

June 22, 2018

The Honorable Alexander Acosta
United States Department of Labor
200 Constitution Ave NW
Washington, DC 20210

RE: FAQs About Mental Health and Substance Use Disorder Parity Implementation and The 21st Century Cures Act Part XX

Dear Secretary Acosta,

The National Council for Behavioral Health (National Council) appreciates the opportunity to submit the following comments on the **“Proposed FAQs About Mental Health and Substance Use Disorder Parity Implementation and the 21st Century Cure Act Part XX,”** as well as the revised Disclosure Form (included as an attachment to the end of this document). We also take this opportunity to express our strong support for the updated “Self-Compliance Tool for the Mental Health Parity and Addiction Equity Act (MHPAEA)” and identify specific items that will promote enforcement.

The National Council is the unifying voice of America’s health care organizations that deliver mental health and addictions treatment and services. Together with our 2,900 member organizations serving over 10 million adults, children and families living with mental illnesses and addictions, the National Council is committed to all Americans having access to comprehensive, high-quality care that affords every opportunity for recovery.

We applaud the Departments for addressing many of the more complex, yet common, Parity Act questions in FAQ 39 and providing clear and detailed responses regarding specific non-quantitative treatment limitations. We are also very encouraged that the Self-Compliance Tool sets out a detailed framework for assessing compliance. We do not interpret the Self-Compliance Tool as establishing any new standards that could be subject to challenge. Instead, it provides a clear articulation of the MHPAEA regulatory standards in a form that will promote more effective compliance reviews by plans and regulatory bodies.

The National Council believes that the most effective MHPAEA enforcement strategy is to require carriers and plan sponsors to demonstrate parity compliance **prior** to offering plans in the market and to ensure that regulators have complete parity analyses to facilitate plan review. The Self-Compliance Tool offers regulators a framework for obtaining plan compliance submissions for form review and, as appropriate, verifying compliance pre-market. **We encourage the Departments to identify the submission of plan compliance materials based on the tool as a “best practice” and to work with the National Association of Insurance Commissioners (NAIC) to establish this framework as a model standard for state insurance departments.**

As explained below, the National Council offers the following recommendations for FAQ 39, future FAQs and the Disclosure Form, and steps to improve DOL’s enforcement authority.

- Enhance consumer awareness and understanding of MHPAEA and improve compliance by conducting state-based consumer education programs. (FAQ 1)
- Study the role of accreditation in improving compliance with MHPAEA to assess whether it would constitute a “best practice.” (FAQ 1)
- Clarify in FAQ 5 that the exclusion of all benefits for bipolar disorder must take into consideration whether medications used to treat bipolar disorder are also covered on a plan’s formulary for the treatment of other medical conditions.
- In future FAQs, identify the range of quantitative data that are probative of compliance with the “in operation” requirement for NQTLs and subject to plan disclosure.
- Seek authority to impose civil penalties on insurers for egregious violations of MHPAEA, including failure to fully disclose plan documents.
- Clarify in the model disclosure form that a plan must disclose its analysis of NQTL compliance both, as written and in operation, which include analysis of average denial rates and appeal overturn rates.

We fully support the content of the Self-Compliance Tool and offer no recommendations apart from the adoption of the tool as a “best practice” by plans and regulators.

I. Proposed FAQ 39

The National Council commends the Departments for addressing several key NQTL issues in the FAQs, including standards for setting reimbursement rates, network adequacy metrics, and the exclusion of a facility type, such as residential settings for mental health conditions. FAQ 8, which reinforces that disparate network adequacy standards violate MHPAEA, is particularly important because carriers have taken the position that “network adequacy” is not an NQTL, separate from network admission standards. FAQ 8 affirms the standard set out in the preamble to the Final Rule and provides useful guidance as states increasingly review their network adequacy standards and consider the adoption of quantitative metrics.

The National Council also commends the Departments for providing examples in FAQs 2, 3, and 6 that highlight the requirement that NQTLs must comply with regulatory standards “in operation” as well as “as written”. We are aware of many plans and issuers that continue to ignore the “in operation” prong of the law in parity grievances and do not provide quantitative data that are essential to assessing whether an NQTL is applied more stringently to MH/SUD benefits in operation. The Self-Compliance Tool reinforces that denial and appeal overturn rate data are required as part of the NQTL in operation analysis. See Self-Compliance Tool at 17 and 20.

Other quantitative data are equally essential to assess, for example, the application of NQTLs related to prior authorization and continuing care practices, reimbursement rates, network adequacy (e.g. level of out-of-network use), and the application of medical necessity criteria that result in determinations that authorize a lower level of care than the recommended level of care. We note that Milliman has analyzed claims data to assess network adequacy (in and out-of-network utilization) and reimbursement rates for behavioral health and other medical practitioners billing the same CPT codes and has identified significant disparities in all states that

are likely grounded in MHPAEA violations. See Stephen P. Melek, Daniel Perlman and Stoddard Davenport, “Addiction and Mental Health vs. Physical Health: Analyzing Disparities in Network Use and Provider Reimbursement Rates” (Dec. 2017).

State insurance departments also analyze quantitative data to assess MHPAEA compliance. For example, the Texas Insurance Department requires individual, small group and large group plans to submit the following data annually:

- For MH, SUD and medical/surgical services, each level of service subject to prior authorization, concurrent review and fail first requirements;
- For MH, SUD and medical/surgical drugs, the number of drugs covered by specific code and the application of prior authorization, fail-first and any other utilization management requirements to each drug;
- For MH, SUD and medical/surgical benefits by classification, the number of reported claims; number of prior authorizations requested by age group and number approved; median number of days between request and receipt of approval or denial; number of authorizations requiring peer-to-peer or physician-to-physician review; number of authorizations subject to fail-first, number of authorizations partially denied as not medically necessary or experimental/investigational with a lesser amount of benefit approved; number of concurrent and retrospective reviews; and data on internal and external appeals and results.

See HB 10 Data Collection Index Page <http://www.tdi.texas.gov/health/hb10.html#Reporting>. Other State insurance departments, including Connecticut, Vermont, and Massachusetts, also require annual data reporting by issuers to assess compliance of NQTLs in operation.

To reinforce the availability of quantitative data that informs the “in operation” analysis of specific NQTLs and the plan’s obligation to audit compliance using such quantitative data, **we urge the Departments to issue additional FAQs that identify other quantitative metrics that are probative of the “in operation” comparative analyses.**

The National Council offers the following comments on FAQs 1 and 5.

A. Q1: Departments’ Efforts to Promote Understanding of and Compliance with MHPAEA.

FAQ 1 identifies the Departments’ most recent activities to educate the public and employers about the Parity Act standards and the Departments’ enforcement activities. While we agree that the new Self-Compliance Tool and FAQ 39 will help all stakeholders better understand the MHPAEA standards and improve enforcement, we urge the Departments to pursue a broader public education campaign in the states to better inform consumers of their rights. Nearly ten years after the enactment of the Parity Act, the level of awareness about the consumer’s right to equitable coverage is woefully inadequate. While regulators in some states are doing more to educate consumers about the law, we urge the Departments to spearhead comprehensive parity education initiatives in collaboration with state regulators.

We also note that FAQ 1 identifies efforts among some stakeholders to develop “accreditation programs that seek to advance understanding of and compliance with the law” and that the Departments’ are considering how such accreditation programs can be utilized as a best practice to help increase compliance with MHPAEA.” (FAQ 1 at p. 3 and 4). Members of the National Council have participated actively on the Standards Committee of one such accreditation effort.

The development and adoption of accreditation standards in the MHPAEA context raise significant questions about (1) the underlying “fit” between an accreditation program and the enforcement of a civil rights statute whose core requirement is a discrimination analysis; (2) the probative value of plan accreditation in regulatory reviews and dispute/litigation contexts, both as to the weight that may be afforded an “accreditation seal of approval” and the risk of accreditation being used as a substitute for independent regulatory or judicial review; and (3) the inability of an accreditation program to assess a range of plan practices that affect compliance but are not easily detectable, such as standards embedded in carrier software programs and training materials/programs.

Taken together, the risks and benefits of accreditation as well as the quality of any particular accreditation program must be carefully considered before accreditation can be deemed a “best practice.” This is particularly true when accreditation standards are in their infancy without clear stakeholder consensus about the standards themselves.

Based on the above issues and, in anticipation of such programs coming to market, the National Council urges the Departments to:

- Assemble an independent group of experts to identify key issues and assess the appropriate use of accreditation in the MHPAEA context as well as other auditing practices that could be required as a preliminary step to accreditation (such as evidence of implementation of the DOL Self-Compliance Tool.)
- Develop guidelines based on the expert panel’s recommendations and seek public comment on the recommendations.
- Pending the development of guidelines, issue guidance that clearly establishes that accreditation is not a substitute for independent regulatory review, regardless of state practices and deference in other accreditation contexts.

B. FAQ 5: General Exclusion for Items and Services to Treat Bipolar Disorder, Including Prescription Drugs.

The Departments’ response to FAQ 5 notes that a general exclusion for all services related to bipolar disorder would be permissible under MHPAEA, subject to state law requirements for the coverage of benefits related to bipolar disorder and essential health benefit coverage requirements for small group and individual plans. We request that the Departments clarify this response to reflect that coverage is also dependent on a plan’s formulary coverage for bipolar medications that are used to treat other medical conditions. If medications used to treat bipolar disorders are covered for other medical/surgical conditions, then the rules that determine medication coverage for mental health and medical/surgical conditions must meet the NQTL standard. To the extent a plan’s “processes, strategies, evidentiary standards, or other factors”

used for determining coverage of mental health medications are not comparable to or are applied more stringently for medical/surgical conditions, as written or in operation, and result in the exclusion of prescription drugs for bipolar disorders, the plan would not be in compliance. See Self-Compliance Tool at 5 (identifying a MHPAEA violation in a plan that covered methadone for pain management but not opioid use disorder treatment).

We note that some medications listed on the US Pharmacopeia for bipolar disorders are also used to treat other medication conditions. For example, Carbamazepine, Divalproex, Lamotrigine are medications that are listed for the treatment of convulsions, and Valproic Acid is listed for the treatment of migraines. If based on a plan's formulary, it is required to cover some medications for the treatment of bipolar disorder medications, then it must also cover benefits for bipolar disorders in all other classifications for which medical benefits are covered. We request clarification of this response to reflect that the response depends on this additional consideration.

C. ERISA Disclosures for MH/SUD Benefits: Civil Penalty Authority Required to Improve Insurer Compliance

In FAQ 39 and the Self-Compliance Tool, the Departments have restated the disclosure requirements previously addressed in FAQs 17, 31 and 34. We enthusiastically support the Self-Compliance Tool guidance that sets out the plan and issuer obligation to **“be prepared to provide”** NQTL compliance information (Self-Compliance Tool at 20) and specifically:

- “Records documenting NQTL processes and how the NQTLs are being applied to both medical/surgical as well as MH/SUD benefits to ensure they can demonstrate compliance with the law....
- For the period of coverage under review, plans and issuers should be prepared to provide a record of all claims (MH/SUD and medical/surgical) submitted and the number of those denied within each classification of benefits.”

Notwithstanding the clear disclosure requirements in regulations and guidance, plans and issuers continue to ignore requests for the disclosure of plan documents required to assess NQTL compliance in the context of grievances and appeals and pursuant to 29 C.F.R. 2520.104b-1. To ensure that the DOL's crystal clear guidance leads to changes in issuer practices, **we support the imposition of civil penalties to incentivize plans and issuers to comply with disclosure requirements and to generate funds that can be devoted to additional DOL and HHS oversight investigations and consumer education efforts.**

The Secretary of DOL has requested additional authority to impose civil penalties on insurers and plan sponsors “in egregious cases of noncompliance to deter bad actors.” See U.S. Dept. of Labor, *2018 Report to Congress: Pathway to Full Parity* at 6; *The President's Commission on Combatting Drug Addiction and the Opioid Crisis, Final Draft Report* at 9 and Recommendation 35 at 15. We agree fully with the view of the President's Opioid Crisis Commission that:

The Department of Labor must be given the real authority to regulate the health insurance industry. The health insurers are not following the federal law requiring reimbursement for

mental health and addiction. They must be held responsible. The Secretary of Labor testified that he needs the ability to fine violators and to individually investigate insurers not just employers. We agree with Secretary Acosta. If we do not get Congress to give him these tools, we will be failing our mission as badly as health insurance companies are failing their subscribers on this issue today leading to deaths.

The President's Commission Final Draft Report at 9. We urge the DOL to renew its request for authority to levy civil penalties for purposes of addressing egregious patterns of non-compliance with disclosure requirements and other MHPAEA standards.

II. Model Disclosure Form

The National Council appreciates the proposed revisions to the model disclosure form, which will identify continuing authorization requirements among the plan limitations and provide examples of the types of evidentiary standards that a plan must disclose regarding the development and application of NQTLs. We also support the proposed revisions to the form's background description, which create a more consumer-friendly form and connects the consumer's insurance experiences with MHPAEA protections.

We have offered additional suggestions to the form (*see Attachment 1*) to:

- Tweak the background description to further improve consumer understanding of their rights under MHPAEA.
- Reference "service and medication exclusions" as an NQTL example, consistent with the *See Self-Compliance Tool* at p. 5 (emphasizing a MHPAEA violation for failure to cover methadone for opioid addiction).
- Identify the plan's summary of its comparative analysis and data analysis, including denial and appeal overturn rates, as documents that must be disclosed. *See Self-Compliance Tool, Compliance Tips* at p. 17 ("Determine average denial rates and appeal overturn rates for concurrent review and assess the parity between these rates for MH/SUD and medical/surgical benefits.") and at p. 20 ("plans and issuers should be prepared to provide a record of all claims (MH/SUD and medical/surgical) submitted and the number of those denied within each classification of benefits.")
- Reference disclosure of third-party vendor materials that are relevant to benefit coverage and limitations. *See Self-Compliance Tool, Compliance Tips* at p. 23 ("If a group health plan or...issuer uses mental health and substance use disorder vendors and carve-out service providers, the plan must ensure that all combinations of benefits comport with parity; therefore, vendors and carve out providers should provide documentation of the necessary information to the plan to ensure that all combinations of benefits comport with parity.")

We believe the proposed additions to the form will reinforce the NQTL and disclosure requirements set out in the Self-Compliance Tool.

The National Council also requests that **the Departments develop a separate form that mental health and substance use treatment providers could use to request documentation of parity**

compliance with regard to network adequacy, network admission standards, network credentialing and contracting, and reimbursement rates.

Members receive no information about these plan design features, and, in many instances, will not know that these design features are limiting access to care. To increase the likelihood that violations related to these NQTLs are identified, providers should be encouraged to make a request for documents on behalf of their patients and independently, under state and federal standards that regulate plan networks. The Milliman report and study by Tami Mark and colleagues, "Differential Reimbursement of Psychiatric Services by Psychiatrists and Other Medical Providers," 69 PSYCHIATRIC SERVICES, vol. 3 (2017) demonstrate the importance of identifying the barriers to care that result from disparities in reimbursement rates and network participation and adequacy.

The National Council appreciates the opportunity to provide comments. We welcome any questions or further discussion about the recommendations described here. Please contact Chuck Ingoglia at chucki@thenationalcouncil.org or 202-684-7457 ext. 249. Thank you for your time and consideration.

Sincerely,



Linda Rosenberg, MSW
President & CEO
National Council for Behavioral Health

ATTACHMENT 1

National Council for Behavioral Health Recommended Revisions: Explanation

The goal of the proposed revisions in the introductory language is to further improve the consumer's understanding of their rights under MHPAEA and connect the form's content to a consumer's experience as he or she tries to access benefits. The proposed revisions to the set of documents that are subject to disclosure build upon the standards in the DOL's Self-Compliance Tool. Our comments (1) emphasize the need for document disclosure as well as identification of standards; (2) highlight the need to coordinate the disclosure of documents between the issuer/health plan and any third-party vendor that manages behavioral health benefit; and (3) emphasize that the disclosure of the plan's evidence and documentation of its "in operation" analysis is a mandatory element of compliance and, thus, disclosure of the plan analysis (as opposed to "any" analysis) is required. (Proposed additions are in red and proposed deletions have a strike-through.)

FORM TO REQUEST DOCUMENTATION FROM AN EMPLOYER-SPONSORED HEALTH PLAN OR AN INSURER CONCERNING TREATMENT LIMITATIONS

Background: This is a tool to help you request information from your employer-sponsored health plan or your insurer regarding limitations that may affect your access to mental health or substance use disorder **treatment or medications** benefits. You can use this form to request general information about treatment limitations or specific information about limitations that may have resulted in denial of your benefits **or delays in accessing treatment or medications**. An example of a request for general information might be a request for the plan's preauthorization policies for medical/surgical and mental health treatments. An example of a request for specific information related to a denial of benefits based on a failure to show medical necessity might be a request for the internal medical necessity guidelines used to deny your claim. Your plan or insurer is required by law to provide you this information in certain instances, and the information will help you determine if the coverage you are receiving complies with the law.

Under a federal law called the Mental Health Parity and Addiction Equity Act (MHPAEA), many health plans and insurers must make sure that there is "parity" between mental health and substance use disorder benefits, and medical and surgical benefits. This generally means that treatment limits applied to mental health and substance use disorder benefits, **including treatment services and prescription drugs**, must be at least as generous as the treatment limits applied to medical and surgical benefits. In other words, treatment limits cannot be applied to mental health and substance use disorder benefits unless those limits are comparable to limits applied to medical and surgical benefits. The types of limits covered by parity protections include:

- Financial requirements – such as deductibles, copayments, coinsurance, and out-of-pocket limits;
- Treatment limits– such as limits on the number of days or visits covered, or other limits on the scope or duration of treatment (for example, being required to get prior

authorization to get treatment **or having specific benefits excluded like residential treatment or medication assisted treatment**).

If you, a family member, or someone you are helping obtains health coverage through a private employer health plan, federal law requires the plan to provide certain plan documents about your benefits, including coverage limitations on your benefits, at your request. For example, you may want to obtain documentation as to why your health plan is requiring pre-authorization for visits to a therapist before it will cover the visits or **why it has denied or excluded coverage of residential treatment for a substance use disorder or mental illness**. Generally, the plan must provide the documents you request within thirty (30) calendar days of the plan's receipt of your request.

This form will help you request information from your plan about treatment limits on mental health and/or substance use disorder benefits. Many common types of treatment limits are listed on this form. If the type of treatment limit being imposed by your plan does not appear on the list, you may insert a description of the treatment limit you would like more information about under "Other."

Instructions: Complete the attached form to request general information from your plan or insurer about coverage limitations or specific information about why your mental health or substance use disorder benefits were denied. This information can help you appeal a claim denial but you must initiate the plan's general review and appeals process if you want to appeal with your plan or insurer the claim denial. You do not have to use this form to request information from your plan. Consult your summary plan description (SPD) or certificate of coverage to see how to request information from the plan.

If you are helping someone with obtaining information about his/her health coverage, you are often required to submit an authorization along with this form signed by the person you are helping if you have not submitted one beforehand.

If you have any questions about this form and you are enrolled in a private employer health plan, you may visit the Employee Benefits Security Administration's (EBSA's) website at www.dol.gov/ebsa for answers to common questions about your private employer health plan. You may also contact EBSA electronically at www.askebsa.dol.gov or call toll free 1-866-444-3272.

You can also use this form if you are enrolled in coverage that is not through a private employer health plan, for example if you have individual health coverage or coverage sponsored by a public sector employer, like a city or state government. You may contact the Centers for Medicare & Medicaid Services (CMS) at phig@cms.hhs.gov or 1-877-267-2323 ext. 6-1565 for questions about your individual health coverage or public sector health plan.

Date: _____

Mental Health and Substance Use Disorder Parity Disclosure Request

To: _____ [*Insert name of the health plan or issuer*]

(If you are a provider or another representative who is authorized to request information for the individual enrolled in the plan, complete this section.)

I am an authorized representative requesting information for the following individual enrolled in the plan:

Attached to this request is an authorization signed by the enrollee.

(Check the box to indicate whether your request is for general information or specific information related to your claim or denial for benefits.)

General Information Request

- I am requesting information concerning the plan's treatment limitations related to coverage for:
- Mental health and substance use disorder benefits, generally.
 - The following specific treatment for my condition or disorder:
_____.

Claim/Denial Information Request

I was notified on [*Insert date of denial*] that a claim for coverage of treatment for [*Insert mental health condition or substance use disorder*] was, or may be, denied or restricted for the following reason(s) shown immediately below:

(Based on your understanding of the denial of, limitation on, or reduction in coverage, check all that apply)

- I was advised that the treatment service or medication is excluded from coverage.
- I was advised that the treatment was not medically necessary.
- I was advised that the treatment was experimental or investigational;
- The plan requires authorization before it will cover the treatment;
- The plan requires ongoing authorizations before it will cover my continued treatment.

- The plan is requiring me to try a different treatment before authorizing the treatment that my doctor recommends.
- The plan will not authorize any more treatments based on the fact that I failed to complete a prior course of treatment.
- The plan's prescription drug formulary design will not cover the medication my doctor is prescribing.
- My plan covers my mental health or substance use disorder treatment, but does not have any reasonably accessible in-network providers for that treatment.
- I am not sure how my plan calculates payment for out-of-network services, such as its methods for determining usual, customary and reasonable charges, complies with parity protections.
- Other: *(Specify basis for denial of, limitation on, or reduction in coverage):*

Because my health coverage is subject to the parity protections, treatment limits cannot be applied to mental health and substance use disorder benefits unless those limits are comparable **to and applied no more stringently than** ~~to~~ limits applied to medical and surgical benefits. Therefore, for the limitations or terms of the benefit plan specified above, **within thirty (30) calendar days of the date appearing on this request**, I request that the plan:

1. Provide the specific plan language, **including language in a third-party vendor's documents**, regarding the limitation and identify all of the medical/surgical and mental health and substance use disorder benefits to which it applies in the relevant benefit classification;
2. Identify the factors used in the development of the limitation **and disclose the documents containing the factors for both the mental health or substance use benefit and medical and surgical benefits**. (Examples of factors include, but are not limited to, excessive utilization, recent medical cost escalation, high variability in cost for each episode of care, and safety and effectiveness of treatment);
3. Identify the evidentiary standards used to evaluate the factors **and disclose the documents containing the factors for both the mental health or substance use benefit and medical and surgical benefits**. Examples include, but are not limited to, the following:
 - a. Excessive utilization as defined by two standard deviations above average utilization per episode of care;
 - b. Recent medical cost escalation as defined by medical costs for certain services increasing 10% or more per year for **at least** 2 years;

- c. High variability in cost per episode of care as defined by episodes of outpatient care being 2 standard deviations higher in total costs than the average cost per episode 20% or more of the time in a 12-month period; and
 - d. Safety and efficacy of treatment modality as defined by 2 random clinical trials required to establish a treatment is not experimental or investigational;
4. Identify **and provide documents verifying** the methods and analysis used in the development of the limitation **for the mental health or substance use disorder benefit and for medical and surgical benefits**; and
 5. Provide **any** evidence and documentation to establish that the limitation is **comparable to and** applied no more stringently, as written and in operation, to mental health and substance use disorder benefits than to medical and surgical benefits, **including analyses of denial rates, appeal overturn rates, and other plan and claims data.**

(Complete this section for all requests)

Printed Name of Individual Enrolled in the Plan or his or her Authorized Representative
I am an authorized representative requesting information for the following individual
enrolled in the plan: _____.
Attached to this request is an authorization signed by the enrollee.

Signature of Individual Enrolled in the Plan or his or her Authorized Representative

Member Number (*number assigned to the enrolled individual by the Plan*)

Address

Date

E-mail address (if email is a preferred method of contact)