November 21, 2019

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SE
Washington, DC 20201

Re: Bulletin: Opportunity for States to Participate in a Wellness Program Demonstration Project to Implement Health-Contingent Wellness Programs in the Individual Market

Dear Secretary Azar:

The 15 undersigned organizations are writing regarding the recently released Insurance Standards Bulletin, Opportunity for States to Participate in a Wellness Program Demonstration Project to Implement Health-Contingent Wellness Programs in the Individual Market. Our organizations urge the Department of Health and Human Services (HHS) to withdraw the bulletin. We have several concerns with the bulletin, including lack of evidence about the effectiveness of wellness programs, the potential for discrimination against patients with pre-existing conditions, state capacity to monitor and enforce non-discrimination requirements, lack of federal oversight of these programs, and lack of transparency and opportunity for public input as these programs are developed.

Our organizations represent millions of patients and consumers facing serious, acute and chronic health conditions across the country. We have a unique perspective on what individuals and families need to prevent disease, cure illness and manage chronic health conditions. Our diversity enables us to draw upon a wealth of knowledge and expertise that can be an invaluable resource in this discussion. We urge HHS to utilize the collective insight and experience our patients and organizations offer in response to the new bulletin.

In March of 2017, our organizations agreed upon three overarching principles[1] to guide any work to reform and improve the nation's healthcare system. These principles state that: (1) healthcare should be accessible, meaning that coverage should be easy to understand and not pose a barrier to care; (2) healthcare should be affordable, enabling patients to access the treatments they need to live healthy and productive lives; and (3) healthcare must be adequate, meaning healthcare coverage should cover treatments patients need.

Unfortunately, programs such as those outlined in the Wellness Program Demonstration Project have been found ineffective in lowering costs or improving health outcomes and opens the door to discrimination against patients with serious and chronic health conditions. Our organizations ask HHS to withdraw the bulletin.

Wellness Programs have been found to be Ineffective in the Employer Market

Wellness programs are common with employers; 84 percent of large firms that provide health coverage have a wellness plan.[2] Despite the popularity of these programs, as well as early data that showed mixed results, they have been found to be largely ineffective. For instance, while a 2019 randomized control trial, published in the *Journal of the American Medical Association*, that there was no significant difference in clinical measures of health or healthcare spending and utilization between the group of employees in the wellness program and the group of employees not in the wellness program.[3] This is despite the fact that the group who participated in the wellness program reported higher rates of exercise and active weight management.

Additional research shows that individuals who participate in wellness programs are already healthy; these individuals were less likely to have high medical costs.[4] The results of this study suggest that because wellness programs do not encourage participants to change their behavior, these programs could serve as a discriminatory screening mechanism by incentivizing plan participation among healthy people and disincentivizing participation among those with health conditions.

Research also shows that tobacco surcharges, which are currently allowable in the individual market, also do not work to improve health outcomes. The evidence shows most smokers do not quit smoking, but rather, due to the increased premiums, go without health insurance.[5] Additionally, almost half of small employers that used the tobacco surcharge did not offer the required tobacco cessation counseling to help those individuals quit.[6]

Wellness Programs and Discrimination

The Affordable Care Act (ACA) created health insurance market protections indented to shield patients from discrimination based on health status. The bulletin inviting states to participate in the wellness program demonstration project could undermine those protections.

Under the demonstration, issuers in the individual market could vary the cost of coverage by up to 30 percent dependent upon participation in specified health-related activities or achievement of certain health goals. This would create an opening for plans to charge higher premiums to patients with health conditions, which limit their ability to participate in wellness programs, favoring healthier individuals who are able to participate. If the experience of the tobacco surcharge in the individual market is indicative of the impact of wellness programs, some patients who are charged more will lose coverage. Over half of those who receive insurance through healthcare.gov have incomes of less than 250 percent of the federal poverty level, which is $53,325/year for a family of three.[7] With health care costs and out-of-pocket maximums continuing to rise, these families simply cannot afford to cover additional healthcare costs leading some to forgo health insurance and needed care as a result of these increased costs.

Furthermore, the conditions typically targeted by wellness programs often occur more frequently in older adults and fall disproportionately on women and some racial and ethnic groups, raising the potential for wellness programs to discriminate based on age and gender and to exacerbate racial

disparities. For example, the incidences of hypertension, diabetes and high blood sugar, arthritis, high cholesterol and obesity increase with age. Since a wellness program penalty can take the form of a premium surcharge of up to 30 percent of the cost of coverage, on top of premiums that can vary by age (up to three times the cost of a younger enrollee's premium), the penalty could vastly increase premiums for older adults in the non-group market.

State Capacity to Monitor and Enforce Wellness Non-discrimination Requirements

Under the Affordable Care Act, states must review health plans for discriminatory plan design. Under a wellness demonstration program, state regulators will have additional responsibilities to ensure wellness programs do not discriminate against participants based on health status. For example, to meet the requirements of 45 C.F.R §146.121(f), states will need to ensure issuers are meeting the requirement to provide a reasonable alternative standard, including the requirement to specify alternative standards for any health outcome the issuer establishes; to specify how and when program participants can access the alternative standard, and to do so without additional cost and with sufficient time to satisfy the alternative standard; and to accommodate any further modifications to the alternative standard for participants for whom their personal physician has identified barriers or medical reasons that require a different standard.

We have no data on how these requirements are being met in workplace wellness programs, including the type of reasonable alternative standards offered to employees or how often alternative mechanisms are accessed. Nevertheless, HHS is inviting states to expand these programs into their non-group markets, where individual plan participants will need to understand and access these alternative mechanisms on their own, without the help of a human resources department or other intermediary. For patients who are in active treatment, suffer from serious and chronic health conditions, or have been instructed by their doctor to limit activity, mandatory wellness plans clearly will have opportunities to discriminate. Yet it is unlikely that states have the resources or capacity to effectively carry out these additional responsibilities, even in states that choose to develop a *standard demonstration project*.

States that choose to develop an *issuer-based demonstration project* present event greater concerns, given the flexibility for insurers to design wellness programs that are impossible for sicker patients to comply with—thereby forcing those patients to pay more for care. We are concerned that an issuer may mandate participation in their wellness program in order to access affordable premiums. In counties with few plan offerings, such a requirement could be, in effect, a requirement for the purchase of any qualified coverage.

Lack of Meaningful Federal Oversight

HHS reserves the right to rescind a State's approval to implement a wellness program demonstration project, but HHS is not requiring states to submit data that would be needed to evaluate whether a program meets the statutory requirements. For example, there is no requirement that states report on the type of reasonable alternative standards offered to employees or how often alternative standards are accessed, nor is there a requirement to report changes in enrollment that would be needed to assess a program's effect on coverage levels.

Lack of Transparency

The invitation for states to participate in a Wellness Program Demonstration Project has the potential to substantially impact patients' access to quality and affordable care. These programs can increase premiums for patients or create discriminatory plan designs, leading to less consumer choice. Despite

these potential negative consequences, this opportunity for states was released as a bulletin, without any opportunity for public comment or input from patients and other stakeholders.

On top of the lack of transparency regarding the creation of the policy, there are no requirements in the bulletin for states to seek public feedback on proposals to participate in the Wellness Program Demonstration Project. The state is only required to submit an analysis confirming that the wellness program will not lead to a decrease, on net, in coverage or increased cost to the federal government, indicating that HHS acknowledges the possibility that a wellness program could lead to coverage loss or higher premiums for individual enrollees. The patients impacted by these programs should have opportunity to comment on their design.

The lack of transparency extends beyond the state level. HHS has not announced plans to solicit public comment prior to a state's approval to participate in the Wellness Program Demonstration Project. Under the bulletin as drafted, the only way the public can be certain to learn that a state is considering participation is when a state is approved for the Wellness Program Demonstration Project. This is very troubling to our organizations.

If HHS wishes to pursue a Wellness Program Demonstration Project, it should withdraw the current bulletin and instead issue a proposed rule and solicit robust public comment. Additionally, states should also be required to publicly share their proposal to participate in Wellness Program Demonstration Project and allow the public to provide comment about the impact of the proposed program on coverage and premiums.

Our organizations urge HHS to rescind the bulletin dated September 30, 2019, "Opportunity for States to Participate in a Wellness Program Demonstration Project to Implement Health-Contingent Wellness Programs in the Individual Market" to ensure that patients with serious and chronic health conditions do not face discrimination through wellness programs.

Sincerely,

American Cancer Society Cancer Action Network
American Liver Foundation
American Lung Association
Chronic Disease Coalition
Cystic Fibrosis Foundation
Epilepsy Foundation
Hemophilia Federation of America
Leukemia & Lymphoma Society
Lutheran Services in America
National Multiple Sclerosis Society
National Organization for Rare Disorders
National Patient Advocate Foundation
National Psoriasis Foundation
Pulmonary Hypertension Association
Susan G. Komen

CC: The Honorable Seema Verma
Administrator
Centers for Medicare and Medicaid Services

Samara Lorenz
Director, Oversight Group
Center for Consumer Information & Insurance Oversight

[1] American Heart Association website, "Healthcare reform principles." Available at: http://www.heart.org/idc/groups/heart-public/@wcm/@adv/documents/downloadable/ucm_495416.pdf.
[2] Kaiser Family Foundation. Employer Health Benefits 2019 Annual Survey. 2019. Available at: http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2019
[3] Song Z, Baicker K. Effect of a Workplace Wellness Program on Employee Health and Economic Outcomes: A Randomized Clinical Trial. JAMA. 2019;321(15):1491–1501. doi:10.1001/jama.2019.3307
[4] Jones, D. Molitor, D. and Reif, R., A Reason to Be Skeptical of the Workplace Wellness Industry: New study finds no changes in health care costs. Scientific American. March 19, 2019. Accessed at: https://www.scientificamerican.com/article/a-reason-to-be-skeptical-of-the-workplace-wellness-industry/
[5] Evidence Suggests That The ACA's Tobacco Surcharges Reduced Insurance Take-Up And Did Not Increase Smoking Cessation Abigail S. Friedman, William L. Schpero, and Susan H. Busch Health Affairs 2016 35:7, 1176-1183
[6] Nearly Half Of Small Employers Using Tobacco Surcharges Do Not Provide Tobacco Cessation Wellness Programs Michael F. Pesko, Jaskaran Bains, (Johanna) Catherine Maclean, and Benjamin Lê Cook Health Affairs 2018 37:3, 473-481
[7] Centers for Medicare and Medicaid Services. HEALTH INSURANCE EXCHANGES 2019 OPEN ENROLLMENT REPORT. March 25, 2019. Accessed at: https://www.cms.gov/newsroom/fact-sheets/health-insurance-exchanges-2019-open-enrollment-report