April 5, 2022

The Honorable Ron Wyden
Chairman
Senate Committee on Finance
DSOB 219
Washington, DC 20510

The Honorable Mike Crapo
Ranking Member
Senate Committee on Finance
DSOB 219
Washington, DC 20510

Dear Chairman Wyden and Ranking Member Crapo:

We write to share concerns regarding your March 30, 2022 hearing: Behavioral Health Care When Americans Need It: Ensuring Parity and Care Integration. The Partnership for Employer-Sponsored Coverage (P4ESC) is an advocacy alliance of employment-based organizations and trade associations representing businesses of all sizes and the over 181 million American workers and their families who rely on employer-sponsored coverage every day. We are committed to ensuring that employer-sponsored coverage is strengthened and remains a viable, affordable option for decades to come.

We are concerned that this hearing – like so many others concerning access to mental health care – is wrongly and punitively focused on employers and other payers for health care and mental health care benefits. The bigger barriers to access to care come from acute shortages of mental health care providers and mental health care providers, many who refuse to enter our networks so that employees can access care. Telemedicine has been one positive exception to the shortages during the pandemic; it is our hope that telemedicine access to mental health care services can be made permanent.

Employers work tirelessly to provide quality mental health and substance use disorder coverage for our employees and their families. Employers have innovated and invested in significant new programs during the COVID pandemic. Addressing the current mental health care crisis will require significant efforts in partnership between employers, providers, government, patient groups and other stakeholders. We believe that punitive legislative provisions like civil monetary penalties will poison these efforts and serve only to hurt patients.

Employers and mental health care providers worked together to build the compromise that became the Mental Health Parity and Addiction Equity Act of 2008. Employers and providers worked closely with the late former Senators Edward Kennedy (D-MA) and Pete Domenici (R-NM) to build compromise language that balanced financial parity in coverage with health plan and insurer's retained ability to medically manage that coverage. It is this latter element – particularly as regards noneconomic factors, such as network adequacy, formulary design, and step therapy – that is at issue now.

Civil monetary penalty enforcement proposes to impose network adequacy requirements by penalizing employers based on the raw number of mental health or substance use disorder providers in network. Yet, employer networks consistently report that these providers refuse to bargain in good faith and decline to participate in our networks at reasonable rates. Provider shortages – inside- as well as outside-networks – are rampant. According to HHS, 129.6 million Americans live in areas designated as Mental Health Professional Shortage Areas.[1] There are 6,559 additional BHC providers[2] needed to fill these provider gaps.[3] Provider shortages, in conjunction with limited in-network providers, make it difficult for patients to find affordable in-network providers.

Additionally, employers and other issuers have repeatedly and earnestly urged the DOL's Employee Benefits Security Administration to provide adequate guidance regarding the applicable mental health parity standards. As evidenced by the DOL's recent 2022 MHPAEA Report to Congress in which NO plans were without findings under agency review – we believe the agency has failed to provide sufficient implementing guidance for any plan to truly comply. While we believe employers and other payers wish to comply, there is and will continue to be no way to do so without additional rulemaking guidance and time to come into compliance.

We implore you to call on the agency to work in partnership with all the stakeholders and provide additional guidance. Without this guidance we will continue to see the intent of MHPAEA inadvertently frustrated by well-intentioned employers and other payers who are trying to do their best in the absence of adequate agency implementation. We are concerned and wary of the defeating cycle of attempting to comply, but perpetually being found lacking because the rules are not adequate or clear.

We believe the call for civil monetary penalties is premature. Civil monetary penalties, at this point, will add unnecessary tension and fear into what we think should be a partnership to breathe life into the MHPAEA requirements in a fulsome and sustainable way. Penalties distract from and compound the absence of guidance and may make a confusing situation into chaos. Plans and payers are doing their best to build a house without adequate blueprints and calling for civil monetary penalties is like the designer standing on the sidewalk, yelling "you're doing it wrong," and then charging for design changes after the fact. It's not fair, efficient, or good for the system as a whole.

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[1] Bureau of Health Workforce Health Resources and Services Administration, U.S. Department of Health & Human Services, "Designated Health Professional Shortage Areas Statistics," September 30, 2021, available at: https://data.hrsa.gov/Default/GenerateHPSAQuarterlyReport.

[2] Behavioral health providers are health care practitioners or social and human services providers who offer services for the purpose of treating mental disorders including: psychiatrists, clinical social workers, psychologists, counselors, credentialed substance use specialists, peer support providers, and psychiatric nurse providers.

[3] Bureau of Health Workforce Health Resources and Services Administration, U.S. Department of Health & Human Services, "Designated Health Professional Shortage Areas Statistics," September 30, 2021

Imposing penalties on plan sponsors cannot solve provider shortages. The federal government should not put its thumb on the scale in private negotiations between providers and employers. In keeping with the spirit of the mental health parity law, employers should be treated on par with providers.

We would welcome the opportunity to discuss these issues with you or your respective staff. If such a meeting would be of interest to you, please have your staff contact P4ESC's Executive Director Neil Trautwein at eneiltrautwein@gmail.com.

Sincerely,

Partnership for Employer-Sponsored Coverage (P4ESC)
www.p4esc.org