September 13, 2017

Filed electronically via e-ohpsca-mhpaea-disclosure@dol.gov

U.S. Department of Labor
Employee Benefits Security Administration
Office of Health Plan Standards and Compliance Assistance
200 Constitution Avenue, N.W.
Washington, DC 20210
Attn: MHPAEA Comments

RE: Comments on Mental Health Parity Act Disclosure Issues

Dear Sir or Madam,

I write on behalf of the American Benefits Council ("Council") to provide comment in connection with the FAQs about Mental Health and Substance Use Disorder Parity Implementation and the 21st Century Cures Act Part 38, published on June 16, 2017 by the Departments of Labor, Health and Human Services, and the Treasury (collectively, the Departments). We understand from the request for comments that a response submitted to one Department will be shared with the other Departments.

The American Benefits Council (the "Council") is a national nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 425 members are primarily large multistate U.S. employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs.

Our members strongly believe in the value of mental health and substance use disorder ("MH/SUD") benefits for employees. As key stakeholders directly impacted by mental health parity requirements, we are committed to working with the Departments in developing reasonable guidance for the provision of MH/SUD benefits provided by group health plans.

The Departments are specifically soliciting comments on the Mental Health Parity and Addiction Equity Act ("MHPAEA") disclosure requirements and a draft model form that participants, enrollees, or their authorized representatives could -- but would not be required to -- use to request information from their health plan or issuer regarding nonquantitative treatment limitations ("NQTLs") that may affect their MH/SUD benefits, or to obtain documentation after an adverse benefit determination involving MH/SUD benefits to support an appeal.

The Council appreciates the opportunity to comment with respect to MHPAEA disclosure issues and the draft model form, including ways to reduce administrative burden on group health plans. The Council is responding to the following questions presented by the Departments and on the draft model form.

- Whether issuance of model forms that could be used by participants and their representatives to request information with respect to various NQTLs would be helpful and, if so, what content the model forms should include.

- Do different types of NQTLs require different model forms? Should there be a separate model form for plan participants and other individuals to request the plan's analysis of its MHPAEA compliance?

- What other steps can the Departments take to improve the scope and quality of disclosures or simplify or otherwise improve processes for requesting disclosures under existing law in connection with MH/SUD benefits?

Issuance and Content of Model Form

A model form that could be used by participants to request information with respect to various NQTLs could be helpful as long as it is voluntary, in "plain language" and easy for individuals to understand, and narrowly targeted to specific NQTL disclosure requirements. Group health plans are currently subject to MHPAEA's disclosure requirements related to a plan's criteria for medical necessity determinations with respect to MH/SUD benefits and the reason for any denial of reimbursement or payment for services with respect to MH/SUD benefits. Plans should be permitted the flexibility to respond to such disclosure requests in ways they have identified to be most helpful to participants and beneficiaries, which may or may not include the use of a model disclosure form.

- **Voluntary:** While a model form could be helpful, it is important that it not be imposed on plans as a requirement for individuals to request information with respect to NQTLs. Employers must maintain the flexibility to accept requests for information with respect to NQTLs in various formats, and individuals should have flexibility in submitting such requests.

- **"Plain language" and easy for individuals to understand:** The MHPAEA NQTL requirement is highly complex and can be difficult to understand. If the Departments decide to utilize a model form, it should be drafted in plain language and in a straightforward manner so that individuals clearly understand how to complete the form and identify the specific information they are requesting. It should also be clear as to the specific information the plan is expected to disclose through the use of the form, consistent with the rules.

- **Targeted to specific NQTL disclosures:** Any model form that could be used by participants to request information with respect to NQTLs should be targeted to specific NQTLs, rather than framed as a general request for plan information related to MH/SUD benefits, which is how the form is currently drafted. Group health plans are currently subject to many different disclosure requirements, and any disclosure requirement through the use of this form should not be duplicative of existing disclosure obligations. For example, it would be appropriate for a group health plan to respond to a request for general information about a plan's MH/SUD benefits by providing an ERISA-required summary plan description ("SPD") that provides detailed information about a plan's benefits for both MH/SUD benefits and medical and surgical ("M/S") benefits.

Different Model Forms

Although a voluntary model form to request information with respect to various NQTLs could be helpful, we do not believe that separate model forms for different types of NQTLs and separate forms for different individuals is necessary. The use of multiple forms would likely result in a complicated and confusing process for plan sponsors, participants and beneficiaries. In addition, rather than improving and simplifying the disclosure request process, the use of separate forms could result in redundant or overlapping requests for information adding further burden to the disclosure process.

Specific Comments on Draft Model Form

- **Background:** The "Background" section of the draft model form is drafted in an overly broad manner and in a way that may confuse consumers. Although the FAQ indicates that the Departments' stated purpose of the model form is for requesting information "regarding NQTLs that may affect their MH/SUD benefits, or to obtain documentation after an adverse benefit determination involving MH/SUD benefits to support an appeal," the model form itself goes beyond that purpose by stating that individuals "can use this form to request general information about coverage limitations."

Individuals in group health plans and other types of coverage already have access to general information about their plan, including coverage limitations, in other mandated plan disclosures, such as SPDs and Summary of Benefits and Coverage ("SBC"). The Council believes that making this model form available for requesting general information about the plan would be duplicative of information that is already required to be provided to individuals pursuant to other existing mandated disclosure requirements.

The Council is also concerned that the statement "the information will help you determine if the coverage you are receiving complies with the law" suggests that information that is disclosed will be determinative of compliance with the MHPAEA parity rules. As noted above, determining parity compliance under MHPAEA involves a complex analysis, often challenging even for the most sophisticated plan sponsors and insurers. We are concerned that the statement above could suggest that information requested and received using the form would determine parity compliance. If the Departments keep this statement, we recommend revising "will help you determine if the coverage you are receiving complies with the law" to "<u>may</u> help you determine if the coverage you are receiving complies with the law."

In the second paragraph of the "Background" section, we are concerned that the description of the parity requirement as "comparable" could be confusing to individuals. Determining whether benefits are in parity is not a simple "cross walk" of the same medical management standards or financial requirements. Parity compliance requires different analyses depending on the type of limitation, and the analyses are highly complex in different ways. Because of this, parity can be confusing for consumers and any model form should be clear as to how parity is defined.

This potential for misunderstanding parity compliance is of particular concern with the NQTL requirement. We recommend that any model form include a statement, in plain language, providing that the parity analysis, including the NQTL analysis, is not a one-to- one comparison, but rather that the rule requires plans and issuers to adhere to strict standards for testing financial requirements, quantitative treatment limitations and NQTLs. The model form should specifically note that regulations do not require plans and issuers to use the same NQTLs for both MH/SUD and M/S benefits, and that disparate results alone do not mean that the NQTLs in use do not comply with the MHPAEA.

- **Instructions:** Similar to our comment in the "Background" section, permitting this model form to be used for requesting general information about coverage limitations is duplicative, given that such information is already required to be provided to individuals through other required disclosures, such as an SPD and SBC. If the Departments finalize a model form, the Council requests that it be

narrowly targeted to request information for NQTLs rather than a broad request for general information about the plan.

- **Disclosure Request, Authorized Representative:** The draft model disclosure request permits the form to be used by a representative who is "authorized" to request information for the individual enrolled in the plan. The Council is concerned that this model form appears to allow any individual to represent him/herself as an authorized individual to request information about an individual's plan without acknowledging that a plan may require additional documentation of an individual's status as an authorized representative before the plan can respond to the request. Many plans have procedures in place to protect individuals by confirming that individuals are aware of the representation and request for information. The Council believes that an "authorized representative" should be limited to an individual expressly authorized by a participant to request information on his or her behalf. In addition, the Department of Labor claims regulation allows plans to establish reasonable procedures for determining whether an individual has been authorized to act on behalf of a claimant. We request that plans be permitted to apply similar, reasonable procedures for an authorized representative's use of the model form.

- **Disclosure Request, General Information Request:** The model form allows individuals to request "information on the plan's limitations related to coverage for: Mental health and substance use disorder benefits, generally" and/or a "specific condition or disorder." The Council recommends that the information request use the MHPAEA NQTL terminology, using plain language, rather than a broad reference to limitations under the plan. This will allow the request for information to be focused on the actual plan limitation for which additional information is being requested rather than a broad-based request of information that is already provided in an SPD or other required disclosure.

  In addition, we recommend deleting the ability to request information about "Mental health and substance use disorder benefits, generally" from the model form and only allow the use of this section for requests for information about a specific condition(s) or disorder(s). General information about MH/SUD benefits is included in an SPD and SBC in which all participants are required to receive under ERISA. This section of the model form would be more appropriately used for requesting information about a specific condition(s) or disorder(s) so that the information provided to the individual addresses the condition or disorder of interest. The Council believes that a broad request for general information about the plan's limitations on MH/SUD benefits generally is duplicative of information that is provided in an SPD and SBC and will not necessarily be helpful for an individual that is trying to learn about coverage for a specific condition (i.e., a condition for which the individual has been diagnosed) to

understand the NQTLs for such condition and how their benefits are in parity. We are also concerned that individuals may check all of the "boxes" in order to obtain information broadly, but that such information may not be meaningful to consumers and would create unnecessary burden for group health plans.

- **Disclosure Request, Claim/Denial Information Request:** In the last section of the request, it appears the information that is required to be provided under numbers 1 through 4 is intended to apply only to the claim/denial information request, not to the general information request-which would make sense since plans should have flexibility in responding to general information requests- but it would be helpful to have this clarified. This is an important clarification for plan sponsors for determining what disclosures are expected of them through the use of this form. These sections should also be consistent with the regulatory disclosure requirements applicable to plan sponsors.

  In addition, the introductory paragraph to this section includes a general statement of the parity requirement that may be confusing to consumers. Similar to the comment above in the "Background" section, we request a statement be included, in plain language, explaining that a parity analysis, including the NQTL analysis, is not a one-to-one comparison. Specifically pointing out that the regulations do not require plans and issuers to use the same NQTLs for both MH/SUD and M/S benefits, and that disparate results alone do not mean that the NQTLs in use do not comply with MHPAEA's requirements.

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Thank you for the opportunity to share our views and for the continued dialogue. If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,

Kathryn Wilber
Senior Counsel, Health Policy