rebate or other reward are based on an individual satisfying a standard that is related to a health status factor. 42 U.S.C. § 300gg-4(j)(2). See also 26 C.F.R. § 54.9802-1(f) (1)(ii); 29 C.F.R. § 2590.702(f)(1); 45 C.F.R. § 146.121(f)(1). A health-contingent wellness program is one that conditions a premium discount, rebate or reward on an individual satisfying a standard that is related to a health status factor. 42 U.S.C. § 300gg-4(j)(3). See also 26 C.F.R. § 54.9802-1(f) (1)(iii); 29 C.F.R. § 2590.702(f)(2); 45 C.F.R. § 146.121(f)(2).

¹⁷ 42 U.S.C. § 300gg-4(j)(3)(B). See also 26 C.F.R. § 54.9802-1(f) (3)(iii); 29 C.F.R. § 2590.702(f)(2)(ii); 45 C.F.R. § 146.121(f)(2)(ii).

prevent disease. A program satisfies this standard if it has a reasonable chance of improving the health of, or preventing disease in, participating employees, and it is not overly burdensome, is not a subterfuge for **violating the ADA or other laws prohibiting employment discrimination**, and is not highly suspect in the method chosen to promote health or prevent disease.¹⁸ (emphasis added.)

There are multiple concerns with this approach. First, this regulatory sleight of hand appears to be an effort to actually define “wellness programs,” a term that is not present in the ADA. Congress and the Administration have already defined the term in the ACA and the Tri-Agency Regulations, respectively. Now, the EEOC proposes to adopt a new definition, which it concedes is only “similar.” Introducing a “similar” definition means that the EEOC intends to adopt a *different* standard than the one adopted by Congress in the ACA or the Departments of Labor, Treasury and HHS in the Tri-Agency Regulations. Adopting a new definition will cause unnecessary confusion for employers, and is inconsistent with standards promulgated by the Agencies which have clear jurisdiction and expertise on health care policy. Moreover, although the EEOC knows a lot about federal anti-discrimination laws, the EEOC cannot possibly know whether or when a wellness program is “reasonably designed.” Such a question is simply beyond the expertise of the Commission. Therefore, the EEOC must restrict itself to adopting the statutory and Tri-Agency definition, not synthesizing and restating it with different terms.

Second, by importing the “reasonable design” requirement for “health-contingent wellness program” to define “employee health program,” the Proposed Rule imputes the burdens previously associated only with health-contingent wellness programs to *all* “employee health programs,” which exceeds what is required under the ACA and the Tri-Agency Regulations. Under the Proposed Rule, even participatory wellness programs would have to be reasonably designed, and the entity that would determine whether any particular wellness program was “reasonably designed” would be the EEOC. For example, would an employer offering a gym membership reimbursement (an archetypal participatory wellness program) be “reasonably designed” to promote health or prevent disease? What would the EEOC’s analysis be for such a wellness program? The EEOC could argue that it may not be “reasonably designed” because an individual must actually use a gym membership to promote health and prevent disease.

The EEOC simply does not have the statutory authority or the health care expertise to determine whether a wellness program is “reasonably designed” or to overrule the ACA or the Tri-Agency Regulations on the matter. The EEOC’s only jurisdiction is whether a medical inquiry is voluntary, not wellness program design. Any final rule should recognize that limitation.

Finally, by including “or other laws prohibiting employment discrimination” in the proposed definition, it appears as if the Proposed Rule attempts to promulgate a regulation that encompasses

¹⁸ Proposed Rule, 80 Fed. Reg. at 21,667.

statutes, such as Title VII, where the EEOC lacks authority to issue regulations.¹⁹ Indeed, it seems to indicate that if an employee health program discriminates under Title VII, then any related inquiries would not be voluntary under the ADA. That type of circular analysis appears to be a bold and impermissible attempt to regulate under Title VII.

The EEOC should merely state the obvious – that any wellness program meeting the requirements of the ACA and HIPAA are “employee health programs” under the ADA, and that medical examinations, including medical histories, which are part of it, must be voluntary.

C. The EEOC’s Treatment of the ADA Safe Harbor

Congress included a safe harbor provision in the ADA related to bona fide benefit plans. Specifically, the ADA provides, in relevant part:

(c) Insurance. – Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict...

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law[.]²⁰

Despite this mandate, the Proposed Rule’s Preamble appears to eliminate this clear statutory provision. The Preamble provides that “[a]ccordingly, the Commission concludes that allowing certain incentives related to wellness programs, while limiting them to prevent economic coercion that could render provision of medical information involuntary, is the best way to effectuate the purposes of the wellness provisions of [the ADA and HIPAA],”²¹ and the EEOC rejects the decision of the only Court of Appeals to address this issue. The EEOC declares:

The Commission does not believe that the ADA’s “safe harbor” provision applicable to insurance, as interpreted by the court in *Seff v. Broward County*, 778 F. Supp. 2d 1370 (S.D. Fla. 2011), affirmed, 691 F.3d 1221 (11th Cir. 2012), is the proper basis for finding wellness program incentives permissible. The ADA contains a clear “safe harbor” for wellness programs – the “voluntary” provision at 42 U.S.C. 12112(d)(4)(B). *See* H.R. Rep. 101–485, pt. 2, at 51 (“A growing number of employers today are offering voluntary wellness programs in the workplace. These programs often include medical

¹⁹ *See* 42 U.S.C. § 2000e-12(a), granting the EEOC authority only to issue procedural regulations related to Title VII.

²⁰ 42 U.S.C. § 12201(c).

²¹ Proposed Rule, 80 Fed. Reg. at 21,662.

screening for high blood pressure, weight control, cancer detection, and the like. As long as the programs are voluntary and the medical records are maintained in a confidential manner and not used for the purpose of limiting health insurance eligibility or of preventing occupational advancement, these activities would fall within the purview of accepted activities.”). Reading the insurance safe harbor as exempting these programs from coverage would render the “voluntary” provision superfluous.²²

In accordance with *Chrysler Corp.*, Congress did not grant authority to the EEOC to issue regulations interpreting the ADA’s safe harbor. Indeed, Congress only granted the EEOC authority to interpret Title I of the ADA. *See* 42 U.S.C. § 12116 (“[T]he Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of Title 5 [the Administrative Procedure Act]”); 42 U.S.C. § 12205a (granting the EEOC authority to issue regulations implementing the changes to the definition of disability under the ADA Amendments Act of 2008). The ADA safe harbor provision is not contained within Title I of the ADA; rather, it is found in Title V of the ADA. Therefore, the EEOC’s attempt to issue a regulation – surreptitiously in the form of a Preamble footnote – which rejects the application of the ADA safe harbor provision vis-à-vis wellness program incentives exceeds its statutory authority. Indeed, the safe harbor provision must mean something, and nothing gives the EEOC the prerogative to disregard it. Simply put, the EEOC has no authority to issue such a regulatory provision disregarding a statutory provision, and it should be stricken from any final rule.

Even if EEOC did have rulemaking authority under Title V, it must be noted that federal agencies lack the power or authority to erase provisions of laws that it finds inconvenient. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 125 (2000) (“Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’”)(internal citations omitted). Such is the case with the Proposed Rule’s treatment of Section 501(c) of the ADA. The Proposed Rule definitively rejects the notion that any wellness plan could ever be part of a bona fide benefit plan. In other words, the Proposed Rule rejects the premise that a wellness plan can be structured to fall within the safe harbor established by the ADA if based on underwriting, classifying and administering risks. Yet, the Proposed Rule only applies to wellness program incentives offered as part of a group health plan.²³

The fact is, some wellness plans fall within the safe harbor, and some do not. For example, a wellness program could be designed to reflect different cost structures depending on how many employees and/or spouses participate in the wellness program. Indeed, a health insurance company could charge an employer \$8,000 for an employee-only plan if 80% of the employees participate,

²² *Id.*

²³ Proposed Rule Section 1630.14(d)(3), discussed *infra* Part IV.B.

but \$10,000 if only 50% of the employees participate. Clearly, this determination would be based on “underwriting, classifying and administering risks” and therefore, fall within the ADA safe harbor.

Ultimately, many wellness programs, depending on their design and how they are incorporated into an employer’s group health plan, may fall into the statutory safe harbor. While the EEOC may disagree with the 11th Circuit’s decision in *Seff*, it has gone beyond its disagreement with the *Seff* decision and has unilaterally, and without any authority, written the safe harbor out of the statute regardless of the wellness program’s design. The regulatory process does not afford an opportunity for such statutory revision.

D. Gateway Plans Are Permissible Under HIPAA, Yet Proposed Rule Section 1630.14(d)(2)(ii) Prohibits Them

Under the ACA and HIPAA, an employer may offer many different benefit options, including one or more options which are available only to those employees who choose to participate in a wellness program. This common construct is referred to as a “gateway plan.” Indeed, such a plan design would be considered nondiscriminatory under HIPAA, as amended by the ACA, and the Tri-Agency Regulations, if it was offered to all similarly situated employees.

However, Proposed Section 1630.14(d)(2)(ii) would prohibit this common plan design. As noted above, the EEOC’s jurisdiction in this area is precisely limited to what makes a medical examination or inquiry “voluntary.” In essence, the sole concern for the EEOC is the disclosure of medical information to employers. Otherwise, the EEOC does not have the jurisdiction to opine on different types of insurance plan designs that are permissible under other statutes. Thus, the EEOC cannot, through this regulation, limit health benefit design and implementation when other agencies with the authority and expertise have determined otherwise.

Like many other aspects of the Proposed Rule, this draft provision simply does not reflect an understanding of benefit plan design or implementation and would have serious, even if unintentional, adverse effects on today’s employer sponsored offerings.

E. The EEOC’s Potential Treatment of “Affordability”

The EEOC requested written comments on various topics, including the following inquiry regarding affordability. Specifically, the Proposed Rule asks in Question 1(b):

Whether to be considered “voluntary” under the ADA, the incentives provided in a wellness program that asks employees to respond to disability-related inquiries and/or undergo medical examinations may not be so large as to render health insurance coverage unaffordable under the Affordable Care Act and therefore in effect coercive for an employee... Where such incentives would render *a plan* unaffordable for an individual, it would be deemed coercive and involuntary to

require that individual to answer disability-related inquiries and/or submit to medical examinations connected with the wellness program at issue. (emphasis added).

Posing such a question suggests that the Commission is considering importing the concept of an affordability cap on wellness program incentives from the ACA's separate and distinct shared responsibility provision. This would greatly increase an employer's burden in providing a wellness program to its employees. The EEOC – an agency focused on employment discrimination – simply does not have the expertise to carefully consider and adopt regulations that would greatly expand an employer's health coverage-related burdens in providing incentives to its employees through a wellness program.

The ACA is an enormously complicated law. In general, it requires applicable large employers²⁴ to be subject to a payment if any full-time employee is certified to receive an applicable premium tax credit or cost-sharing reduction and either (1) the employer does not offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer sponsored plan²⁵ or (2) the employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage that either is unaffordable²⁶ or does not provide minimum value.²⁷

In short, the ACA only requires an employer to offer employees the opportunity to enroll in a plan that meets the statute's affordability and minimum value requirements or be subject to a tax penalty. The employer may choose which avenue to pursue, either offer the qualifying plan or pay the tax penalty for not offering a qualifying plan. The ACA does not require employers to provide health insurance.

In addition, the ACA does not prohibit employers from offering more substantial health plans to employees that *do not meet* the affordability requirements. As long as an employer offers at least one affordable minimum value plan, it will not be subject to the tax penalty. Critically, it is up to the *employee* whether to enroll in the plan that merely satisfies the minimum value and affordability requirements or a plan that is more comprehensive and expensive or to obtain health

²⁴ The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year. 26 U.S.C. § 4980H(c)(2).

²⁵ 26 U.S.C. § 4980H(a)(1).

²⁶ 26 U.S.C. § 36(B)(c)(2)(C)(i). To be considered affordable, the employee's required contribution with respect to the plan cannot exceed 9.5 percent of the applicable taxpayer's household income. *Id.* Because employers generally will not know their employees' household incomes, employers can take advantage of one or more of the three affordability safe harbors set forth in the final regulations that are based on information the employer will have available. The three affordability safe harbors - (1) the Form W-2 wages safe harbor, (2) the rate of pay safe harbor, and (3) the federal poverty line safe harbor. 26 C.F.R. § 54.4980H-5(e)(2). If an employer meets the requirements of any of these safe harbors, the offer of coverage will be deemed affordable.

²⁷ 26 U.S.C. § 36(B)(c)(2)(C)(ii).

insurance by other means. Regardless, an employer meets the ACA affordability requirements by offering *one* such affordable, minimum value plan.

Importing the ACA's affordability cap into the ADA's voluntariness inquiry would greatly expand the requirements of the ACA, where only *one* plan must be affordable. Based on the Proposed Rule's question about affordability, it appears as if the EEOC is considering a requirement that *all* plans offered by an employer must meet the ACA's affordability standard. The Chamber's concern is best illustrated by an example. Employee A earns \$75,000 from her employer, and enrolls in a minimum value plan with a \$10,000 premium, to which her employer pays 50% or \$5,000. If she chooses not to participate in a health-contingent wellness program, the employer assesses a \$1,200 surcharge, in which case she would be responsible for \$6,200 for insurance coverage. The surcharge represents 12% of the total cost of coverage (\$1,200 / \$10,000). For ACA purposes, the cost of insurance for Employee A would be 8.27% percent of her household income (\$6,200 / \$75,000) under the Form W-2 Wages safe harbor. Under this hypothetical, the employer has complied with the ACA, therefore, the incentive would be considered voluntary for purposes of the ADA (under both the 30% rule and a potential affordability requirement).

Conversely, Employee B, who has the same position and earns an equal amount as Employee A, chooses to enroll in a more expensive plan instead of the more modest plan described above. This more comprehensive plan costs \$13,000, again, split evenly with the employer. Failure to participate in a health-contingent wellness program results in a surcharge of \$2,500 to Employee B. Under this scenario, the surcharge represents 19.2% of the total cost of coverage (\$2,500 / \$13,000). For ACA purposes, the cost of insurance would be 12% of her household income (\$9,000 / \$75,000). Here, the employer has still complied with the ACA, as it offered the affordable minimum value plan with a \$10,000 premium. But, if the EEOC determines in a final regulation that all plans must be deemed affordable under the ACA, the wellness program surcharge would render the more comprehensive plan "unaffordable" under the ACA, and therefore, likely not voluntary under the ADA.

In addition, based on the question 1(b) of the Proposed Rule, it appears that the EEOC would require employers to analyze whether the workplace wellness program's incentives offered in conjunction with *every* health insurance plan (minimum value and more comprehensive health coverage options) render the incentives involuntary for *every* employee. The ACA and ADA do not require such an individualized analysis of every permutation of the above hypothetical. In theory, under such an analysis, the same wellness program could be voluntary for some employees and involuntary for others regardless of whether the employer offered an affordable ACA plan that the employee chose not to enroll in.

The overarching concern for the regulated community is a lack of clarity and certainty of the Proposed Rule. Adopting such a measure is far beyond the intent of the affordability cap contained in the ACA, would cause significant uncertainty for the regulated community, and may cause employers to either forego wellness programs or cease offering more robust health plans. Simply put, adopting a standard that would determine ADA compliance through the prism of the ACA's

“affordability” component is fraught with peril, and clearly against the intent of Congress or the Administration. It would further realistically reduce program offerings and participation. Given that the EEOC has failed to provide specific regulatory language on such a proposal, it is difficult to comment on every possible reason why adopting such a standard would be unwise. But, if the EEOC’s stated goal of limiting employer access to medical data while simultaneously promoting wellness programs is true, adopting an affordability metric would counter that goal.

F. The Multiple References to Other Laws

The Proposed Rule is entitled “Amendments to Regulations Under the Americans with Disabilities Act.”²⁸ In multiple places throughout the Preamble, and then in Section 1630.14(d)(7), the EEOC states and restates that compliance with the Proposed Rule “does not relieve a covered entity from the obligation to comply in all respects with the nondiscrimination provisions of Title VII, the EPA, the ADEA, and GINA.”²⁹

The statement is manifestly obvious, and yet totally unnecessary. It merely heightens the concern that the EEOC will use these other laws to show that incentives offered through wellness programs violate other statutes within the EEOC’s jurisdiction. It is clear that offering incentives to females and not males, or to Hispanics and not African-Americans, or to employees under 40 but not over 40, would clearly violate the employment nondiscrimination laws. It is so clear, that it need not be said in regulations. Indeed, agencies issuing authorized regulations have an obligation not to cavalierly implicate other laws or requirements. Of greater concern, however, is the EEOC’s focus on systemic and disparate impact litigation. Repetitively including this concept indicates that the EEOC will use the other laws within its purview to continue to investigate and litigate claims involving wellness program incentives under the disparate impact theory. It simply does not have the authority to do so. To reiterate, the more uncertainty introduced by the EEOC will cause employers to limit the availability of wellness programs and negatively impact health care policy and implementation.

Notably, the Proposed Rule also “seeks comment on whether additional protections for low income employees are needed.”³⁰ Of course, “income” is not a disability under the ADA – the statute which grants the authority upon which the EEOC relies in pursuing this rulemaking. Nor is it a protected characteristic under the other federal employment nondiscrimination laws. Yet, it appears as if the EEOC is considering using income as a proxy for other protected bases. This is misguided and inappropriate given EEOC’s limited authority to regulate workplace wellness programs.

Ultimately, a workplace wellness program incentive is earned by participating in the program or by reaching certain outcomes. It requires that the individual *choose* to do something –

²⁸ Proposed Rule, 80 Fed. Reg. at 21,659.

²⁹ Proposed Rule, 80 Fed. Reg. at 21,660 and 21,667.

³⁰ Proposed Rule, 80 Fed. Reg. at 21,662.

whether it is filling out a health risk assessment, exercising, or meeting a certain health-related outcome. But where employees *choose* to do nothing, for whatever reason, should an employer have to provide the incentive regardless of the employee's participation (or not offer incentives to those that do participate) or be subjected to a lengthy investigation based upon a speculative theory of discrimination?

Adopting such a standard would encourage this type of claim or investigation, would counter the EEOC's goal of providing clarity of promoting wellness, and undercut the certainty that the regulated community has sought in the six years that the EEOC has remained silent on wellness program incentives.

G. This Proposed Rule Impermissibly Imposes the HIPAA Privacy Rule onto all ADA-Covered Employers

Both the ADA and current regulations require that disability-related medical information be kept in a separate medical file - apart from personnel records - and that access be limited to those who need to know. Section 1630.14(d)(6) of the Proposed Rule would add new restrictions regarding medical information obtained in connection with wellness programs for all ADA covered entities (i.e., those with 15 or more employees). Specifically, it provides that:

Except as permitted under paragraph (d)(4) and as is necessary to administer the health plan, information obtained under paragraph (d) of this section regarding the medical information or history of any individual may only be provided to an ADA covered entity in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of any employee.

The HIPAA Privacy Rule governs the use and disclosure of protected health information ("PHI") by covered entities and the rights of individuals on how their PHI is used. It applies to most health plans, healthcare clearinghouses and health care providers that transmit PHI in electronic form.³¹ Indeed, most employers are not HIPAA-covered entities in and of themselves. However, if an employer was a HIPAA-covered entity, then medical information gained through a wellness program would be subject to the HIPAA Privacy Rule.

The Proposed Rule would require all ADA-covered employers that offer wellness programs to establish that it either received PHI (i) for administration purposes or (ii) in aggregate form. The Proposed Rule empowers the EEOC to render its judgment on whether such requirements are met. Under HIPAA, where an employer is a plan sponsor administering certain aspects of a group health plan, in the absence of written authorization from the individual, the plan sponsor employer must certify to the group health plan that it agrees to, among other things, (i) establish adequate separation between employees who perform administration functions and those who do not; (ii) not

³¹ However, a group health plan with less than 50 participants is not subject to the HIPAA Privacy Rule. 45 C.F.R. § 160.103.

use PHI for employment-related purposes; (iii) ensure that a firewall and/or other security measures separate administration and employment functions; and (iv) report any unauthorized use or disclosure to the group health plan. These administrative measures are not required by the ADA or its implementing regulations.

In practice, for (typically smaller) employers whose health plans are fully insured, the Proposed Rule imposes a new set of compliance requirements. For these employers, wellness programs may be offered through their health insurance carrier or a third party vendor. In that context, responsibility for complying with the HIPAA Privacy Rule rests with the carrier or vendor. However, the EEOC's Proposed Rule would make the employer responsible for ensuring compliance, which conflicts with HIPAA.

Such a rule would extend these HIPAA requirements applicable to group health plans with 50 or more participants to all employers with over 15 employees that offer wellness programs. It strains credulity to suggest that Section 1630.14(d)(6) is in any way related to whether medical examinations or inquiries are "voluntary." The EEOC has no jurisdiction to impose such requirements and no expertise to determine whether such requirements are met. Instead, HIPAA is the sole jurisdiction of HHS and the EEOC should not cavalierly insert additional requirements from other statutes to serve its questionable pursuits.

H. Concern for Small Businesses

As noted above, the ACA's employer shared responsibility requirement applies to "applicable large employers," i.e., those with over 50 full-time equivalent employees. However, the ADA applies to employers with 15 or more employees. If promulgated as written, small employers will be required to analyze their wellness programs under the rubric of the ACA's shared responsibility provision, including any affordability measure that the EEOC may include. Grafting on a potential individualized analysis of how affordability impacts voluntariness for every employee under every plan would require a great deal of expertise, knowledge and training, none of which is reflected in the Proposed Rule.

The Proposed Rule quantifies only the potential cost of creating a notice required by Section 1630.14(d)(2)(iv). The EEOC indicates that some employers may need up to four hours to develop the required notice.³² However, the EEOC does not attempt to quantify the time that smaller employers not covered by the ACA or HIPAA will spend analyzing their wellness program provisions to otherwise ensure compliance with these Proposed Rules, including the confidentiality requirements. Every small employer with between 15 and 49 full-time employees will have to comply with provisions of a law that do not apply to it. That burden will only grow if the EEOC

³² Proposed Rule, 80 Fed. Reg. at 21,665.

imports any affordability standard into such employer's decision making process, as discussed *supra* Section II.E.³³

III. The 30% Maximum Allowable Incentive Contained in the Proposed Rule Conflicts with the ACA and the Tri-Agency Regulations

Section 1630.14(d)(3) of the Proposed Rule provides that the maximum allowable incentive to be deemed voluntary for a wellness program, either participatory or health-contingent, cannot exceed "30 percent of the total cost of employee-only coverage."³⁴ Accounting solely for employee-only coverage, adopting a hard percentage cap for incentive levels and limiting the incentives for smoking cessation programs that require an employee to undergo a medical examination for nicotine are all inconsistent with the overarching goals of the ACA's wellness provision to improve health. These limits will discourage employers from designing and implementing wellness programs. For the reasons set forth below, this provision should be revised.

A. Calculating the Permissible Incentive Relative to Employee-Only Coverage Conflicts with the ACA and Tri-Agency Regulations

The Proposed Rule limits permissible incentives to 30 percent of the total cost of employee-only coverage for all wellness programs - participatory or health-contingent. That limitation, however, conflicts with the level of permissible incentives under HIPAA, as amended by the ACA. First, for participatory wellness programs, no incentive limit exists.³⁵ For health-contingent wellness programs, HIPAA provides:

If, in addition to employees or individuals, any class of dependents (such as spouses or spouses and dependent children) may participate fully in the wellness program, such reward shall not exceed **30 percent of the cost of the coverage in which an employee or individual and any dependents are enrolled.**³⁶ (emphasis added.)

Adopting these limitations will lead to confusing results for employers who wish to implement, and employees with families who choose to participate in, wellness programs under the ADA and HIPAA. Indeed, the Proposed Rule will adversely impact those employees who either enroll in (i) participatory wellness programs or (ii) plus-one or family coverage.

Under HIPAA, basic arithmetic requires that as the cost of the plan chosen by the employee increases, so do the permissible incentive levels. Under the Proposed Rule, incentive levels would not increase based on the plan chosen by the employee. For example, an employee who enrolled in

³³ An analysis of the economic burden of the Proposed Rule is set forth in greater detail in Part VI.

³⁴ Proposed Rule, 80 Fed. Reg. at 21,667.

³⁵ 42 U.S.C. 300gg-4(j)(2).

³⁶ 42 U.S.C. 300gg-4(j)(3)(A).

an employee-only minimum value plan that costs \$8,000 would be entitled to a \$2,400 incentive under both the ADA and HIPAA. If that employee chose a minimum value “employee plus-one” plan that costs \$14,000, the maximum incentive under HIPAA would increase to \$4,200, but remain \$2,400 under the EEOC’s interpretation of the ADA. Finally, assuming that the employee enrolls in a minimum value family plan that costs \$20,000, the maximum incentive under HIPAA would increase to \$6,000, but remain \$2,400 under the ADA. Ultimately, such a requirement would mean that for family coverage, the incentive level under the ADA would be 60% less than a permissible HIPAA incentive. That drastic reduction in permissible incentives runs contrary to the Commission’s belief that the Proposed Regulation interprets the ADA in a manner that reflects “both the ADA’s goal of limiting employer access to medical information and HIPAA’s and the [ACA]’s provisions promoting wellness programs.”³⁷

It is also common for employers to offer more than one plan within each subgroup. For example, an employer could offer a minimum value plan, and several more comprehensive coverage options for employee-only, plus one and family coverage. Employees will choose whichever plan most fits his or her needs. If one employee chooses the minimum value plan with family coverage that costs \$20,000 (as above), the permissible ADA incentive would be \$2,400. But, a second employee could choose the most comprehensive coverage option for employee-only coverage which costs \$20,000, and the permissible ADA incentive would be \$6,000. It hardly seems fair that the EEOC would limit the available incentives to the employee who chooses the minimum value family plan to \$2,400, where the incentive for the single employee who chooses the most comprehensive plan may be \$6,000 and still be deemed voluntary.

Finally, one must recognize that in the vast majority of wellness programs that offer incentives to spouses and dependents, for practical purposes, the incentive runs through the employee, as no direct relationship between the employer and an employee’s spouse or dependents exists. In certain instances, spouses or dependents may choose not to participate in an employer-sponsored wellness program. If the employer penalizes the employee for spousal nonparticipation, and that penalty exceeds 30% of employee-only coverage, under the Proposed Rule, that would appear to make the incentive non-voluntary based on the spouse’s choice not to participate. But, if the extent of the EEOC’s analysis is whether participation by the employee is voluntary, then such a structure would more likely be permissible where the calculation of a permissible incentive is based on the plan that the employee is enrolled in.

These examples demonstrate why addressing wellness program incentives on a piecemeal basis is improper, and that any permissible incentive calculation should be based on the total cost of coverage of the plan chosen by the employee, rather than limited to the cost of employee-only coverage. Congress made that determination in amending HIPAA through the ACA. Calculating whether an inquiry is voluntary under the ADA based upon the cost of a plan that the employee is not enrolled in is misguided and could lead to absurd results. The EEOC should modify any final

³⁷ Proposed Rule, 80 Fed. Reg. at 21,662.

rule to base the incentive calculation on the total cost of the plan chosen by that employee, as contemplated by the ACA and HIPAA.

B. Restricting Incentives to 30% is Contrary to the ACA and Tri-Agency Regulations

As noted above, the ACA and the Tri-Agency Regulations do not limit incentives for participatory wellness programs. In establishing an incentive limit only for health-contingent wellness programs, while the ACA identified 30% of the cost of coverage as the permissible reward limit to comply with HIPAA's nondiscrimination provisions, Congress granted authority to the Secretaries to increase that limit up to 50% of the cost of coverage. Specifically, the ACA provided as follows:

The Secretaries of Labor, Health and Human Services, and the Treasury may increase the reward available under this subparagraph to up to 50% of the cost of coverage if the Secretaries determine that such an increase is appropriate.³⁸

In fact, that is exactly what the Secretaries did in promulgating the Tri-Agency Regulations. Not only did the Tri-Agency Regulations adopt the 30% baseline limit for incentives related to health-contingent wellness programs, but the Secretaries *actually increased* the permissible reward to 50% for smoking cessation programs based on the flexibility granted to them by Congress. Specifically, the Tri-Agency Regulations provided as follows:

For purposes of this Paragraph (f), the applicable percentage is 30 percent, except that the applicable percentage is increased by an additional 20 percentage points (to 50 percent) to the extent the additional percentage is in connection with a program designed to prevent or reduce tobacco use.³⁹

Contrary to both, the EEOC adopted a hard cap for *all* wellness program incentives (participatory *and* health contingent/outcomes based programs) that include a medical examination or disability-related inquiry. While the Proposed Rule extends the percentage adopted by the Tri-Agency Regulations for health-contingent wellness programs to *all* wellness programs, it fails to account for the possibility that the Secretaries may modify the standard in the future. If the EEOC includes such a hard cap in a final rule, then the practical effect is that employers and employees alike will – again – be confronted with conflicting rules for permissible wellness program incentives should the Secretaries modify the percentages. An agency cannot just disregard an existing regulation and/or quickly replace it with a new one. The regulatory process is a time consuming one and there are no guarantees on any particular outcome. To bring its regulation into alignment

³⁸ 42 U.S.C. 300gg-4(j)(3)(A).

³⁹ See 26 C.F.R. § 54.9802-1(f) (5); 29 C.F.R. § 2590.702(f)(5); 45 C.F.R. § 146.121(f)(5).

with the ACA and the Tri-Agency Regulations, the EEOC should adopt a flexible “HIPAA Standard” for permissible incentives.

C. Restricting Smoking Cessation Benefits To 30% Conflicts with the ACA and Tri-Agency Regulations

The Proposed Rule limits incentives for smoking cessation programs to 30% where an employer conducts a medical examination to confirm whether that employee (and his/her spouse/dependent(s)) actually smokes. Where an employer merely asks whether an employee is a smoker, then it would be permissible for that employer to offer a 50% incentive because the ADA is not implicated in such a scenario. Specifically, the Proposed Rule’s Interpretive Guidance to Section 1630.14(d)(3) provides:

A smoking cessation program that merely asks employees whether or not they use tobacco (or whether or not they ceased using tobacco upon completion of the program) is not an employee health program that includes disability-related inquiries or medical examinations. The incentive rules in Section 1630.14(d)(3) would not apply to incentives a covered entity could offer in connection with such a program. Therefore, a covered entity would be permitted to offer incentives as high as 50 percent of the cost of employee coverage for that smoking cessation program, pursuant to the regulations implementing HIPAA, as amended by the Affordable Care Act, without implicating the disability-related inquiries or medical examinations provision of the ADA...

By contrast, a biometric screening or other medical examination that tests for the presence of nicotine or tobacco is a medical examination. The ADA financial incentive rules discussed supra would therefore apply to a wellness program that included such a screening.⁴⁰

One major cost driver for employee health insurance is smoking-related diseases and complications. The Proposed Rule would restrict the rewards available for employers to encourage its workforce to stop smoking. It strains credulity to suggest that an employer would offer the maximum incentive permitted, indeed encouraged, by the ACA where it could not confirm that an employee did not smoke and would have to rely on each employee’s honesty. If an employer asked employees whether they smoke, and offered a larger rebate if they simply answered no, it is simply unreasonable to believe that all employees would answer truthfully. If the employer subsequently discovered that an employee who responded “no” was a smoker, what would the EEOC’s position be if the employer then terminated the individual for dishonesty?

⁴⁰ Proposed Rule, 80 Fed. Reg. at 21,669.

If promulgated, the Proposed Rule will cause fewer people to have the maximum allowable resources to assist them to stop smoking. That is a perverse policy decision to impose, given the health issues caused by smoking. The EEOC should defer to the health policy experts, like HHS, on how best to reduce smoking, as the EEOC has no expertise in the area. It is improper for the EEOC to choose to promulgate a rule that limits an employer's ability to incentivize nonsmoking, when Congress and other Cabinet-level agencies have proactively created such incentives.

IV. The Failure of the EEOC to Address Spousal Incentives and Stand Alone Wellness Programs Renders This Rulemaking Flawed

A. Spousal Incentives

Many employers provide group health insurance coverage to their employees, spouses and dependents, and extend workplace wellness plans and incentives to everyone who participates in and/or reaches certain health outcomes under the wellness program. This sometimes includes requiring a spouse to complete a health risk assessment, which may contain questions about the spouse's health conditions and lifestyle.

The regulated community has, for years, raised concerns about EEOC investigations into incentives offered to employee spouses for completing health risk assessments where inquiries about the spouse's manifested conditions are made. In 2010, when the Commission promulgated its GINA Regulations, it did not address what it considered a "voluntary" wellness program, nor did it clarify whether spousal incentives were lawful.⁴¹ Despite this lack of guidance, in its *Honeywell* litigation, the EEOC asserted, in part, that spousal incentives violated GINA.

Despite the overall lack of clarity for employers regarding the EEOC's view of wellness program incentives under both the ADA and GINA, instead of addressing all wellness program-related concerns at one time, the EEOC chose to proceed on a piecemeal basis. The failure to provide comprehensive proposed regulations simply kicks the can down the road and until that time, leaves employers who offer wellness programs on uncertain ground as to whether the EEOC will permit spousal incentives. Notably, in its 2014 Spring Agenda published on May 23, 2014, the EEOC indicated that it would issue proposed regulations for *both* the ADA and GINA.⁴² Yet, in roughly eleven months, the EEOC was only able to produce two columns of regulatory text in the Federal Register to address half of the overall issue.⁴³

⁴¹ Indeed, GINA does not contain the phrase "voluntary wellness program" but provides that an employer may collect genetic information as part of a wellness plan where the employee provides prior, knowing, voluntary, and written authorization, among other requirements. *See supra* fn 15.

⁴² *See* the EEOC's Semiannual Regulatory Agenda, Spring 2014, at <http://www.regulations.gov/#!documentDetail:D=EEOC-2014-0005-0001>. (last visited May 11, 2015).

⁴³ The 2015 Spring Agenda lists the GINA proposed regulations as issuing in July 2015.

With respect, this is not sound rulemaking. ADA and GINA, and the roles that the two statutes play in preventing discrimination in employer wellness programs, are so closely related that the two proposals should be considered simultaneously. As noted above, the EEOC should hold this rulemaking in abeyance until it releases the GINA NPRM, and extend the comment period for both rulemakings for 90 days. Supplied with a more complete perspective of the EEOC's vision regarding workplace wellness programs, stakeholders will likely be able to offer the Commission more fully developed commentary, which will provide the Commission with a more robust rulemaking record. Moreover, holding the ADA rulemaking in abeyance until the GINA NPRM issues will help to illuminate the true economic costs of the Commission's efforts to regulate employer wellness programs. On the other hand, maintaining two separate comment periods potentially obscures the true economic burden of the proposals and at least raises the appearance of sleight-of-hand rulemaking.⁴⁴ The EEOC's decision to ignore this critical aspect of wellness programs – while it files litigation which asks employers to stop providing spousal incentives – is inconceivable and irresponsible.

B. Wellness Programs That are Not Part of a Group Health Plan

Proposed Section 1630.14(d)(3) limits incentives for wellness programs that are part of a group health plan to 30% of the total cost of employee-only coverage. However, the Proposed Rule does not provide any guidance regarding what is voluntary vis-à-vis stand-alone wellness programs, i.e., those that are *not* part of a group health plan. Whether this omission was intentional or not, it again reflects a lack of commitment to address wellness program incentives in a holistic manner, much like the failure to address spousal incentives.

As noted above, some wellness programs are part of group health plans, and others are not. Failing to set forth the EEOC's position on permissible wellness program incentives for stand-alone wellness programs yet again leaves employers and employees without guidance on how to determine the voluntariness of medical inquiries. Will the EEOC use a 30% standard as it does for wellness program incentives that are part of a group health plan? Will it be something less? If so, what would the basis for that be, as such a rule would clearly conflict with HIPAA and the ACA.

⁴⁴ Other agencies such as the Department of Labor (DOL) and the General Services Administration (GSA) have issued concurrent NPRMs when separate regulatory proposals have been sufficiently integrated. Indeed, the recently proposed guidance from the DOL and Proposed Rule from GSA which both implement the President's "Fair Pay and Safe Workplaces" Executive Order were issued simultaneously on May 28, 2015. This is because, as noted in the GSA's NPRM, "[g]iven the integrated nature of the two documents, they are being published under separate notice on the same day so that respondents have the opportunity to *consider the documents holistically* in addition to offering comment on the specifics of each document." 80 Fed. Reg. 30554 (May 28, 2015)(emphasis added). For the same reason, the EEOC should undertake a similar simultaneous rulemaking process with respect to the ADA and GINA wellness proposals.

V. Miscellaneous Concerns

A. The Definition of Rewards

The ACA provides the following definition for the term “reward”:

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.⁴⁵

The Proposed Rule provides the following definition:

The use of incentives (financial or in-kind) in an employee wellness program... will not render the program involuntary if... [it] does not exceed 30 percent of the total cost of employee-only coverage.⁴⁶

The Preamble provides the EEOC’s view of “in-kind” incentives.

Incentives can be framed as rewards or penalties and often take the form of prizes, cash, or a reduction or increase in health care premiums or cost sharing.⁴⁷

In addition to exceeding the statutory definition for reward under the ACA, the EEOC does not provide any sort of de minimis exception for potential “prizes” distributed by an employer. For example, an employer may offer a 30% premium reduction in accordance with the ACA and the ADA under the Proposed Rule, and presumably violate the Proposed Rule by simply providing employees with a key chain, stress ball, refrigerator magnet, or highlighter. Notably, none of these “prizes” is taxable, and compliance with the Proposed Rule would require all employers to consider such value in its voluntariness analysis. That result is patently absurd.

B. The Proposed Rule’s Reasonable Accommodation Requirement

1. The Proposed Rule’s “Reasonable” Requirement is Too Broad

The Proposed Rule’s interpretive guidance indicates that employers would be required to provide a reasonable accommodation for participatory wellness programs.⁴⁸ While the ADA

⁴⁵ 42 U.S.C. 300gg-4(j)(3)(A).

⁴⁶ Proposed Rule, 80 Fed. Reg. at 21,667.

⁴⁷ Proposed Rule, 80 Fed. Reg. at 21,660.

⁴⁸ Proposed Rule, 80 Fed. Reg. 21,668. Providing a reasonable alternative standard and notice to employees of the availability of a reasonable alternative under HIPAA and the ACA as part of a health-contingent program would likely

requires a covered employer not to discriminate on the basis of a disability with regard to “terms, conditions and privileges of employment,” the example provided in the Proposed Rule is imprecise and overbroad. It provides:

For example, an employer that offers employees a financial incentive to attend a nutrition class, regardless of whether they reach a healthy weight as a result, would have to provide a sign language interpreter so that an employee who is deaf and who needs an interpreter to understand the information communicated in the class could earn the incentive, as long as providing the interpreter would not result in undue hardship to the employer.⁴⁹

Title III of the ADA provides that no person “who owns, leases (or leases to), or operates a place of public accommodation” may discriminate “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.” 42 U.S.C. §12182(a). Unlike other civil rights laws, the ADA requires public accommodations to take affirmative steps to ensure that their goods and services are available to individuals with disabilities. Among other things, public accommodations must provide “auxiliary aids and services” that “may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals,” unless the public accommodation “can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.” 42 U.S.C. §12182(b)(2)(A)(iii); 28 C.F.R. § 36.303(a).

The example in the Proposed Rule does not distinguish between a nutrition class held at the employer’s premises or one presented by another company that provides those services at that entity’s location (or via telephone, for that matter). Depending on who provides the service, and how and where the service is provided, the reasonable accommodation requirement flows to different parties. If the nutrition class is offered offsite by another company who provides those services, then the obligation to provide a reasonable accommodation would be that entity’s responsibility, not that of the employer who sponsors the wellness program. Even if the class were held at the employer’s site, then the interpreter would still have to be provided by the nutrition class provider, rather than by the employer.

fulfill an employer’s obligation to provide a reasonable accommodation under the ADA. However, reasonable accommodation under the ADA is also required for a participation-only program even though HIPAA does not require participation-only programs to offer a reasonable alternative standard. This is another area in which it would be helpful for the EEOC to specify the difference between “reasonable accommodations” and a “reasonable alternative standard”.

⁴⁹ *Id.*

2. The Medical Certification Described in the Proposed Rule is Insufficient to Determine Whether an Individual Has a Disability

The EEOC requested written comments on various topics, including the following inquiry regarding whether physician certifications are sufficient to require entities to provide incentives to those individuals who choose not to disclose medical information. Specifically, the Proposed Rule asks in Question 1(a):

Whether to be “voluntary” under the ADA, entities that offer incentives to encourage employees to disclose medical information must also offer similar incentives to persons who choose not to disclose such information, but who instead provide certification from a medical professional stating that the employee is under the care of a physician and that any medical risks identified by that physician are under active treatment.⁵⁰

Posing such a question indicates that the Commission will consider imposing a reasonable accommodation requirement where the employee has only provided a physician’s certification that the individual “is under the care of a physician and that any medical risks identified by that physician are under active treatment.” Under the Proposed Rule, an employee could be under treatment for the common cold or an ingrown toenail, neither of which would be disabilities under the ADA, yet the employer would be required to provide that person a reasonable accommodation. However, this requirement is inconsistent with the reasonable accommodation requirement under the ADA and the EEOC’s own guidance.

It is axiomatic that to be eligible for a reasonable accommodation, an individual must have a “disability” as defined by the ADA.⁵¹ Merely stating that an individual is under a physician’s care and that medical risks are under treatment does not establish a “disability” under the statute, and therefore, does not trigger an employer’s reasonable accommodation requirement. According to EEOC’s Enforcement Guidance, employers are entitled to ask for reasonable documentation to establish that a disability exists. Specifically, the guidance provides, in part, that:

Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. Thus, an employer, in response to a request for reasonable accommodation, cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation...

⁵⁰ Proposed Rule., 80 Fed. Reg. 21,664.

⁵¹ 42 U.S.C. § 12112(b)(5).

An employer may require that the documentation about the disability and the functional limitations come from an appropriate health care or rehabilitation professional.⁵²

Therefore, based on the EEOC's own guidance, the certification described in the Proposed Rule is insufficient, as a matter of law, to establish that an individual has a "disability" under the ADA.

C. Prior, Written, and Knowing Confirmation

The EEOC requested comments on whether any notice requirements should include a requirement that employees provide prior, written, and knowing confirmation that their participation is voluntary.⁵³ The EEOC purposefully failed to address spousal incentives under GINA in the Proposed Rule. It seems odd that in the face of such steadfast refusal to address wellness program incentives in a holistic manner that the EEOC would then seek information on an issue untethered to the ADA and found only in GINA.⁵⁴ Under the ADA, there is no requirement that participating employees provide prior, written, and knowing confirmation that their participation is voluntary. It is inappropriate to impute such a requirement through this Proposed Rule. This is one more reason why GINA and the ADA should be addressed simultaneously and comprehensively, and that the decision to proceed in a piecemeal process was a mistake.

D. Effective Date

The EEOC must consider two concerns when contemplating an effective date for any final rule. First, if the EEOC promulgates a final rule, it must allow employers enough time to design and implement health plans, including wellness programs, in a reasonable manner. For example, if a regulation is finalized in the summer months, then it is likely too late in the process for an employer to redesign its plan for the upcoming plan year to be ready for an open enrollment period in the fall. Practically speaking, much of the design and marketing plan will have been submitted for printing well before open enrollment, and nearly be impossible to change, if enough time to implement the new regulations is not provided.

Second, the EEOC has waited six years to address the issue, despite being pressed by Congress, the Administration, the regulated community, and individuals. The EEOC should commit to suspending such investigations and ceasing litigation which allege that incentives violate either the ADA or GINA until final rules – under both the ADA and GINA – are promulgated and in effect.

⁵² See U.S. Equal Employment Opportunity Commission, *Enforcement Guidance, Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, at Q. 6, available at <http://www.eeoc.gov/policy/docs/accommodation.html> (last visited June 3, 2015).

⁵³ Proposed Rule, 80 Fed. Reg. at 21,664.

⁵⁴ 42 U.S.C. § 2000ff-1(b)(2)(B).

VI. The EEOC Underestimates the Burden Associated with the Requirements of the NPRM

The EEOC's attempt to provide "some information on potential costs and benefits" is seriously flawed with assumptions not supported by empirical evidence and by failure to address a number of significant cost elements. Regardless of legal or administrative requirements, a thorough and accurate analysis of the benefit and costs of every proposed regulation and of potential regulatory alternatives considered is simply a matter of good government practice. Such a thorough and accurate benefit/cost analysis is an aid to reasoned decision making. It is important for every agency to conduct economic analysis before regulatory decisions are made, rather than as a post-decision self-justification exercise. A thorough and accurate analysis helps the decision maker to discharge the regulatory power to command and reallocate resources responsibly by seeking to fulfill a stated public need in the most efficient and least costly way. An agency that neglects to perform this fundamental analysis or that does it incompletely or haphazardly runs the risk of wasting scarce economic resources, betraying the public trust, and making decisions that are unreasoned, arbitrary and capricious. Accordingly, for the reasons set forth below, the EEOC would better serve its own decision makers, persons protected by the ADA and the general public interest by withdrawing or delaying the Proposed Rulemaking to conduct a more complete and credible analysis of the costs and benefits of the proposed approach and of regulatory alternatives.

A. Notice Requirement

On page 21665 of the Federal Register notice under the EEOC discussion of Executive Order 12866 Regulatory Procedures, the agency "estimates that the total cost of developing a notice that complies with the requirements of the Proposed Rule would be \$42,583,000."⁵⁵ This statement is in error based on the EEOC's own published calculations: 299,115 affected employers, each devoting two hours of management related labor at \$55.56 per hour and two hours of administrative support labor at \$23.98 per hour. The correct calculation is $[299,115 * (2 * (\$55.56 + \$23.98))] = \$47,583,214.20$. The EEOC's estimate of this item is in error by over \$5 million based on its own assumptions.

A second problem with the EEOC calculation of the paperwork burden for the notice requirement is the assumption by the EEOC that designing and developing the required notice will require two hours of management related labor time and two hours of administrative support labor time. No empirical basis for this estimate is cited. The estimated hours and labor category requirements appear to have been invented from imagination. It was well within the capability of the EEOC to have conducted an experiment by which teams of the EEOC's employees would have been tasked to develop notices meeting the requirements and to report the time devoted by each

⁵⁵ The notice requirement is subject to OMB clearance of the associated Information Collection Request (ICR) under the Paperwork Reduction Act of 1995. The error noted here and other errors in the ICR are noted in separate comments by the Chamber to OMB objecting to approval of the ICR.

employee to the task. Alternatively, the EEOC could have surveyed potentially affected companies to obtain their estimates based on similar past experience.

Since the notice is a legal document with serious liability consequences if incorrectly drafted, it would be reasonable to presume that some attorney review time would be included in the process. Our own informal survey of experienced attorneys suggests that drafting the required notice would reasonably require at least two hours of attorney time in addition to management and clerical time estimated by the EEOC. The addition of in-house attorney time significantly increases the total economic impact of the Proposed Rule.

A third problem with the EEOC's calculation of the paperwork burden for the notice requirement is the application of \$55.56 per hour and \$23.98 per hour compensation rates for management and administrative labor time. While these BLS-published compensation rates are reasonable estimates of the direct labor cost, the EEOC's calculation omits consideration of overhead cost and lost profit, which are also appropriate components of the full economic opportunity cost of the paperwork burden. Allocating scarce labor resources to fulfilling a regulatory paperwork requirement takes those resources away from alternative normal productive work. The EEOC should have adjusted the BLS direct compensation values by a 2.5 multiplier load factor derived from published Federal government data showing fully loaded labor rates for the relevant occupations in 2014/2015 Federal General Services Administration government-wide procurement contracts under the Alliant program.⁵⁶ This reflects the overhead and profit "load" that the federal government routinely accepts as part of the price of private legal, professional and administrative contract services, and it is a reasonable proxy for similar general private sector costs. Applying the 2.5 adjustment, the appropriate labor opportunity costs that the EEOC should have used in its calculation are \$138.90 per hour of management time and \$59.95 per hour of administrative time. Based only on the EEOC's calculation of two hours each of management and administrative time across 299,115 firms, the national cost burden for the notice requirement would be \$118,958,000. An additional two hours of attorney time at an in-house counsel compensation rate of \$98.15 per hour,⁵⁷ which amounts to \$245.37 after adjusting by 2.5 to account for overhead and profit opportunity cost, would add another \$146,791,000 to national paperwork burden. The

⁵⁶ The data reflect the government-approved hourly labor rates charged for various types of skilled, administrative, professional and management occupations services by 58 private information technology and management services companies on current contracts applied across the spectrum of Federal agencies. These fully loaded labor rates include wages, fringe benefits, overhead, general and administrative expenses and profit. These fully loaded labor services hourly rates were compared to the comparable occupations for which BLS publishes employer cost of employee compensation data (wages plus fringe benefits only). On average the difference between the BLS compensation-only hourly amounts and the fully loaded amounts paid by the government for such labor under these contracts revealed a markup factor of 2.5 times the basic compensation amount reported by BLS. <http://www.gsa.gov/portal/content/103877>. See Excel spreadsheet link on this page entitled "Loaded hourly pricing for work done on contractor site."

⁵⁷ <http://www.inhouseblog.com/inhouse-counsel-salaries-guide/>

addition of the two hours of attorney time to the 2 hours each of management and administrative time would result in a total paperwork burden across 781,904 firms of \$265,748,000.

The calculation above strongly suggests that the economic impact of the EEOC's Proposed Rule may be well in excess of the \$100 million threshold for "economically significant" regulations under Executive Order 12866 and above the current inflation adjusted threshold of \$140 million for "major" regulations under the Unfunded Mandates Act of 1995. As noted, the EEOC has not conducted any empirical research to validate its estimates of 2 hours of management and administrative labor time per affected firm. Our estimate of an additional two hours for the needed attorney input and review is based on a survey with too few responses for statistical reliability. Experience suggests that these estimates are at the low end of the reasonable range, and careful empirical research would likely show higher numbers. In addition, the notice cost burden is only one element of the economic cost impact of the Proposed Rule. As discussed under items B and C, below, there are other cost impacts that the EEOC failed to include in its analysis. Consideration of these additional elements add further weight to the argument that the Proposed Rule will have an economic impact significantly in excess of the threshold for a "major" regulation under the Unfunded Mandates Act of 1995, which is discussed below.

B. The Proposed Rule Underestimates the Potential Number of Employers Affected

The Proposed Rule includes requirements that are important to know for both employers who currently do have affected wellness programs and for employers who do not now have such programs. While EEOC estimates that only 299,115 employers currently request completion of health assessment surveys that may trigger the notice requirement, all 781,904 private firms with 15 or more employees need to know about the requirements of the Proposed Rule. Even though 482,789 of these 781,904 firms may not have immediate obligations under the notification requirement, they need to know about these proposed obligations before they make future decisions regarding adoption of wellness programs. Assuming that it would take just two hours for a human resources manager to read the Proposed Rule and to assess what elements of it currently affect her company or might affect it under future contingencies, the cost of regulatory familiarization would be significant.

Ignorance of law is no excuse for violation, and an agency that expects its regulations to be obeyed must consider the public cost of familiarization as an economic impact of any decision to issue a new rule or to revise an existing rule. Even if one accepts the premise that the underlying statute the regulation elucidates is already familiar, the issuance of a rule adds a layer of definition and interpretation that requires further effort by covered and potentially covered individuals to understand their rights and obligations. For example, two hours of familiarization time across

781,904 firms with 15 or more employees amounts to \$217 million.⁵⁸ It is arguable that the 4.9 million firms with fewer than 15 employees should also be familiar with the regulation, because its requirements could be a factor in a decision to add jobs that would bring the firm's total employment over the threshold. That could add \$1.4 billion more to the economic impact. Regulators need to be aware that their actions and mandates can have large impacts when multiplied across the national scale. This is why care and caution in rulemaking is essential.

C. The EEOC Neglects its Obligations Under the Unfunded Mandates Act

The Unfunded Mandates Act requires agencies to provide a full assessment and a notification to Congress in the event that a proposed regulation has a "major" cost impact in any year. The original threshold of \$100 million is adjusted for inflation and currently stands at approximately \$140 million. It is clear that the Proposed Rule will have combined cost impacts on the private sector, state and local governments, and tribal entities in excess of that threshold amount. It is also clear that at least some of these costs will fall on states, local governments or tribes. For example, state universities that operate employee wellness programs under health insurance plans will be covered, as will local public school systems, fire and police departments, and government administrative units. The EEOC, therefore, is statutorily obligated to include in its rulemaking notices an assessment of the cost impact of the Proposed Rule in total and in detail in terms of the portions of the total cost that will fall on designated state and local government units. The Act imposes this requirement because the covered government units need to know these unfunded mandate requirements that the Federal government proposes to impose on them so that they can make appropriate budget plans. The Congress needs to know the details of amount costs being imposed on state, local and tribal governments so that it can consider funding to mitigate these costs or other action. The EEOC has erroneously stated on p. 21667 of the Federal Register notice of proposed rulemaking that the cost of the Proposed Rule is less than the Act's threshold. This error should be corrected by a published notice and the proposed rulemaking suspended until a correct analysis and notice can be published.

VII. Conclusion

The Proposed Rule, in many respects, conflicts with the ACA and the Tri-Agency Regulations and proposes positions that exceed the EEOC's jurisdiction. In addition, the EEOC's failure to promulgate a Proposed Rule that comprehensively addressed wellness program incentives under the ADA and GINA is inexplicable, and ultimately, does not provide the regulated community with a foundation upon which to design wellness programs in an innovative manner. Congress and the Administration recognized the clear benefits of wellness programs, but the EEOC did not in its Proposed Rule. Instead, the EEOC's Proposed Rule will chill employers from offering such programs, impose roadblocks to a healthier American public, and potentially, take money

⁵⁸ 781,904 firms * 2 hours each * \$55.56 per hour compensation for a manager * 2.5 overhead/profit opportunity cost factor = \$217,212,931.

away from American workers. Therefore, we insist that any final rule adopted by the EEOC relating to workplace wellness programs be completely harmonized with the existing federal standards under ACA, HIPAA and the Tri-Agency Final Rule.

Thank you for your consideration of these comments. As always, please contact us if you have questions or would like to discuss our comments on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Randel K. Johnson", with a large, sweeping flourish at the end.

Randel K. Johnson
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