THE VOICE OF FOOD RETAIL

Feeding Families Enriching Lives

June 19, 2015

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

Submitted electronically via http://regulations.gov

RE: Amendments to Regulations Under the Americans With Disabilities Act
Document Number: 2015-08827
RIN 3046-AB01

Dear Ms. Wilson:

On April 20, 2015, the U.S. Equal Employment Opportunity Commission (EEOC) published in the Federal Register a Proposed Rule regarding Amendments to Regulations Under the Americans With Disabilities Act (ADA)[1] as they relate to employer wellness programs ("Proposed Rule"). The Food Marketing Institute (FMI) appreciates the opportunity to comment on the proposed revisions and for the agency's consideration of incorporating these comments into the rule-making process.

FMI proudly advocates on behalf of the food retail industry. FMI's U.S. members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost $770 billion. Through programs in public affairs, food safety, research, education and industry relations, FMI offers resources and provides valuable benefits to more than 1,225 food retail and wholesale member companies in the United States and around the world. FMI membership covers the spectrum of diverse venues where food is sold, including single owner grocery stores, large multi-store supermarket chains and mixed retail stores. For more information, visit www.fmi.org and for information regarding the FMI foundation, visit www.fmifoundation.org.

[1] 80 Fed. Reg. 21659 (April 20, 2015).

Importance to Preserve Supermarkets' Ability to Promote, Encourage Participation and Continually Innovate Health and Wellness Programs

The supermarket industry has not only embraced but has been an innovator in encouraging health and wellness both as employers and as retailers. According to *FMI's 2014 Report on Retailer Contributions to Health & Wellness*, 54 percent of food retailers have an established health and wellness program for both customers and employees and 78 percent of the respondents view in-store health and wellness programs as a responsibility to their communities.[2] Many retailers have invested significant resources in wellness programs both programmatically and financially to meet growing employee and customer desire for more diverse health and wellness services. To that end, many supermarkets have woven promotion of health and wellness into their corporate and brand philosophy. In fact, retailers often "pilot" wellness programs and initiatives internally with their workforce before offering services to customers.[3] This is further evidenced by federal, state and local agencies who often approach the supermarket industry for participation in and promotion of public health initiatives. Therefore, FMI is wary that additional regulatory hurdles and potential exposure to regulatory enforcement and associated liabilities will stymie that innovative spirit.

For many FMI members, wellness programs are a critical component to employee benefits not only because they are valued by employees but also as a means for both the employee and employer to maintain health care costs while improving peoples' health. FMI submitted comments on the effect of the Proposed Rule on employers' ability to maintain voluntary, Participatory, as well as Activity-Based and Outcome-Based wellness programs as outlined in the Affordable Care Act[4] and subsequent final rules issued by the Departments of Health and Human Services, Labor and Treasury for "Incentives for Nondiscriminatory Wellness Programs in Group Health Plans" (2013 Final HIPAA Nondiscrimination Rules).[5]

Deference to 2013 Final HIPAA Nondiscrimination Rules

While the preamble of the EEOC Proposed Rule states that the ACA statute and 2013 Final HIPAA Nondiscrimination Rules do not apply to the ADA or EEOC's regulations and responsibilities, many of the issues and questions raised in the Proposed Rule have been raised, undergone public comment and addressed through previous rule-making, regulatory guidance and sub-regulatory guidance. FMI members have since incurred administrative and financial costs to review and make adjustments to ensure their employee wellness programs and over-arching health benefit plans are compliant with the cumulative regulatory changes for plan years on or after January 1, 2014.

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[2] Food Marketing Institute 2014 Report on Retailer Contributions to Health & Wellness;
[3] *Id*.
[4] P.L. 111–148.
[5] 78 Fed. Reg. 33158 (June 3, 2013).

In order to minimize the cumulative burden[6] and further disruption to employer wellness programs that are compliant with the 2013 Final HIPAA Nondiscrimination Rules and other ACA guidance, EEOC's Final Rule should either defer to or, if the ADA clearly directs the agency to codify rules, refer to and adopt relevant provisions of the 2013 Final HIPAA Nondiscrimination Rules and other agency guidance relevant to nondiscrimination rules for employer-sponsored health wellness programs that have previously undergone public comment and been issued since enactment of the Affordable Care Act. More specifically, the 2013 Final HIPAA Nondiscrimination Rules address "reasonable design", "reasonable alternatives", notice of reasonable alternatives, applicability and limits of rewards, and parameters around each of these areas for constructing nondiscriminatory wellness programs. [7]

In addition, EEOC should not duplicate, but align, notices and confidentiality requirements with HIPAA privacy rules regarding plan sponsors' treatment of personal health information. Section 1630.14 (d)(2)(iv) of the EEOC Proposed Rule would require employers to provide a notice explaining what medical information will be obtained, how the medical information will be used, who will receive the medical information, the restrictions on its disclosure, and the methods the covered entity uses to prevent improper disclosure of improper medical information. Therefore, compliance with HIPAA privacy requirements by a health plan or stand-alone wellness program should similarly be deemed in compliance with the EEOC's proposed confidentiality requirements. Further, written notice and/or communication to employees notifying them of a voluntary wellness program, as EEOC requested comment, is unnecessary in lieu of other HIPPA privacy rules and benefits laws.

Deference to other Regulations and Guidance Related to the ACA and Wellness Programs

In addition, EEOC's proposed revisions would set different caps or limits for wellness programs. FMI is concerned that different caps or limits on wellness program could result in unwarranted discrepancies and confusion, particularly since the limits were clearly established and raised, under the ACA, and implemented under the 2013 Final HIPAA Nondiscrimination Rules and the United States Treasury Department's final rule regarding Minimum Essential Coverage and Other Rules Regarding the Shared Responsibility Payment for Individuals.[8]

Congress sought for employers' non-discriminatory contingent-based wellness programs to be allowed to utilize a reward (in the form of a discount or rebate of a premium or

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[6] Executive Order 13610 requires agencies to "give consideration to the cumulative effects of their own regulations, including cumulative burdens...and...give priority to reforms that would make significant progress in reducing those burdens..."

[7] 78 FR 33162-33192.

[8] 79 Fed. Reg. 70464 (November 26, 2014).

contribution, a waiver of all or part of a cost-sharing mechanism) of up to 30 percent of the cost of coverage for non-discriminatory wellness programs but also to provide authority for agencies to increase that reward to 50 percent of the cost of coverage. The 2013 Final HIPAA Nondiscrimination Rules implemented the ACA statute by applying the 30 percent reward to the employee's plan, inclusive of spouses and dependent children, and allowed a 50 percent award programs to reduce tobacco use. The EEOC Proposed Rule, however, would cap wellness program incentives at 30 percent of the total cost of employee-only coverage, which appears to contradict Congressional intent in these recently finalized rules. FMI urges the EEOC to align or defer to the ACA statute, the 2013 Final HIPAA Nondiscrimination Rules and other preceding guidance, in referring to the setting of incentive caps for employee wellness programs as a means for designating the programs as "voluntary" under the ADA.

EEOC should also defer to the other agencies regarding "affordability" since regulations implementing affordability requirements under the ACA's employer shared responsibility provisions have been specifically addressed by the U.S. Treasury Department final rules regarding Shared Responsibility for Employers Regarding Health Coverage[9] by applying the ACA's 9.5 percent affordability standard (and safe-harbors) only to the employee premium share for self-only coverage under the employer's lowest-cost plan that meets the ACA's minimum value standards. The affordability standard is not applied or required for other plan offers or certain parts within a plan, and EEOC should not adopt a different affordability standard or policies beyond what has been ruled by the Shared Responsibility regulations.[10]

In addition, the U.S. Treasury Department and Internal Revenue Service published final regulations on November 26, 2014, regarding Minimum Essential Coverage and Other Rules Regarding the Shared Responsibility Payment for Individuals specifically addressing wellness program incentives impact ACA affordability requirements.[11] Neither the ACA statute nor the implementing regulations indicate that an affordability standard for employee wellness programs is warranted.

Deference to Exceptions and Safe Harbors in Prior ADA Guidance Related to Voluntary Examinations When Applying to Wellness Plans

The EEOC Proposed Rule also proposes several new contingencies for wellness programs that may include a medical inquiry or exam to qualify as "voluntary". In the preamble, EEOC explains that "a covered entity may not require an employee to participate in such a program and may not deny coverage under any of its group health plans or particular benefits packages within a group health plan."[12]

[9] 79 Fed. Reg. 8542 (February 12, 2014).
[10] 79 Fed. Reg. 8563-85655.
[11] 79 Fed. Reg. 70466.
[12] 80 Fed. Reg. 21663 (April 20, 2015).

The 2013 Final HIPAA Nondiscrimination Rules, which are currently in place, require that incentives in wellness programs are available to all individuals:

> "The reward must be available to all similarly situated individuals. For this purpose, a reasonable alternative standard (or waiver of the otherwise applicable standard) must be made available to any individual for whom, during that period, it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard (or for whom it is medically inadvisable to attempt to satisfy the otherwise applicable standard). "[13]

Further, the U.S. Treasury Department Final Rule regarding Shared Responsibility for Employers Regarding Health Coverage under the Affordable Care Act outline what type of health coverage the employer is required to offer employees, who qualify as full-time under the ACA, an effective opportunity to accept coverage.[14]

FMI believes that if reasonable alternatives are provided, as cited under the 2013 Final HIPAA Nondiscrimination Rules, and enrollment in such a wellness program is voluntary and non-participation does not disqualify an employee from qualifying for an offer of coverage from the employer-sponsored plan that otherwise meets the Affordable Care Act's employer shared responsibility requirements, such as affordability and minimum value, then the wellness program should be considered voluntary and qualify for the ADA exception provided for voluntary medical examinations as part of an employee health program available to employees at the work site referenced in EEOC enforcement guidance issued in 2000[15] and/or for a safe-harbor provided for "bona fide benefit plans."[16]

New ADA Requirements for "De Minimis" Incentives and for Wellness Programs that Are Not Part of a Group Health Plan Are Not Warranted

Since many FMI members offer wellness programs as a benefit to employees who may not qualify or enroll in the employer-sponsored plan, we strongly believe that EEOC should not apply new or additional requirements on those plans or upon de minimis awards. As noted earlier, many FMI members have embraced health and wellness programs and seek to offer them to as many employees and customers as possible. Since these are benefits that are widely available, do not disqualify employees from other health care options within or outside the workplace and would otherwise not be offered, new regulatory requirements or restrictions by EEOC to de minimis incentives or wellness programs that are not part of a group health plan do not appear warranted

[13] 78 Fed. Reg. 33159
[14] 79 FR 8565
[15] EEOC Enforcement Guidance at Q&A-22 (July, 2000).
[16] 42 U.S C. Section 12201 (c)(2).

and would have the unintended consequence of employees losing access to a benefit – wellness programs—which are highly valued.

Need for Adequate Review of Public Comments and Potential Disruption Due to Cumulative Regulatory Burdens Prior to Finalizing and Setting Implementation Timeline

Since there is no statutory deadline for EEOC to issue final rules addressing ADA and employee wellness programs, we urge the agency to more fully examine and consider other rules and notices prior to finalizing the Proposed Rule in order to minimize redundancy and prevent conflicting rules which would result in additional and unnecessary burdens on FMI members, particularly since employer wellness programs have undergone significant changes in order to comply with the 2013 Final HIPAA Nondiscrimination Rules and other ACA guidance. Plan designs for group-sponsored plans begin at least one-year prior to a plan's open enrollment, so any regulatory changes that disrupt integration of wellness programs into those plans will need additional implementation time.

Continuing and Accumulating Uncertainty and Anxiety with Forthcoming "GINA" Guidance

The cumulative, yet piecemeal, approach of various agencies issuing new and different regulations, such as the 2013 Final HIPAA Nondiscrimination Rules, ACA's implementing regulations and guidance, and now EEOC's Proposed Regulations Under the Americans With Disabilities Act have caused a significant number of disruptions and repeated compliance burdens within a three-year period. Looking forward, FMI members are also anxious about potential forthcoming EEOC proposed guidance that would impose new restrictions on employee wellness programs, potentially related to the Genetic Information Nondiscrimination Act (GINA). As demonstrated by FMI's concerns with EEOC's proposed revisions under the ADA, we seek for any such guidance to minimize disruption to employee wellness programs that are currently compliant under HIPAA.

We hope you will consider these comments and allow for future comment and dialogue as EEOC considers revisions to the ADA that are applicable to employee wellness programs. Please contact me at (202) 220-0642 or rrosado@fmi.org for further discussion on any of these issues.

Sincerely,

Robert Rosado
Director, Government Relations
Food Marketing Institute