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November 29, 2021

Arizona Department of Insurance and Financial Institutions (DIFI)
100 North 15th Avenue, Suite 261
Phoenix, AZ 85007-2630

Attention: Mary Boatright, JD, CHC, Manager, Life & Health Oversight
public_comments@difi.az.gov

Re: Comments to Proposed MHPAEA Rulemaking

Dear Department of Insurance and Financial Institutions,

On behalf of the Arizona Psychiatric Society (APS), which represents over 500 psychiatrist members in the state that serve as advocates for the mentally ill, we thank you for considering our comments in response to draft rules promulgated by the Department of Insurance and Financial Institutions (DIFI), as required by Arizona Senate Bill SB1523 and ARS § 20-3502 to ensure compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA). We have restricted the scope of our comments to commentary on Exhibit A, Medical Necessity Criteria and Nonquantitative Treatment Limitation (NQTL) Reports, as we found the text regarding definitions, quantitative treatment limitations (QTLs), and financial requirements (FRs) to be completely appropriate and in need of no revision. **As we provide in the detail and analysis below, we request that DIFI modify the comparative analysis steps addressing factors so that they explicitly state that the factors must be defined.**

Exhibit A

Before we provide any commentary on Exhibit A of the proposed draft rules, we think it is necessary to highlight the amendments made to MHPAEA last year within Section 203 of Division BB of the Consolidated Appropriations Act (CAA), which President Trump signed into law on December 27, 2020. We know that DIFI and other stakeholders are well aware of these amendments, but we think it is appropriate to bring attention to them again because our commentary on Exhibit A flows from the new MHPAEA obligations for health insurance issuers (issuers).

The most relevant of the amendments made last year was the addition of a new subsection (a)(8)(A) to 42 U.S.C. 300gg-26, which is the MHPAEA statute that DIFI (and other state insurance departments) can enforce. This new subsection established NQTL compliance requirements for state-regulated health insurance issuers. The text is as follows (***emphasis added***):

(8) Compliance requirements

(A) Nonquantitative treatment limitation (NQTL) requirements

In the case of a group health plan or a health insurance issuer offering group or individual health insurance coverage that provides both medical and surgical benefits and mental health or substance use disorder benefits and that imposes nonquantitative treatment limitations (referred to in this section as "NQTLs") on mental health or substance use disorder benefits, such plan or issuer shall perform and document comparative analyses of the design and application of NQTLs and, ***beginning 45 days after December 27, 2020***, make available to the ***applicable State authority*** (or, as applicable, to the Secretary of Labor or the Secretary of Health and Human Services), upon request, the comparative analyses and the following information:

(i) The specific plan or coverage terms or other relevant terms regarding the NQTLs and a description of all mental health or substance use disorder and medical or surgical benefits to which each such term applies in each respective benefits classification.

(ii) The factors used to determine that the NQTLs will apply to mental health or substance use disorder benefits and medical or surgical benefits.

(iii) The evidentiary standards used for the factors identified in clause (ii), when applicable, provided that every factor shall be defined, and any other source or evidence relied upon to design and apply the NQTLs to mental health or substance use disorder benefits and medical or surgical benefits.

(iv) The comparative analyses demonstrating that the processes, strategies, evidentiary standards, and other factors used to apply the NQTLs to mental health or substance use disorder benefits, as written and in operation, are comparable to, and are applied no more stringently than, the processes, strategies, evidentiary standards, and other factors used to apply the NQTLs to medical or surgical benefits in the benefits classification.

(v) The specific findings and conclusions reached by the group health plan or health insurance issuer with respect to the health insurance coverage, including any results of the analyses described in this subparagraph that indicate that the plan or coverage is or is not in compliance with this section.

The most obvious matter the text reveals is that issuers in Arizona have been obligated under federal law to perform NQTL analyses since February 10 of this year (45 days after

December 27, 2020). And, they must make these analyses available to the applicable state authority upon request, which in Arizona is DIFI. Therefore, the main question at hand is whether the stipulated reporting format in Exhibit A is inconsistent with or exceeds the requirements of 42 U.S.C. 300gg-26(a)(8)(A). The answer is no, and the format of Exhibit A might even be slightly more lenient in a way that probably requires slight modification.

First, it is necessary to explain how the format of Exhibit A does not exceed the requirements of 42 U.S.C. 300gg-26(a)(8)(A). And, this is necessary because some commenters may note that within each classification of benefits there appear to be more comparative analysis steps involved than what is in 42 U.S.C. 300gg-26(a)(8)(A). Exhibit A requires a distinct as written comparative analysis requirement for each process, each strategy, each evidentiary standard, and each factor along with a distinct in operation comparative analysis requirement for each process, each strategy, each evidentiary standard, and each factor. However, this is exactly what is required under clause (iv) of 42 U.S.C. 300gg-26(a)(8)(A), even if it may not appear to be salient. Again, here is clause (iv) (***emphasis added***): (iv) The comparative ***analyses*** demonstrating that the processes, strategies, evidentiary standards, and other factors used to apply the NQTLs to mental health or substance use disorder benefits, ***as written and in operation***, are comparable to, and are applied no more stringently than, the processes, strategies, evidentiary standards, and other factors used to apply the NQTLs to medical or surgical benefits in the benefits classification.

Note that the term analyses is plural. That means that the comparative analysis requirement fundamentally requires multiple analyses. In other words, a single comparative analysis addressing all of the terms processes, strategies, evidentiary standards, and factors does not meet the requirements of clause (iv). Further, the text clearly separates the concepts of as written and in operation. And, even further, each term—processes, strategies, evidentiary standards, and factors—is listed in terms of applying to mental health or substance use disorder (MH/SUD) benefits and in terms of applying to medical or surgical (M/S) benefits. That means that each as written process that applies to MH/SUD benefits must be compared and analyzed to its corresponding as written process that applies to M/S benefits. Each in operation process that applies to MH/SUD benefits must be compared and analyzed to its corresponding in operation process that applies to M/S benefits. This reality repeats itself for each of strategies, evidentiary standards, and factors, both as written and in operation. This is exactly the same as what is required under Exhibit A. Congress simply chose to be more parsimonious in its phrasing. Please note that we conferred with our colleagues at the American Psychiatric Association (APA) and they confirmed that this interpretation is correct. The APA is a good authority on this matter as they supplied Congress with the legislative text that became codified in section 203 of Division BB of the CAA (including what is now 42 U.S.C. 300gg-26(a)(8)(A)).

However, as noted above, we do believe that slight modification is necessary in order to fully match the requirements of 42 U.S.C. 300gg-26(a)(8)(A). First, for each classification of benefits the comparative analysis steps of Exhibit A list the terms as process, strategy, evidentiary standard, and factor. By framing the terms in the singular, instead of the plural as 42 U.S.C. 300gg-26(a)(8)(A) does, it

creates the possibility that issuers will interpret the language as only requiring them to report on one process as written, one process in operation, one strategy as written, one strategy in operation and so on. For most NQTLs there are multiple as written processes and in operation processes, and multiples of all of the other terms as well. We request that DIFI modify the language to pluralize each of the four terms.

Second, clause (iii) of 42 U.S.C. 300gg-26(a)(8)(A) is important and may not be explicitly captured by Exhibit A. Clause (iii) states (***emphasis added***):

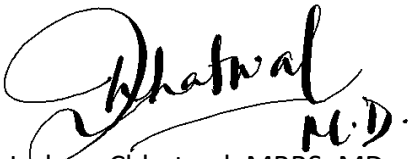
> (iii) The evidentiary standards used for the factors identified in clause (ii), when applicable, ***provided that every factor shall be defined***, and any other source or evidence relied upon to design and apply the NQTLs to mental health or substance use disorder benefits and medical or surgical benefits.

Clause (iii) is very explicit in requiring that every factor shall be defined. While this is implied, and certainly should be interpreted as being required within the steps of Exhibit A, there is a reason why the final version of the CAA explicitly spelled it out. The original piece of legislation that ended up being adapted into the CAA was the Mental Health Parity Compliance Act (H.R. 3165/S. 1737).

If you look at the text of that bill, while it is very, very similar, clause (iii) is missing the explicit requirement that every factor shall be defined. The reason this explicit requirement was added was due to the experience of our colleagues at the APA in working with state legislatures and state regulators. Before the CAA was signed into law, 12 states (not including Arizona) had passed legislation essentially identical to the Mental Health Parity Compliance Act and several other state insurance departments required issuers to report on NQTLs with that same format. This process began in 2017. In fact, before the CAA passed, over 20 states were collecting and reviewing NQTL analyses in this stepwise format. Our colleagues at the APA worked (and are currently working) with a number of state insurance departments that were reviewing the analyses. One of the greatest commonalities across states was that issuers quite frequently failed to adequately define listed factors. For example, "quality of care concerns" is often listed as a factor that triggers prior authorization or concurrent review for both MH/SUD benefits and M/S benefits. But, very rarely would an issuer actually define what it was about the "quality of care" that would meet the level of "concern" that would then trigger the imposition of the NQTL. Without thorough definitional clarity, it is completely impossible to know if the factor of "quality of care concerns" is in fact comparable and applied no more stringently to MH/SUD benefits versus M/S benefits. There are many other factors that were similarly undefined or poorly defined. It was because of this experience that the final text in the CAA was edited to include the explicit requirement that "every factor shall be defined". While we think this is implicitly required in the comparative analysis steps in Exhibit A, experience suggests that unless it is made explicit, issuers will not do it. And, of course, it is already required under federal law. **We request that DIFI modify the comparative analysis steps addressing factors so that they explicitly state that the factors must be defined.**

Thank you for allowing APS to provide comment. We have been very encouraged by the good work DIFI has done so far in implementing MHPAEA and are impressed by the team at the Department. We look forward to working with you to further implement MHPAEA and Jake's Law and we are available to respond to any questions that you may have regarding these comments or related matters.

Respectfully yours,



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