June 18, 2020

MHPAEA (B) Working Group
National Association of Insurance Commissioners (NAIC)
Attn: Jolie H. Matthews, Senior Health and Life Policy Counsel
444 North Capitol Street, NW
Hall of the States, Suite 700
Washington, DC 20001-1509

Via Email: jmatthews@naic.org

Dear MHPAEA (B) Working Group:

Thank you for the opportunity to provide feedback on the NAIC draft revised draft Quantitative Treatment Limit (QTL) template and instructions. As you know, while the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), has brought significant improvements to behavioral health coverage and access, for many people with behavioral health conditions, access to behavioral health services remains a challenge. One study found that 53 million Americans wanted mental health services but were unable to access them in 2018.[1] Access was a particular challenge for people with lower incomes, and those who lived in rural areas.[2] Research has also long established that Black, Indigenous, and People of Color often experience disproportionate barriers to accessing behavioral health services.[3] We appreciate that the NAIC is working to support states in ensuring behavioral health parity, which should help improve access to behavioral health services and reduce disparities in behavioral health access.

In general, we believe that this template captures the necessary information that regulators need to ensure that plans' QTLs are in parity between medical / surgical benefits and behavioral health benefits. While we think that the template accurately reflects the measurements for QTLs, we are concerned that the instructions do not provide guidance on how an issuer should classify the limits and benefits in the template. In order to indicate compliance, a plan could reverse engineer compliance to determine how limits can be classified to make the template indicate compliance. Clear

[1] *See* Cohen Veterans Network & Nat'l Council Beh. Health, *America's Mental Health 2018* at 7 (2018), https://www.cohenveteransnetwork.org/wp-content/uploads/2018/10/Research-Summary-10-10-2018.pdf.
[2] *Id.* at 9.
[3] *See, e.g.,* Nat'l Counsel State Leg., *The Costs and Consequences of Disparities in Behavioral Health Care*, NCSL.org (Feb. 2018), https://www.ncsl.org/Portals/1/HTML_LargeReports/DisparitiesBehHealth_Final.htm.

instructions are needed to ensure that issuers use the template in way that accurately reflects parity.

We recommend that in the instructions, the NAIC provide regulators with more guidance to ensure that when they review the template, they evaluate whether services are categorized correctly. It is important that regulators review the categorization of benefits in the template to confirm that the template accurately compares QTLs between medical / surgical benefits and behavioral health benefits. This concern applies across multiple categorizations in the template. For example, regulators must ensure that benefits are properly categorized as medical / surgical versus behavioral health. In addition, they must ensure that benefits are properly categorized as "in-patient, in-network," "in-patient, out-of-network," etc. Unscrupulous issuers could deliberately mis-categorize benefits in a way that created a finding of parity, when in fact there are serious disparities. For example, if an issuer classifies care in skilled nursing facilities and rehabilitation hospitals for medical/surgical benefits as inpatient benefits, it must classify covered care in residential treatment facilities for MH/SUD benefits as inpatient benefits; regulators should review issuers' classifications to ensure that they are accurate. NAIC should encourage regulators to scrutinize issuers' categorizations closely to ensure that they do not obscure any parity issues.

In addition, we recommend that the instructions provide regulators with guidance and recommendations around evaluating the "expected claim amount" of benefits, particularly those that are subject to co-insurance or a deductible. Regulators must be directed to review these estimates to ensure that they are reasonable, since over-estimating the cost of medical / surgical benefits or under-estimating the cost of behavioral health benefits could lead to a false finding of parity. We are concerned that if regulators accept insurer's estimates at face value, they could miss areas where there are serious parity problems.

We also recommend that if an issuer indicates that claim administrators may use discretion in approving benefits beyond the QTLs measured, that should be indicated on the compliance chart. Discretion is a highly common way in which otherwise compliant QTLs are easily changed and become non-compliant. We recommend that, where an issuer provides claims administrators with discretion, the instructions direct issuers to provide outcomes data on how a plan adheres to the set QTLs so that regulators can determine whether the QTLs operate in practice the way the plan's policies state.

We also urge the NAIC to caution regulators against deferring to the template tool to the exclusion of performing their own independent analysis or review when consumers complain about parity issues or raise concerns about access to behavioral health. As

discussed above, the findings of the template are only as strong as the data that is put into it. When regulators receive complaints, they must look closely at the underlying data rather than merely accept a finding of parity by the template.

Finally, we recognize that this committee indicated that this QTL template was a first step and that next would be guidance on NQTLs. We ask that this group focus efforts on this important area. In the last MHPAEA Enforcement Factsheet from the U.S. Department of Labor, NQTLs were nearly half of the violations found, and this was slightly down from previous years in which NQTLs were a majority of the violations found.[4] In particular, using the collective wisdom of the group to analyze the DOL recommendations for analyzing NQTL compliance and other recommendations for NQTL compliance to identify recommendations that will make parity compliance meaningful.[5] We particularly ask this committee to identify ways to operationalize NQTL compliance analysis in a way that is accessible by consumers. A significant problem with MHPAEA compliance is that many individuals seeking behavioral health care do not understand the protections of parity or how to spot it if a plan is violating the requirements.

Thank you again for the opportunity to comment. If you have any questions about these suggestions, please contact NAIC Consumer Representative Wayne Turner (turner@healthlaw.org).

Sincerely,

---

[4] U.S. Dep't Labor, Factsheet: FY 2017 MHPAEA Enforcement, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/mhpaea-enforcement-2017.pdf (showing NQTLs as 48.91% of violations compared to 28.26 for financial limits and QTLs, and cumulative financial requirements/treatment limitations and annual and lifetime dollar limits at 8.70% each); U.S. Dep't Labor, MHPAEA Enforcement Fact Sheet (Jan. 2016), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/mhpaea-enforcement.pdf (reflecting violations for 2010-2015). *See also* Milliman Research Report, Addiction and mental health v. physical health: Widening disparities in network use and provide reimbursement (Nov. 19, 2019), http://assets.milliman.com/ektron/Addiction_and_mental_health_vs_physical_health_Widening_disparities_in_network_use_and_provider_reimbursement.pdf (finding ongoing disparities stemming from NQTLs); Parity at 10, Consumer Health Insurance Knowledge and Experience Survey: Report of Findings (Feb. 3, 2019) (finding that about one-fifth of surveyed consumers could not find the behavioral health care they needed due to limitations and a majority had accepted their plans denial of coverage for mental health services).

[5] U.S. Dep't Labor, Self-Compliance Tool for the Mental Health Parity and Addiction Equity Act (MHPAEA) (2018), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/compliance-assistance-guide-appendix-a-mhpaea.pdf. We recognize that there are other recommendations outside of those of DOL, including the 6-step process put forth by The Kennedy Forum, https://www.apna.org/files/six_step_issue_brief.pdf, and as discussed in the Milliman white paper approach to documenting NQTL compliance, http://www.mhtari.org/NQTL_Guidelines_White_Paper_10-07-19.pdf.

Wayne Turner, Senior Attorney

Ashley Blackburn
Courtney Bullard
Laura Colbert, MPH, MCHES
Deborah (Deb) Darcy
Eric Ellsworth
Justin Giovannelli, JD, MPP
Katie Keith
Amy Killelea, JD
Anna Schwamlein Howard
Matthew Smith, Esq
Andrew Sperling
Caitlin Westerson
Silvia Yee