Assessment of Public Comments on the Proposed New Part 230 to 11 NYCRR (Insurance Regulation 218)

The New York State Department of Financial Services (the "Department") received comments from associations that represent insurers and health maintenance organizations ("issuers"), associations that represent healthcare providers, and advocacy organizations, including organizations that provide or promote mental health and substance use disorder health care services. Many of the comments supported the regulation. However, some of the commenters requested changes to or clarification of the regulation.

Comment: One commenter suggested that the regulation be amended to make specific reference to the Mental Health and Substance Use Disorder Parity Report Act ("Parity Report Act") and explicitly mandate compliance with the Act. In addition, the commenter requested information on the interplay between the data submission requirements of the Parity Report Act and the regulation's Mental Health and Substance Use Disorder Parity Compliance Program ("Parity Compliance Program").

Response: There is no need for the regulation to reference the Parity Report Act or mandate compliance with that Act because the Act is already set forth in Insurance Law section 343 and issuers already must comply with the Act. While the Parity Compliance Program and the Parity Report Act both relate to parity compliance, the two stem from separate regulatory and legal authority and have somewhat different objectives. The Parity Report Act amended the Insurance Law to require issuers to submit a biennial report to the Department on their administration of mental health and substance use disorder benefits in comparison to their administration of medical and surgical benefits. The regulation provides minimum standards for ensuring parity compliance and sets forth provisions regarding the prohibition of improper practices and annual certification requirements. The data submission requirements of the Parity Report Act are separate and apart from the submission and transparency requirements of the proposed regulation. As such, compliance with the submission requirements of the Parity Report Act does not equate to meeting the submission requirements of the Parity Compliance Program and vice versa. The Department did not make any changes in response to this comment.

Comment: In lieu of an annual certification, one commenter recommended that the Department establish an attestation to be completed as part of the annual SERFF rate and form submission process.

Response: These two options are not mutually exclusive. As written, the proposed regulation does not preclude the Department from considering a SERFF attestation as part of a policy form and rate submission. The Department would be willing to explore this option in the future. The Department did not make any changes in response to this comment.

Comment: One commenter expressed strong support for the requirement that issuers conspicuously post on their websites any improper practices and issues for remediation within 60 days of discovery but suggested that the regulation also require that the Department publish and make the same information available on the Department's website to ensure that this information is widely available to the public.

Response: The proposed regulation, as written, would not prohibit the Department from publishing this information on its website and the Department would be willing to consider this option in the future. However, the Department does not wish to include this as a requirement in the regulation as its website policies and content are subject to change. The Department did not make any changes in response to this comment.

Comment: One commenter requested that the Department amend the regulation to mandate that in addition to reporting its compliance activities to its board of directors, the issuer publish its compliance activities on its public-facing website.

Response: The proposed regulation currently requires an issuer to publish any identified improper practices and its remediation efforts on its website. While an additional requirement to publish its compliance activities on its website would increase the burden on the issuer, it is unclear what the added benefit to the consumer would be. As a result, the Department does not believe the additional burden on the issuer is justified in this instance. The Department did not make any changes to the regulation in response to this comment.

Comment: One commenter suggested that the annual certification of an issuer's compliance on a form prescribed by the Department be made available to the public by means of posting it on the issuer's public facing website.

Response: The proposed regulation requires that each issuer submit an annual written certification to the Department that the issuer satisfactorily meets the requirements of the regulation. The Department will maintain records of the certifications and will follow up with an issuer should the issuer fail to provide a timely certification. The Department is unsure how consumers or the Department would benefit by requiring an issuer to post its annual certification on its website. The Department did not make any changes to the regulation in response to this comment.

Comment: One commenter noted that the comparable Department of Health ("DOH") proposed regulation ("DOH regulation") states that civil penalties may be imposed on issuers that engage in improper practices and encouraged the Department to include the same language.

Response: The Department does not have statutory authority to establish penalties by regulation. The Insurance Law provides the authority for the Department to impose penalties for violations of the Insurance Law or regulation. Thus, the Department did not make any changes in response to this comment.

Comment: One commenter noted that while section 98-4.4(4)(iii), (iv), and (v) of the DOH regulation contain the phrase "and to ensure there is an adequate network of mental health and substance use disorder providers to provide services on an in-network basis," the Department's proposed regulation does not. The commenter strongly encouraged the Department to ensure that both regulations set forth identical requirements, unless other considerations mandate a different wording.

Response: The Department intended to include the phrase quoted above in its regulation and has added the language so that the language is consistent with the DOH regulation. The Department considers this change to be non-substantive because the language merely clarifies that the purpose of the requirements in this section of

the regulation is to ensure that an issuer meets the already existing requirement in the Insurance Law that the issuer has an adequate network of mental health and substance use disorder providers to provide services on an in-network basis.

Comment: Section 230.3(a)(6) of the proposed regulation currently requires "training and education for all employees…." A commenter suggested that the Department amend this language to clarify that the training and education is "on the requirements of federal and state mental health and substance use disorder parity laws".

Response: The Department added language to the regulation to clarify that the referenced training should be on federal and state mental health and substance use disorder parity requirements.

Comment: Two commenters suggested that the Department amend section 230.3(b)(1) of the proposed regulation to include additional instances of improper practices, such as implementing automatic or systemic non-payment or down-coding of Current Procedural Terminology codes used for the care and treatment of mental health and substance use disorder and failure to provide comparable reimbursement for evaluation and management claims submitted by psychiatrists when the underlying service is provided in the course of treatment of a mental illness or substance use disorder.

Response: The Department reviewed the suggested amendments but does not believe it is necessary to include additional improper practices in the proposed regulation. All practices by issuers related to either quantitative or nonquantitative treatment limitations on mental health and substance use disorder benefits must be consistent with the federal Mental Health Parity and Addiction Equity Act ("MHPAEA"), regardless of whether they are specifically listed in the regulation as an improper practice. The Department did not make any changes in response to this comment.

Comment: One commenter noted that while the DOH regulation states that the regulation will take effect 90 days after publication of the notice of adoption in the State Register, the Department's regulation does not and strongly urged conformity in this regard.

Response: The Department believes this comment was submitted in error as the first paragraph of the Department's proposed regulation indicates that it is to take effect 90 days after publication of the notice of adoption in the State Register. As a result, the Department did not make any changes in response to this comment.

Comment: One commenter recommended that the Department adhere to the practices described in the U.S. Department of Labor's Employee Benefits Security Administration MHPAEA Self-Compliance Tool ("DOL Self-Compliance Tool").

Response: The Department reviewed the referenced DOL Self-Compliance Tool, including the proposed MHPAEA Compliance Plan recommendations, and concluded that, although the proposed regulation provides more detail than the DOL recommendations for compliance plans, it is consistent with the objectives of the DOL recommendations. The Department did not make any changes in response to this comment.

Comment: One commenter requested that the Department revise the definition of "comparative analysis" in the proposed regulation to enhance clarity and to ensure fidelity to the MHPAEA standards.

Response: The Department reviewed the definition of "comparative analysis" in the proposed regulation and determined that the definition is clear and not inconsistent with the MHPAEA standards. The Department did not make any changes in response to this comment.

Comment: With respect to section 230.3(a)(4) of the regulation, one commenter stated that the items that the regulation requires issuers to review in conjunction with monitoring ongoing compliance over-emphasize results, rather than focusing on methodologies, evidentiary standards, factors, and policies and procedures used by issuers in establishing and applying nonquantitative treatment limitations ("NQTLs"). The commenter requested that the Department revise paragraph (4) to require that issuers have "a system for the ongoing assessment of parity compliance, which may include" review of the listed items.

Response: The items that the regulation requires issuers to review in conjunction with monitoring ongoing compliance are intended to assist issuers in determining whether the methodologies, evidentiary standards,

factors, and policies and procedures used in establishing and applying NQTLs are MHPAEA compliant. They are not intended to demonstrate a MHPAEA violation based solely on the results of the review of those items. Further, the list of items is not exhaustive, and issuers may review items not specifically enumerated in the proposed regulation. The Department did not make any changes in response to this comment.

Comment: One commenter requested that the Department revise section 230.3(b)(1)(i) of the regulation to remove reference to "different" standards and replace it with a reference to standards that are "not comparable to or applied more stringently than." The commenter states that the change is necessary because the use of "different" standards is permissible under the law, as long as the standards are comparable and applied no more stringently.

Response: Although the Department interprets the word "different" in this context to mean "not comparable to or applied more stringently than," the Department amended the regulation in accordance with the comment for clarity. As a result, the Department considers this change to be non-substantive.

Comment: One commenter requested that the Department revise section 230.3(b)(1)(ii) of the regulation so that the improper practice is not dependent on whether an issuer engages in utilization review of mental health or substance use disorder benefits more than it does for medical or surgical benefits. The commenter states that the fact that a higher percentage of mental health and substance use disorder services are subject to utilization review than medical or surgical services is permissible under the law as long as the standards for imposing utilization review on both types of services are comparable and applied no more stringently.

Response: The proposed regulation recognizes that a higher percentage of utilization review for mental health or substance use disorder services does not result in an improper practice in and of itself. The proposed regulation specifically provides that it is only an improper practice in the absence of defined clinical or quality triggers. Therefore, the Department did not make any changes in response to this comment.

Comment: One commenter requested that the Department delete section 230.3(b)(1)(iv) of the regulation because an auto adjudication process does not limit scope or duration of benefits and is not an NQTL. The commenter states that federal guidance suggests higher rates of approval through auto adjudication for claims for inpatient medical or surgical benefits than for inpatient mental health or substance use disorder benefits is a "red flag" but not necessarily a violation.

Response: The proposed regulation does not provide that the improper practice is necessarily a violation of MHPAEA and reflects that the improper practice could be a "red flag." However, the Department is not precluded from finding that a practice that indicates a potential MHPAEA violation is an improper practice within the framework of the proposed regulation. Thus, the Department did not make any changes in response to this comment.

Comment: Two commenters suggested removal of the public posting requirement contained in section 230.3(b)(3) of the regulation because: the requirement creates a perverse incentive for health plans to determine that an identified compliance risk does not in fact constitute an improper practice in order to avoid the notice requirement, since providing such notice puts beneficiaries and plaintiffs' attorneys on notice of their opportunity to sue the plan for non-compliance; the public display of violations is overly punitive given the vagueness and complexity of federal guidance on measures of NQTL compliance; it may violate due process as it requires self-reporting of violations publicly; often there are legitimate disagreements on NQTL compliance and any posting of noncompliance could lead to inappropriate public admonishments; and since such a notice would likely be posted after the noncompliance has been remediated, any minimal public benefit it may provide will be substantially outweighed by the confusion it would cause.

Response: Rather than incentivizing an issuer to determine that a compliance risk is not an improper practice as argued in the comment, the Department believes that it will provide additional incentive for an issuer to ensure that they are in compliance with the regulation. While NQTL compliance may be complex, the Department

believes that the improper practices as described in the regulation are clear and will not be overly burdensome on issuers to detect. The Department does not understand the due process argument as it is the issuer's own determination as to whether it has engaged in an improper practice as identified in the regulation. Therefore, the Department did not make any changes in response to this comment.

Comment: One commenter expressed strong support for the Department's proposal that each issuer designate an "appropriately experienced" person to manage parity compliance. However, two commenters recommended that the Department provide clarification on what constitutes "appropriately experienced" to ensure that the compliance program is appropriately administered. A commenter suggested that "appropriately experienced" be qualified with the language "with a background or training in Parity Act compliance."

Response: The Department believes it is the responsibility of the issuer to determine whether an individual is appropriately experienced in this regard and is unsure of the benefit of qualifying this language. It is inferred that this individual should either be familiar with or have a background or training in parity compliance and it was not the intent of the proposed regulation to monitor or audit the credentials or qualifications of the chosen individual. The Department did not make any changes to the regulation in response to this comment.

Comment: One commenter requested that the Department amend the definition of "financial requirements" so that it does not present an exclusive list of financial requirements but only an illustrative list. The commenter also suggested that the definition of an "NQTL" remove the term "qualitative limit" and instead use the language "limitation on scope or duration of benefits that is not expressed numerically." Finally, the commenter suggested that the Department should define "statistically valid sample" and "down-coding" because it is not clear what they mean.

Response: The regulation defines "financial requirement" as deductibles, copayments, coinsurance, and out-of-pocket maximums. The Department believes the current definition is clear and sufficiently captures all financial requirements. It is unclear what the commenter believes is not captured and why only an illustrative list

is needed. With regard to the definition of NQTL, the Department believes the current language "qualitative limit affecting the scope or duration of benefits" has the same meaning as the suggested "limitation on scope or duration of benefits that is not expressed numerically" and prefers the current positive language as it provides clarity and describes what an NQTL is, "a qualitative limit affecting the scope or duration" versus the commenter's suggested negative language which explains what an NQTL is not, "limitation on scope or duration…not expressed numerically." The Department did not define "statistically valid sample" because the Department believes its meaning is sufficiently clear in the context in which it is presented. While the Department did not define "down coding," it added language that better describes "down coding." This change serves as a clarification and therefore is not a substantive change.

Comment: One commenter requested clarification as to why latency period is used as a factor for determining whether to apply an NQTL to medications in section 230.3(a)(4)(vii) of the regulation.

Response: The Department included latency period in section 230.3(a)(4)(vii) of the regulation because the Department recognizes that a drug's latency period is a factor that an issuer may consider in its decision to apply an NQTL to a prescription drug.

Comment: With regard to the proposed regulation's annual certification requirement, one commenter suggested that the Department revise the proposed regulation to require issuers to use a standardized form that sets forth instruction and definitions to ensure standardization across all issuers and permit the Department to monitor for any irregularities and ensure appropriate remediation.

Response: Section 230.3(d)(2) of the regulation states in relevant part that "[s]uch certifications shall be in a form prescribed by the superintendent." As a result, all issuers will use a standardized form and the Department did not make any changes to the regulation in response to this comment.

Comment: One commenter recommended requiring issuers to make specific disclosures to plan members about their parity compliance efforts, including information about the parity compliance officer and his or her

role in providing required disclosures and securing parity compliant benefits. In addition, the commenter suggested that the regulation require issuers to provide annual reports of compliance activities, including comparative reviews, to plan members.

Response: The Department believes mental health and substance use disorder parity compliance is a complex matter that is best assessed and overseen by the Department and is unclear as to the benefit of requiring issuers to disclose the details of their compliance efforts to plan members. The Department did not make any changes to the regulation in response to this comment.

Comment: Section 230.3(b)(3) of the regulation requires issuers to provide written notification to affected members that includes a description of efforts to remediate the improper practice. One commenter suggested that the Department amend this section to address the details of remediation, including the re-adjudication of claims and restitution to adversely impacted members who were harmed by the violation.

Response: The Department believes the language of section 230.3(b)(3) that references the disclosure of remediation efforts to consumers applies to and implies the re-adjudication of claims and restitution, where applicable. For this reason, the Department did not make any changes to the regulation in response to this comment.

Comment: One commenter requested that the Department amend section 230.3(a)(4)(iii) of the regulation to clarify what the regulation means when it references no in-network provider being "available" because without clarification it could be read to mean a provider is not available for an appointment in a specified amount of time, is not within a defined travel time or distance from the patient, or is not accepting new patients.

Response: The Department did not specify what is meant by the term "available" because it intended the term to apply broadly. As a result, "available" would include when a provider is not available for an appointment in a specified amount of time, is not within a defined travel time or distance from the patient or is not accepting new patients. Thus, the Department did not make any changes to the regulation in response to this comment.

Comment: One commenter suggested that the Department amend section 230.3(a)(4)(iv) to clarify that the reviews required in this section are a review of the average length of time to negotiate provider agreements and a review of negotiated reimbursement rates and the methods of determination of usual, customary and reasonable charges, as both are important reviews that will illustrate different potential parity violations.

Response: The Department believes this comment may have been submitted in error because these two reviews are already specified in section 230.3(a)(4)(v) of the regulation. Thus, the Department did not make any changes in response to this comment.

Comment: One commenter recommended that the Department amend section 230.3(a)(4)(vii) of the regulation, which references several NQTLs related to medications, to add tier placement to the list and add catch all language for any other utilization management requirements not expressed.

Response: The Department believes that the language in section 230.3(a)(4)(vii) clearly indicates that the list of NQTLs is not exclusive and only meant to be illustrative and therefore is unsure as to the benefit of naming additional limitations. The Department did not make any changes in response to this comment.

Comment: One commenter suggested that the Department amend section 230.3(a)(4)(viii) of the regulation, which requires a review of any fail first policies, to reference explicit state law or guidance regarding the prohibition of fail first or step therapy policies.

Response: The Department does not believe it is necessary in this instance to reference state law or specific guidance because the statutory requirements related to step therapy and fail first policies are clearly stated in the Insurance Law. The Department did not make any changes in response to this comment.

Comment: One commenter requested that the Department amend the definition of "comparative analysis" to include additional detail via a step-wise process as put forward in The Kennedy Forum, American Psychiatric Association, and Parity Implementation Coalition's Six-Step Compliance Guide or in the DOL Self-Compliance Tool.

Response: The regulation is not intended to prescribe a process or tool that every issuer must use. It provides flexibility to an issuer to choose a process or tool that works best for it, with the understanding that whatever process or tool the issuer chooses, the issuer must be able to demonstrate that it is in compliance with MHPAEA. The Department did not make any changes in response to this comment

Comment: The proposed regulation requires the designation of an individual who is responsible for assessing, monitoring, and managing parity compliance. One commenter urged that this individual be responsible for responding to consumers and provider requests relating to potential parity problems and that this person be responsible for ensuring that required disclosures, including medical necessity criteria both for mental health and substance use disorder and medical/surgical benefits and parity analyses, are made to providers and consumers pursuant to state and federal law.

Response: The regulation requires that the Parity Compliance Program include the designation of an appropriately experienced individual who is responsible for assessing, monitoring and managing parity compliance. Within that framework, the proposed regulation is intended to provide issuers with some flexibility as to how they comply with state and federal parity laws. The Department did not make any changes in response to this comment.

Comment: One commenter suggested that the Department amend section 230.3(a)(6) of the regulation to make explicit that "functions that are subject to federal or state mental health and substance use disorder parity requirements or involved in analysis as a part of the compliance program" include functions relating to medical or surgical benefits, as MHPAEA is a comparative law that is equally dependent on issuers' medical or surgical benefits. Related to this, the commenter suggested that the Department revise the proposed regulation to include a requirement that an insurer must analyze any changes to either mental health and substance use disorder or medical or surgical benefits before implementing them.

Response: While it is true that MHPAEA is a comparative law, the training referenced in this section of the proposed regulation is intended for those individuals whose functions are related to parity compliance, not to all employees who are involved with medical or surgical benefits. Additionally, mental health and substance use disorder benefits must be provided in compliance with MHPAEA and this would include any changes to those benefits. The Department did not make any changes in response to this comment.

Comment: One commenter suggested the Department amend section 230.3(c) of the regulation to require that the issuer adopt internal rules requiring the sharing of information both within the organization and with any other parties engaged in benefit management services, such as entities performing utilization review activities on behalf of the issuer.

Response: An issuer is ultimately responsible for ensuring that it has a parity compliance program and that it is in compliance with MHPAEA, regardless of whether it contracts with any other parties engaged in benefit management services. Therefore, the Department does not feel it is necessary for the regulation to require an issuer to adopt internal rules requiring the sharing of information and the Department did not make any changes in response to this comment.

Comment: One commenter suggested that the Department amend section 230.3(d) of the regulation to require that the issuer's chief executive officer ("CEO") sign the annual written certification to the Superintendent of Financial Services ("Superintendent") specifying that the issuer meets the Parity Compliance Program requirements.

Response: The proposed regulation already requires that the annual certification be signed by the CEO or the individual responsible for assessing, monitoring, and managing the compliance program attesting to the best of his or her knowledge and belief that the information contained therein is true and that a copy of this certification has been provided to the issuer's board of directors or other governing body, or the appropriate committee thereof. Thus, the Department did not make any changes in response to this comment.

Comment: One commenter urged the Department to make clear that mental health benefits and substance use disorder benefits must each, independent of one another, comply with MHPAEA because issuers should not have the false impression that they can lump mental health and substance use disorder together when conducting their benefit analyses.

Response: The Department believes that the proposed regulation is already clear that issuers must comply with MHPAEA as it relates to both mental health benefits and substance use disorder benefits. The preamble to the regulation specifically provides that the purpose of the regulation is to establish mental health and substance use disorder parity compliance program requirements to ensure that insurers are providing comparable coverage for benefits to treat mental health and substance use disorder as required under both state and federal law and regulations. As a result, the Department did not make any changes in response to this comment.

Comment: One commenter expressed concern that the December 31, 2021 effective date for compliance set forth in the proposed regulation will allow noncompliance for too long and that the Department should amend the regulation to require issuers to attest to compliance earlier, such as requiring attestation of compliance as part of an issuer's rate and form submission. In contrast, another commenter expressed concern that the effective date is overly aggressive and urged the Department to push back the effective date to December 31, 2022, as it will take time for issuers to assemble compliance teams with appropriate expertise and to develop and implement the required revised compliance program.

Response: In choosing an effective date, the Department must balance consumer protections against the practical considerations related to operationalizing the requirements of the Parity Compliance Program. The December 31, 2021 effective date is a recognition that issuers will need time to develop a Parity Compliance Program that complies with the regulation. However, notwithstanding the regulation, issuers currently must comply with MHPAEA. As a result, the Department did not make any changes in response to this comment.

Comment: One commenter recommended adding language to section 230.3(a) of the regulation that would allow both in-network and out-of-network providers of mental health and substance use disorder treatment services to appeal issuers' medical necessity determinations via a unique email address or link on the issuer's website. The commenter further requested that the proposed regulation specify that the Department collect and review these appeals.

Response: The Department believes the commenter's suggestion falls outside of the scope of the proposed regulation. The focus of the regulation is on issuers establishing a Parity Compliance Program. In addition, there is already a framework for filing appeals that is set forth in Insurance Law Article 49. The Department did not make any changes in response to this comment.

Comment: One commenter asked whether issuers must develop separate Parity Compliance Programs to address the requirements of the regulation or if issuers may use their existing compliance programs.

Response: The proposed regulation sets forth the requirements for a Parity Compliance Program. An issuer has the discretion to meet the requirements as described in the proposed regulation through an existing compliance program or through a new and separate compliance program. The Department did not make any changes in light of this comment.

Comment: One commenter asked whether there is an expectation that issuers specifically reference what is being done to ensure parity compliance within policies and procedures that apply across the board or if it will be acceptable for issuers to specify that policies and procedures apply to both physical and mental health. The commenter further inquired into the future enforcement mechanisms of the Department.

Response: The Department is unsure as to what this commenter is asking. The proposed regulation sets forth the specific requirements of the Parity Compliance Program and it is unclear whether the commenter is referring to specific language or any particular section. The Department intends to use a number of enforcement

mechanisms, including requesting information under Insurance Law section 308, performing market conduct audits, and imposing civil penalties in instances of non-compliance.

Comment: In order to facilitate clarity and consistency with MHPAEA, one commenter requested that the Department revise the definition of "benefit classification" to state that the outpatient in-network and outpatient out-of-network classifications may be sub-divided into "outpatient office-based services" and "outpatient other services" sub-classifications.

Response: The last sentence in the definition of "benefit classification" currently states that "the outpatient classification includes any subclassification of office visits." The Department believes the current language is sufficiently clear and understood to mean the outpatient office-based services and outpatient other services as these are the only acceptable sub-classifications for purposes of determining parity for outpatient benefits. Thus, the Department did not make any changes in response to this comment.

Comment: One commenter suggested that the regulation should permit issuers to designate more than one individual to assume the responsibility for assessing parity compliance.

Response: While the Department recognizes the need for more than one person to assist in the oversight of the Parity Compliance Program, the Department believes that one individual should oversee the entire Parity Compliance Program to ensure maximum responsibility, transparency, and accountability. Thus, the Department did not make any changes in response to this comment.

Comment: One commenter requested clarity regarding the language in section 230.3(a)(2)(i) of the regulation because the commenter thinks it is unclear as to what an issuer would do to define a benefit classification since existing law and regulations define the classifications.

Response: The Department is unclear what the commenter means. Section 230.3 (a)(2)(i) references "a system for assigning each benefit to the defined benefit classifications as required by MHPAEA." The Department understands that existing law and regulations define the benefit classifications and believes the

language in this section clearly reflects its intent to have a system in place that ensures the appropriate or correct designation of benefits. Per the language above, the issuer would not be defining the benefit classification but instead would be appropriately assigning each benefit to the defined benefit classification. The Department believes the commenter may have misinterpreted the language and therefore did not make any changes in light of this comment.

Comment: One commenter requested that the list of specific NQTL elements set forth in section 230.3(a)(4) of the regulation be replaced with a statement that the Parity Compliance Program be adequate to ensure parity compliance. The commenter's rationale was that the list is arbitrary and incomplete.

Response: The Department believes including the requirements set forth in section 230.3(a)(4)(i)-(ix) is essential to furthering the objective of mental health and substance use disorder parity compliance. The list is illustrative, not exhaustive. It was the Department's intent to include what it deemed to be the most significant minimum standards for assessing ongoing parity compliance. For these reasons, the Department did not make any changes in response to this comment.

Comment: One commenter requested that the Department revise or delete section 230.3(a)(4)(i) because a statistically valid sampling of denials is not indicative of whether determinations were consistent with approved clinical review criteria. The commenter further explained that the state has established greater limits on prior and concurrent utilization management for behavioral health then medical benefits, which may result in increased use of retrospective reviews for behavioral health by necessity. The commenter requested that the regulation recognize this and provide that these factors will be taken into account when evaluating issuer parity compliance.

Response: The Department acknowledges the commenter's concerns and notes that in the aforementioned scenarios, these factors will be considered. However, it is unclear whether revising the proposed regulation to include this level of granularity would be beneficial. As a result, the Department did not make any changes in response to this comment.

Comment: One commenter objected to the inclusion of section 230.3(a)(4)(i), which would require issuers to "review the comparability of coverage within each benefit classification for mental health and substance use disorder benefits" because federal parity laws do not require a comparable continuum of services.

Response: The Department reviewed the language of the proposed regulation against the requirements of federal parity laws and regulations, and while the proposed regulation provides more detail than federal parity laws and regulations, the proposed regulation is consistent with the objectives of MHPAEA and 45 C.F.R. Parts 146 and 147. Therefore, the Department did not make any changes in response to this comment.

Comment: One commenter suggested that the Department revise section 230.3(a)(4)(i) to clarify that the percentage of services provided by out-of-network providers for mental health and substance use disorder benefits where no in-network provider is available, is a monitoring strategy and not a compliance issue. The commenter cited several reasons why the obligation to track cases where services are accessed on an out-of-network basis because no in-network option was available is burdensome and unpredictable and susceptible to being skewed by many factors.

Response: The Department appreciates the potential complications associated with gathering this type of data and is aware of the possibility of skewed outcomes in certain instances. However, the Department believes this is an important metric for assessing parity compliance related to provider network standards and reimbursement rates. Thus, the Department did not make any changes in response to this comment.

Comment: One commenter requested that the Department revise section 230.3(a)(4)(iv) to separately address credentialing policies and network adequacy.

Response: The Department believes the language of the proposed regulation in its current form addresses network adequacy and credentialing separately under section 230.3(a)(4)(iv) and (5). As a result, the Department did not make any changes to the regulation in response to this comment.

Comment: One commenter noted that the language in section 230.3(a)(4)(v) of the regulation, which states that the "review of the average length of time to negotiate provider agreements and negotiated reimbursement rates with network providers and methods for the determination of usual, customary, and reasonable charges", is an example of an outcome measure not highly correlated with parity compliance and requested the deletion of this language.

Response: While the Department acknowledges that this metric may be influenced by factors outside of an issuer's control, the Department believes these are important metrics for parity compliance related to provider network standards and reimbursement rates. Therefore, the Department did not make any changes in response to this comment.

Comment: One commenter requested that the review of issuer policies for automatic or systematic non-payment or down-coding of current procedure terminology ("CPT") codes not be applied in instances when an issuer is following generally accepted rules.

Response: The Department notes that section 230.3(a)(4)(vi) requires that the systematic payment or down-coding of CPT codes used for mental health and substance use disorder benefits be comparable to and applied no more stringently than it is to medical or surgical benefits. A generally accepted rule to apply these standards in a manner that is not comparable would not exempt an issuer from this requirement. Therefore, the Department did not make changes in response to this comment.

Comment: One commenter requested clarification regarding what is meant by "all mental health and substance use disorder medications" as used in section 230.3(a)(4)(vi) of the regulation. The commenter also stated that the requirement to provide a demonstration that factors other than cost, including latency periods, were considered in determining whether to apply a step therapy or prior authorization requirement goes beyond the scope of mental health parity requirements and should be deleted. Finally, the commenter requested clarification

on the distinction between step therapy requirements referenced in section 230.3(a)(4)(vii) of the regulation and fail first requirements referenced in section 230.3(a)(4)(viii) of the regulation.

Response: The Department is unsure what the commenter means when the commenter asks for clarification regarding "all mental health and substance use disorder medications". Based on the language of the proposed regulation, "all mental health and substance use disorder medications" would include all medications used for the treatment of mental health conditions and substance use disorder that are subject to NQTLs. Regarding the reference to cost and latency periods, we believe the commenter misread the regulation as the regulation merely lists those as examples of factors issuers sometimes rely on in determining whether to impose an NQTL. It is consistent with MHPAEA to require that whatever factors are used, that they are comparable to and applied no more stringently than the factors used to determine whether to impose an NQTL on a medical or surgical benefit. Regarding the distinction between step therapy in section 230.3(a)(4)(vii) and fail first requirements referenced in section 230.3(a)(4)(viii), the Department notes that section 230.3(a)(4)(vii) relates to prescription drugs specifically, while section 230.3(a)(4)(viii) relates to mental health and substance use disorder benefits generally. As a result, the Department did not make any changes in light of these comments.

Comment: One commenter recommended that the Department remove "actuarial" from section 230.3(a)(5) of the regulation because federal regulators have indicated that actuarial certification is not a requirement of quantitative limit for financial requirement testing.

Response: As a part of the proposed regulation's minimum standards for parity compliance, section 230.3(a)(5) includes "a process for the actuarial certification, in compliance with actuarial standards of practice, of the data used for, and the outcome of, the analyses of the financial requirements and quantitative treatment limitations applicable to mental health and substance use disorder benefits to ensure that they are no more restrictive than the predominant financial requirements and quantitative treatment limitations applied to substantially all the medical and surgical benefits." The Department has reviewed this recommendation and

believes that requiring an actuarial certification is both warranted in this instance and necessary to ensure the soundness of the data used for parity analysis. Although federal regulators may not require actuarial certification, there is nothing that precludes the Department from requiring it. Therefore, the Department did not make any changes in response to this comment.

Comment: With respect to improper practices, one commenter requested that the Department define the "level of documentation" referenced in section 230.3(b)(1)(i) of the regulation.

Response: The Department did not define or qualify "level of documentation" to allow for a broad interpretation as applicable. For instance, this could refer to the amount or type of documentation. As a result, the Department did not make any changes in response to this comment.

Comment: One commenter requested that the Department define the methodology for calculating the percentage of benefits in section 230.3(b)(1)(ii).

Response: Section 230.3(b)(1)(ii) states that the following shall be considered an improper practice related to mental health and substance use disorder benefits: "requiring preauthorization, concurrent, or retrospective utilization review for a higher percentage of mental health or substance use disorder benefits in the absence of defined clinical or quality triggers, as compared to medical or surgical benefits." The Department believes defining the methodology for this calculation is unnecessary as this requires a basic comparison between the percentage of mental health and substance use disorder benefits with preauthorization, concurrent, or retrospective utilization review requirements as compared to medical and surgical benefits with preauthorization, concurrent, or retrospective utilization review requirements. Therefore, the Department did not make any changes in response to this comment.

Comment: With respect to section 230.3(b)(1)(iii) of the regulation, one commenter raised a concern that the payment rate provisions do not reflect local market factors or differences in intensity of the service delivery

that warrant variations in reimbursement. For example, inpatient treatment for mental health conditions and substance use disorder is commonly less intensive and less costly than medical or surgical hospitalization.

Response: Section 230.3(b)(1)(iii) states that the following shall be considered an improper practice related to mental health and substance use disorder benefits: "implementing a methodology for developing and applying provider reimbursement rates for mental health or substance use disorder benefits that is not comparable to or is applied more stringently than the methodology for developing and applying provider reimbursement rates for medical or surgical benefits." The Department notes that the focus of this improper practice is the methodology for developing and applying provider reimbursement rates and not the actual reimbursement rates. Such methodologies may include consideration of various factors, including local market factors and cost, as long as they are applied comparably and no more stringently to mental health and substance use disorder services than medical or surgical services. Thus, the Department did not make any changes in response to this comment.

Comment: One commenter requested that the Department change the maximum allowed 60-day time period after discovery to remediate and report improper practices to a 30-day period because it would be more reasonable. In contrast, another commenter noted that remediation may take longer than 60 days given the wide variety in NQTLs and suggested removing the 60-day reference and replacing it with "as soon as commercially reasonable."

Response: The Department understands that issuers may need more than 30 days to remediate certain improper practices and believes a 60-day timeframe is most appropriate. Further, replacing a specific timeframe with a "commercial reasonableness" standard of an indefinite duration presents enforcement issues and the potential for undue delay and consumer harm. Thus, the Department did not make any changes in response to these comments.

Comment: One commenter requested that the Department revise Section 230.3(c) of the regulation to clarify what activities are included in the term "benefit management services."

Response: Section 230.3(c) states that "[a]n insurer shall be responsible for and coordinate parity compliance monitoring activities with any agents and other representatives providing benefit management services or performing utilization review activities on behalf of the insurer." The Department understands that an issuer may have several different vendors and contractors managing its benefits and the term "benefit management services" is used broadly here to be inclusive of any and all such third-party vendors and contractors. The Department does not believe further clarification is necessary in this instance. The Department did not make any changes to the regulation in response to this comment.

Comment: One commenter requested clarification on what period the initial certification is intended to cover under section 230.3(d) of the proposed regulation.

Response: The initial certification requires that the issuer have a compliant Parity Compliance Program as of December 31, 2021. Each year thereafter the issuer will certify that it continues to maintain a compliant Parity Compliance Program.

Comment: With regard to the certification form prescribed by the Superintendent, one commenter suggested that the Department either convene a work group to provide input into the form or allow stakeholders to review and comment on the form when developed.

Response: The Department will consider this suggestion. Since this comment did not suggest any changes to the regulation, the Department did not make any.

Comment: One commenter requested that the Department amend the definition of "benefit classification" to recognize a subclassification of office "and/or medication administration-dispensing visits."

Response: MHPAEA does not recognize a subclassification for "medication administration-dispensing visits." The only subclassification recognized under the outpatient benefit classification is "office visits." Therefore, the Department did not make any changes to the regulation in response to this comment.

Comment: One commenter requested that the Department amend the language in the regulation that requires issuers to review the percentage of services for mental health and substance use disorder benefits and medical and surgical services provided by out-of-network providers where no in-network provider was available, to "include the review of corresponding percentage of services provided by in-network mental health and substance use disorder providers for each OMH/OASAS certification, where no out-of-network benefits were utilized."

Response: The Department believes the current requirement in the regulation is sufficient to capture the information being requested by the commenter and therefore did not many any changes to the regulation to address this comment.

Comment: One commenter requested that the Department revise the improper practice described in the regulation of implementing claim edits or system configurations that provide for higher rates of approval through auto-adjudication for claims for inpatient medical or surgical benefits than for inpatient mental health or substance use disorder benefits to also make it an improper practice to implement "claim edits or system configurations that provide higher rates of **claims denied** for mental health or substance use disorder benefits that are not comparable to or is applied more stringently than the methodology for processing and denying claims for medical or surgical benefits."

Response: The Department does not believe that the requested change would add anything new to the provision but rather would merely restate the provision in a different way. The Department did not make any changes to the regulation based on this comment.

Comment: One commenter noted that there are several mentions of requiring preauthorization throughout the regulation even though the law prohibits a preauthorization requirement for substance use disorder treatment in many instances. The commenter recommended that the Department delete references to "preauthorization" or add "where allowed by NYS law."

Response: Issuers must already comply with the Insurance Law, which sets forth the instances in which issuers may not require preauthorization for substance use disorder treatment. There remain instances in which issuers are permitted to require preauthorization. The Department did not make any changes to the regulation as a result of this comment.