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June 19, 2015

Equal Employment Opportunity Commissioners  
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U.S. Equal Employment Opportunity Commission  
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RIN number 3046-AB01

<http://www.regulations.gov>

Dear Commissioners:

The Business Roundtable is an association of chief executive officers of leading U.S. companies. Together, our member companies employ nearly 16 million individuals and provide healthcare coverage to over 40 American employees, retirees and their families. Business Roundtable member companies are invested in offering coverage to their workers that promotes health improvements that may lessen or eliminate chronic diseases. I am writing on behalf of the Business Roundtable in response to the Equal Employment Opportunity Commission (EEOC) proposed rule on the Application of the Americans with Disabilities Act (ADA) to Employer Wellness Programs.

Employers and employees have made progress in improving the health of workers and their families. Employers are engaging with employees and their families as part of the ongoing efforts of companies to drive innovations in health care and improve the delivery of benefits. Given the opportunity to lessen or eliminate certain chronic diseases through these programs, we believe that providers of health insurance should offer employees incentives to encourage participation.

Employer wellness programs are explicitly authorized by the Affordable Care Act (ACA). The Departments of Treasury, Labor, and Health and Human Services (HHS) issued rules in 2013 and reaffirmed the value of incentives for encouraging greater employee engagement on employee's own health.

Any additional regulation must not contradict existing regulations on wellness programs or inhibit employers' ability to offer wellness programs that are in compliance with the ACA.

We strongly urge the EEOC not to undermine the value of these programs. Inconsistent and complex regulation will impede the evolution and growth of these types of engagements in improving health status where possible. Under the current regime, private employers must offer programs that are well-designed to achieve the goals established; must offer reasonable alternatives for employees who cannot participate for medical reasons; and must ensure that strong privacy protections are in place. Business Roundtable believes that EEOC should not unnecessarily regulate those employers who are in compliance with the ACA. Rather, EEOC should focus their resources on identifying employers who are not compliant.

While we appreciate the delicate balance that EEOC took with regard to the ADA and ACA in adopting a regime that treats the 30 percent incentive as a "voluntary" standard, we encourage consideration of specific additional issues as follows:

#### **The Thirty Percent Reward or Penalty Threshold**

The 30 percent reward or penalty threshold should be applied to either the self-only coverage, or if a family plan is elected, the 30 percent reward or penalty threshold should relate to the family plan value. We recognize that the EEOC's legal authority extends to employees only and not to family members; however, the construct of the proposed rule is limiting and inconsistent with the Affordable Care Act. We ask that this be clarified.

Incentives are an important part of wellness programs and encourage employees to participate and engage in their own health. If the reward or penalty threshold is limited to 30 percent of self-only coverage for family coverage too, this will unduly limit employer's ability to reward employees for making an effort to improve their health. The amount of the reward or penalty should be proportional to the amount of coverage. Limiting the reward or penalty for family coverage to a percentage of self-only coverage artificially limits an employer's ability to reward an employee and his family for making efforts to improve their health.

#### **The Thirty Percent Limitation on the Reward or Penalty for Nicotine Testing**

Smoking cessation programs are very important to workplace wellness. Each year, smoking costs the United States nearly \$170 billion in direct medical care for adults and more than \$156 billion in lost productivity. The Business Roundtable has concerns about the Notice of Proposed Rulemaking (NPRM) limitation on the reward or penalty for nicotine testing and believes that incentives related to smoking cessation programs should not be limited below ACA requirements.

Workplace smoking cessation programs can increase smoking cessation rates, improve employee health, reduce exposure to second-hand smoke and decrease health care costs. In fact, tobacco cessation is one of the most cost-effective measures to reduce health care costs and increase productivity in the workplace. It is important that employers have the flexibility to

design smoking cessation programs to meet the needs of their workforce, as well as the ability to offer adequate rewards to incent their employees to cease tobacco use.

### **Privacy Notices**

We urge you to reconsider a requirement to provide employees with additional privacy notices and information regarding wellness programs. Privacy notices and requirements are already required and managed by HHS as HIPAA privacy standards are regulated and enforced by HHS. The Business Roundtable has concerns about the complexity and the cost<sup>1</sup> of these additional notices and believes that the process of notifying employees about privacy standards should be streamlined. Employers could use a pre-developed form, developed by HHS, which would describe covered entities' responsibilities and limitations in disclosing an employees' personal health information in relation to wellness programs. This approach would ease the administrative burden on employers and would ensure that notices sent to employees are clear, accurate and fully compliant with existing HIPAA privacy requirements.

### **Participatory Wellness Programs**

The EEOC NPRM applies a 30 percent limit on rewards and penalties to participatory wellness programs, which is not applicable under ACA wellness regulations. The Business Roundtable understands the need to balance employers' ability to reward employees for participating in wellness programs with the need to ensure that wellness programs are voluntary. We urge EEOC to clarify that this new limitation only applies to participatory programs that include medical testing. We also recommend there be some narrow exceptions when the collection of medical information will aid those who solely administer the plan to tailor benefits and services to those employees and family members who are enrolled in the plan.

### **Additional Questions Contained in the Proposed Regulation**

Business Roundtable encourages the EEOC to avoid modifications to the rule relating to questions raised at the end of the proposed rule. The questions posed by the Agency are more properly the subject of an Advanced Notice of Proposed Rulemaking rather than a Notice of Proposed Rulemaking. Rulemaking through question and answer does not provide the regulated community with an opportunity to comment on the Agency's proposal, since a question by definition is not a proposal. The questions also suggest a course of action outside both the jurisdiction and authority of this Agency.

In conclusion, as sponsors of health care coverage for more than 40 million Americans, Business Roundtable members are deeply concerned about any new requirements that limit employers' ability to offer workplace wellness programs, without permitting flexibility to design programs to fit their population. Any new requirements must not conflict with existing requirements under ACA regulations or limit employers' ability to reward their employees for making an effort to improve their health. We believe that workplace wellness programs offer value to

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<sup>1</sup> The proposed rule estimates that the total cost of developing a notice as required in the NPRM would be \$42,583,000.

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employees and their families and have the potential to lower overall health costs. We encourage the EEOC to finalize the rule consistent with the ACA provisions and in direct alignment with the EEOC's authority. Regulating benefit plan designs and privacy notices are within the ambit of the HHS, Labor and Treasury Departments, and questions governing affordability and access to health coverage are squarely and firmly defined in the Affordable Care Act.

We encourage you to bear in mind the benefit of workplace wellness programs and avoid overly restrictive regulations that would discourage the design, establishment and operation of employer-provided wellness programs. These programs help employers, employees and their spouses and dependents identify and manage chronic medical conditions and reduce the cost and burden of these medical conditions on individuals, government, employers and society. The Business Roundtable supports the goal of employers encouraging the health and well-being of their employee population. We believe that the above recommendations and efforts by the EEOC to avoid contradicting existing ACA regulations will enhance engagements of employees in their health and address privacy and discrimination concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "G. W. L.", followed by a long horizontal line.

Gary Loveman  
Chairman, Chief Executive Officer and President  
Caesars Entertainment Corporation  
Chair, Health and Retirement Committee  
Business Roundtable