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Nancy Grodin
Deputy Insurance Commissioner
Maryland Insurance Administration
2000 St. Paul Place, Suite 2700
Baltimore, Maryland 21202

Dear Deputy Commissioner Grodin:

On behalf of the Drug Policy Clinic, University of Maryland Carey School of Law Clinical Law Program, I am writing to respond to questions that were raised at the Maryland Insurance Administration's December 1, 2016 Network Adequacy meeting regarding standards that other states have adopted to regulate the disclosure of carrier access plans. I have also set out the federal regulatory standards for the disclosure of plan documents related to the establishment of network adequacy standards under the Mental Health Parity and Addiction Equity Act (Parity Act). As described below, the federal Parity Act regulates the standards carriers use to establish networks and network adequacy as well as the disclosure of plan documents related to these standards. The MIA's access plan disclosure requirements must take into consideration both the State's Public Information Act standards on confidential commercial information and the federal Parity Act standards on disclosures of plan documents. The final disclosure standard adopted by the Maryland Insurance Administration in its regulations may not conflict with Federal law or regulations.

I. Access Plan Requirements

Under MD CODE INSURANCE § 15-112(c), carriers will be required to file an access plan that describes its provider network and the underlying factors it has used to establish the network. The access plan must describe, among other items, the carrier's: (1) network, including the use of technology to meet network access standards; (2) process for monitoring and ensuring the sufficiency of the network to meet the health care needs of enrollees; (3) factors used to build its provider network, including the criteria used to select providers for network participation and placement in network tiers; (4) efforts to address the needs of enrollees with limited English proficiency, diverse backgrounds, physical or mental disabilities and chronic or complex health conditions; (5) efforts to include providers that serve predominantly low-income, medically underserved individuals; and (6) methods for assessing enrollee health care needs and satisfaction with health services. § 15-112(c)(4). The MIA has requested guidance on the portions of the access plan that the Commissioner should identify as containing confidential commercial or confidential financial information which would be exempt from disclosure under the Maryland Public Information Act (PIA), § 4-335 of the General Provisions Article. *See* § 15-112(c)(3).

The starting point for the MIA's determination, in our view, should be the disclosure standard set out in the NAIC's Health Benefit Plan Network Access and Adequacy Model Act. The Model Act creates a presumption that the access plan is public information and that exceptions based on proprietary or competitive information will be narrowly construed. Model Act at Sec. 5, E.2 Drafting Note. According to the NAIC drafters, "state insurance regulators should review their open records laws in determining whether ***a particular provision, if any,*** of an access plan is [proprietary, competitive or trade information]...." *Id* (emphasis added). This guidance supports the NAIC's view that carriers should not be permitted to request that the entire access plan be exempt from public disclosure. *Id.*

In addition to applying the PIA's standards to determine which, if any, provisions in the access plans should remain confidential, the MIA must also consider the federal Parity Act's disclosure requirements. Under the Parity Act, the access plan is a plan instrument that governs the establishment of a carrier's network as well as network adequacy. These plan design features are non-quantitative treatment limitations (NQTLs) (citations provided below), and are subject to the Parity Act's disclosure requirements as well as ERISA standards for those small and large group plans subject also to that law. 45 C.F.R. § 146.136(d)(3); 29 C.F.R. § 2590.712(d)(3).

To the extent a carrier establishes one network for non-group and small and large group plans, the most expansive disclosure requirements – those under ERISA – should set the rules for access plan disclosure. In other words, since plan participants of small and large group plans would have access to the instruments under which a plan is developed and implemented, the carrier should be required to meet that standard for all plans – whether non-group or group – that are governed by the same access plan.

II. State Standards – Disclosure of Carrier Access Plans

A. Survey of State Laws and Regulations

Seven states have adopted statutory or regulatory standards that address the public availability of carrier access plans: Connecticut, Louisiana, Mississippi, Missouri, Montana, Nebraska and Oklahoma.[1] None of the state provisions identify specific portions of the access plan that are exempt from disclosure. Instead, each state statute or regulation provides authority to the insurance department to designate, at the request of the carrier, sections of the access plan it considers to be proprietary or competitive information that may not be made public.[2] Connecticut, Mississippi, Missouri, Montana, and Nebraska's standards specify that the

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[1] These seven states represent the cross-section of network adequacy standards. Three states – Mississippi, Nebraska and Oklahoma – have not adopted any network adequacy standards. Two states - Connecticut and Louisiana – require carriers to meet NCQA or URAC standards, and two states – Missouri and Montana – have adopted quantitative distance and wait time standards.

[2] Connecticut, CONN. GEN. STAT. ANN. § 38a-472f(h)(3) (eff. Jan. 1, 2017);. Louisiana, LA. REV. STAT. ANN. § 22:1019.2(B)(5); Mississippi, MISS. CODE R. § 19-3:14.05(B); Missouri, MO. ANN. STAT. § 354.603(2); Montana, MONT. CODE ANN. § 33-36-201(5); Nebraska, NEB. REV. STAT. § 44-7105(2); and Oklahoma, OKLA. STAT. ANN. Tit. 36, § 6927.

information is deemed proprietary if disclosure would cause the health carrier's competitors to obtain valuable business information.

Maryland's PIA establishes a comparable standard for the disclosure of confidential commercial information.

B. Maryland

Maryland's Public Information Act bars disclosure of public records that contain confidential commercial and financial information. MD. GEN. PROV. § 4-335(2) and (3). Maryland's courts generally looked to the interpretation of analogous provisions in the federal Freedom of Information Act to determine the scope of exemptions. Confidential commercial information is addressed in FOIA, 5 U.S.C. § 552(b)(4). *See* Amster v. Baker, 229 Md. App. 209, 222 (2016). Under federal case law, when a private entity is required to disclose information to the government, as with access plans under § 15-112(c)(2), confidential commercial information is protected against disclosure under two circumstances: (1) disclosure would impair the government's ability to get necessary information in the future; or (2) disclosure would cause substantial harm to the competitive position of the entity from whom the information is obtained. National Parks & Conservation Assn. v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).[3] Applying this exemption standard to access plans, a carrier would be required to demonstrate that ***substantial*** harm to its competitive position will occur from the disclosure of the specific access plan provision(s). *Id.* at 771.

The lack of transparency for access plans makes it impossible for consumer stakeholders to offer specific recommendations on the portions of the plan, if any, that would meet this standard. But in applying this standard, it is the carrier that must (1) identify the specific portions of the access plan it seeks to exempt from disclosure and (2) prove that disclosure would cause the carrier's competitors to gain valuable business information. *See* National Parks, 498 F.2d at 771-72. We recommend that stakeholders be informed of the provisions a carrier seeks to exempt from disclosure and given an opportunity to address the merits of the request to ensure that exemption requests are not overbroad.

Consumers should have full access to information that will allow them to evaluate whether a plan will meet their needs for a range of health services, provide coverage for services in a linguistically and culturally appropriate manner, and ensure that the carrier has an effective plan to monitor and address deficiencies. The legislative mandate to establish quantitative standards implicitly means that consumers should have access to information by which they can test the carrier's representations of network adequacy.

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[3] The Amster Court relied on a different test set out in Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871 (D.C. Cir. 1992), because Amster involved the "voluntary" disclosure of information to county officials. The Court in Critical Mass makes clear that the disclosure test in National Parks applies when the private entity does not voluntarily provide information to the government entity. 975 F.2d at 872.

III. Mental Health Parity and Addiction Equity Act

The Parity Act provides additional guidance on plan information that must be made available to plan participants so that they may evaluate whether the plan's coverage of mental health and substance use disorder benefits complies with federal law. A plan's network is among the standards regulated by the Parity Act, and, for plans subject to ERISA, the Act provides for the disclosure of "instruments under which the plan is established and operated." The carrier's access plan is clearly an "instrument under which the plan is established and operated," and federal regulators have stated that carriers cannot withhold disclosure of such information by characterizing the documents as proprietary or commercially valuable.

Under the Parity Act, the standards for provider admission to a network and network adequacy, itself, are non-quantitative treatment limitations (NQTLs). 45 C.F.R. § 146.136(c)(4)(ii)(D) and 29 C.F.R. § 2590.712(c)(4)(ii)(D) (network admission standards); and Final Rules Under the Paul Wellston and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, 78 Fed. Reg. 68240, 68246 (Nov. 13, 2013) (identifying network adequacy as an NQTL even though it is not included in the enumerated illustrative list). As NQTLs, the "processes, strategies, evidentiary standards or other factors" used to develop the carrier's network and its network adequacy standards must be comparable for medical/surgical, mental health and substance use disorder benefits. 45 C.F.R. § 146.136(c)(4)(i). In addition, the carrier must apply these criteria comparably across all benefits as it builds its network. *Id.*

The access plan contains information related to the processes, strategies and evidentiary standards that have been used to establish the network of medical, surgical, mental health and substance use disorder providers. For example, the access plan must describe the plan's network, the use of technology to meet access standards, the factors the carrier uses to build its network, the criteria used to select providers and place them in tiers, efforts to include essential community providers and methods to assess enrolled health care needs. Each of these elements constitutes a strategy for ensuring network adequacy. We suspect that the access plan will also describe the carrier's processes for developing a network and monitoring sufficiency.

The Parity Act regulations contain specific disclosure standards for documents related to NQTL development and application and also make clear that other provisions of federal and state law may require "disclosure of information relevant to medical/surgical, mental health, and substance use disorder benefits." 45 C.F.R. § 146.136(d)(3); 29 C.F.R. § 2590.712(d)(3). The regulations specifically state:

> For example, ERISA section 104 and 29 CFR 2520.104b-1 provide that, for plans subject to ERISA, instruments under which the plan is established or operated must generally be furnished to plan participants within 30 days of request. Instruments under which the plan is established or operated include…the processes, strategies, evidentiary standards, and other factors used to apply a nonquantitative treatment limitation with respect to medical/surgical benefits and mental health or substance use disorder benefits under the plan.

45 C.F.R. § 146.136(d)(3); 29 C.F.R. § 2590.712(d)(3); and 78 Fed. Reg. at 68247-48 and n. 27. Accordingly, carrier access plans that address the small and large group markets are subject to these disclosure requirements for plan participants.

Finally, in establishing the scope of disclosure for information related to the development and application of NQTLs, federal regulators have directly addressed carrier opposition to disclosure of proprietary or confidential information. In DOL/HHS FAQs Part 31 (FAQ 31), federal regulators pose the question of whether the documentation of the "processes, strategies, evidentiary standards or other factors" may be withheld as proprietary information and reject such defense, concluding:

> As the Departments indicated in prior guidance, the fact that any information (including factors and evidentiary standards used for medical/surgical benefits) may be ***characterized as proprietary or commercially valuable is not legitimate grounds for not providing the information.***

FAQ 31, Q.9 (April 20, 2016) (emphasis added). Available at: https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-31.pdf.

Clearly, the Parity Act regulations provide for broad disclosure of medical/surgical, mental health and substance use disorder information in instruments used to administer the plan and render some documents public information, even when a carrier asserts that they contain propriety or confidential information. While the MIA may well determine that no portion of a carrier's access plan is confidential under PIA § 4-335, regulators must enforce the Parity Act standard to the extent any provision could be protected under state disclosure laws.

We, therefore, recommend that the MIA require each carrier to (1) identify any provision of its access plan for which disclosure would cause substantial harm to its competitive position; and (2) provide evidence that demonstrates substantial harm. We also recommend that the MIA inform stakeholders of the provisions a carrier seeks to exempt from disclosure and provide an opportunity for interested parties to address the merits of the request to ensure that such requests are not overbroad. The MIA should carefully evaluate the information, consistent with the NAIC's policy, and, in the final analysis, apply the Parity Act disclosure requirements for any provision that would be subject to exemption under the PIA.

Thank you for considering our views.

Sincerely,

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