

July 2, 2021

Maureen Mustard
Committee Chair

Frederick Isasi
Data Submission Subgroup (Subgroup 4) Chair

State All Payer Claims Databases Advisory Committee
Employee Benefits Security Administration
Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Submitted electronically via SAPCDAC@dol.gov

Dear Chair Mustard and Mr Isasi:

On behalf of the American Society of Plastic Surgeons (ASPS), I am writing to thank you for your work thus far on creating State All Payer Claims Databases Advisory Committee (SAPCDAC) recommendations as laid out in the *No Surprises Act*. ASPS is the world's largest association of plastic surgeons. Our over 7,000 members represent 93 percent of Board-Certified Plastic and Reconstructive Surgeons in the United States. ASPS promotes not only the highest quality in patient care, but also in professional and ethical standards. Our members are highly skilled surgeons who improve both the functional capacity and quality of life for patients, including treatment of congenital deformities, burn injuries, traumatic injuries, hand conditions, and gender affirmation surgery.

We appreciate that your work had to be completed under a very tight timeline, and we write to provide input on recommendations being developed by the Data Submission subgroup, particularly as it relates to data submission by self-funded or ERISA plans. ASPS acknowledges the legal opinions the SAPCDAC and Subgroup 4 received indicate that states cannot mandate ERISA participation in state APCDs and that there are questions about whether creation of an “opt-out” mechanism for ERISA plan data submission would run into obstacles with this inability of states to govern ERISA plans. While we would encourage the SAPCDAC to issue recommendations that it believes would achieve the desired policy goals, even if that runs into the grey areas of state law and ERISA exemptions, we nonetheless understand that you are conducting your work with this issue in mind.

As such, the latest version of the Subgroup recommendations on this topic as discussed at the June 24, 2021 meeting are as follows:

- Recommendation #1: *The Secretary of DOL in partnership with the Secretary of HHS should clarify and emphasize all of the public policy and business interests of having self-funded employer-sponsored health plans self-insured submit data*
- Recommendation #2: *The Secretary of DOL should make it easier for plan sponsors to participate in APCD data submission. This includes:*
 - *Simplifying the process for plan sponsors to opt in to data submission by creating a standard opt-in process managed by DOL (e.g., allowing plan sponsors to opt-in via the DOL annual form 5500)*
 - *Creating a uniform process across states that clarifies that decision to submit data rests with the plan sponsor self-insured employer, not the TPA, and that TPAs must exercise plan sponsor wishes. This could include creating model contract language for TPAs around APCD data submission*
 - *Clarifying the ability of TPAs to pass along the cost of APCD data submission to plan sponsors and ensuring these fees do not unduly burden plan sponsors*

We are also interested in the longer-term recommendations put forward by the Subgroup:

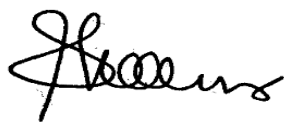
- *The Secretary should monitor progress in securing robust self-insured data within state APCDs. This includes examining access to data from government-sponsored coverage – particularly, FEHBP, DOD/VA, Medicare FFS, and Medicare Advantage as well as state sources of coverage including Medicaid, CHIP and State/City/County employee coverage*
- *The Secretary should establish a date (e.g., 3 years) and metric (e.g., percent of state covered lives with data submitted to state APCD) by which DOL determines if voluntary data submission has succeeded to create more robust APCD data, and if not, triggers:*
 - *Administrative action or a recommendation for congressional action to require uniform standards for submission and mandatory submission across self-insured, government sponsored, and fully insured*
 - *Actions by DOL in its oversight role (potentially with the assistance of another government agency like HHS) to centrally collect all claims data from self-insured employers that will then be disseminated to states based on beneficiary geography (residence and utilization of health care services)*
 - *The creation of a new committee to consider progress made over the time period and make recommendations to the Secretary for additional steps that he/she should take (e.g., creating centralization or more streamlined processes included considering a regionalized approach)*

To the extent that the legal opinions on which these recommendations are based hold true, **ASPS urges the SAPCDAC to issue a short-term recommendation that a system be created that acknowledges or quantifies the sufficiency or insufficiency of ERISA data in a state APCD.** If the goal is for state APCDs to represent an adequate cross-section of claims from which policymakers and stakeholders can draw conclusions, the extent to which there is insufficient data from ERISA plans in the database, this should be made clear from the outset. We are concerned that some of the recommendations that appear under your “long term” category of recommendations might start to move in this direction, but if not implemented at the outset with the rest of your recommendations, this will create an environment where reliance on state APCDs could take hold with no acknowledgement of potential lack of ERISA plan participation or data. This would serve public policy goals of transparency and data integrity to address the lack of the state APCDs to compel ERISA plan data submission.

In addition, ***ASPS recommends that the SAPCDAC add to the list of long term recommendations that the DOL (or new committee included in your current recommendations) develop a methodology to adjust state APCD data or rates to address the absence of ERISA data in that database.*** Databases, and potentially state APCDs, play an important role under the *No Surprises Act* in helping to set the Qualifying Payment Amount (QPA) for items and services for which a plan has insufficient data to calculate a QPA or for new plans not in existence in 2019 or for items and services that were not in existence or covered by a plan in 2019. We cannot simultaneously allow ERISA plans to withhold data from state APCDs and expect state APCDs to fulfill the role envisioned for state APCDs under statute. As such, ***we believe the SAPCDAC should be making recommendations that allow the role of state APCDs to be fulfilled without giving ERISA plans veto power over whether those state APCDs have sufficient data in them.*** To the extent that systematic underrepresentation of ERISA claims affects the database, we believe that a methodology to systematically adjust the state APCD data to address that underrepresentation could provide an opportunity for state APCDs to maintain their utility even in the face of ERISA plan noncompliance. In addition, the SAPCDAC could recommend that ERISA plans be ineligible to have QPA calculations (for new plans, new items or services, or “insufficient data” items or services) based on data bases deemed to have insufficient ERISA data included in them. There are likely other concepts in this category that we believe would go a long way toward ensuring that ERISA plans do not take advantage of the fact that states cannot compel data submission, and we believe that it is in the public interest that all parties know whether a state APCD is one in which there is sufficient ERISA plan data submission to provide confidence in the information contained in the database.

The ERISA plan opposition to the SAPCDAC development of these recommendations is striking. While we understand the limits of state, the SAPCDAC’s, and Secretary of Labor’s authority, we do believe that the SAPCDAC recommendations could play a vital role in ensuring the value state APCDs without regard to whether ERISA plans see the public good that can come from an all payer claims database and encourage the SAPCDAC take this into consideration as it makes refinements to the its final recommendations.

Sincerely,



Joseph Losee, MD, FACS, FAAP
President, American Society of Plastic Surgeons

CC: Elizabeth Schumacher
Designated Federal Officer

