



September 21, 2010

Office of Consumer Information and Insurance Oversight
Department of Health and Human Services
Attention: OCIO-9993-IFC, RIN 0991-AB70
P.O. Box 8016
Baltimore, Maryland 21244-1850

Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration, Room N-5653
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Attention: RIN1210-AB45

Internal Revenue Service
CC: PA: LPD: PR, Room 5025
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044
Attention: REG-125592-10

Re: NAMI Comments on Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Internal Claims and Appeals and External Review Processes under the Patient Protection and Affordable Care Act (File Codes OCIO-9993-IFC, RIN 0991-AB70/ RIN 1210-AB45/REG-125592-10)

Dear Sir or Madam:

The National Alliance on Mental Illness (NAMI) appreciates the opportunity to comment on interim final rules that implement provisions of the Patient Protection and Affordable Care Act (“Affordable Care Act” or “ACA”) regarding internal claims and appeals and external review processes for group health plans and health insurance coverage in the group and individual markets. NAMI is the nation’s largest organization representing children and adults living with mental illness.

A. Provisions of the Interim Final Rule NAMI Strongly Supports

NAMI applauds the issuance of the interim final rules issued by the Departments of Health and Human Services, Labor, and Treasury (collectively the Departments), because

their promulgation is an important step forward in creating a fair and uniform appeals process that guarantees internal review as well as an external review by an *independent* entity that is *binding* on a plan or issuer.

The establishment of a right to external review is profound; until now consumers who receive coverage through plans governed by the Employee Retirement Income Security Act (ERISA) did not have the right to external review. Consumers had the option to appeal adverse benefit determinations, but Supreme Court case law instructed courts to provide deference to an ERISA plan's decisions.¹ Accordingly, the right to external review under the Affordable Care Act and its regulations is—in the words of one health policy scholar—“a complete game changer,” especially given that the Department of Labor estimates that 77 million Americans receive coverage through ERISA plans.²

In addition to a guarantee of external review, we strongly support the following specific provisions regarding *internal* claims and appeals procedures:

- (1) The internal claims and appeals processes of plans and issuers must provide for full and fair review of adverse benefit determinations including rescissions of health care policies;
- (2) In the case of urgent care claims, plans and issuers must notify a claimant of a benefit determination (whether adverse or not) as soon as possible but not later than 24 hours;
- (3) A plan or issuer must provide a claimant, free of charge, with any new or additional information or rationale regarding a claim as soon as possible and sufficiently in advance of a final adverse benefit determination;
- (4) Plans and issuers must avoid conflicts of interest by ensuring that all claims and appeals are adjudicated in a manner designed to ensure the independence and impartiality of the persons involved in making the decision;
- (5) Plans and issuers must provide notice to enrollees in a culturally and linguistically appropriate manner (this is also applicable to external review);
- (6) The failure of plans and issuers to “strictly adhere” to all the requirements of internal claims and appeals processes with respect to a claim will allow a claimant to seek external review including judicial review if necessary; and
- (7) Individuals in urgent care situations and individuals receiving an ongoing course of treatment may proceed with expedited external review at the same time the internal appeals process is pursued.

¹ *Firestone Tire and Rubber v. Bruch*, 489 U.S. 101 (1989).

² Sara Rosenbaum, “Appeals of Claims for Benefits,” Health Reform GPS, available at <http://www.healthreformgps.org/resources/appeals-of-claims-for-benefits/> (accessed at September 16, 2010).

B. Recommendations to Improve the Interim Final Rule

NAMI endorses the following comments submitted separately by the Consortium for Citizens With Disabilities (CCD) so that the Departments can strengthen the interim final rules, particularly with respect to the external review process.

(1) The Scope of External Review Should Include Review of Rescissions and Denials of Insurance Coverage Based on Eligibility

The scope of external review should be consistent with the scope of internal claims and appeals. Accordingly, NAMI urges the Departments to expand the range of adverse benefit determinations that can be subject to state and federal external review processes. Under the interim final regulations, external review processes are required to assess a narrower set of adverse benefit determinations than internal appeals but little justification for this disparity is offered. This disparity is not in the best interests of consumers and will lead to confusion and frustration with the appeals process. It is recommended that the scope of external review processes be equivalent to the scope of internal appeals.

A relatively broad range of adverse benefit determinations can be subject to internal claims and appeals. More specifically, the interim final regulations provide that for purposes of internal appeals, the term “adverse benefit determination” has the same meaning as the definition set forth at 29 CFR 2560.503-1 *plus* any rescissions of coverage. According to 29 CFR 2560.503-1(m)(4):

The term “adverse benefit determination” means any of the following: a denial, reduction, or termination of, or a failure to provide or make payment (in whole or in part) for, a benefit, including any such denial, reduction, termination, or failure to provide or make payment that is based on a determination of a participant’s or beneficiary’s eligibility to participate in a plan, and including, with respect to group health plans, a denial, reduction or termination of, or a failure to provide or make payment (in whole or in part) for, a benefit resulting from the application of any utilization review, as well as a failure to cover an item or service for which benefits are otherwise provided because it is determined to be experimental or investigational or not medically necessary or appropriate.

This definition of “adverse benefit determination” is considerably broader than standards used for purposes of external review processes. Under the interim final regulations, health plans and issuers are required to comply with either state or federal standards for external review. A state standard must provide, at a minimum, the consumer protections of the Uniform Health External Review Model Act developed by the National Association of Insurance Commissioners (NAIC Uniform Model Act). Accordingly, a state standard must provide for the external review of adverse benefit determinations only with regard to “medical necessity, appropriateness, health care setting, level of care, or

effectiveness of a covered benefit.”³ This standard is unduly narrow as it excludes external review of rescissions and other adverse benefit determinations. Similarly, the federal standard is also narrow as it specifically excludes external review of adverse benefit determinations “based on a determination that a participant or beneficiary fails to meet the requirements for eligibility under the terms of a group health plan.”⁴

NAMI strongly recommends that the Departments require *all* adverse benefit determinations considered under internal review to be subject to external review under either state or federal law. Otherwise, consumers may not receive an impartial review of decisions made by health plans and issuers, decisions that could literally mean the difference between accessing critical health care treatment or not.

(2) Standard of External Review

The interim final regulations do not explicitly state that independent review organizations (*i.e.* external review) must make a *de novo* (or fresh) assessment of adverse benefit determinations. Rather, the Department of Labor mentioned this standard of external review in sub-regulatory guidance and it is only applicable to the federal review process.⁵ A *de novo* standard of external review is important because it allows an objective review of the facts surrounding an adverse benefit determination. The importance of a *de novo* standard is evident by the fact that the NAIC Uniform Model Act provides for such a standard. **Given its importance, NAMI strongly recommends that the Departments set forth a *de novo* standard of external review in their regulations, and that this standard be one of the minimum requirements for state review processes as well as an element of the federal review process.**

(3) Evidence and Testimony

The statute and interim final regulations allow consumers to provide evidence and testimony during internal claims appeals. It is important for consumers to also have this opportunity during external review, and the Departments should consider a regulatory provision that would permit consumers to provide evidence and testimony during external review. Further, it is recommended that both internal claims appeals and external reviews should (1) be non-adversarial in nature and not permit cross-examination of the enrollee by representatives of the health plan or health plan issuer, (2) should not require compliance with state or federal rules of evidence, and (3) should allow oral testimony. Such provisions would benefit consumers who may not be represented by counsel or other consumer advocates.

³ 45 CFR 147.136(c)(2)(i).

⁴ 45 CFR 147.136(d)(1).

⁵ Department of Labor, Technical Release 2010-01, Interim Procedures for Federal External Review Relating to Internal Claims and Appeals and External Review under the Patient Protection and Affordable Care Act (August 23, 2010),

(4) Requirement to Provide Continued Coverage Pending the Outcome of External Review

The statute and interim final regulations require plans and issuers to provide continued coverage pending the outcome of an *internal* claims appeals process. However, there appears to be no such requirement when consumers are pursuing external review of an adverse benefit determination. Continuation of coverage is important to ensure a fair external review, and it is especially important to individuals in urgent care situations and individuals receiving an ongoing course of treatment. People living with mental illness and other disabilities and chronic conditions will be particularly susceptible to negative outcomes when services addressing a complex or serious medical condition are cut off during the course of an external appeal. **Accordingly, NAMI strongly recommends that the Departments implement a regulatory provision that would require plans and issuers to provide continued coverage pending the outcome of external review.**

(5) Applicability of Federal External Review Process in States without Universal Applicability of External Review Laws

The Departments have specifically requested comments on the issue of whether the federal external review process should apply to all plans and issuers in a state if the state external review process does not apply to all issuers in the state. This issue arises because some state external review processes do not apply to all issuers (e.g., state external review laws may be only applicable to HMOs and not other types of health coverage). In such instances, the federal government could apply its external review process only to health coverage not covered by state law or it could apply the federal process to all health coverage in a state.

In NAMI's view, the more prudent option would be to have the federal process apply to all health coverage in a state. As noted by the Departments themselves, a central principle behind the interim final regulations is to create a uniform appeals process. Accordingly, the application of federal law to all health plans in states, having less than universal applicability of external review processes, would lessen confusion among consumers and increase efficiencies for plans and issuers.

(6) Transition Period

Under the interim regulations, plans do not have to comply with the new rules until plan years beginning after July 2011, but they must be subject to binding reviews before then. The final regulations should also immediately expand the scope of issues subject to review, using the new definition of adverse benefit determination for individual as well as group plans.

Consumers need an immediate mechanism to appeal and assert the various rights that go into effect on September 23, 2010 under the Affordable Care Act. Plans and issuers should fully comply with the new process as of July 2011, not in health plan years that begin after that time. It will be easier to monitor the new appeals system and educate

consumers about their rights if there is a clear date by which the system is effective. Although it may take until the next plan year for plans to conform their evidences of coverage and handbooks to explain the new requirements, they can begin providing appropriate information on claims denials on a given date that does not vary by plan year.

(7) Representation

Many consumers rely on their healthcare providers to support, and sometimes, initiate appeals on their behalf. Some healthcare providers and/or their clinical staff act on information about a whole or partial denial of their patients' benefits, and occasionally do so without their patient's full knowledge. Just as enrollees can mistakenly exhaust one or more appeal opportunities through lack of understanding about appeal procedures, clinicians can also inadvertently compromise their appeal rights by calling the health plan to discuss a denial or limitation in benefit.

The model notices and all other information about enrollees' appeal rights should explicitly state when or if the prescribing healthcare provider may act as an authorized representative for the purposes of exercising his/her patient's appeal rights. The NAIC model law discusses a consumer's right to designate a representative in writing. That specific right to representation is among the consumer protections in the model law and it should be included in federal regulations as one of the minimum protections.

(8) Medically Trained Decision-Makers of Claims Based on Medical Necessity

Although the interim final rule requires decision-makers to avoid conflicts of interest in order to render impartial decisions, the rules do not require those making important claims decisions to have an appropriate degree of medical or clinical education and training when rendering a decision related to medical necessity or appropriateness. Because of this, the decisions of physicians and other providers who actually directly treat and personally interact with patients are at risk of being overturned by individuals with no medical or clinical expertise. The interim final rule should require the final decision-maker at both the internal and external levels of appeal to have appropriate medical and clinical credentials to assess appeals based on medical necessity and appropriateness.

(9) Disability-Appropriate Communication

The interim final rules require that health plans and health plan issuers provide notice to enrollees in a culturally and linguistically appropriate manner. However, the interim final rules make no mention of notices that ensure effective communication with enrollees with disabilities under either the Americans with Disabilities Act of 1990, as amended, or the Rehabilitation Act of 1973, as amended. NAMI, therefore, recommends that the final rule specifically require that health plans and health plan issuers ensure effective communication with respect to notices and appeals information when communicating with enrollees with disabilities, including the provision of notices in alternative formats.

Conclusion

NAMI appreciates the opportunity to give comments on the rules related to external appeals under the ACA. Thank you for your careful consideration on the recommendations intended to improve protections for children and adults living with mental illness and their families.

Respectfully Submitted,

Andrew Sperling
Director of Legislative Advocacy
National Alliance on Mental Illness
3803 North Fairfax Drive, #100
Arlington, VA 22203
703-524-7600
andrew@nami.org
www.nami.org