July 6, 2022

The Honorable Xavier Becerra
Secretary
U.S. Department of Health & Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

The Honorable Martin Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Initial and urgent large employer plan sponsor requests resulting from the *Dobbs v. Jackson Women's Health Organization* decision.

Dear Secretaries Becerra, Yellen and Walsh:

We write to first express our appreciation for the Departments' sincere request to partner with employer plan sponsors and other stakeholders in-light of the recent Supreme Court decision in *Dobbs v. Jackson Women's Health Organization (Dobbs)*. Regardless of one's position on the merits and prudence of the decision, it will be undeniably disruptive to Americans in many facets of their lives. Further, the decision has introduced an unprecedented level of uncertainty for American companies that provide health benefits for over 170 million employees and family members.

For employers that sponsor ERISA health benefit plans, the policy underpinning such offerings hinges on certainty and uniformity for employers, employees, and families regarding the benefits provided. For at least the short term, it is inarguable that the requisite certainty and uniformity will be disrupted as employer plan sponsors will have to navigate the evolving legal requirements associated with abortion, fertility, and other reproductive health coverages. We believe this is a critical moment for the Departments and the Administration to act and support employer plan sponsors (and by extension

other coverage providers such as multi-employer plans and issuers) to continue to fulfill the promise and ideal of ERISA for American workers and families.

Business Group on Health represents a network of more than 440 of today's largest and most progressive employers, including 74 Fortune 100 companies, providing health coverage for 60 million workers, retirees and their families in 200 countries. Business Group members – innovative employer plan sponsors – are leading the way and encouraging others by providing strong health plan offerings, adopting alternative payment models, managing the total cost of care, promoting health equity, furthering population health, and keeping people well.

I. Affirmatively and unequivocally support and defend ERISA preemption to the greatest degree possible as it pertains to state civil and criminal action against plans, plan sponsors, settlors, fiduciaries, service providers, and their personnel.

We urge the Departments to take immediate, aggressive, and justified action to support and ensure the maximum deference to ERISA's preemption provisions. Without regard to political orientation or benefit design, employer plan sponsors and their vendors are concerned that they will be pulled into a legal morass of state-by-state assessments, litigation, or worse – personal criminal proceedings. As it applies ERISA does not, and should not, allow this outcome. The Departments should be unequivocal in their policy, guidance, and actions to ensure that challenges are resolved favorably for plans and, preferably, that challengers are deterred from raising specious, wasteful claims.

We are profoundly concerned that an ERISA preemption challenge will get swept up unnecessarily in the political arguments of the moment and be decided in a derisive and erosive manner. Even if ERISA preemption is affirmed, however, the financial and nonmonetary cost of defending such claims will potentially drain vital resources that should rather be invested elsewhere and inure to the benefit of American families. We implore you to issue regulatory, subregulatory, and other available guidance, and use other resources within your authority to reenforce and ensure that ERISA preemption is clear, strong, and unwavering in these circumstances and beyond.

II. Undertake accelerated rulemaking and/or provide other guidance to update HIPAA's privacy protections to ensure that covered entities are able to protect private health information (PHI) regarding medical procedures and related benefits or other information when lawfully undertaken in the jurisdiction where performed, or as otherwise appropriate under applicable law.

We note and appreciate HHS's June 29, 2022, clarifications of "existing requirements under the law or [HHS's] policies"[i]. However, as noted in the document itself, the clarifications provided do "not have the force and effect of law and are not meant to bind the public in any way". While these clarifications may be helpful and give employer plans some basis for questioning or resisting automatically providing abortion, fertility, and other reproductive health-related PHI to state officials, its reliability is unclear for covered entities.

We anticipate litigation over the disclosure of PHI for law enforcement purposes related to state-level abortion restrictions or bans and fear that employer plan sponsors will be caught in the middle facing untenable options. Employers may face an interminable period of personal and corporate uncertainty operationally, financially, and with respect to criminal charges involving incarceration – their personal civil liberties. We urge HHS to take immediate regulatory, subregulatory, and other available action to bolster the reliability and defensibility of HIPAA privacy-based protections for plan sponsor covered entities, business associates, and the PHI of protected individuals.

III. Issue Treasury/IRS guidance assuring plan sponsors that travel benefits meeting IRC 213(d) requirements (including any future amendments) are categorically "not significant" medical benefits, regardless of group health plan status, and thus will not disqualify an otherwise qualified individual from contributing to a health savings account (HSA).

The post-*Dobbs* landscape has caused many employers to focus more heavily on the use, necessity, and utility of medical-related travel benefits. Generally, these have been relatively uncontroversial and often developed in conjunction with beneficial "centers of excellence" arrangements. In some cases, important access to care assumptions underlying the employer sponsorship and employee selection of an HSA-qualified high deductible health plan (HDHP) may have fundamentally changed and warrants Treasury/IRS review and further clarification broadly categorizing travel benefits as "not significant".

Although it is true that prior to *Dobbs* an enrollee selecting an HDHP would generally have to pay travel expenses for medical care before meeting their deductible, that selection may have been based on certain assumptions of available local care that no longer exist. Moreover, the recent intense review of travel benefits under IRC 213(d) has pulled into focus that such coverage can be important but is generally ancillary to the care itself. The benefit amount is typically a low amount in comparison to the actual cost of care. This warrants a policy distinction and categorization that does not interfere with the overarching status of the plan's medical coverage provisions.

Consistent with a categorical characterization as "not significant," we urge Treasury/IRS to explicitly state (or identify reliable prior guidance to support) that provision of medical travel benefit itself within or without the terms of an ERISA group health plan will not cause any group health plan coverage to disqualify an otherwise qualified individual from contributing to an HSA. Assuming no other disqualifying coverage applies to the individual, the individual should remain qualified to contribute to an HSA regardless of whether a categorically "not significant" medical travel benefit is offered under a non-ERISA plan/program, a spouse or dependent's ERISA or non-ERISA plan/program, or the individual's own applicable ERISA group health plan.

IV. Exercise enforcement discretion regarding Mental Health Parity and Addiction Equity Act (MHPAEA) assessments to accommodate expected plan uncertainties and volatility regarding abortion, fertility, and other reproductive health benefits, and any medical travel benefits.

Employers are committed to providing robust, compliant mental health and addiction treatment benefits in accordance with and, in many cases, beyond MHPAEA requirements. Our request here is unequivocally not an effort to avoid any requirements or the spirit of MHPAEA. We raise concerns and request temporary accommodation from the Departments because we anticipate potentially extreme volatility in the benefit offerings applicable to abortion, fertility and other reproductive health services, and medical travel coverage.

It has been widely reported and expected that states will start enforcing existing or newly triggered restrictions on abortion-related services. It is further anticipated that states will continue to adjust their legal and enforcement mechanisms as they decide or are legislatively or judicially compelled to shift their intended strategy to achieve their desired policy outcomes. We expect this to result in the need for employer plan sponsors to revisit abortion, fertility, other reproductive health coverages, and medical travel benefit offerings near constantly in the short-term, and with some regularity over the next few years. This is even more pronounced in the absence of additional ERISA preemption affirmations requested above.

With this volatility, plans may need to change benefit offerings suddenly in response to particular state circumstances. Moreover, some plans have already made changes in reaction to the *Dobbs* decision. Sudden plan changes are not generally "normal" for ERISA plans, which typically prepare for changes months or years in advance of implementation or annual enrollment. The normal adoption cycle provides time for assessments and revisions potentially required under MHPAEA.

Facing a potential shortage of providers and/or the specter of state criminal prosecution or other enforcement, plans are or may be faced with abandoning desired programs due to, among other things, uncertainty over whether such programs will inadvertently push them afoul of MHPAEA requirements. We expect that the volatility in this area will subside over time but urge the Departments to act now to assure plans that they can make desired changes without fear of negative federal consequences or undesirable and misleading publicity under otherwise applicable reporting requirements.

Thank you for considering our comments and requests. We would welcome the opportunity to discuss these comments and partner with the Departments on developing appropriate protections and guidance for employer plan sponsors. As mentioned, we expect the applicable circumstances will evolve, employer needs will change, new issues will be identified, and that we will need to continue to raise issues and requests for the Departments' consideration and action. We appreciate your interest in partnering with us and other stakeholders to ensure the protection and stability of our health care and health plan system.

Please feel free to contact me (kelsay@businessgrouphealth.org) or Garrett Hohimer, Director, Policy and Advocacy (hohimer@businessgrouphealth.org) to discuss further.

Sincerely,

Ellen Kelsay
President and CEO

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[i] https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html