Mental Health Parity under the Trump Administration

Mental Health, Addiction, and the Law CLE

Mitchell Hamline School of Law

Friday, February 24, 2017

Stacey Tovino, JD, PhD

Roadmap

- Traditional Examples of Mental Health Benefit Disparities
- Federal Mental Health Parity and Mandatory Mental Health and Substance Use Disorder Laws
  - Mental Health Parity Act of 1996 (MHPA)
  - Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA)
  - Affordable Care Act of 2010 (ACA)
- Mental Health Parity Law under the Trump Administration
  - President Trump's January 20, 2017, Executive Order
  - Federal and state options going forward

Traditional Examples of Mental Health Benefit Disparities

- No coverage of mental health care
- Lower lifetime spending caps on mental health care
- Lower annual spending caps on mental health care
- Lower number of covered inpatient days
- Lower number of covered outpatient visits
- Higher deductibles, copayments, and coinsurance amounts
- More stringent medical necessity requirements
- More stringent experimental/investigative exclusions

Illustrative Mental Health Exclusions

Mental health and chemical dependency

Blue Priority HSA plans exclude coverage for:

- Bereavement counseling or services
- Certain developmental and le[illegible] disorders
- Certain disorders of early chil[illegible] academic underachievement
- Chemical dependency treatm[illegible] inpatient treatment for alcoh[illegible]
- Communication disorders (such as stuttering and stammering)
- Impulse-control disorders (such as pathological gambling)
- Marriage and family counseling
- Nicotine dependence
- Outpatient treatment for alcoholism
- Residential treatment of mental health conditions or chemical dependency except those services received in a Residential Treatment Facility as described in the benefits policy
- Sensitivity, shyness and social withdrawal disorder
- Sexual identification or gender disorders (including sex-change surgery)

Wellmark South Dakota

Illustrative Mental Health Exclusions

2013-2014 Student Injury & Sickness Insurance Plan Highlights

For students attending

EMBRY-RIDDLE
Aeronautical University

No benefits will be paid for: a) loss or expense caused by, contributed to, or resulting fro

1. Acupuncture;
2. Addiction, such as: nicotine addiction, except as specifically provided in the policy; and caffeine addiction; non-chemical addiction, such as: gambling, sexual, spending, shopping, working and religious; codependency;

Illustrative Mental Health Exclusions

UPMC HEALTH PLAN

Exclusions

Unless otherwise set forth in a Rider, the following is a list of services that are not typically covered under UPMC Health Plan commercial employer group benefit plans.

3. Behavioral Health Services:

Medicare Limitation on Inpatient Psychiatric Hospital Days 42 C.F.R. 409.62

§ 409.62 Lifetime maximum on inpatient psychiatric care.

There is a lifetime maximum of 190 days on inpatient psychiatric hospital services available to any beneficiary. Therefore, once an individual receives benefits for 190 days of care in a psychiatric hospital, no further benefits of that type are available to that individual.

Old (Pre-2008) Medicare Outpatient Mental Health Care Cost-Sharing SSA 1833(c)

(c) Mental disorders

Notwithstanding any other provision of this part, with respect to expenses incurred in any calendar year in connection with the treatment of mental, psychoneurotic, and personality disorders of an individual who is not an inpatient of a hospital at the time such expenses are incurred, there shall be considered as incurred expenses for purposes of subsections (a) and (b) of this section only 62 1/2 percent of such expenses. For purposes of this subsection, the term "treatment" does not include brief office visits (as defined by the Secretary) for the sole purpose of monitoring or changing drug prescriptions used in the treatment of such disorders or partial hospitalization services that are not directly provided by a physician.

62.5% x 80% = Historically, Medicare beneficiaries paid 50% of the cost of their outpatient mental health care

MIPPA 102 (2008), amending SSA 1833(c)

SEC. 102. ELIMINATION OF DISCRIMINATORY COPAYMENT RATES FOR MEDICARE OUTPATIENT PSYCHIATRIC SERVICES.

Section 1833(c) of the Social Security Act (42 U.S.C. 1395l(c)) is amended to read as follows:

"(c)(1) Notwithstanding any other provision of this part, with respect to expenses incurred in a calendar year in connection with the treatment of mental, psychoneurotic, and personality disorders of an individual who is not an inpatient of a hospital at the time such expenses are incurred, there shall be considered as incurred expenses for purposes of subsections (a) and (b)--

"(A) for expenses incurred in years prior to 2010, only 62 1/2 percent of such expenses;

"(B) for expenses incurred in 2010 or 2011, only 68 3/4 percent of such expenses;

"(C) for expenses incurred in 2012, only 75 percent of such expenses;

"(D) for expenses incurred in 2013, only 81 1/4 percent of such expenses; and

"(E) for expenses incurred in 2014 or any subsequent calendar year, 100 percent of such expenses.

"(2) For purposes of subparagraphs (A) through (D) of paragraph (1), the term 'treatment' does not include brief office visits (as defined by the Secretary) for the sole purpose of monitoring or changing drug prescriptions used in the treatment of such disorders or partial hospitalization services that are not directly provided by a physician.".

Mental health parity "phase in"

Medicaid's IMD Limitation
42 C.F.R. 435.1009(a)(2)

§ 435.1009 Institutionalized individuals.

(a) FFP is not available in expenditures for services provided to—

(1) Individuals who are inmates of public institutions as defined in § 435.1010; or

(2) Individuals under age 65 who are patients in an institution for mental diseases unless they are under age 22 and are receiving inpatient psychiatric services under § 440.160 of this subchapter.

Federal and State Mental Health Parity Laws

Mental Health Parity Act of 1996.

42 USC 201 note.

TITLE VII—PARITY IN THE APPLICATION OF CERTAIN LIMITS TO MENTAL HEALTH BENEFITS

SEC. 701. SHORT TITLE.—This title may be cited as the "Mental Health Parity Act of 1996".

SEC. 702. AMENDMENTS TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.—(a) IN GENERAL.—Subpart B of part 7 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 (as added by section 603(a)) is amended by adding at the end the following new section:

"SEC. 712. PARITY IN THE APPLICATION OF CERTAIN LIMITS TO MENTAL HEALTH BENEFITS.

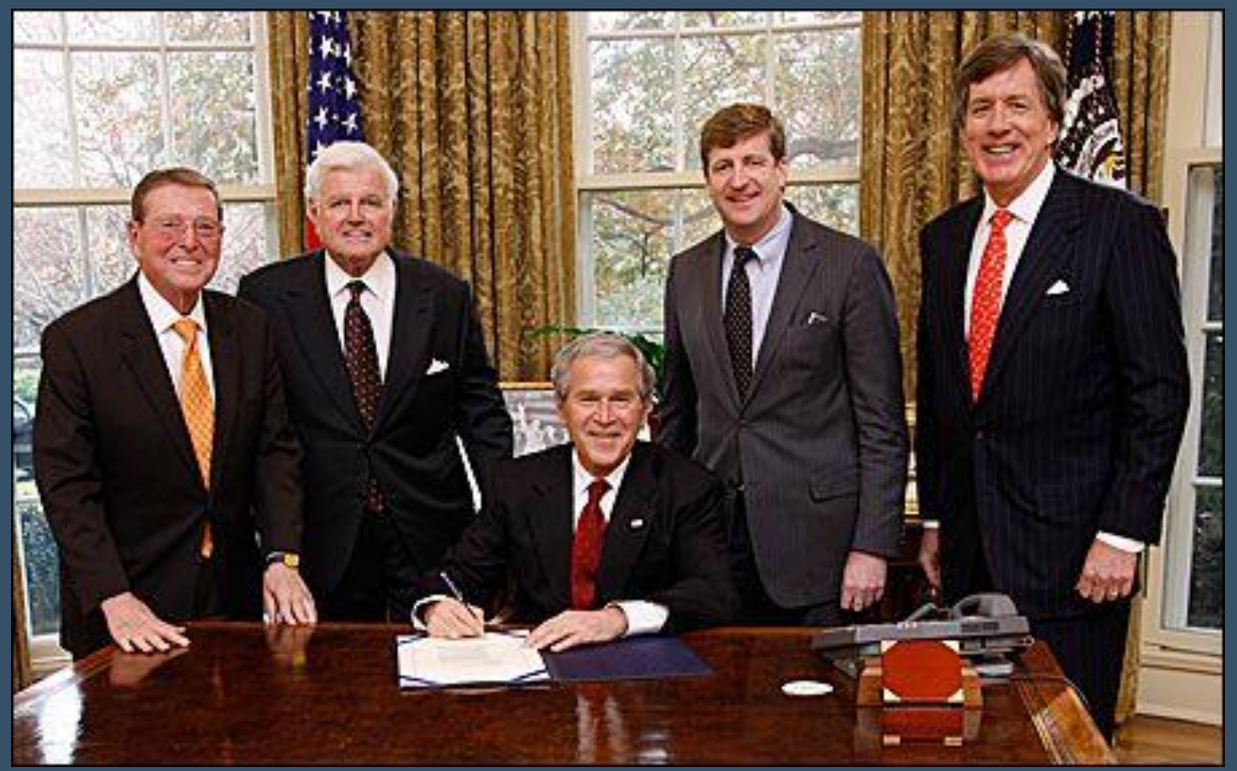
"(a) IN GENERAL.—

"(1) AGGREGATE LIFETIME LIMITS.—In the case of a group health plan (or health insurance coverage offered in connection with such a plan) that provides both medical and surgical benefits and mental health benefits—

"(2) ANNUAL LIMITS.—In the case of a group health plan (or health insurance coverage offered in connection with such a plan) that provides both medical and surgical benefits and mental health benefits—

Limitations of MHPA '96

- Not a mandated benefit law
- Did not protect individuals with substance-related and addictive disorders
- Did not require parity in any context other than lifetime and annual spending limits
- Did not protect individuals insured through individual health plans, small group health plans, self-funded non-federal governmental plans, Medicare plans, and Medicaid non-managed care plans



Subtitle B—Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008

SEC. 511. SHORT TITLE.

This subtitle may be cited as the "Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008".

"(3) FINANCIAL REQUIREMENTS AND TREATMENT LIMITATIONS.—

"(A) IN GENERAL.—In the case of a group health plan (or health insurance coverage offered in connection with such a plan) that provides both medical and surgical benefits and mental health or substance use disorder benefits, such plan or coverage shall ensure that—

"(i) the financial requirements applicable to such mental health or substance use disorder benefits are no more restrictive than the predominant financial requirements applied to substantially all medical and surgical benefits covered by the plan (or coverage), and there are no separate cost sharing requirements that are applicable only with respect to mental health or substance use disorder benefits; and

"(ii) the treatment limitations applicable to such mental health or substance use disorder benefits are no more restrictive than the predominant treatment limitations applied to substantially all medical and surgical benefits covered by the plan (or coverage) and there are no separate treatment limitations that are applicable only with respect to mental health or substance use disorder benefits.

Deductibles, copayments, coinsurance

Inpatient day limits, Outpatient visit limits

Benefits and Limitations of MHPAEA '08

- Benefits
  - Expressly protects individuals with substance-related and addictive disorders
  - Extends parity to the contexts of financial requirements and treatment limitations

- Limitations
  - Still not a mandated benefit law
  - Still did not protect individuals insured through individual and family health plans, small group health plans, self-funded non-federal governmental plans, Medicare plans, and Medicaid non-managed care plans

Not a Mandated Benefit Law

See 75 Fed. Reg. 5410, 5413 (Feb. 2, 2010)

This rule does not require an expansion of the range of mental health conditions or substance use disorders covered under the plan; it merely requires, for those conditions or disorders covered under the plan, that coverage also be provided for them in each classification in which medical/surgical coverage is provided. If a plan

medical/surgical benefits. These regulations do not address the scope of services issue. The Departments invite

An Act

Entitled The Patient Protection and Affordable Care Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Patient Protection and Affordable Care Act".

#1. Expansion of federal mental health parity law to the individual and small group markets

#1: Expansion of Federal Mental Health Parity Law

- ACA 1311(j):

(j) APPLICABILITY OF MENTAL HEALTH PARITY.—Section 2726 of the Public Health Service Act shall apply to qualified health plans in the same manner and to the same extent as such section applies to health insurance issuers and group health plans.

#1: Expansion of Federal Mental Health Parity Law

- ACA 1563(c)(4):

(4) in section 2726 (42 U.S.C. 300gg–5), as so redesignated by section 1001(2)—

(A) in subsection (a), by striking "(or health insurance coverage offered in connection with such a plan)" each place that such term appears and inserting "or a health insurance issuer offering group or individual health insurance coverage";

(B) in subsection (b), by striking "(or health insurance coverage offered in connection with such a plan)" each place that such term appears and inserting "or a health insurance issuer offering group or individual health insurance coverage"; and

(C) in subsection (c)—

(i) in paragraph (1), by striking "(and group health insurance coverage offered in connection with a group health plan)" and inserting "and a health insurance issuer offering group or individual health insurance coverage";

#2. Establishment of Mandatory Mental Health and Substance Use Disorder Benefits

#2. Establishment of Mandatory MH&SUD Benefits

ACA 1302(b)(1)(E); 45 C.F.R. 156.110(a)(5)

SEC. 1302. ESSENTIAL HEALTH BENEFITS REQUIREMENTS.

(a) ESSENTIAL HEALTH BENEFITS PACKAGE.—In this title, the term "essential health benefits package" means, with respect to any health plan, coverage that—

(1) provides for the essential health benefits defined by the Secretary under subsection (b);

(2) limits cost-sharing for such coverage in accordance with subsection (c); and

(3) subject to subsection (e), provides either the bronze, silver, gold, or platinum level of coverage described in subsection (d).

(b) ESSENTIAL HEALTH BENEFITS.—

(1) IN GENERAL.—Subject to paragraph (2), the Secretary shall define the essential health benefits, except that such benefits shall include at least the following general categories and the items and services covered within the categories:

(A) Ambulatory patient services.
(B) Emergency services.
(C) Hospitalization.
(D) Maternity and newborn care.

(E) Mental health and substance use disorder services, including behavioral health treatment.

(F) Prescription drugs.
(G) Rehabilitative and habilitative services and devices.
(H) Laboratory services.
(I) Preventive and wellness services and chronic disease management.
(J) Pediatric services, including oral and vision care.

Essential Health Benefits (EHB)
ACA 1302(b)(1)

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(D) Maternity and newborn care.

(E) Mental health and substance use disorder services, including behavioral health treatment.

(F) Prescription drugs.

(G) Rehabilitative and habilitative services and devices.

(H) Laboratory services.

(I) Preventive and wellness services and chronic disease management.

(J) Pediatric services, including oral and vision care.

NEVADA 2017 EHB BENCHMARK PLAN

SUMMARY INFORMATION

Plan Type	Small Group Market
Issuer Name	Health Plan of Nevada, Inc.
Product Name	HMO
Plan Name	HPN Solutions HMO Platinum 15/0/90%
Supplemented Categories (Supplementary Plan Type)	None

Included in Nevada's Benchmark Plan (2017 – Forward)

A Benefit	B EHB	C Is the Benefit Covered?	D Quantitative Limit on Service?	E Limit Quantity	F Limit Unit
Delivery and All Inpatient Services for Maternity Care	Yes	Covered	No		
Mental/Behavioral Health Outpatient Services	Yes	Covered	No		
Mental/Behavioral Health Inpatient Services	Yes	Covered	No		
Substance Abuse Disorder Outpatient Services	Yes	Covered	No		
Substance Abuse Disorder Inpatient Services	Yes	Covered	No		

Excluded from Nevada's Benchmark Plan (2017 – Forward), pp. 26, 46

Therapy is not covered for Marital or family problems; Social, occupational, or religious maladjustment; Behavior disorders; Impulse control disorders; Learning disabilities; Mental retardation; Personality disorder; also excludes counseling and other forms of cognitive and behavioral therapy in connection with the treatment of Attention Deficit Hyperactivity Disorder (ADHD) or Attention Deficit Disorder (ADD).

EHBs still do not apply in the following settings

- The grandfathered and grandmothered health plan setting;
- The self-insured group health plan setting; and
- The large health plan setting*

Updates from the Trump Administration

January 20, 2017, Executive Order

the WHITE HOUSE PRESIDENT DONALD J. TRUMP

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The White House
Office of the Press Secretary

For Immediate Release — January 20, 2017

Executive Order Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal

EXECUTIVE ORDER

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January 20, 2017

President Donald Trump, flanked by Vice President Mike Pence and Chief of Staff Reince Priebus, signs his first executive order on health care, on Friday.

Evan Vucci/AP

EXECUTIVE ORDER

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MINIMIZING THE ECONOMIC BURDEN OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT PENDING REPEAL

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. It is the policy of my Administration to seek the prompt repeal of the Patient Protection and Affordable Care Act (Public Law 111-148), as amended (the "Act"). In the meantime, pending such repeal, it is imperative for the executive branch to ensure that the law is being efficiently implemented, take all actions consistent with law to minimize the unwarranted economic and regulatory burdens of the Act, and prepare to afford the States more flexibility and control to create a more free and open healthcare market.

Sec. 2. To the maximum extent permitted by law, the Secretary of Health and Human Services (Secretary) and the heads of all other executive departments and agencies (agencies) with authorities and responsibilities under the Act shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.

Sec. 3. To the maximum extent permitted by law, the Secretary and the heads of all other executive departments and agencies with authorities and responsibilities under the Act, shall exercise all authority and discretion available to them to provide greater flexibility to States and cooperate with them in implementing healthcare programs.

Sec. 4. To the maximum extent permitted by law, the head of each department or agency with responsibilities relating to healthcare or health insurance shall encourage the development of a free and open market in interstate commerce for the offering of healthcare services and health insurance, with the goal of achieving and preserving maximum options for patients and consumers.

Sec. 5. To the extent that carrying out the directives in this order would require revision of regulations issued through notice-and-comment rulemaking, the heads of agencies shall comply with the Administrative Procedure Act and other applicable statutes in considering or promulgating such regulatory revisions.

Sec. 6. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

POLITICS

SHARE

Keep or Replace Obamacare? It Might Be Up to the States.

By HAEYOUN PARK and JASMINE C. LEE UPDATED Feb. 9, 2017

Several Senate Republicans have proposed a plan that offers three options for changing health care coverage under the Affordable Care Act, also known as Obamacare. One option allows states to continue using the existing law. The other two options would change it in these ways:

	Option #1: Let states keep A.C.A. as is	Option #2: Alternative plan with federal funding	Option #3: Alternative plan with no federal funding
Essential health benefits	Under the A.C.A., all insurers must offer 10 essential health benefits, including maternity care and preventive services.	**Keep just one.** States would be required to keep coverage only for mental health and substance use disorder.	**Keep just one.** States would be required to keep coverage only for mental health and substance use disorder.
Prohibitions on annual and lifetime limits	The A.C.A. bars insurers from setting any limit on how much they have to pay to cover someone.	**Keep** States would be required to keep this provision.	**Keep** Even states not receiving any federal funding would be required to keep this provision.
Dependent coverage until 26	Under the A.C.A., children can stay on their parents' insurance policies until age 26.	**Keep**	**Keep**

Mental Health Parity under the Trump Administration

Mental Health, Addiction, and the Law CLE

Mitchell Hamline School of Law

Friday, February 24, 2017

Stacey Tovino, JD, PhD

Appendix

How do we know when a condition is a mental health condition?

Test #1:
The "who is the treating provider" test

- *See, e.g.*, *Blake v. UnionMutual Stock Life Ins. Co.*, No. 87-0543-CIV, 1989 U.S. Dist. Lexis 16331, at *12 (S.D. Fla. Mar. 10, 1989) (explaining that the patient's postpartum depression was properly considered a mental illness because "she was treated primarily by psychiatrists . . . ").

Test #2:
The "nature of the treatment" test

- *See, e.g.*, *Simons v. Blue Cross*, 536 N.Y.S.2d 431, 434 (N.Y. App. Div. 1989) ("The plain, ordinary meaning of 'psychiatric' care is the sort of treatment, such as electroshock therapy and psychotropic medication, rendered to a patient who has been admitted to a psychiatric ward in order to attend to his or psychiatric disorder"; holding that a patient with anorexia nervosa who was treated for malnutrition with artificial nutrition and hydration received physical health treatments that insurance must cover; the cause of the need for such treatments is irrelevant).

Test #3:
The "origin of the patient's illness" test

- *See, e.g.*, *Arkansas Blue Cross v. Doe*, 733 S.W.2d 429, 431–32 (Ark. Ct. App. 1987) (deferring to the lower court's finding that bipolar affective disorder has a biological basis; noting that the experts hired by the insureds convinced the court that the current scientific evidence overwhelmingly showed that bipolar disorder has physical and biological causes; requiring insurance coverage of that bipolar disorder).

Test #4:
The "patient symptom" test

- A final test focuses on the patient's symptoms. According to this test, a patient has a mental illness if the patient's symptoms are behavioral, such as mood swings, delusions, hallucinations, aberrant behavior, or lying.

- *See, e.g.*, *Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150, 154 (8th Cir. 1990) ("Robert C. Brewer's disease manifested itself in terms of mood swings and aberrant behavior. Regardless of the cause of his disorder, it is abundantly clear that he suffered from what lay persons would consider to be a 'mental illness.' Consequently, Lincoln National properly limited its coverage under both policies."); *Equitable Life Assurance Soc'y v. Berry*, 212 Cal. App. 3d 832, 839–40 (Cal. Ct. App. 1989) (classifying an individual's manic-depressive illness as a mental illness characterized by the individual's changing moods, delusions, and hallucinations).

Codification of Regulations

- ERISA: 29 C.F.R. Part 2590
- Public Health Service Act: 45 C.F.R. Part 46
- Internal Revenue Code: 26 C.F.R. Part 54

MHPAEA's Definition of Mental Health Benefits

Substance use disorder benefits means benefits with respect to items or services for substance use disorders, as defined under the terms of the plan or health insurance coverage and in accordance with applicable Federal and State law. Any disorder defined by the plan as being or as not being a substance use disorder must be defined to be consistent with generally recognized independent standards of current medical practice (for example, the most current version of the DSM, the most current version of the ICD, or State guidelines).

Application of MHPAEA '08: Six Classifications

- 1. Inpatient, in-network
- 2. Inpatient, out-of-network
- 3. Outpatient, in-network
- 4. Outpatient, out-of-network
- 5. Emergency care
- 6. Prescription drugs

Subtitle C—Quality Health Insurance Coverage for All Americans

PART 1—HEALTH INSURANCE MARKET REFORMS

SEC. 1201. AMENDMENT TO THE PUBLIC HEALTH SERVICE ACT.

"SEC. 2707. COMPREHENSIVE HEALTH INSURANCE COVERAGE.

"(a) COVERAGE FOR ESSENTIAL HEALTH BENEFITS PACKAGE.—A health insurance issuer that offers health insurance coverage in the individual or small group market shall ensure that such coverage includes the essential health benefits package required under section 1302(a) of the Patient Protection and Affordable Care Act.

45 C.F.R. § 147.150(a)

Subtitle D—Available Coverage Choices for All Americans

PART 1—ESTABLISHMENT OF QUALIFIED HEALTH PLANS

SEC. 1301. QUALIFIED HEALTH PLAN DEFINED.

(a) QUALIFIED HEALTH PLAN.—In this title:

(1) IN GENERAL.—The term "qualified health plan" means a health plan that—

(A) has in effect a certification (which may include a seal or other indication of approval) that such plan meets the criteria for certification described in section 1311(c) issued or recognized by each Exchange through which such plan is offered;

(B) provides the essential health benefits package described in section 1302(a); and

45 C.F.R. Part 156