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**House Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor, and Pensions**
**Written Testimony for the Hearing Record**
***ERISA's 50th Anniversary: The Path to Higher Quality, Lower Cost Health Care***
**April 16, 2024**

Chairman Good, Ranking Member DeSaulnier, and distinguished members of the Committee, my name is Mairin Mancino, and I am the Senior Advisor for Policy at the Peterson Center on Healthcare ("the Center"), which is a division of the nonpartisan Peter G. Peterson Foundation. Thank you for the opportunity to testify before the Committee today as you examine ways to build upon and strengthen the Employee Retirement Income Security Act (ERISA) of 1974, the law that helps serve as one of the foundations of employer-sponsored healthcare.

Founded in 2014, the Center is a nonprofit, nonpartisan organization dedicated to making higher quality, more affordable healthcare a reality for all Americans. We are working to transform healthcare in the United States into a more efficient and cost-effective system by finding innovative solutions that improve quality and lower costs and by accelerating their adoption at scale.

**The Peterson Center on Healthcare Supports Access to Usable and Actionable Data**

One of the Center's core beliefs is that empowering health plan sponsors with actionable healthcare data can improve care and lower spending growth. The Center's work on the Peterson-Milbank Program for Sustainable Health Care Costs[1] underscores the critical role of data in identifying drivers of healthcare cost growth while simultaneously highlighting its limitations in availability and use across the healthcare sector. Through the Peterson-KFF Health System Tracker,[2] we know that recent efforts by the federal government to make healthcare pricing data more transparent have revealed wide market pricing variation for common healthcare procedures like diagnostic colonoscopies and hip replacements, even showing big differences in prices within the same health system for the same procedure. Price transparency data, in its current form, is valuable, but limited in utility without knowing more about utilization patterns or clinical outcomes.

The most recent example of the Center's commitment to supporting data-driven healthcare purchasing is Peterson Health Technology Institute (PHTI), an initiative that launched last year with a $50 million commitment to advance better innovation by producing independent evaluations of digital healthcare technologies to improve health and lower costs. PHTI's rigorous, evidence-based assessments aim to improve the healthcare contracting decisions of employers, health plans, and health systems, by empowering them with more accurate and comprehensive information than the marketplace provides today so that they can purchase digital tools that augment or replace usual care for their members and patients.

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[1] https://www.milbank.org/focus-areas/total-cost-of-care/peterson-milbank/

[2] Kurani, N., Ramirez, G., Hudman, J., Cox, C., Kamal, R. (April 2021). Early results from federal price transparency rule show difficulty in estimating the cost of care. https://www.healthsystemtracker.org/brief/early-results-from-federal-price-transparency-ruleshow-difficultly-in-estimating-the-cost-of-care/ and Lo, J., Claxton, G., Wager, E., Cox, C., Amin, K., (February 2023). Ongoing challenges with hospital price transparency. https://www.healthsystemtracker.org/brief/ongoing-challenges-with-hospital-price-transparency/



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**How Uncertainty and Lack of Information Contribute to Higher Costs**

As the members of this Committee know well, nearly half of all Americans rely on employer-sponsored insurance (ESI) for their healthcare coverage. Unfortunately, the rapid increase in healthcare costs and associated insurance premiums experienced by this population in the past 25 years[3] has put significant financial pressure on employers and families alike. These financial pressures have emerged in the form of lower wages than would otherwise have been paid, higher coinsurance, copayments, deductibles, and other forms of cost-sharing. As a result, Americans are increasingly citing challenges in their ability to afford healthcare, with 30 percent of ESI-enrolled workers reporting they are paying off medical debt over time.[4]

Although the past two Administrations have significantly advanced healthcare data availability by requiring the disclosure of payer and provider-negotiated rates, we believe and continue to hear from multiple stakeholders and grantees with whom the Center partners that further action is needed to foster, at scale, a transparent and competitive healthcare market.

The Center believes increased data transparency will serve the market well by providing key conduits for change – such as policymakers, employers, and consumers – with information that can correct inefficiencies in the market and ultimately lower healthcare spending growth to more sustainable levels. In support of that thesis, the Center and its grantees have studied the employer-sponsored insurance marketplace for the last several years. In 2023, the Center interviewed over two dozen employers and purchaser groups to further advance our understanding of the data needs and market dynamics employers face as they procure health benefits for their employees. This work culminated in an in-person roundtable in the late fall of 2023[5] – which brought together employers, brokers, purchasing coalition leaders, employer advocates, representatives of state and national claims database curators, consumer advocates, philanthropy, and academic researchers. Topics of discussion included data availability, data usability, and the actionable translation of data. Our work identified a need to increase access to employer members' price, cost, and utilization data, along with comparative benchmarking data, to support competitive purchasing and enhance market competition. My recommendations included in today's testimony draw on the totality of our grant partners' work, along with other independent studies, and the internal research we have conducted.

**Policy Options**

Congress should take the following steps to equip employers with the health data and information they need to purchase high-quality, efficient, and affordable care for their members.

1. **Congress should clarify the nature of employer fiduciary obligations**. Similar to the transformation of the retirement benefits industry, lawsuits appear poised to catalyze change for employer health plans– e.g., *Lewandowski and others similarly situated v. Johnson and Johnson, et al.*[6] We are concerned that the transformation of the employer health benefits ecosystem may be unconstructively disrupted if judicial decisions are the primary force of change. The American economy could be well served by Congressional

[3]KFF, Employer Health Benefits Survey (2023) https://www.kff.org/report-section/ehbs-2023-section-1-cost-of-health-insurance/#:~:text=Over%20the%20last%20ten%20years,compared%20to%2027%25%20wage%20growth.

[4] The Commonwealth Fund (2023). Paying for It: How Health Care Costs and Medical Debt are Making Americans Sicker and Poorer. https://www.commonwealthfund.org/publications/surveys/2023/oct/paying-for-it-costs-debt-americans-sicker-poorer-2023-affordability-survey

[5] "Empowering Employer Purchasers: Recommendations To Support Market Transparency And Health System Performance", Health Affairs Forefront, March 25, 2024. https://www.healthaffairs.org/content/forefront/empowering-employer-purchasers-recommendations-support-market-transparency-and-health

[6] Lewandowski vs Johnson and Johnson, et al. February 5, 2024, United States District Court of New Jersey, https://fingfx.thomsonreuters.com/gfx/legaldocs/znpnkkrmbvl/EMPLOYMENT_JANDJ_ERISA_complaint.pdf

guidance to accelerate the transition of employers to fulfillment of their role, rather than relying solely on the often time-consuming and variable guidance of the courts.

2. **Congress should clarify the extent to which fiduciary responsibilities are applied to third party administrators (TPAs) and other service providers.** Legal scholars have emphasized that fiduciary status under ERISA adheres to actions (e.g., exercising discretion in the management or administration of the plan or handling plan assets), not to categories or types of organizations. Yet, our work demonstrates that further clarification is needed. Congress should codify ERISA-specific criteria by which plan sponsors, TPAs, pharmacy benefit managers, or other service providers can individually demonstrate fiduciary compliance. These criteria could include, but are not limited to:

    - Use of certain methodologies, which could include but are not limited to, reference-based pricing, to assess reasonableness of prices and fees and to correct information asymmetries that distort normal market functions;
    - Use of state APCD data or data collectively shared by other ERISA plans to determine whether prices and fees are reasonable;
    - Removal of contract terms that inhibit competition and prudent employer exercise of fiduciary obligations (e.g., all-or-nothing, anti-tiering, and anti-steering clauses);
    - Inclusion of a high-value network benefit alongside other plan options[7];
    - Contribution of data to state All-Payer Claims Databases (APCDs) or other multi-payer claims databases without undue restrictions, such as those restrictions that are used to circumvent the ban on gag clauses;
    - Support for and contribution to a national data resource based on a minimum necessary data set and standardized reporting formats – as has been proposed by the American Benefits Council and the ERISA Industry Committee (ERIC), among others; and
    - Establishment of fiduciary committees for health benefits, like those developed in the retirement benefits space.

3. **Congress should strengthen employer's ability to access their own data.** Though the Consolidated Appropriations Act of 2021 established a prohibition on gag clauses in ERISA, implementing guidance from the Department of Labor has left an opening for third-party administrators to hinder access to claims data. Congress should direct the Department of Labor to issue guidance that expressly prohibits third-party administrators from restricting employer plan access to their members' claims data. Ambiguity surrounding the "reasonable restrictions" that may be placed on public disclosure represents another barrier employers face in accessing their claims data and fulfilling their fiduciary obligations. To prevent inappropriate interpretations of the guidance, the Department of Labor should explicitly, and as specifically as possible, identify practices that violate the prohibition on gag clauses. The guidance should include illustrative examples that demonstrate how the law applies in certain situations and how a TPA or other service provider might or might not comply with the law. Provisions that could be defined as not "reasonable" include:

    - Restrictions on the format of data, except when a standard data format is recognized and accepted (that is, allow disclosures of data in a standardized format that can be easily ingested by the plan);
    - Excessive fees that may be imposed on plans, beyond the actual costs incurred by a TPA in responding to a request; and
    - Purpose-based limitations on the data, other than those that prevent public disclosures or those that are required for compliance with applicable law.

4. **Congress should pursue actions that make more and better pricing data available to healthcare stakeholders, including consumers and those who purchase healthcare and health coverage**. For transparency to be

[7]Amy B. Monahan & Barak D. Richman "Hiding in Plain Sight: ERISA's Cure for the $1.5 Trillion Health Benefits Market" (2024) pre-publication.

meaningful, employers need data that is complete, accurate, usable, and actionable. We commend the House for its passage of the Lower Costs, More Transparency Act. The Senate is considering similar legislation, and recent research encourages this body and the Senate to consider additional transparency requirements specifically around the availability and use of discounted cash prices to further unlock competition.[8] Congressional action to codify payer and provider transparency rules into law and extend transparency requirements to include other provider and service types such as lab tests, imaging providers, and ambulatory surgical centers will send a clear message – price transparency is vital to competitive purchasing. The proposed bills also address the lack of usable data about pharmaceutical prices, requiring pharmacy benefit managers to comply with transparency requirements.

In addition, a provision of the No Surprises Act called the "Advanced Explanation of Benefits" (AEOB), would make personalized cost estimates available to privately insured patients *before* they receive scheduled care. This provision was supposed to go into effect January 1, 2022. However, the Administration has delayed enforcement of these rules. Congress should work to ensure the Administration remains focused on implementing the requirements that must be met by providers and payers to issue AEOBs so that consumers can use this tool to shop for care with the information they need upfront to understand their financial obligations given their health plan benefit design.

5. **Congress should increase the utility of data for employers, who often lack the tools and resources to translate available raw data into meaningful information to support purchasing**. Even in its limited form to date, we have seen federal price transparency efforts motivate employers to use data in ways that promote competition, especially through the increasing availability of hospital price data and Transparency in Coverage (TiC) payer data files. Yet, more work is needed to enhance this burgeoning use case. Employers need pricing and utilization information to increase their leverage to negotiate and achieve better provider reimbursement rates. For example, Congress could create incentives to encourage employers' and health plans' voluntary contribution of claims data to existing or future multipayer claims databases. Those claims databases, in turn, could make contributed data available in useful formats to help inform employer negotiations with TPAs, hospitals, and other vendors for the provision of health benefits. Congress could also require HHS and DOL to increase the utility of the required price transparency data submissions from plans and hospitals by requiring the inclusion of utilization estimates (to put the price into context of volume), and further implementing file standardization, translation, and ease of use ideas. Lastly, Congress should encourage CMS to release the technical specifications and implementation timelines for the TiC prescription drug machine readable file. These advancements would take important steps forward to ensure data provided pursuant to price transparency or other future rules is made available in useful and usable formats and is ultimately used for its intended purpose of promoting competition.

6. **Congress should further support employers who often do not have the capabilities and experience to translate their business intelligence into rebalanced plan, TPA, and vendor contract negotiations, and must rely heavily on brokers and other intermediaries to assess purchasing options and negotiate terms on their behalf**. Intermediaries—while willing and increasingly capable of supporting these objectives—often have opaque financial incentives that may not align with those of the employer plans. Congress should urge the Department of Labor to clarify employers' obligations to oversee and negotiate with their third-party administrators and other service providers that contract on their behalf with healthcare providers. Congress should also urge the Department of Labor to clarify the fiduciary responsibilities and financial disclosure requirements of brokers and intermediaries. Where necessary, amendments to ERISA may be needed to provide

[8] "Federal Legislation And State Policy Efforts Promote Access To And Use of Discounted Cash Prices", Health Affairs Forefront, March 27, 2024. https://www.healthaffairs.org/content/forefront/federal-legislation-and-state-policy-efforts-promote-access-and-use-discounted-cash

the Department with necessary authority. Together, these measures can foster trust and spur collaboration and greater market competition.

7. **Congress should continue efforts to promote consistency across statutes and regulations such as the Health Insurance Portability and Accountability Act (HIPAA) and ERISA that protect patient data.** While we fully support data transparency and sharing to facilitate more efficient healthcare marketplaces, we also recognize the need for standards to protect sensitive patient data. One of the key challenges we have identified in using and reporting on health data is a lack of consistency. We especially appreciate the recent HHS final rule on 42 CFR Part 2 patient information which aligned requirements under Part 2 with HIPAA and the Health Information Technology for Economic and Clinical Health (HITECH) Act.[9] It is important to balance the protection of sensitive information with the goal of enhancing access to and utility of data for fiduciary determination of reasonable prices and fees.

8. **Congress should ban anti-tiering, anti-steering, all-or-nothing, and most-favored nation clauses from contracts and require attestation from employers and their contracted entities that they are not engaging in these practices**. Lawmakers can help promote greater competition within the employer healthcare market, as well as individual and commercial health insurance markets, by more directly addressing anticompetitive practices that arise in consolidated markets. Anti-tiering and anti-steering clauses require that an insurer place physicians, hospitals, and other facilities associated with a particular system in the most favorable tier of providers or at the lowest cost-sharing level regardless of whether they meet cost and quality requirements to be in that tier or if other providers have better value. All-or-nothing clauses require insurers to include all of a health system's providers and facilities in their network, regardless of cost or quality differences. Most favored nation clauses also limit competition by guaranteeing that an insurer receives terms from providers that are at least as favorable as those provided to any other insurer, which prevents other insurers from offering new products at a lower rate. These clauses give dominant organizations an unfair advantage over competitors, and the lack of competition prevents employers from being able to prudently fulfill their fiduciary obligations.

9. **Congress should expand the role of the ERISA Advisory Council or create a new advisory council to provide recommendations to Congress on issues affecting employer-sponsored health benefits**. Congress should ensure that this council is representative, balanced, adequately funded, and empowered to contribute ideas and topics for review. To safeguard the independence of the council and ensure a regular cadence of policy review, the council should be authorized to examine specific ERISA-related topics and make recommendations to Congress in an annual report. Specific topics for review could include: healthcare costs and prices; healthcare transparency, including price transparency, billing or location transparency, and ownership transparency; gag clause prohibition compliance; data sharing compliance; network adequacy compliance; and benefit design trends. Examination of these issues should include implications for workers, employers, purchasers, and federal and state regulators. Congress should make an investment in the form of annual appropriations to enable the council to perform its duties fully and adequately or consider novel ways to fund the council's work (e.g. a user fee model).

In closing, policy reforms that seek to improve employers' purchasing leverage and access to better data will bolster competition, equipping employers with the tools necessary to negotiate confidently in the healthcare market and to ensure their plan sponsors and administrators are meeting fiduciary responsibilities. In turn, and most importantly, employers may then be better positioned to secure higher quality, more affordable healthcare for their workforce.

Mr. Chairman and members of the Committee, thank you for the opportunity to testify today. We hope you find our recommendations to be responsive and constructive. I would be happy to answer any questions at this time.

[9] https://www.hhs.gov/hipaa/for-professionals/regulatory-initiatives/fact-sheet-42-cfr-part-2-final-rule/index.html