United States Senate
COMMITTEE ON FINANCE
WASHINGTON, DC 20510–6200

November 18, 2020

David S. Wichmann
Chief Executive Officer
UnitedHealth Group
9900 Bren Road East,
Minnetonka, MN 55343

Dear Mr. Wichmann,

As part of an ongoing inquiry into the barriers Americans face when accessing mental health and substance use disorder (SUD) care, I write seeking information about your company's growing business in behavioral health as well as concerns that have been raised regarding UnitedHealth's administration of mental health and SUD benefits. UnitedHealth is the largest insurer of behavioral health in the nation[1] and has faced widespread allegations of improperly denying coverage for mental health and SUD services. Thus, it is critically important to have a clearer understanding of how UnitedHealth administers such benefits to ensure that Oregonians[2] and Americans across the country are able to receive the mental health and SUD services they need. Unfortunately, the need for quality and affordable behavioral health care has only increased during the COVID-19 pandemic, which has subjected families to extraordinary levels of disruption, isolation, financial instability, and grief.[3]

Since 2014, UnitedHealth's behavioral health business has been the subject of a major class action lawsuit, *Wit v. United Behavioral Health*, over its denial of coverage for behavioral health treatment. In March 2019, a federal court ruled that the level of care guidelines used by United Behavioral Health (UBH)—which also operates as OptumHealth Behavioral Solutions, one of the company's many subsidiaries and affiliates—led to the wrongful denials of claims for mental health and SUD services for 50,000 people between 2011 and 2017.[4] The court found that in addition to violating its duties under the Employee Retirement Income Security Act (ERISA), UnitedHealth violated laws in multiple states related to the coverage of SUD services.[5] In August

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[1] https://www.modernhealthcare.com/law-regulation/united-loses-court-behavioral-health-coverage-rules
[2] UnitedHealth administers behavioral health benefits for large health plans operating in Oregon. *See e.g.*, https://healthplans.providence.org/providers/provider-support/provider-networks/.
[3] https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use.
[4] *Wit v. United Behavioral Health (UBH)*, No. 14-CV-02346-JCS, 2019 WL 1033730, at *46 and 51-54 (N.D. Cal. Mar. 5, 2019). The court noted that coverage may have been denied to beneficiaries in 3,000 different health insurance plans. *See* Order granting motion for class certification, September 19, 2016, Document 174 at 3-4.
[5] *Id.* at *42 ("the Court finds that during the class period UBH violated the laws of Illinois, Connecticut, Rhode Island, and Texas by failing to apply criteria that were in compliance with the laws of those states for making coverage determinations relating to substance use disorders treatment").

2020, the court issued an additional ruling that UnitedHealth's coverage determination guidelines—which incorporated these overly restrictive level of care guidelines—also violated beneficiaries' legal rights.[6]

According to the court, UBH's guidelines were "significantly narrower" than generally accepted standards of care and had become "infected" by financial incentives.[7] The guidelines used "language that strongly conveys to clinicians that they should err on the side of moving members to lower levels of care even where there is uncertainty about whether such a move is safe."[8] The court found that "the emphasis on cost-cutting that was embedded in UBH's Guideline development process actually tainted the process, causing UBH to make decisions about Guidelines based as much or more on its own bottom line as on the interests of the plan members."[9] For example, the court concluded that UnitedHealth's refusal to adopt the American Society for Addiction Medicine's (ASAM) criteria was "not based on clinical justification," but financial considerations:

> Indeed, all of its clinicians recommended that the ASAM Criteria be adopted. The *only* reason UBH declined to adopt the ASAM Criteria was that its Finance Department wouldn't sign off on the change. In other words, UBH's Finance Department had veto power with respect to the Guidelines and used it to prohibit even a change in the Guidelines that all of its clinicians had recommended. (emphasis included in original)

These unlawful practices had devastating consequences for UnitedHealth's members, including adults and children, many of whom suffered severe health setbacks when they were unable to receive needed care, or were responsible for tens of thousands of dollars in out-of-pocket expenses after obtaining care without coverage. One of the named plaintiffs, Lauralee Pfeiffer, died five months after UnitedHealth's coverage denial, having been "deterred from seeking any further residential treatment due to UBH's previous benefits denials."[10]

In recent weeks, the court ordered UnitedHealth to reprocess the 67,000 behavioral health claims it denied for the class members in the suit.[11] The court also subjected UnitedHealth to a 10-year injunction requiring the company to comply with coverage determination guidelines developed by professional associations "that do not have the financial incentives that caused UBH to develop flawed guidelines" in the first place.[12] The court also appointed a special master to oversee United's compliance with the order.[13]

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[6] *Wit v. UBH*, No. 14-CV-02346-JCS, 2020 WL 4517283, at *1 (N.D. Cal. Aug. 6, 2020).
[7] *Wit v. UBH*, No. 14-CV-02346-JCS, 2019 WL 1033730, at *22 and 47 (N.D. Cal. Mar. 5, 2019).
[8] *Id.* at *30.
[9] *Id.* at *53.
[10] Amended Complaint, at 42-43
[11] *Wit v. UBH*, No. 14-CV-02346-JCS, 2020 WL 6479273, at *53 (N.D. Cal. Nov. 3, 2020); https://psych-appeal.com/press-releases/wit-v-ubh-update-federal-court-orders-special-master-and-10-year-injunctions-for-unitedhealthcare-affiliate
[12] *Wit v. UBH*, No. 14-CV-02346-JCS, 2020 WL 6479273, at *44 and 55 (N.D. Cal. Nov. 3, 2020).
[13] *Id.* at *56.

Separate from the *Wit* litigation, UnitedHealth has faced scrutiny for similar practices with respect to behavioral health coverage. For example, in November 2019, Pennsylvania regulators fined UnitedHealth $1 million for improper coverage practices, particularly with respect to SUD services and autism treatment.[14] According to a 2019 news report, UnitedHealth's practices forced families to wait for their loved ones' health to deteriorate in order to qualify for needed services.[15] For example, in 2016, one UnitedHealth representative advised a family to pursue Medicaid for their son after denying him coverage for residential mental health treatment.[16] The representative also recommended that he seek out a lower level of care not sought by the family and not covered by the plan.

The Senate Committee on Finance has jurisdiction over Medicare, Medicaid, and the Children's Health Insurance Program (CHIP). As Ranking Member, I am committed to ensuring that program beneficiaries are able to access the coverage they need, including coverage for behavioral health services that complies with the requirements of the Affordable Care Act (ACA), the Mental Health Parity and Addiction Equity Act, and other federal laws.[17] To this end, I recently submitted a request to the Governmental Accountability Office (GAO) to examine how frequently insurers contract-out their behavioral health benefits and how such contracts impact beneficiaries' coverage.[18] As *Wit* examined coverage determinations for consumers enrolled in plans subject to ERISA, I want to ensure similarly restrictive and unlawful guidelines are not being applied to claims for other enrollees, including Medicare, Medicaid, and CHIP beneficiaries.[19]

Behavioral health appears to be a large and growing part of UnitedHealth's business. UnitedHealth has more than a half dozen "significant subsidiaries" whose names—or the names of entities doing business on their behalf—suggest involvement in the behavioral health business.[20] In recent years, UnitedHealth has cited behavioral services, generally,[21] and "behavioral services [in] new Medicaid markets," specifically, as growth drivers for its subsidiary OptumHealth.[22] The company's subsidiary OptumRx also operates more than 500 community mental health facility pharmacies, which the company reports "help align benefits, care management and pharmacy services for those living with complex, chronic medical and behavioral health issues."[23] Earlier this year, UnitedHealth cited the growth of these pharmacies

[14] https://www.startribune.com/unitedhealthcare-faces-1-million-penalty-for-claims-payment-violations/564370152/
[15] https://www.cbsnews.com/news/mental-health-insurance-coverage-families-fight-for-life-saving-care
[16] *Id*.
[17] https://www.healthaffairs.org/do/10.1377/hpb20140403.871424/full.
[18] https://www.finance.senate.gov/ranking-members-news/wyden-asks-federal-watchdog-to-investigate-mental-health-services-contracts-among-insurance-companies
[19] https://www.statnews.com/2019/03/18/landmark-ruling-mental-health-addiction-treatment/.
[20] Behavioral Healthcare Options, Inc.; U.S. Behavioral Health Plan, California; OptumHealth Behavioral Solutions of California; United Behavioral Health; United Behavioral Health Of New York, I.P.A., Inc.; Life Strategies; Optum Idaho, OptumHealth Behavioral Solutions; Plan 21, Incorporated. (https://www.sec.gov/Archives/edgar/data/0000731766/000073176620000006/unhex21112312019.htm).
[21] https://www.sec.gov/Archives/edgar/data/0000731766/000073176619000023/a2019q2exhibit991.htm; https://www.sec.gov/Archives/edgar/data/0000731766/000073176618000037/a2018q3exhibit991.htm
[22] https://www.sec.gov/Archives/edgar/data/0000731766/000073176616000079/q2exhibit991.htm
[23] http://www.sec.gov/Archives/edgar/data/0000731766/000073176620000006/unh2019123110-k.htm

and digital behavioral health in its quarterly report to shareholders,[24] following reports that it planned to purchase the remote behavioral health provider AbleTo for $470 million.[25] UnitedHealth also reported increasing the "number of behavioral health professionals using our proprietary online behavioral health platform by 45% to more than 10,000."[26] Moreover, behavioral health coverage is an important component of Medicaid and CHIP programs, which is a major part of United's business.[27] Taken together, these disclosures underscore the enormous footprint of UnitedHealth in the behavioral health space.

In light of this litigation and your company's role in the behavioral health landscape, I am seeking more information about how UnitedHealth (including and not limited to all of its subsidiaries, affiliates, partners and contractors) is carrying out its behavioral health benefits and activities. Please provide responses to the following questions by December 15, 2020:

1. In reports to shareholders, UnitedHealth has repeatedly cited growth in its behavioral health business as a driver of increased revenue while noting acquisitions and expansions in the behavioral health space.

    a. Please describe the scope of the behavioral health business of UnitedHealth. The description should include but not be limited to its revenue, service offerings, and the number of plans it serves.

    b. Please provide additional information about what factors are driving revenue and net income growth in UnitedHealth's behavioral health business lines.

    c. How many beneficiaries does UnitedHealth serve as an administrator for behavioral health benefits? How has that changed since 2015? How many of these beneficiaries are covered by Medicare, Medicaid, or CHIP?

2. In the *Wit* litigation, UnitedHealth indicated in a court filing earlier this year that it was still using some of the coverage determination guidelines that had been found to be inconsistent with generally accepted standards of care for a "limited" number of self-funded plans.[28]

    a. Is UnitedHealth continuing to use these invalidated guidelines to make coverage determinations for beneficiaries enrolled in Medicare Advantage, Medicaid, or

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[24] https://www.sec.gov/Archives/edgar/data/0000731766/000073176620000038/a2020q2exhibit991.htm
[25] https://www.cnbc.com/2020/04/27/unitedhealth-near-buying-telehealth-provider-ableto-for-470-million.html
[26] https://www.sec.gov/Archives/edgar/data/0000731766/000073176620000038/a2020q2exhibit991.htm
[27] Medicaid and CHIP plans operated by UnitedHealth fall under UnitedHealthcare Community & State, which reports participating in Medicaid/CHIP programs in 31 states and D.C. and serving 5.9 million people as of December 31, 2019.
https://www.sec.gov/Archives/edgar/data/0000731766/000073176620000006/unh2019123110-k.htm
[28] Plaintiffs' Response to UBH's Supplemental Remedies Brief (June 15, 2020), Case No. 3:14-CV-02346-JCS ("But UBH also admits that it is still using its Coverage Determination Guidelines for an unspecified, purportedly 'limited' number of self-funded plans, based on the assertion that those plans 'do not condition coverage on a determination of medical necessity'").

CHIP coverage? Please also describe whether UnitedHealth has used such guidelines for these policies in the past.

b. How do UnitedHealth's behavioral health coverage guidelines for self-funded and fully-insured commercial benefits differ from its guidelines for Medicare, Medicaid and CHIP benefits?

c. A court injunction is requiring UnitedHealth to adopt coverage guidelines issued by professional associations for health plans subject to ERISA. How will these changes impact the coverage guidelines or practices used for the Medicare Advantage, Medicaid, or CHIP benefits that UnitedHealth administers?

3. In reports to shareholders, UnitedHealth notes that it has been "involved or is currently involved in various governmental investigations, audits and reviews," including "routine, regular and special investigations, audits and reviews by CMS, state insurance and health and welfare departments, state attorneys general, the Office of the Inspector General, the Office of Personnel Management, the Office of Civil Rights, GAO, the Federal Trade Commission, U.S. Congressional committees, the U.S. Department of Justice, the SEC, the Internal Revenue Service, the U.S. Drug Enforcement Administration, the U.S. Department of Labor, the Federal Deposit Insurance Corporation, the Defense Contract Audit Agency and other governmental authorities." Please provide a list of all such "investigations, audits and reviews" related to UnitedHealth's behavioral health business, and its administration of behavioral health benefits in Medicare, Medicaid, and CHIP.

4. In 2016, after denying a patient coverage for the residential care he needed, a UnitedHealth representative recommended that a patient seek out Medicaid to access a lower level of care the patient and his family had not requested.[29] This patient was 20 years old at the time and enrolled in his family's private health plan.[30]

    a. Please describe the circumstances under which UnitedHealth employees are, or have been, advised to recommend that beneficiaries in commercial lines of business seek out coverage under Medicaid or other federal health care programs.

    b. Please describe other instances in which UnitedHealth recommended that customers seek out coverage under Medicaid or other federal programs because its commercial coverage for behavioral health was inadequate. Please describe whether such recommendations are more common for certain types of patients, including patients who require residential treatment for mental health or SUD treatment, or young adults under the age of 26.

    c. Please provide the number of Medicaid or CHIP beneficiaries in UnitedHealth lines of business who have been diagnosed with a serious mental illness and were previously or are currently enrolled in self-funded or fully-insured commercial plans administered by UnitedHealth?

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[29] https://www.cbsnews.com/news/mental-health-insurance-coverage-families-fight-for-life-saving-care.
[30] *Id.*; https://www.youtube.com/watch?v=bJOdGqyyXOY.

d. What is the average per member per year revenue and margin for beneficiaries who receive services for a serious mental illness who are enrolled in UnitedHealth's commercial, Medicare Advantage, Medicaid, and CHIP lines of business? Please distinguish between self-funded and fully-insured policies.

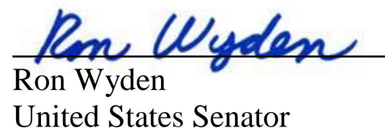
5. Entities sometimes contract with UnitedHealth to administer their behavioral health benefits (thereby "carving-out" the responsibility for the benefit).

   a. How do these entities typically ensure the compliance of UnitedHealth with federal coverage requirements, including with regards to which mental health and SUD benefits must be covered and the extent to which such coverage must have parity with medical benefits?

   b. Please identify barriers to ensuring compliance with behavioral health coverage standards in these cave-out arrangements.

Thank you for your prompt attention to this important matter. If you or your staff have any questions, please contact Elizabeth Jurinka at Elizabeth_Jurinka@finance.senate.gov, Elizabeth Dervan at Elizabeth_Dervan@finance.senate.gov, and Peter Gartrell at Peter_Gartrell@finance.senate.gov.

Sincerely,



Ron Wyden
United States Senator

CC: Wyatt W. Decker, Chief Executive Officer, OptumHealth