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March 9, 2020

Ms. Bridget Burke  
Regulatory Coordinator  
Pennsylvania Insurance Department  
1341 Strawberry Square  
Harrisburg, PA 17120

**Re: Proposed Regulation #11-258--Mental Health Parity Analysis Documentation**

Dear Ms. Burke

Independence Blue Cross ("Independence") appreciates the opportunity to provide public comments on proposed Regulation #11-258--Mental Health Parity Analysis Documentation ("Regulation").

Independence applauds the Pennsylvania Insurance Department's ("Department") goal of ensuring Pennsylvanians have access to the mental and behavioral health services that they are afforded under state and federal law. Independence is committed to providing our members with access to high-quality, affordable healthcare, which includes access to mental and behavioral health services in a manner that complies with the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA"). We appreciate the continuing open dialogue with the Department as we work together to fully employ and enhance the Commonwealth's MHPAEA compliance tools through the legislative and regulatory processes. As such, Independence believes it is crucial that any MHPAEA compliance system put into place by the Commonwealth should: (1) adhere to established regulatory processes, (2) limit unnecessary administrative burdens, and (3) provide clear regulatory guidance to health insurance issuers.

**Regulatory Process**

Independence supports the Department's focus on MHPAEA compliance. We have been committed, participatory partners in the ongoing mental health parity dialogue with the Department and other interested stakeholders. As we have considered the proposed regulation, Independence believes that changes of this scope are more appropriately pursued through the legislative

process. It is unclear if the Department's authority to promulgate regulations under Section 606-B of the Insurance Company Law (40 P.S. §908-16) extend to mental health parity compliance in the individual and small group markets. Section 606-B of the Insurance Company Law, otherwise known as Health Insurance Coverage Parity and Nondiscrimination Act ("HICPNA"), granted the Department regulatory authority to enforce MHPAEA. At the time HICPNA was enacted, MHPAEA only applied to self-funded health plans and the fully-insured large group market. Health insurance policies sold in the individual and small group markets were not required to provide mental health and substance use disorder benefits ("MH/SUD") in compliance with MHPAEA until passage of the federal Affordable Care Act ("ACA") and its subsequent implementing regulations for essential health benefits ("EHBs"). While we recognize the Department's authority to apply this proposal to fully-insured large group plans, we believe the application to the individual and small group markets exceeds the Department's authority under HICPNA.

#### Administrative Complexity

Compliance with MHPAEA is a complex undertaking, particularly as it relates to nonquantitative treatment limits ("NQTLs"). Independence urges the Department to make every effort to avoid unnecessary administrative burdens, which can stymie the ability to appropriately react and address any changes in established medical protocols.

At Independence, we take a company-wide approach towards our NQTL analysis. This allows us to ensure that there is almost no variation in the NQTLs in our various health insurance policies and forms. We believe it would be prudent and much more effective to allow health insurance issuers to utilize and maintain a single form to document NQTL analysis for all conforming health insurance policies. In the rare circumstance that a policy does not conform to a health insurance issuer's general NQTL framework (e.g. customized large group policy, EPO, etc.), a separate analysis form could be maintained. We believe this would promote a uniform approach to employing, analyzing, and documenting NQTLs, while easing the administrative burden on health insurance issuers.

Recent attention on MHPAEA compliance has focused on NQTLs. However, Independence has concerns around the administrative burden posed by retaining a written analysis statement on quantitative treatment limits ("QTLs"). Coverage limits that fall into the QTL category can be reduced to a numeric value and

are easily measured, such as day limits and visitation limits. Financial requirements including co-payments and deductibles are often included in QTL analysis. While these limitations are easily measured, there is significant variation on the QTLs contained in different health insurance policies. This is especially true in the fully-insured large group market, where employers seek greater customization in health insurance offerings. Independence issues thousands of customized large group policies that each use different QTLs. Maintaining a written QTL analysis for thousands of distinct policies for an unspecified period poses a significant administration burden. Independence urges that the QTL documentation required under the regulation be limited to the method of testing and test results. Performing an analysis on a health insurance policy's QTLs is technical in nature because it deals with numeric limits that can be quantitatively tested. As such, we believe the method of testing and the test results are more important for documenting QTL analysis than a written analysis statement.

Both state and federal regulators have taken the position that "network adequacy" is a NQTL for purposes of MHPAEA. While we have concerns about the classification of network adequacy as a NQTL due to shortage of MH/SUD providers, relative to medical/surgical providers, we recognize that network adequacy is part of MHPAEA compliance. We would, however, draw attention to Box 13 on page 3 of the Department's Regulatory Analysis Form, in which the Department states that this regulation "will not affect any other regulations...of any other state agency." It is important to note this statement, as the Department of Health ("DOH") currently has regulatory authority over network adequacy standards for managed care organizations ("MCOs"), including health maintenance organizations ("HMOs") and certain preferred provider organizations ("PPOs").

Independence is concerned that this regulation could result in conflicting agency positions on a health plan's "network adequacy." This could create a situation whereby the DOH approves an HMO/PPO as meeting network adequacy; however, the Department makes a subsequent determination, finding the same HMO/PPO has a MH/SUD provider network that is not on "par" with its medical/surgical network. The Department would therefore find that the HMO/PPO has an inadequate network for purposes of MHPAEA compliance, which would create a clear conflict with no means of resolving the different findings.

For the purpose of administrative clarity, Independence urges that the same standard for network adequacy be applied for purposes of DOH regulation and MHPAEA compliance. Further, we would recommend that a single agency be given regulatory authority for making network adequacy determinations. For plans that DOH has regulatory authority to approve a plan's network adequacy, we believe DOH should also make the determination whether the plan's MH/SUD provider network is adequate and "on par" with its medical/surgical provider network. If a plan is not subject to network adequacy review by DOH, the Department should determine if the plan has an adequate network for purposes of MHPAEA compliance.

Independence would also remind the Department that, as part of our ongoing dialogue about MHPAEA compliance, we have acknowledged the need for appropriate timing before we effectuate any significant alterations to the administrative process. This is particularly true as we consider any new requirements on MHPAEA analysis and documentation. Health insurance issuers, including Independence, have stressed the need for lead time in implementing new analysis and documentation requirements and the complications involved in adding requirements to health insurance plans that have already been filed with the Department. The current regulation has an immediate effective date (see Box #29, page 10 of the Regulatory Analysis Form). As health insurance issuers will have already filed forms and rates for the 2021 plan year by the projected delivery date of the final-form regulation (Summer 2020), we urge the Department to delay the effective date until January 1, 2022.

### Regulatory Guidance

As state regulatory enforcement of MHPAEA in Pennsylvania and around the nation has demonstrated, compliance with MHPAEA is complicated. It is a significant undertaking in terms of both time and resources to ensure that a health plan is uniformly applying the same treatment limits to MH/SUD benefits as it is for medical/surgical benefits. While quantitative treatment limits ("QTLs"), such as co-payments and visitation limits, are easily measured, ambiguity persists in the application and analysis of NQTLs. There is no definitive list of what "is" and "is not" a NQTL. For purposes of accurately conducting the MHPAEA documentation and analysis required under the proposed regulation, we suggest that the Department publish an annual list of qualified NQTLs in the Pennsylvania Bulletin. Along with the defined list, we would also urge the Department

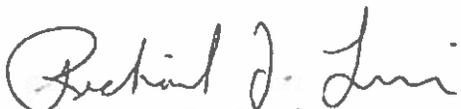
to develop an optional mental health parity documentation analysis template for plans to use as a reference when conducting their QTL and NQTL analysis and documentation.

**Technical Correction**

We would offer an additional technical correction to Section 168.4--Analysis and Disclosure Documentation. Subsection 164.8(c) prescribes the way a health insurance issuer must maintain parity analysis documentation for review by the Department. The language states that the documentation must be maintained and made available for examination in the same manner as for an examination under Section 901 of the Insurance Company Law (Act 284 of 1921). Section 901 of the Insurance Company Law implicates Lloyds Associations. We believe the Department's intended citation was Article IX of the Insurance Department Act (Act 285 of 1921).

We appreciate the opportunity to offer our perspective and recommended changes to the Department's Proposed Regulation #11-258 - Mental Health Parity Analysis Documentation. We appreciate the continued collaboration between the Department and the insurer community, as we seek to ensure parity in the mental and behavioral health space. Independence looks forward to our ongoing engagement on this issue and appreciates your consideration of our comments. If you have any questions related to this letter or would like any additional clarification, please do not hesitate to contact me directly ([richard.levins@ibx.com](mailto:richard.levins@ibx.com), 215-241-3805).

Sincerely,



Richard F. Levins  
Vice President, Deputy General Counsel,  
General Counsel-PA Markets  
Independence Blue Cross