January 27, 2016

Bernadette Wilson,
Acting Executive Officer,
Executive Secretariat
Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, DC 20507

Submitted electronically via www.regulations.gov

Re: RIN# 3046-AB02, Proposed Rule on the Genetic Information Nondiscrimination Act of 2008

Dear Ms. Wilson:

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefits specialists nationally. We are pleased to have the opportunity to provide comments in response to RIN# 3046-AB02, a proposed rule regarding the Genetic Information Nondiscrimination Act (GINA) and its impact on employer group wellness programs. We greatly appreciate the Equal Employment Opportunity Commission's willingness to hear from stakeholders on this important issue.

The members of NAHU help millions of individuals and employers purchase administer and utilize health insurance coverage, and they have been assisting employers with designing and implementing meaningful wellness programs for decades. In addition, our members have worked directly and tirelessly over the past five years with of employers of all sizes to help them implement health plan changes related to the Patient Protection and Affordable Care Act (ACA), including the allowable changes to wellness programs provided by the health reform law and its related regulations. NAHU members have a critical interest in the development of the EEOC's proposed rules and how they will impact employer-sponsored health insurance coverage and wellness plans

NAHU has long seen the need for additional clarification as to how GINA may apply to employer group wellness programs. Furthermore, we believe our membership's direct experience regarding how employer-sponsored plans generally and wellness programs specifically are currently structured and administered could be helpful to you as you finalize these requirements and other related regulatory guidance. Therefore, in addition to commenting on the proposed new requirements, we have submitted detailed responses to the questions about wellness program structure and potential additional regulation

you posed in the preamble. Finally, please be aware that a representative group of health insurance agents and brokers with specific expertise in the wellness field helped develop these comments, which have been organized by topic. Accordingly, they reflect the views of experts who fully understand the needs and interests of today's group health insurance purchasers, as well as the intent and design of a wide array of employer group wellness programs.

Benefit of Wellness Programs and the Need for Employer Flexibility to Ensure Access

As NAHU emphasized in our comments to you in June of 2015 on the pending proposed rule titled "Amendments to Regulations under the Americans for Disabilities Act," we believe that comprehensive employer group wellness programs benefit both employers and employees by improving employee health, reducing medical care, disability and workers compensation costs and claims, increasing workplace productivity and morale, and reducing turnover. This viewpoint is widely supported by academic research about wellness programs, including perhaps the most significant research ever done on workplace wellness programs—the 2013 RAND Health study commissioned by the U.S. Departments of Labor and Health and Human Services.[1] This study illustrates the public health benefits of the programs noting, "workplace wellness programs can help contain the current epidemic of lifestyle-related diseases, the main driver of premature morbidity and mortality in the United States." It also confirms the prevalence of workplace wellness programs, stating that this common employer-sponsored benefit "is now available at about half of U.S. employers with 50 or more employees, which employ three-quarters of the U.S. workforce employed at firms and organizations of that size."

A key reason so many employers are able to offer their workers access to these popular and important programs is the flexibility afforded to employers for their design and implementation. While it is critical to ensure consumer protection, NAHU believes that as additional wellness program regulations are developed, priority to should be given to making sure that employer standards are clear, fair and can be easily and economically adopted. Otherwise, employee access to these beneficial programs could decrease because the employer burden for providing the programs could outweigh any cost savings.

Need for Consistent and Integrated Rulemaking

Another reason behind the popularity of employer-sponsored wellness programs is the decades-long bipartisan support of federal and state policymakers regarding employer innovation in this area, including the development of national policies to expand individual and employee access to these programs. As a result, the proposed EEOC rule would complement extensive existing state and federal wellness program requirements, including the wellness program rules established as a result of the Health Insurance Portability and Accountability Act (HIPAA) and ACA. American employers are continuously investing significant resources to ensure that their programs are in compliance with all of

[1] https://www.dol.gov/ebsa/pdf/workplacewellnessstudyfinal.pdf

these state and federal rules and have based their existing wellness programs on the current regulatory framework.

NAHU believes that it is imperative as the EEOC moves forward with both this proposed rule and the pending proposed rule on how the Americans with Disability Act (ADA) will impact employer group wellness programs, that the EEOC prioritize coordination and consistency with existing federal rules and statutes. We are concerned that both of the EEOC's pending wellness-program rules include components that are inconsistent with existing requirements. These conflicts need to be addressed in the final version of each measure. Integration and uniformity with regard to wellness-program rules is what will lead to strict employer compliance and ensure true consumer protection. Furthermore, providing employers with reasonable standards that mesh well with existing requirements will continue to incent employers to provide Americans with valuable wellness benefits. Inconsistent, confusing and costly rules will only cause spotty compliance and could easily lead to some employers dropping employee access to wellness programs.

Consistency in the Effective Date of Any New Requirements

Effective dates of any required changes is another area where consistency will be crucial in terms of employer compliance and seamless implementation. NAHU requests that the EEOC follow the standard set by all other ACA-related rules by tying the compliance date for new requirements for group health plans to the group's plan year date as per ERISA. Conversion of wellness programs to meet any new requirements will necessitate a long lead-time. If employers are forced to make a switch mid-plan-year, or if all non-calendar-year plans were forced to make switches on a calendar-year cycle, it could easily result in a material modification of existing health plan contracts and plan documents. Making such significant changes mid-year could substantially disrupt existing employee coverage arrangements. Furthermore, making such changes mid-plan-year would be very costly and complicated for employers of all sizes to administer.

Reasonable Design Standard with Regard to Genetic Information and Wellness Programs

The proposed rule would allow an employer to "request, require or purchase genetic information" in connection with employer-provided health or genetic services only if the services "are reasonably designed to promote health or prevent disease." NAHU believes this language would cover most outcome-based wellness programs in place today. NAHU feels that the reasonable-design standard, as interpreted by existing HIPAA and ACA rules, is clear and workable for employers and is in widespread use. We do not feel additional regulation by the EEOC relative to what constitutes reasonable design is necessary.

Authorization Requirement with Regard to the Collection of Certain Genetic Information from Spouses

The proposed rules specify that the employer must obtain prior knowing, voluntary and written authorization from a spouse before requiring the spouse to provide past or current medical status in connection with a wellness program, and the authorization form has to "describe the confidentiality protections and restrictions on the disclosure of genetic information or disclosure of current or past health status." NAHU requests that, in the final rule, the EEOC provide employers with model language that would satisfy this requirement so that employers may easily include it on future health risk assessment forms.

Amount of Allowable Employer Wellness Program Incentives for Spouses

NAHU appreciates the clarification in the proposed rules that GINA allows for wellness-program inducements for the collection of certain health history and health risk assessment information from employees and their spouses. We also appreciate that the EEOC proposes to base allowable wellness-program incentives for completion of a health risk assessment on 30% of the cost of family coverage or employee-plus spouse costs for the health plan (as applicable), as opposed to basing the calculation on the value of the single employee rate for all families, as the EEOC did with its earlier wellness program proposed regulation with regard to the ADA. Allowing incentives for spousal participation based on the family or employee plus spouse rate is similar to the limits the wellness rules under HIPAA and the ACA allow.

However, the structure of the allowable 30% incentive proposed by the EEOC is very different than the current ACA- and HIPAA-driven standard, and we have concerns about the way the EEOC has required that any incentives that include the completion of a health risk assessment be apportioned between spouses. The proposed rule specifies that the employee's share of the incentive cannot exceed 30% of the employee-only premium rate. Then the spouse's incentive would be based on the difference between employee's share of the incentive and 30% of the family coverage or employee-plus-spouse rate, whichever is applicable for the family's enrollment circumstance. The use of this methodology is completely inconsistent with other employer wellness program rules. HIPAA and ACA rules do not require that a family's incentive be divided in any way between and employee and a spouse. Not only would this methodology likely result in an uneven incentive, with the incentive for the spouse in all likelihood being significantly greater than the incentive for the employee, but this inconsistency would also make wellness programs significantly more complicated for employers to administer. In order to be compliant with this requirement, it would appear that employers would have to apply this apportionment requirement for spouses across the board to all wellness program components, since it would be the strictest applicable regulatory standard. Requiring such a change would be very burdensome for employers to track, record and implement. We also believe it would limit the effectiveness and value of such programs and could discourage employers from wellness program

creation and innovation in the future. NAHU urges consistency with existing ACA rules relative to the structure of incentives and elimination of the apportionment requirement in the final version of this rule.

NAHU also requests clarification regarding the applicability of the EEOC's proposed incentive limiting requirements to smoking-cessation programs and their allowable incentives. We note that existing wellness-program rules allow employers to increase the amount of their incentives to up to 50%of the cost of coverage if the group participatory wellness program includes components related to smoking cessation and tobacco-use prevention. NAHU believes that since the EEOC in this rule appears to clearly distinguish between the medical collection of true genetic information and the collection of an individual's health history, questions about an individual's current or past tobacco usage as part of a smoking-cessation program would be permissible according to the proposed GINA rules. Furthermore, since a blood or other medical test to determine an individual's nicotine level does not involve the collection of true genetic information, we believe that such tests in coordination with a smoking-cessation program would also be permissible. As the EEOC works to finalize these rules, NAHU requests not only explicit clarification that the information collected in a typical smoking-cessation program would be outside the scope of GINA, but also that these EEOC GINA rules in no way limit an employer from including a tobacco-reduction component into a group wellness program to expand the amount of allowable inducements up to 50%.

Incentives for Spouses Who Do Not Complete a Health Risk Assessment

In the preamble of the proposed rule, the Commission requests comments as to whether or not incentives should be required to be made available to spouses who refuse to disclose genetic information or past or current health status, but instead provide certification from a medical professional saying that the spouse is under the care of a physician and that medical risks are under treatment. NAHU does not believe that a refusal to provide this information constitutes the need for a reasonable alternative standard under existing wellness rules and therefore does not believe that inducements should be required under the circumstances described by the EEOC in the preamble.

Programs that Offer *De Minimus* Incentives

The Commission also requested information about the prevalence of *de minimus* awards and the need for alternative standards for such programs, such as simplifying the requirements so that no spousal authorization was needed for participation. NAHU members note that some voluntary employer wellness programs do offer minimal rewards for participating employers and dependents. Examples might include full-family participation in a "get moving" or "step" challenge with participants entered into a drawing for a prize. However, based on NAHU member experience designing wellness programs for hundreds of thousands of employers both small and large, we note that it is extraordinarily rare for health-contingent outcome-based participatory employer-sponsored wellness programs to use *de minimus* rewards as inducements. Participatory programs almost always base their rewards on the value of the premium; therefore, the *de minimus* standard is always eclipsed. Given the uncommon use of *de minimus* rewards

for outcome-based programs, including those that would require a health risk assessment, NAHU believes that forgoing the authorization requirement for such programs would be appropriate. Furthermore, with regard to any further EEOC regulation of such programs or for definition purposes, we believe that it would be simplest for employers and employees if the EEOC simply uses the existing IRS definition of the term *de minimus* as this is the standard already in use by employers. Finally, in previous rulemaking relative to HIPAA and the ACA, regulation of incentive caps is limited to health contingent programs and we urge the EEOC to be consistent. Inconsistency in rulemaking lends itself to employer confusion and compliance problems. Therefore, we request clarification in the final rule as to how this EEOC requirement will interplay with already existing rulemaking.

Best Practices for Ensuring that Wellness Programs "Promote Health and Prevent Disease"
Existing rules regulating employer-sponsored wellness programs promulgated under HIPAA and the ACA already require the use of a reasonable design standard to ensure that employer-sponsored wellness programs are aimed at promoting health and preventing disease, and are nondiscriminatory. The use of these standards to govern wellness programs is the industry norm and its widespread use already goes beyond the realm of "best practice." Other than requiring adherence to the strict standards already in existence for employers seeking to establish wellness programs, we do not believe that additional regulation is needed by the EEOC.

Ensuring Data Security
Ensuring the security of data and protecting health information and other sensitive information of employees and other participants in group health insurance programs from unwanted breaches and attacks is unfortunately a necessary and pressing concern for both employers and all other entities involved with group health insurance plans today. Currently, many federal and state policy-making and regulatory bodies, including the U.S. Congress, the Department of Health and Human Services, the Department of Labor, state legislatures and departments of insurance and the National Association of Insurance Commissioners (NAIC), have standards in place to protect data security, and most entities are either in the process of, or are actively considering, revising current requirements to further protect consumers in this age of cybersecurity threats. While the protection of an individual's genetic information is exceedingly important, NAHU does not believe that its protection needs separate or different the other privacy standards that what is generally required of employers today or the general health privacy standards that will be required of employers, insurers and other covered entities in the future. In fact, we believe the development of additional and/or separate standards for the treatment and protection of genetic information by employers, including for wellness programs, could be harmful for consumers since it would create compliance confusion. Instead, NAHU believes the EEOC should allow existing state and federal privacy standards for employers, insurers and other business associates and covered entities to apply. If the EEOC has specific concerns relative to genetic information protection, NAHU believes those would be best shared by the EEOC to HHS and the DOL and the NAIC so they may take these views into consideration and apply them to future action on their end.

Restrictions on the Collection of Information
The preamble of the proposed rule also requests comments on whether the wellness program should be restricted to collecting the bare minimum of information needed to "promote health and prevent disease." The preamble additionally inquires whether or not wellness programs should be prohibited from acquiring genetic information from sources other than directly from the employee or spouse. As NAHU has previously noted, existing rules regulating employer-sponsored wellness programs promulgated under HIPAA and the ACA require the use of a reasonable-design standard to ensure that employer-sponsored wellness programs promote health, prevent disease and are nondiscriminatory. The reasonable-design standard in widespread use today would prevent an employer from using a wellness program as a reason to collect unnecessary information about an employee or other participant in an employer-sponsored health plan. Therefore, we do not see any need for additional regulation by the EEOC in this area.

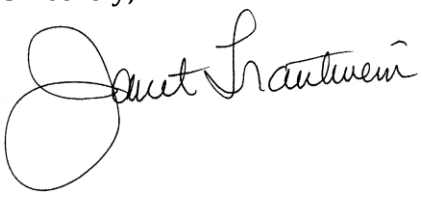
Wellness Programs Outside of Group Health Insurance Plans
The EEOC requested information about any wellness programs that may exist for employees outside the bounds of the group benefit plan structure. NAHU members have vast experience designing and helping to implement and manage employer-sponsored wellness programs for employers of all sizes. Health-contingent and outcome-based programs that may involve genetic information are always tied to health insurance premiums and the employer group health plan. Voluntary programs that encourage good health and wellness in the workplace, such as contests to drink more water or the provision of discount memberships to exercise facilities, would rarely, if ever, involve the collection of any type of genetic information. Eligibility for these programs may or may not be tied to participation in the employer-sponsored health plan or have similar eligibility requirements (full-time employee status for example). However, they certainly would not have incentives tied to employer-sponsored plan premiums.

As for other wellness programs that employees may have access to, NAHU members note that, in many cases, health insurance issuers have their own participatory programs for all customers that are fully outside the bounds of employer control. Often, an employer would not even have knowledge of whether or not employees participate in such programs. It would be impossible for employers to monitor employee participation in such programs, know the bounds or requirements of such programs, or impose limits or aggregate the value of any incentives an employee may or may not receive, particularly if multiple issuers are involved. Therefore, we feel that EEOC regulation of these programs would be inappropriate and request a safe harbor for employers with regard to general participatory programs offered to beneficiaries of health insurance issuers. Without one, issuers and employers are likely to eliminate beneficiary access to such programs, denying employees access to popular voluntary benefits.

NAHU sincerely appreciates the opportunity to provide comments on this proposed rule concerning the applicability of the Genetic Information Nondiscrimination Act of 2008 to employer group wellness

programs. We look forward to reviewing additional guidance and providing you with input and information as you move forward with the finalization of this rule and others you are considering with regard to group wellness programs. If you have any questions or need additional information, please do not hesitate to contact me at either (202) 595-0787 or jtrautwein@nahu.org.

Sincerely,



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