Close the Loophole to Medical Underwriting in the Senate Health Care Reform Bill

December 21, 2009

Dear Member of Congress:

The undersigned organizations believe that the final health care reform bill signed by the President should include support for prevention and wellness programs and we applaud both the House and the Senate for their work in this area. However, we are deeply concerned that certain provisions in the Senate health care reform bill create a loophole to medical underwriting by allowing employers to charge employees thousands of dollars more for their health insurance based on a health status factor - such as obesity, hypertension, diabetes, or high cholesterol. Such exorbitant penalties undermine a fundamental goal of health care reform - the creation of a system in which no one can be charged more based on their health status.

The language in Section 2705 of the Senate bill codifies and expands regulations governing worksite wellness programs that were promulgated in 2006 by the Bush Administration. These provisions allow employers and insurers to apply rewards or penalties to worker's health insurance costs based on a health status factor. The proposed cap would be at least 30 percent of the cost of the health plan, or roughly $4,000 based on the average cost of family coverage, and the amount could increase to 50 percent. These adjustments can make insurance unaffordable for workers with pre-existing health conditions. We share the following major concerns about the Senate provisions.

The incentives can be in the form of penalties or direct surcharges for failure to meet the standard or through cost shifting from healthier to sicker employees. Explanations that accompanied the current rule acknowledged that possible outcomes included a "shifting of costs… from plan sponsors to participants who do not satisfy the standards, and from participants who satisfy the standards to those who do not." The Departments of Labor, Treasury, and Health and Human Services also noted that "the 20 percent limit was designed to avoid rewards or penalties so large as to deny coverage or create too heavy a financial penalty on individuals who do not satisfy an initial wellness program standard that is related to a health factor." These provisions may force low and middle income individuals who receive subsidies to spend a higher percentage of their income on premiums or cost-sharing than is permitted under other sections of the Senate bill.

The provisions lack standards for what is considered a "reasonably designed" wellness program. The Bush Administration regulations made it clear that the "reasonably designed" standard was intended "to be an easy standard to satisfy." More importantly, there is no requirement to provide a scientific record that a program promotes wellness. Absent more rigorous standards, a wellness program may consist of nothing more than charging higher premiums to individuals or their family members with health conditions whose causes may be linked in part to lifestyle choices as an incentive to get better with no other programs or activities offered within the worksite to help individuals improve their health status. (For example, a wellness program could consist solely of a premium surcharge based on a blood cholesterol count over 200).

The wellness provisions contained in Section 2705 of the Senate bill stand in stark contrast to other legislative efforts that outline thoughtful criteria for wellness programs. For example, the Healthy

Workforce Act introduced earlier this year by Senators Harkin and Cornyn requires that all wellness programs benefiting from the legislation must use practices consistent with evidence-based research and best practices strategies.

The Senate language and current federal regulations allow alternative standards or the waiver of standards only for individuals with a "medical condition" that makes it difficult or medically inadvisable to meet the target. However, employees can be required to provide verification that their medical condition qualifies them for an alternative standard, and this raises concerns for those who do not wish to share personal health records with anyone other than their medical care providers. There is no allowance for those who face barriers to compliance with the standard for non-medical reasons – such as a second job, or family responsibilities. There are also no limits set on the risk factors or outcomes that employers may target other than they must be reasonably designed to promote health or prevent disease. Americans don't begin from the same starting line when it comes to health, for reasons ranging from genetics to important environmental influences that may be beyond an individual's control.

The Senate language may undermine the core policies included in the Civil Rights Act of 1964, The Americans with Disabilities Act of 1990, the Genetic Information Nondiscrimination Act, the Health Insurance Portability and Accountability Act of 1996, and the Family and Medical Leave Act. These include policies that (1) prohibit employers from adopting criteria and methods of administration that have the effect of subjecting protected classes to discrimination, including limiting rights and privileges available to others with respect to fringe benefits, promotion, job assignment, and termination and (2) prohibit employees and their family members from being subjected to undue burden with respect to the divulging of highly sensitive, medical information when the information is not job-related and consistent with business necessity.

The Senate bill extends the use of penalties and rewards based on the ability to meet a health status target into the individual market. The absence of an employee/employer relationship makes wellness "programs" in the individual market little more than bare premium adjustments based on health status, and indistinguishable from medical underwriting.

There is limited independently evaluated research that shows that varying health insurance premiums or deductibles has an impact on health outcomes. However, there is abundant research indicating that patients are less able to manage chronic conditions such as hypertension or diabetes when their costs related to insurance coverage are too high. It would be premature to raise the cap on health target rewards and penalties tied to health insurance costs in the absence of a rigorous evaluation into whether the current 20 percent cap set in 2006 actually improved employee wellness and/or resulted in denials of coverage, privacy violations or onerous financial burdens, or other adverse consequences noted above.

We commend employers who have worked to improve the health of their employees through comprehensive worksite wellness programs. We believe that workplace wellness done correctly, can be helpful in reducing the economic toll of chronic disease on our nation. However, penalizing workers who do not meet certain health targets by charging them higher premiums perpetuates the status quo by making health coverage unaffordable for those who need it most. We urge you to close the loophole in the Senate healthcare reform language.

AARP

Academic Pediatric Association

ACCSES

AFL-CIO

AFSCME

AIDS Action Baltimore

AIDS Action Council

AIDS Foundation of Chicago

AIDS Institute

AIDS Project Los Angeles

Alzheimer's Foundation of America

American Association of University Women

American Cancer Society-Cancer Action Network

American Counseling Association

American Diabetes Association

American Group Psychotherapy Association

American Heart Association/American Stroke Association

American Hospice Foundation

American Medical Women's Association

American Music Therapy Association

American Network of Community Options and Resources

American Nurses Association

American Psychoanalytic Association

American Public Health Association

American Social Health Association

American Society for Metabolic and Bariatric Surgery

American Society of PeriAnesthesia Nurses

Americans for Democratic Action, Inc

APSE

Asian & Pacific Islander American Health Forum

Association for Ambulatory Behavioral Healthcare

Association of Professional Chaplains

Association of University Centers on Disabilities

Association of Women's Health, Obstetric and Neonatal Nurses (AWHONN)

Asthma and Allergy Foundation of America

Bazelon Center for Mental Health Law

Black Women's Health Imperative

BlueWaveNJ

Business and Professional Women's Foundation

Campaign for Mental Health Reform

Center for Advancing Health

Center for Democracy & Technology

Center for Independence of the Disabled, NY

Center for Medical Consumers

CHADD, Children and Adults with Attention-Deficit/Hyperactivity Disorder

Chenango Health Network

Clinical Social Work Association

Community Catalyst

Community HIV/AIDS Mobilization Project (CHAMP)

Consumers Union

Council for Responsible Genetics

Disability Rights Education and Defense Fund

Epilepsy Foundation

Families USA

Family Violence Prevention Fund

Family Voices

Friends of Cancer Research

Harris Center for Disability and Health Policy

Health Care For All

Health Care for America Now

Heart Failure Society of America

HIV Medicine Association

International Myeloma Foundation

Japanese American Citizens League

La Fe Policy Research and Education Center

Lance Armstrong Foundation

Leukemia & Lymphoma Society

Lung Cancer Alliance

Malecare Prostate Cancer Support

Mental Health America

NAACP

National Alliance on Mental Illness

National Asian Pacific American Women's Forum

National Association for the Advancement of Orthotics and Prosthetics

National Association of Councils on Developmental Disabilities

National Association of County Behavioral Health and Developmental Disability Directors

National Association of State Mental Health Program Directors (NASMHPD)

National Coalition of Mental Health Professionals and Consumers

National Consumers League

National Council For Community Behavioral Healthcare

National Council of Jewish Women

National Council on Independent Living

National Disability Rights Network

National Down Syndrome Congress

National Foundation for Mental Health

National Health Law Program

National MS Society

National Organization for Women

National Partnership for Women & Families

National Patient Advocate Foundation

National Physicians Alliance

National Spinal Cord Injury Association

National Women's Health Network

National Women's Law Center

New Yorkers for Accessible Health Coverage

Northwest Federation of Community Organizations

Obesity Action Coalition

Our Bodies Ourselves

OWL - The Voice of Midlife and Older Women

Raising Women's Voices for the Health Care We Need

Service Employees International Union (SEIU)

Special Olympics International

Sudden Arrhythmia Death Syndromes (SADS) Foundation

Sudden Cardiac Arrest Association

The Arc of the United States

The LGBT Cancer Project-Out With Cancer

United Cerebral Palsy

United Spinal Association

U.S. Forum – Delta Kappa Gamma Society International

US Psychiatric Rehabilitation Association

WomenHeart: The National Coalition for Women with Heart Disease

World Institute on Disability

If you require additional information, please contact Sue Nelson at sue.nelson@heart.org or 202-785-7812.

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