June 1, 2015

Honorable Steny Hoyer
1705 Longworth House Office Building
Washington, D.C. 20515

Re: ***EEOC's Proposed Rulemaking Concerning ADA's Application to Wellness Programs***

Dear Representative Hoyer:

The undersigned members of the Consortium for Citizens with Disabilities (CCD) write to ask you to weigh in with the U.S. Equal Employment Opportunity Commission (EEOC) to raise concerns about the agency's April 20, 2015 proposed rule to amend its ADA regulations. This proposed rule takes away important workplace rights that Congress enacted to protect people with disabilities. CCD is a coalition of national disability organizations working for national public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

We are very concerned that the EEOC's Proposed Rule narrows the protections of the ADA—specifically, its limits on employers' ability to subject employees to medical inquiries and examinations unrelated to their jobs. Congress allowed such inquiries and examinations only if they are *voluntary* and "part of an employee health program available to employees at that work site."[1] As you know, Congress enacted these limits for a reason. Employers should not have access to employees' medical information unless it is relevant to the person's job performance or it is *voluntarily* provided as part of an employee wellness program. Without these protections, it is extremely difficult to prevent disability-based discrimination from occurring.

[1] 42 U.S.C. § 12112(d)(4)(B).

For the last 15 years, the EEOC has taken the position that, for medical questions asked as part of wellness programs to be voluntary, there must not be penalties for failing to answer.[2] This proposed rule would change that, permitting employees to be penalized up to 30% of the value of their health premiums—for many, thousands of dollars—if they decline to answer such questions. If steep financial penalties or rewards are used to pressure employees to provide medical information to their employers, that information is not provided voluntarily.

The EEOC's Proposed Rule is based on the erroneous assumption that the ADA must be "conformed" to provisions of the Affordable Care Act concerning wellness programs. But the ACA did not change the ADA. Congress does not change significant civil rights protections without saying so. Indeed, the Departments of Health and Human Services, Labor, and Treasury recognize in their regulations implementing the ACA's wellness program provisions that compliance with those regulations does not signify compliance with the ADA, and employers covered by the ADA must *also* "comply with any applicable ADA requirements for disclosure and confidentiality of medical information and non-discrimination on the basis of disability."[3] The EEOC acknowledges this as well.[4]

Moreover, the ADA's requirements concerning medical inquiries and examinations can be implemented consistently with the ACA. The ACA permits penalties of up to 30% of the value of an employee's health premiums in certain types of wellness programs. Nothing in the ADA or the EEOC's existing ADA guidance precludes employers from imposing penalties of that amount. The ADA and the EEOC's existing guidance simply bar penalties on the failure to answer the subset of health risk assessment questions that seek medical information and on the failure to take medical exams.

The EEOC has already promulgated a rule to implement the Genetic Information Non-discrimination Act's (GINA's) parallel provisions permitting voluntary inquiries about employees' genetic information as part of wellness programs. That rule, permitting employers to use penalties or rewards to incentivize employees to respond to wellness plan health risk assessments as long as those penalties/rewards do not apply to questions seeking genetic information, demonstrates how GINA—and the ADA—can be implemented consistently with the ACA, with the ordinary meaning of the term "voluntary," and with protections against workplace discrimination.[5] We would have expected the EEOC's Final Rule concerning the

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[2] *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act* (July 27, 2000), Question and Answer 22, http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

[3] 78 Fed. Reg. 33158, 33165, 33168 (June 3, 2013).

[4] 80 Fed. Reg. 21659, 21661 (Apr. 20, 2015).

[5] 29 C.F.R. § 1635.8.

ADA's application to wellness programs to follow a similar scheme, barring penalties and rewards for health risk assessment questions seeking medical information. Such a rule would preserve the protections that employees already have—and need—while giving effect to the ACA.

The employment rate of people with disabilities is the lowest of any group tracked by the Bureau of Labor Statistics. In light of this backdrop, the notion of reducing the ADA's workplace protections and increasing the potential for disability-based discrimination is particularly troubling. You have demonstrated over many years your deep desire to ensure fair treatment of people with disabilities in the workplace and elsewhere. We hope that you will voice concern about this proposal. People with disabilities deserve better.

Sincerely,

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ACCSES
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American Diabetes Association
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American Foundation for the Blind
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The Arc of the United States
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Association of University Centers on Disabilities
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Autistic Self Advocacy Network
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Bazelon Center for Mental Health Law
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Christopher and Dana Reeve Foundation
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Council for Learning Disabilities
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Disability Rights Education and Defense Fund
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Easter Seals
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