AMERICAN BENEFITS COUNCIL

June 17, 2021

*Submitted via SAPCDAC@dol.gov*

State All Payer Claims Database Advisory Committee
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

**RE: Comments on Self-Insured Plan Reporting to State All Payer Claims Databases (APCDs)**

Dear State APCD Advisory Committee Members:

I write on behalf of the American Benefits Council (the "Council") to provide recommendations for the State APCD Advisory Committee (the "Committee"), as it works to complete its objectives set out under Section 115 of the Consolidated Appropriations Act, 2021 (CAA). We understand that the Committee would like to hear the perspective of self-insured employers on reporting to state APCDs and we greatly appreciate the invitation to participate in the Committee's June 17 virtual meeting to discuss this topic.

The Council is a national nonprofit organization dedicated to protecting employer-sponsored benefit plans. The Council represents more major employers – over 220 of the world's largest corporations – than any other association that exclusively advocates on the full range of employee benefit issues. Members also include organizations supporting employers of all sizes. Collectively, Council members directly sponsor or support health and retirement plans covering virtually all Americans participating in employer-sponsored programs.

By way of background, our comments address the provisions contained in the CAA related to State APCDs. More specifically, the CAA provided for grants by the Secretary of Health and Human Services (HHS) to states to establish APCDs or to improve existing APCDs. In addition, the CAA added Section 735 to the Employee Retirement Income Security Act (ERISA), which directs the Secretary of Labor to establish and

periodically update "a standardized reporting format for the voluntary reporting, by group health plans to State All Payer Claims Databases" and to "provide guidance to States on the process by which States may collect such data from such plans in the standardized reporting format." The CAA also directed the Secretary of Labor to convene an advisory committee to advise the Secretary on these issues. The Committee is directed to provide a report with its recommendation by June 25, 2021, at which point the role of the Committee will sunset, under the statute.

We begin by noting that we appreciate the policy goals behind APCDs – that is, increased cost and quality transparency as a way to bring about higher-quality, lower-cost health care. The Council has long supported increased price and quality transparency and access to data for employer plan sponsors. Employers play a critical role in the health care system, leveraging purchasing power, market efficiencies and plan design innovations to provide health coverage to millions of Americans. Most employers that have had success decreasing the rate of health care spending have started by analyzing their data. They do this to better understand how much they are spending for various services delivered in different settings and, ultimately, to steer their enrollees to higher-value providers operating in higher-value settings. More recently, we have seen employers make efforts to seek and use plan data to address health plan inequities and social determinants of health and we have supported policies to further achieve these goals and will continue to do so.[1]

We also note that the Council has taken the position that access to claims and related data will assist all stakeholders in making more informed utilization and plan design decisions and, accordingly, we have generally been supportive of the establishment of an APCD *at the federal level*.[2] In the context of various legislative efforts, we have expressed to Congress that a properly crafted database that minimizes the burden on self-funded group health plans could be a helpful tool in employer efforts to drive lower- cost, higher-quality health care. At the same time, we have strongly recommended that policymakers prevent the burdens and costs associated with conflicting state requirements that arise from any mandates for reporting to state APCDs.

## STATE APCD REPORTING MANDATES FOR SELF-INSURED EMPLOYERS

Regarding the matter at hand, we understand that the work of the Committee is well underway and that reporting to state APCDs by self-insured group health plans has been discussed in prior Committee meetings. We especially appreciate the opportunity

[1] See https://www.americanbenefitscouncil.org/pub/?id=BF2EFD85-1866-DAAC-99FB-EC12D30A621C.
[2] See https://www.americanbenefitscouncil.org/pub/?id=CA7841E0-1866-DAAC-99FB-4F3FA0A1A070.

to weigh in on this important issue to emphasize that under both ERISA and the CAA, states may not require self-insured group health plans to report to State APCDs.

Under ERISA's preemption provision and the Supreme Court ruling in *Gobeille v. Liberty Mutual Insurance Co.* ("*Gobeille*") in which the Supreme Court held that Vermont's APCD was preempted by ERISA as applied to self-insured group health plans, states may not require self-insured employers to report to state APCDs. Doing so is "inconsistent with the central design of ERISA, which is to provide a single uniform national scheme for the administration of ERISA plans without interference from laws of the several States…."[3]

Section 735 of ERISA, as added by the CAA, confirms and reiterates the impermissibility of states requiring self-insured employers to report to state APCDs by clearly providing that DOL is to create "a standardized reporting format for the *voluntary* reporting, by group health plans to State All Payer Claims Databases" (emphasis added). As a matter of statutory interpretation, courts generally assume that Congress is aware of the existing legal backdrop when it legislates and *Gobeille* remains controlling law. As a result, it is fair to presume that Congress knew state APCD laws were preempted as applied to self-insured group health plans and for the sake of clarity, included the reference to voluntary reporting – which sits on top of the fact that ERISA already dictated such reporting must be voluntary. To overturn *Gobeille*, Congress would have had to expressly alter ERISA's preemption scheme, which it did not do.

Not only is it legally impermissible for states to require self-insured employers to report to state APCDs, it is also inconsistent with sound policy. This is because requiring employers to master the laws of 50 states and to submit different data sets, at different times, in different formats, for different populations would impose substantial burdens on self-insured plans. These significant costs would ultimately be borne in whole or in part by plan participants and would reduce the generosity of benefits employers would be able to provide or increase the cost of offering the same benefits for employers and participants.

We appreciate that the work of DOL, as advised by the Committee, to provide a standardized reporting format is presumably aimed at addressing the issues presented for self-insured employers in reporting in different ways state-by-state. While these efforts may lead to more self-insured employers voluntarily reporting under state APCDs, it does not change the fact that there continue to be significant burdens on plans in submitting data to many different states, even if the format for reporting is made more consistent. Even with more standardized reporting formats, plans will need to prepare the separate data sets, separately submit the different data sets and track the

[3] See *Gobeille*, 136 S. Ct. 936 (2016).

separate state laws to determine which states are using the standard template and which choose not to. This is why the CAA makes clear that reporting by self-insured plans to state APCDs remains voluntary, notwithstanding the legitimate efforts to support transparency by streamlining the format for voluntary reporting.

Accordingly, we ask that the Committee report and the subsequent DOL guidance to the states, state clearly and unequivocally that states cannot require self-insured plans to report to state APCDs.

**MEANING OF VOLUNTARY REPORTING**

We also understand that the Committee is considering whether to advise DOL to provide guidance to states that they may require self-insured plans to report to state APCDs as long as self-insured plans may opt-out of the requirement. We strongly urge the Committee to avoid such a recommendation, for a number of reasons.

First, requiring self-insured plans to report to state APCDs would violate ERISA's preemption provision. Case law is clear that a state law that violates ERISA preemption is not saved by giving the ERISA plan the ability to opt-out of the impermissible requirement. In *Egelhoff v. Egelhoff*, the Supreme Court made clear that a state law that permits an ERISA plan to opt out is still preempted because it effectively forces the plan to comply with the state law in one of two ways (*i.e.*, compliance with the state requirement or affirmatively opting out of the state requirement).[4] It is clear under *Gobeille* that a state law requiring a self-insured plan to report to a state APCD violates ERISA preemption and under *Egelhoff*, adding an option for an employer to opt out would not cure that fact.

In addition, a state requirement that self-insured employers report to the state APCD with an opt-out is inconsistent with the language in the CAA that reporting by group health plans be voluntary. States that were to impose a requirement with an opt-out would need to establish rules for how and when employers would be required to opt-out – and similar to the *Egelhoff* analysis described above, would be forcing self-insured plans to comply and would simply be providing two ways to do so. This would mean that some employers would inadvertently be required to report, by virtue of missing the opt-out deadline or incorrectly attempting to opt out. (We presume this is in fact the purpose of the opt-out – to increase reporting to state APCDs by effectively requiring self-insured employers to report, except for those who are able to opt-out in time and in the right way.) And even for those employers that are able to properly opt out, they would need to spend the time and resources to research and understand the

[4] *See Egelhoff*, 532 U.S. 141 (2001) (finding a Washington state spousal beneficiary law preempted by ERISA even though it allowed ERISA plan administrators to opt-out of the state law).

opt-out procedures and complete those procedures. This is inconsistent with a voluntary reporting regime, which is intended to avoid imposing burdens on self-insured group health plan, unless they choose to report.

Along the same lines, we ask the Committee to recommend and DOL to adopt, a definition of voluntary in this context that not only avoids an opt-out construct but that truly reflects the intent of ERISA and the CAA that reporting by self-insured plans be at their option and that their failure to do so not give rise to a penalty or loss of a benefit. For example, we are aware of some state efforts to provide that if self-insured employers fail to participate in the state APCD they will fail to be eligible for an array of substantial tax credits in the state. In that case, the choice of whether to participate in the state APCD by a self-insured employer is not truly voluntary and therefore such a state law is inconsistent with ERISA and the CAA.

## ENCOURAGING REPORTING BY SELF-INSURED EMPLOYERS

As noted above, it is essential that DOL's guidance to the states make clear that reporting to state APCDs by self-insured employers be truly voluntary. At the same time, we imagine that the Committee and DOL, are considering ways to encourage and support voluntary reporting to state APCDs by self-insured plans.

There are a number of factors that will determine the extent to which self-insured employers voluntarily report to state APCDs. One is that, in order for self-insured employers to consider voluntarily reporting to state APCDs, the costs and burdens associated with state-by-state differences on format, content, timing and method of submission will need to be minimized or eliminated. That goal will be undermined if the standard format that DOL makes available can be customized by states.

In addition, employers will need sufficient information to understand the benefits of potentially reporting to state APCDs, including whether they and other stakeholders, will have access to the data in the APCD and how the state plans to use the data for its own purposes. It will also be key for employers to be confident that the data submitted would be sufficiently de-identified and secure to maintain the privacy of patient information for employees and their family members.

## OTHER TRANSPARENCY REQUIREMENTS

Relatedly, employers and health plans are undertaking major efforts to comply with increased transparency requirements, including the transparency in coverage

requirements under Public Health Service Act Section 2715A[5] and various transparency provisions that apply to group health plans and insurers under the CAA.[6] These efforts mean that soon (over the course of 2021 through 2024) there will be a substantial increase in the amount of price transparency regarding group health plans, not only for employees and their families but for the public as well.

We encourage the Committee and DOL to keep these other requirements in mind in considering guidance to states on state APCDs. Although the information that will soon be available publicly may not completely overlap with the data states wish to seek through APCDs, we expect there to be substantial overlap and we note that states may be able to use the results of various other transparency requirements to achieve some of the goals also intended by state APCDs.

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Thank you for the opportunity to submit these comments and for the opportunity to participate in the Committee's June 17 virtual meeting. We very much appreciate the efforts of the Committee and of DOL, on this matter.

If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,

Katy Johnson
Senior Counsel, Health Policy

[5] The Departments of HHS, Labor and Treasury have finalized regulations under Public Health Service Act Section 2715A which require group health plans and health insurance issuers to provide online cost-sharing estimate tools for participants enrolled in the plans (this requirement is phased in over 2023 and 2024) and *also* to provide to the public, in machine readable files, information on the negotiated rates and out-of-network allowed amounts/billed charges for all items and services covered under the plan (this requirement is effective in 2022).

[6] The CAA includes new reporting requirements on prescription drugs (Section 204), an online cost-sharing estimate tool (Section 114) and a requirement to provide advanced explanations of benefits (Section 111), among others.