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

Submitted via Federal eRulemaking Portal: www.regulations.gov

The Retail Industry Leaders Association (RILA) welcomes the opportunity to provide comments to the U.S. Equal Employment Opportunity Commission (EEOC) regarding RIN 3046-AB01: a proposed rule to amend regulations under the American with Disabilities Act (ADA) regarding employer wellness programs. RILA appreciates the EEOC's recognition that employer wellness programs are an important part of the benefits that millions of American employers offer their employees and families.

RILA, the trade association of the world's largest and most innovative retail companies, product manufacturers, and service suppliers, promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

Employer-sponsored coverage is the crown jewel of the American healthcare system. RILA is committed to ensuring employer-sponsored health coverage remains a viable option for the nearly 170 million Americans receiving coverage today. For decades, retailers have offered quality and affordable health care to their employees and families, and are leaders in benefits design by customizing plans to meet their workforces' specific needs. There is no standard workforce population or standard employer plan in the self-insured market – and no one-size-fits-all employer health plan. Retailers tailor benefits offerings to meet the needs of their employees as a result of specific input from those employees. Self-insured retail plans reflect the uniqueness of plan benefit design and covered population.

Long before the enactment of the Affordable Care Act (ACA) and its employer requirements, retailers embraced the concept that investing in a healthy workforce today not only lays the foundation for a healthier society but also ensures the development of a more productive workforce which is able to enjoy a higher quality of life. Employers have been actively engaged in developing innovative approaches to encourage preventive health care to improve health outcomes, and to lower health care costs and premiums. Under the ACA, Congress and the President recognized that improving the health of Americans and encouraging employers to do so through financial incentives went hand-in-hand. Through improved health and a focus on healthy behaviors, overall health care expenses across the delivery system can be reduced.

Many retail employers encourage their employees to participate in voluntary wellness programs, and appreciate that a foundation of healthy habits can last a lifetime. For years, retail employers have offered employees robust wellness benefits that include programs such as: weight loss; smoking cessation; incentives to see a primary care physician; maternity wellness; diabetes control; nutritional/healthy eating; store discounts on healthy foods; gym discounts; group counseling sessions; and store gift card incentives for enrolling and participating in wellness programs.

The development and implementation of wellness programs by employers encourage healthier lifestyles for employees and their families, and provide important outreach to individuals whose health conditions may make them more likely to experience significant health events and related expenses. Retailers have made a significant investment in encouraging their employees to make more informed decisions and be better consumers of their own health care.

One component of a wellness program that is common to many employer-sponsored plans is a health risk assessment completed by the plan participant. As you are aware, the health risk assessment asks a series of questions aimed at discovering information regarding the plan participant's lifestyle and habits. Based on the results of the health risk assessment, the participant may be paired with a health coach, who works with him/her periodically to address a specific health area. In return for completing the health risk assessment and participating in the coaching, the participant may receive a discounted premium, lower co-pays or other reduced expenses. The health risk assessment is often enhanced to require a medical examination and/or biometric screening. Reduced expenses are based on the results of those examinations or screenings, or on a participant achieving a particular result (e.g. a particular BMI range).

Other wellness programs offered by retailers include both participation and/or outcomes-related goal achievement for rewards, incentives, disincentives, or access to higher levels of benefit coverage. These programs are designed to engage employees and their adult family members in regular activities focused on health, wellness, and consumerism in order to maintain or improve the quality and cost of their health care. Employers also see great value in working with private and public partners, like the Centers for Disease Control and the U.S. Preventive Services Task Force, to access databases of evidence and practice-based research, and collaborate with clinicians and care delivery professionals to assist in wellness program design and implementation.

Additionally, retailers have been leaders in establishing and operating on-site and in-store clinics, which provide conveniently accessible care not only to their own employees and families but also their customers and the community. At in-store clinics, highly trained medical clinicians, such as physician assistants and nurse practitioners who are licensed in many states to dispense basic medications, administer vaccines and treat common non-emergency illnesses and ailments such as influenza and sprains.

These clinics provide many advantages for individuals and the health care system itself such as: providing affordable and accessible, non-emergency health care to individuals who otherwise may have to wait for appointments with a traditional primary care physician or provider; reducing emergency room visits; improving primary care access by providing easy, affordable

options for frontline patient care, especially in medically underserved areas; providing convenient, one-stop shopping for patients who can fill needed prescriptions easily and begin treatment for their diagnosis without delay; reducing the need for specialized, expensive equipment because clinics offer standard care for common ailments; and streamlining costs and passing savings along to patients.

ACA Policy Development Process

Implementing the various employer requirements under the ACA has been a very complex process, involving years of extensive policy and operational conversations between the federal government and employers. Since enactment of the ACA five years ago, RILA has provided comprehensive policy recommendations to the White House, Departments of the Treasury, Health and Human Services (HHS), and Labor, and Internal Revenue Service (IRS) on the numerous employer requirements under the ACA. RILA greatly values the time that regulators have spent with our member companies on the telephone and in-person regarding various operational issues and policy ideas that directly impact employers, especially retailers who have large variable hour workforces.

RILA is very concerned that policies described in the EEOC's proposed rule may run counter to the intent of the ACA and various final rules developed over several years as a result of extensive communication with stakeholders, including retail employers. We are also concerned that the proposed policies, specifically regarding wellness incentives and the ACA's affordability test, go beyond the EEOC's agency scope, reaching into the realm of health policy development, which is the jurisdiction of Treasury, HHS, Labor, and the IRS.

Valuing Wellness Programs and Incentives

Under the ACA, Congress and the President recognized the value of employer wellness programs to improve employees' health and provide cost-savings to the overall health delivery system, by expanding already-allowed financial incentives under federal law. These changes were developed with direct input from retailers, who are innovative leaders in the area of wellness programs. As early as the summer of 2012, RILA has engaged in an on-going dialogue with senior White House and federal department officials about the development of federal rules for the implementation of the ACA's wellness incentives, and the importance of employer wellness programs to retail employees and their families.

The final rules issued by the Departments of the Treasury, HHS, and Labor (Tri-Departments) took into consideration the importance of enabling employers to offer wellness incentives of up to 30 percent of premiums for health-contingent programs, incentives of up to 50 percent of premiums for tobacco cessation programs, and limitless credits for participatory programs. In order to ensure that employers are able to continue providing comprehensive wellness programs, as well as incentivize employers to establish new wellness offerings, it is critical that the requirements of the ADA, the Genetic Information Non-discrimination Act (GINA), and Health Insurance Portability and Accountability Act (HIPAA) be interpreted in a consistent manner.

RILA is very concerned that the EEOC's proposed ADA rules run counter to the intent of Congress, the President, and the Tri-Departments to expand financial incentives for the establishment of employer wellness programs. RILA is also concerned that the EEOC has not released proposed rules regarding GINA.

The EEOC-proposed wellness incentives cap of 30 percent of the cost of self-only coverage, and the design requirement that the cap be shared across all like wellness programs (participatory, health-contingent, and tobacco cessation), dilutes employers' ability to be help employees improve their health by placing an arbitrary limit on the use of incentives to drive engagement. Employees who may currently be voluntarily participating in more than one wellness program, such as a participatory nutrition program and a tobacco cessation program, would see their wellness rewards reduced due to the proposed cap. Additionally, requiring employers to now track and calculate incentives under participatory programs against the proposed 30 percent cap, an administrative burden not currently required, may discourage them from continuing to offer such programs.

Applying the cap to self-only coverage is also problematic. Employers want to retain the ability to design and determine awards based on their workforce's unique needs. This includes the ability to positively incent both employees and their families towards better health. There have been numerous studies showing that when families participate in activities together the likelihood of success is vastly improved.

The purpose and intention of the ADA and GINA were primarily to protect individuals with a disability or genetic-related health conditions from discrimination in employment – not to prohibit health plans from obtaining information necessary to underwriting, classifying, or administering risks, or from providing employees with incentives for better health. Interpreting the ADA and GINA in a manner consistent with HIPAA benefits both plan sponsors and participants. Wellness programs and related incentives that comply with HIPAA should be deemed to comply with the ADA's and GINA's wellness program provisions (subject to any reasonable accommodation requirement).

Health-contingent wellness programs and tobacco cessation programs necessitate both identification of, and verification that, an individual meets certain standards related to a health factor, or has achieved particular health outcomes. Additionally, if an individual does not meet a certain standard related to a health factor, or does not participate in the program, a loss of incentive or penalty can be imposed. The proposed 30 percent cap being applied to all programs, regardless of verification of meeting a particular health outcome, runs counter to the intent of the ACA, undermines the rules established by the Tri-Departments, and weakens the overall effectiveness of wellness programs. As such, RILA urges the EEOC to eliminate the proposed 30 percent cap.

Affordability Test under 4980H

The EEOC rules proposing to link voluntary participation in wellness programs to the affordability test of the employer mandate, Code section 4980H, which would set an extremely dangerous precedence, and run counter to the affordability safe-harbor final rules and the intent

of voluntary wellness programs. The EEOC has no jurisdiction in this policy area and should not be proposing such regulations.

As written in the ACA statute, the affordability test of a self-only employer-sponsored plan regarding the B penalty of the employer mandate would have applied to 9.5 percent of an individual's household income. By law, employers do not and should not know an employee's household income. Under the ACA statute, employers would have been forced to make what possibly amounts to inaccurate estimates based on family structure. The statute, as enacted, would have set a dangerous modeling structure by employers who are assessing potential future risk for failing the affordability test year over year.

RILA and its member companies provided extensive operational input and policy recommendations to Treasury and the IRS during development of the 4980H rules, and specifically voiced our concern about the affordability test being based on household income. As a result of these policy and operational discussions, the final rules developed by Treasury and the IRS included three safe-harbors for employers to use to meet the 4980H affordability test that are not based on household income.

Conclusion

As our nation's health care delivery system continues to evolve, we believe wellness programs will become an increasingly important component of the workforce environment. Retailers have a vested interest in encouraging healthy lifestyles among their workforces and support efforts to establish and expand wellness programs. It is important that federal regulations, and the interpretation and enforcement of the laws, do not stifle employers' ability to continue to be innovative and forward-thinking in plan design and implementation.

Further, RILA would like to note to the Commission that it submitted additional comments through a joint letter filed with other employer trade associations, and supports comments filed by the U.S. Chamber of Commerce.

Please direct questions or requests for further information about this comment letter to Christine Pollack, Vice President of Government Affairs, with the Retail Industry Leaders Association (RILA) at Christine.pollack@rila.org or 703-600-2021.