



December 23, 2009

Timothy Geithner
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue SW
Room 639G
Washington, DC 20201

Hilda Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Interim Final Rules Prohibiting Discrimination Based on Genetic Information in Health Insurance Coverage and Group Health Plans

Dear Secretaries Geithner, Sebelius and Solis:

WebMD Health Services Group, Inc. (“WebMD”) appreciates this opportunity to comment on the interim final rules implementing Title I of the Genetic Information Nondiscrimination Act (“GINA”) recently issued by your respective Departments (“Rules”).

WebMD, together with its affiliated companies, is the leading provider of health information services for consumers, healthcare professionals, employers, and health plans through its public and private portals. WebMD provides private health and benefits portals (collectively, the “Portal”) that enable employees and plan members to make more informed benefit, treatment and provider decisions. WebMD

offers the Portal to members and employees of more than 130 of the largest corporations and health plans based in the United States.

WebMD respectfully requests the Departments' consideration of the following comments in finalizing the Rules.

I. Unintended Effect on Wellness Programs

While WebMD supports the intent of Title I of GINA to prevent discrimination by group health plans and health insurers on the basis of genetic information, WebMD believes that the Rules may have unintended detrimental consequences for voluntary wellness programs. As such, WebMD respectfully requests that the implementation and enforcement of the Rules be postponed until a thorough review of the impact of the Rules on wellness programs can be conducted.

WebMD's health management services that are available through the Portal described above include an overall health risk assessment ("HRA"), lifestyle improvement programs, lifestyle education materials, personalized health alerts, and telephonic health coaching. Individuals participating in these services through their employer or plan-sponsored wellness program are provided with relevant health content and messaging. The primary purpose of the Portal services is to assist its users in improving their health through knowledge and prevention. In order to fully participate in the Portal services, each individual must first complete WebMD's HRA, known as HealthQuotient™. Historically, HealthQuotient has requested family medical history information, such as whether a family member has suffered from certain chronic conditions. This information is helpful in assessing whether an individual could potentially suffer from the same conditions, such as various types of cancers, coronary artery disease, depression and diabetes. Although various factors can contribute to an individual's risk profile, the likelihood that any of these chronic conditions will manifest is influenced by the presence of the condition in a family member. The responses from the family history questions assist WebMD in providing more relevant information to the individual about potential chronic conditions and information on how those potential risks can be reduced.

In the preamble to the Rules, the Departments acknowledged that there may be unintended consequences for wellness programs. In particular, the preamble states that if response rates for HRAs drop as a consequence of the new prohibition against incentivizing health plan members to complete HRAs requesting genetic information, then "a cost may be incurred that is associated with the forgone benefits of identifying disease risks early and preventing their onset."¹ More time is needed to evaluate the extent of the impact on voluntary wellness programs that have been proven to reduce costs and improve health outcomes by enabling better management of chronic

¹ 74 Fed. Reg. 51,664, 51,672 (Oct. 7, 2009).

conditions. We urge the Departments to weigh these potential implications prior to implementation and enforcement of the Rules.

II. Overbroad Definition of “Underwriting Purposes”

One of the more problematic aspects of the Rules is the definition of “underwriting purposes.” The Departments expand the term “underwriting purposes” in the Rules to include a much wider range of activities than contemplated in the statutory definition, including “changes in deductibles or other cost-sharing mechanisms in return for activities such as completing a health risk assessment or participating in a wellness program” and offering “discounts, rebates, payments in kind, or other premium differential mechanisms in return for activities such as completing a health risk assessment or participating in a wellness program.”² By doing so, we believe that the Departments have inappropriately broadened the definition of the term “underwriting purposes” well beyond what Congress specified in the GINA statute.³

This broad definition effectively prohibits any form of incentive for completion of an HRA containing questions about family medical history. Various studies as well as the experiences of WebMD’s clients have shown that incentives are critical in driving participation in wellness programs, and as such, most of WebMD’s clients offer some form of incentive to motivate eligible participants to complete HealthQuotient. The Departments suggest that plans implement two separate HRAs, a pre-enrollment HRA that does not request genetic information but offers an incentive and a post-enrollment HRA that requests genetic information but offers no incentive. The problem with the two HRA approach is that without an incentive, individuals are significantly less motivated to complete the post-enrollment HRA, as discussed above, and such lack of motivation will likely be enhanced if the individual has already completed the pre-enrollment HRA. Thus, information about the participant’s family medical history will be unavailable for purposes of providing any sort of relevant wellness services or information to the participant. Given the impracticality of eliminating incentives, the only practical alternative available under the Rules is to eliminate family medical history questions from HealthQuotient.

If WebMD’s HealthQuotient may not include questions about family medical history, participating individuals may not be able to maximize the utility of the application and as a result, may be less informed about modifiable risk factors relevant to potential chronic conditions and their overall wellness needs. Accordingly, we strongly encourage the Departments to adopt the definition of “underwriting purposes” set forth in the GINA statute without modification.

² See 26 C.F.R. § 54.9802-3T(d)(ii)(A) and (B); 29 C.F.R. § 2590.702-1(d)(ii)(A) and (B); and 45 C.F.R. § 146.122(d)(ii)(A) and (B).

³ See Genetic Information Nondiscrimination Act of 2008, Title I, Section 101(d); Section 102(a)(4); and Section 103(d).

III. Implications of the Effective Date of the Rules

One additional issue that has come to WebMD's attention is the lack of clarity around the effective date of the Rules. The preamble to the Rules states that they are effective with respect to plan years beginning on or after December 7, 2009. Nevertheless, it is unclear how the Rules will be enforced with respect to wellness program rewards that are provided to plan participants throughout the 2010 plan year (*e.g.*, ongoing premium discount or other plan-related benefits) but are based on the completion of an HRA that requested genetic information *prior to* December 7, 2009. Because the Rules were published during or just prior to open enrollment for several of WebMD's clients and there was insufficient time to eliminate the family history questions from HealthQuotient prior to such open enrollment periods, WebMD and its clients are eager to better understand the implications of the Rules on this category of wellness programs and how these clients may need to modify their respective wellness programs to comply with GINA.

Increasing the health of Americans is critical for the good of our nation. Wellness programs empower individuals to take control of their current and future health through, among other things, access to relevant and accurate information. Additionally, employee involvement in wellness programs has been shown to contribute to a reduction in overall health care costs for employers. Given the compelling reasons described above, WebMD respectfully requests that the Rules be reviewed for their impact on such programs and that enforcement be postponed pending a full review.

WebMD appreciates this opportunity to provide the Departments with our comments on the Rules. Should you have any questions about our comments or if WebMD can be of any further assistance to the Departments, please contact WebMD Health Corp.'s General Counsel at 212-624-3700.

Sincerely,

WebMD Health Corp.