November 18, 2021

The Honorable Charles Schumer
Senate Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Mitch McConnell
Senate Republican Leader
United States Senate
Washington, D.C. 20510

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Kevin McCarthy
Republican Leader
U.S. House of Representatives
Washington, D.C. 20515

Dear Leader Schumer, Speaker Pelosi, Leader McConnell and Leader McCarthy:

Every American deserves access to affordable care and coverage choices that help improve their health, well-being, and financial stability. The undersigned groups representing behavioral health providers, health insurance providers, employers, and businesses, appreciate and share your commitment to whole-person care, including access to quality, affordable treatment for mental health and substance use disorders (MH/SUD). For years, our members have supported and worked hard to comply with the Mental Health Parity and Addiction Equity Act (MHPAEA), as well as with other federal and state laws, ensuring access to behavioral health care for millions of Americans.

Since MHPAEA's passage, our collective work has improved access to MH/SUD care for the families enrolled in the health care coverage we provide or sponsor. We have also worked to address larger systemic issues that limit access to care, such as workforce shortages and the lack of integration and coordination between physical and behavioral health providers. Our members have expanded flexibility for, and use of, telehealth during the COVID-19 public health emergency, which improved access to treatment and laid a path for a positive way forward after the public health emergency concludes. We recognize that additional systemic improvements are needed to build on the progress made, and we are committed to working with you and your staff as you examine bipartisan solutions to address MH/SUD care for all Americans.

As Congress continues its work on the Build Back Better Act and considers whether to adopt sweeping new authority for the Department of Labor (DOL) to assess significant civil monetary penalties (CMPs) on group health plan sponsors, issuers, and administrators,[1] we ask you to consider alternatives to this policy. Following the passage of the Consolidated Appropriations Act (CAA) and the guidance released in FAQ Part 45,[2] our members made available the newly required comparative analyses upon request from DOL. However, despite extensive good faith efforts to comply, our members have reported that upon submitting analyses, DOL staff sent back dozens of questions and requests for substantially more documentation.

The public and private sectors are committed to working together to improve MH/SUD access and are taking clear steps to comply. We ask that you now turn your focus toward ensuring that

[1] Sec. 21005 of House Rules Committee Print 117-18, as amended, of H.R. 5376, the Build Back Better Act
[2] https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-45.pdf

the federal agencies that enforce MHPAEA support compliance with the CAA requirements. For example, more robust tools and templates that include examples of complex benefit analyses would be welcomed by our members, as would releasing the de-identified examples of MHPAEA violations, as required by the CAA.

If Congress decides to move forward with the current proposed language in the Build Back Better Act, we urge you to amend the language to ensure adequate due process and ensure robust compliance assistance and opportunities to rectify identified issues before fines are imposed. We have developed the attached technical amendments to the current bill text that reflect the aforementioned suggestions.

Should you have further questions or need further information, please contact James Gelfand at (202) 627-1922.

Sincerely,

American Benefits Council
Association for Behavioral Health and Wellness
AHIP
Blue Cross Blue Shield Association
Business Group on Health
Business Roundtable
The ERISA Industry Committee
National Retail Federation

Attachment

Technical Amendments

Summary of Technical Amendments:

- Identify the parties that can originate complaints to those impacted by the provisions, including participants, beneficiaries, and state regulators;
- Allow for the civil monetary penalties if the parties have not implemented a corrective action plan; and
- Create administrative and judicial review of the process to give plans, issuers, and administrators due process.

SEC. 21005. CIVIL MONETARY PENALTIES FOR PARITY VIOLATIONS.

(a) CIVIL MONETARY PENALTIES RELATING TO PARITY IN MENTAL HEALTH AND SUBSTANCE USE DISORDERS.—Section 502(c)(10) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132(c)(10)(A)) is amended—

(1) in the heading, by striking "USE OF GENETIC INFORMATION" and inserting "USE OF GENETIC INFORMATION AND PARITY IN MENTAL HEALTH AND SUBSTANCE USE DISORDER BENEFITS"; and

(2) in subparagraph (A)—

(A) by striking "any plan sponsor of a group health plan" and inserting "any plan sponsor or plan administrator of a group health plan"; and

(B) by striking "for any failure" and all that follows through "in connection with the plan." and inserting "for any failure by such sponsor, administrator, or issuer, in connection with the plan *upon the complaint of a participant, beneficiary, or applicable state regulator—*

"(i) to meet the requirements of subsection (a)(1)(F), (b)(3), (c), or (d) of section 702 or section 701 or 702(b)(1) with respect to genetic information; or

"(ii) to meet the requirements of subsection (a) of section 712 with respect to parity in mental health and substance use disorder benefits *after a failure to implement a corrective action plan adopted pursuant to subparagraph 712(a)(8)(B).*

(3) by inserting a new subparagraphs (D) and (E) after subparagraph (C) as follows:

"(D) Administrative review.—

"(i) Opportunity for hearing.—The entity assessed shall be afforded an opportunity for hearing by the Secretary upon request made within 30 days after the date of the issuance of a notice of assessment. In such hearing the decision shall be made on the record pursuant to section 554 of title 5, United States Code. If no hearing is requested, the assessment shall constitute a final and unappealable order.

"(ii) Hearing procedure.—If a hearing is requested, the initial agency decision shall be made by an administrative law judge, and such decision shall become the final order unless the Secretary modifies or vacates the decision. Notice of intent to modify or vacate the decision of the administrative law judge shall be issued to the parties within 30 days after the date of the decision of the judge. A final order which takes effect under this paragraph shall be subject to review only as provided under subparagraph (E).

"(E) Judicial Review.—

"(i) Filing of action for review.—Any entity against whom an order imposing a civil monetary penalty has been entered after an agency hearing under this paragraph may obtain review by the United States district court for any district in which such entity is located or the United States District Court for the District of Columbia by filing a notice of appeal in such court within 30 days from the date of such order, and simultaneously sending a copy of such notice by registered mail to the Secretary.

"(ii) Certification of administrative record.—The Secretary shall promptly certify and file in such court the record upon which the penalty was imposed.

"(iii) Standard for review.—The findings of the Secretary shall be set aside only if found to be unsupported by substantial evidence as provided by section 706(2)(E) of title 5, United States Code.

"(iv) Appeal.—Any final decision, order, or judgment of the district court concerning such review shall be subject to appeal as provided in chapter 83 of title 28 of such Code."

(4) Conforming amendments.—

(i) by renumbering subparagraph "(D)" as subparagraph "(F)", and

(ii) by renumbering subparagraph "(E)" as subparagraph "(G)".

(b) EXCEPTION TO THE GENERAL PROHIBITION ON ENFORCEMENT.—Section 502 of such Act (29 U.S.C. 1132) is amended—

(1) in subsection (a)(6), by striking "or (9)" and inserting "(9), or (10)"; and

(2) in subsection (b)(3)—

(A) by striking "subsections (c)(9) and (a)(6)" and inserting "subsections (c)(9), (c)(10), and (a)(6)";

(B) by striking "under subsection (c)(9))" and inserting "under subsections (c)(9) and (c)(10)), and except with respect to enforcement by the Secretary of section 712''; and

(C) by striking "706(a)(1)" and inserting "733(a)(1)".

(c) EFFECTIVE DATE.—The amendments made by subsection (a) shall apply with respect to group health plans, or any health insurance issuer offering health insurance coverage in connection with such plan, for plan years beginning after the date that is 1 year after the date of enactment of this Act.