

November 3, 2021

The Honorable Barbara Richardson  
Commissioner  
Nevada Division of Insurance  
1818 E. College Pkwy.  
Suite 103  
Carson City, NV 89706

The Honorable Sharon Clark  
Commissioner  
Kentucky Department of Insurance  
500 Mero Street  
2 SE 11  
Frankfort, KY 40601

Dear Commissioners Richardson and Clark,

We write to you in your capacity as Chair and Vice Chair of the Market Regulation and Consumer Affairs (D) Committee of the National Association of Insurance Commissioners (NAIC) regarding state oversight of the federal Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). As you may know, the amendments to MHPAEA contained in the Consolidated Appropriations Act 2021 (CAA), which was enacted last December, have important implications for states' parity compliance efforts.

These amendments explicitly require insurers that provide both medical/surgical benefits and mental health or substance use disorder (MH/SUD) benefits to conduct a detailed parity compliance analyses for each of their non-quantitative treatment limitations (NQTLs) that contains 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.*

Every insurer subject to MHPAEA must have completed an analysis for each NQTL it imposes on any MH/SUD benefit starting February 10, 2021 (45 days after enactment) and must make that analysis available to the state regulator (or, as applicable, the U.S. Secretary of Labor or U.S. Secretary of Health and Human Services) upon request. Importantly, the MHPAEA amendments explicitly require plans/issuers to test each of the components of the longstanding federal NQTL rule located at 45 CFR § 146.136(c)(4)(i).<sup>1</sup>

In passing these new requirements, Congress recognized that testing each of the NQTL rule's requirements was critical to ensuring compliance. Nearly half of states – either through statutory, regulatory, or administrative action – have already put in place reporting requirements that are fully consistent with the MHPAEA amendments. While the reporting formats these states are using have superficial differences, they nonetheless are valid because they test compliance with the NQTL rule and are consistent with the MHPAEA amendments. Examples of two NAIC members using such high-quality NQTL reporting formats include the Pennsylvania Insurance Department and the Texas Department of Insurance.<sup>2</sup>

**In contrast, the NAIC Market Regulation Handbook's Data Collection Tool For Mental Health Parity Analysis is grossly inadequate and inconsistent with the new MHPAEA parity compliance analyses requirements for NQTLs. Therefore, we call upon NAIC to update the NAIC Market Regulation Handbook to include a tool that reflects current law. States should not be encouraged to use a tool that neither fully tests the NQTL rule located at 45 CFR § 146.136(c)(4)(i) nor is consistent with the MHPAEA amendments located at 42 USC § 300gg–26(a)(8).**

The NQTL tool in the NAIC Handbook contains the following disqualifying failures.

**FAILURE 1: Not Collecting Information Required By Subparagraphs (i), (ii), (iii), or (v) of 42 USC § 300gg–26(a)(8)**

The NAIC tool does not collect any of the critical essential information that insurers are required to collect under the new MHPAEA amendments within these subparagraphs. Instead, the NAIC tool merely has three basic columns for each NQTL within a given classification of care and does not require a separate analysis for mental health and substance use disorder benefits (see immediately below).

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<sup>1</sup> Federal Register, "Final Rules Under the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008; Technical Amendment to External Review for Multi-State Plan Program." November 13, 2013, <https://www.federalregister.gov/d/2013-27086/p-788>.

<sup>2</sup> Both the U.S. Department of Labor's Self-Compliance Tool and The Kennedy Forum, American Psychiatric Association, and Parity Implementation Coalition's "Six-Step Process" for NQTLs also fully align with these reporting tools, the NQTL rule, and the MHPAEA amendments.

<b>NON-QUANTITATIVE TREATMENT LIMITATIONS, CONT'D</b>			
<b>Area</b>	<b>Medical/Surgical Benefits</b>	<b>Mental Health/Substance Use Disorder Benefits</b>	<b>Explanation</b>
	Summarize the plan's applicable NQTLs, including any variations by benefit	Summarize the plan's applicable NQTLs, including any variations by benefit	Describe the processes, strategies, evidentiary standards or other factors used to apply the NQTLs. Explain how the application of these factors is consistent with 45 CFR §146.136(c)(4). Provide the relevant pages of the documents in which the NQTLs are described and list this documentation in the space provided below. Please include in this column an explanation of how the MH/SUD benefits compare to M/S benefits
<b>B. Prior Authorization Review Process</b> Include all services for which prior authorization is required. Describe any step therapy or "fail first" requirements and requirements for submission of treatment request forms or treatment plans. Inpatient, In-Network:			

The tool's instructions solicit information from insurers that is clearly deficient for a regulator to test compliance with MHPAEA's statutory and regulatory requirements.

**FAILURE 2: Inadequate List of Included NQTLs**

The NAIC tool fails to collect information on critical NQTLs that are frequently used to limit the scope and/or duration of care. Examples of missing NQTLs include outlier management, blanket exclusion of services, exclusions for court-ordered treatment / involuntary holds, out-of-network coverage standards, and unlicensed provider / staff requirements. The failure to solicit information on these NQTLs and other critical NQTLs identified in MHPAEA regulations and federal guidance<sup>3</sup> leaves glaring gaps in regulatory oversight of MHPAEA.

Unfortunately, these failures are not some technical, unimportant matter. Rather, they get to the heart of whether regulators are using a tool that requires insurers to demonstrate that they have provided all of the mandated information, conducted the required comparative analysis and are in compliance with MHPAEA.

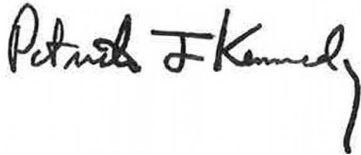
Because the tool in the Handbook does not reflect current law, our organizations strongly believe the Handbook must be updated to include a tool that does. Examples of NQTL reporting tools that are consistent with current law – 45 CFR § 146.136(c)(4)(i) and 42 USC § 300gg–26(a)(8) – include those being used in states such as New York, Pennsylvania, and Texas.<sup>4</sup>

<sup>3</sup> For an example of an illustrative, non-exhaustive list of NQTLs, see page 19 of the U.S. Department of Labor's Self-Compliance Tool for the Mental Health Parity and Addiction Equity Act (MHPAEA), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/self-compliance-tool.pdf>.

<sup>4</sup> This summer, the Texas Department of Insurance adopted particularly strong MH/SUD parity rules, which includes a Data Collection Reporting Form (Division 2) that collects quantitative data on MH/SUD and medical/surgical claims and utilization review, as well as on reimbursement rates. We strongly believe that all states should be collecting such comparative quantitative data as part of their MHPAEA enforcement efforts. For more information, see: <https://www.tdi.texas.gov/health/hb10.html>.

We appreciate your commitment to improving access to mental health and addiction treatment by ensuring non-discriminatory coverage in compliance with MHPAEA. Our organizations stand ready to assist your efforts however we can.

Sincerely,



Patrick J. Kennedy  
Former U.S. Representative (D-RI)  
Founder, The Kennedy Forum



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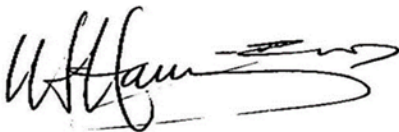
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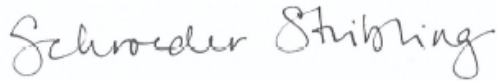
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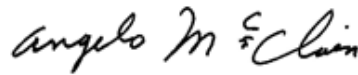
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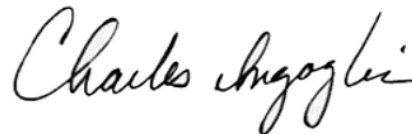
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Cc: Members of the Market Regulation and Consumer Affairs (D) Committee  
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