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SUPERIOR COURT-CIVIL
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CLERK/MAGISTRATE

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO.

_____)
COMMONWEALTH OF MASSACHUSETTS,)
)
Plaintiff,)
)
v.)
)
HARVARD PILGRIM HEALTH CARE, INC.,)
HPHC INSURANCE COMPANY, INC.,)
AND UNITED BEHAVIORAL HEALTH,)
)
Defendants.)
_____)

**ASSURANCE OF DISCONTINUANCE
PURSUANT TO G.L. CHAPTER 93A, § 5**

I. INTRODUCTION

1. The Commonwealth of Massachusetts, through the Office of the Attorney General (“AGO”), conducted an investigation into certain acts and practices of health plans doing business in Massachusetts, including Harvard Pilgrim and its delegate Optum, concerning Behavioral Health Care services (the “Investigation”).

2. In lieu of litigation, the AGO, Harvard Pilgrim, and Optum agree to enter this Assurance of Discontinuance (“AOD”) on the terms and conditions contained herein, pursuant to G.L. c. 93A, § 5.

3. The AGO, Harvard Pilgrim, and Optum voluntarily enter into this AOD.

II. DEFINITIONS

1. These definitions are solely for purposes of this AOD.
2. “Adverse Benefit Determination” shall mean, consistent with the definition of “Adverse Determination” found at 211 CMR 52.02, a determination, based upon a review of information provided, to deny, reduce, modify, or terminate an admission, continued inpatient stay, or the availability or coverage of any other health care services (such as office visits and services, therapy, and psychopharmacology/medication management services), for failure to meet the requirements for coverage based on medical necessity, appropriateness of health care setting and level of care, or effectiveness, including a determination that a requested or recommended health care service or treatment is experimental or investigational.
3. “ALERT” shall mean any algorithm-based process, however named, used by Optum now or in the future for the identification and Utilization Management of episodes of routine outpatient care.
4. “Appreciable Utilization” shall mean, for Harvard Pilgrim’s commercial fully insured health maintenance contracts and accident and/or sickness insurance policies (a) any Current Procedural Terminology (“CPT”) code with utilization that comprises 3% or more of the total utilization and (b) the three physical, occupational, or speech therapy codes with the highest utilization.
5. “Audit” shall mean the processes outlined in Section IV(B)(2)(c) of this AOD.
6. “Average Allowed Amount” shall mean the total amount Harvard Pilgrim or Optum paid to in-network Providers (before any member cost-sharing provisions are applied) for a specific CPT code divided by the total volume of those services based on the paid claim experience.

7. “Base Rates” shall mean the minimum rates (typically set forth in a fee schedule) to be paid by Harvard Pilgrim or Optum to Providers for covered health care services. Such rates may be subject to negotiations that may result in payments to Providers that are higher than the Base Rates.

8. “Behavioral Health” or “Behavioral Health Care” shall mean the diagnosis, prevention, treatment, cure, or relief of a behavioral health, substance use disorder (“SUD”), or mental health condition, illness, injury, or disease.

9. “Behavioral Health Care Provider” shall mean a Health Care Professional licensed, accredited, or certified to provide Behavioral Health Care as the primary purpose of his or her practice or a Facility that regularly provides Behavioral Health Care.

10. “Behavioral Health Care Provider Directory” shall mean any Provider Directory of Behavioral Health Care Providers.

11. “Chapter 258” shall mean Chapter 258 of the Acts of 2014: An Act to Increase Opportunities for Long-Term Substance Abuse Recovery.

12. “Clearly and Conspicuously” shall be defined as such term is defined in 940 C.M.R. § 6.01.

13. “Closed Network Plan” shall mean a plan where covered services are generally available only through in-network Providers and out-of-network benefits are available only in limited circumstances, such as an emergency or when a Member has obtained prior authorization to go out of network because health care services are not available through an in-network Provider. A Preferred Provider Organization (“PPO”) or Point of Service (“POS”) plan shall not be considered a Closed Network Plan.

14. “Contracted Entity” shall mean the legal entity or entities that contract directly with Harvard Pilgrim or Optum on behalf of itself and its Providers.

15. “Designated Contact” shall mean the individual or department(s) designated by a Contracted Entity to receive standard notifications from Harvard Pilgrim or Optum on behalf of all of its contracted Providers, including notices for enrollment and verification of Provider Directory information.

16. “Designated Recipient(s)” shall mean, with respect to Harvard Pilgrim, its member and provider customer service departments, provider network contracting department, HealthCare Administrative Solutions (“HCAS”), or Council for Affordable Quality Healthcare (“CAQH”); with respect to Optum, its member and provider customer service departments and its network relations and network contracting department; and, for both Harvard Pilgrim and Optum, any personnel dedicated to receiving e-mail communications concerning Provider Directory inaccuracies through the electronic link required in Section IV(B)(1)(b)(iv) or designated to receive information through the Provider Outreach described in Section IV(B)(1)(d).

17. “Effective Date” shall mean ninety days from the date this AOD is fully executed by the Parties.

18. “Facility” shall mean any health care setting located and licensed in Massachusetts, including, but not limited to, hospitals and other licensed inpatient centers, ambulatory surgical or treatment centers, skilled nursing centers, residential treatment centers, diagnostic, laboratory, and imaging centers, and rehabilitation and other therapeutic health settings.

19. “Group Practice” shall mean a group of single-specialty or multi-specialty Health Care Professionals who associate as owners, employees, or contractors to deliver health care services.

20. “Harvard Pilgrim” shall mean collectively Harvard Pilgrim Health Care, Inc. and HPHC Insurance Company, Inc., including their officers, directors, employees, parents, subsidiaries, affiliates, and agents.

21. “Harvard Pilgrim Member” or “Member” shall mean an individual who is a Massachusetts resident or member of a group located in Massachusetts enrolled in (i) a commercial fully insured individual policy of accident and/or sickness insurance, (ii) a commercial fully insured group or blanket policy of accident and/or sickness insurance, or (iii) a commercial fully insured health maintenance contract pursuant to which Harvard Pilgrim provides health care coverage.

22. “Health Care Professional” shall mean any individual physician or other health care practitioner licensed, accredited, or certified in Massachusetts to perform services for the diagnosis, prevention, treatment, cure, or relief of a physical health or Behavioral Health condition, illness, or injury and who provides such services in Massachusetts.

23. “Integrated Health System” means a local care unit that comprises multiple Group Practices, Facilities, and/or individual Health Care Professionals, including without limitation, a physician hospital organization, an accountable care organization, a physician organization, an independent practice association, or such other multiple provider practices.

24. “MHPAEA” shall mean the current or future implementing statutory provisions codified in the “Mental Health Parity and Addiction Equity Act” at 29 U.S.C.

§ 1185a; 42 U.S.C. § 300GG-26 and 26 U.S.C. § 9812, the current or future implementing regulations duly promulgated by the Internal Revenue Service (“IRS”), Department of Health & Human Services (“HHS”), and the Department of Labor (“DOL”), and any current or future sub-regulatory guidance on MHPAEA issued by the IRS, HHS, and DOL.

25. “Non-Routine Outpatient Behavioral Health Services” shall mean the following outpatient Behavioral Health services that require prior authorization (unless such prior authorization is precluded subject to Chapter 258): Partial Hospitalization/Day Treatment, Intensive Outpatient Program, Applied Behavioral Analysis, Psychological Testing, Electro Convulsive Therapy, and Repetitive Transcranial Magnetic Stimulation.

26. “Optum” shall mean United Behavioral Health operating under the brand name Optum, including its officers, directors, employees, parents, subsidiaries, affiliates, and agents.

27. “Practice Location” means the physical address(es) reported by a Health Care Professional or his or her Designated Contact as the location(s) where the Health Care Professional is regularly scheduled to provide health care services.

28. “Provider” shall mean a Health Care Professional or Facility.

29. “Provider Directory” or “Directory” shall mean any grouping, compilation, or listing of in-network Providers that Harvard Pilgrim or Optum provides or makes available to Members, Providers, or the public-at-large, electronically or in paper format.

30. “Utilization Management” shall mean any techniques or procedures designed to monitor the use of, or evaluate the clinical necessity, appropriateness, efficacy, or efficiency of, health care services, including levels of care and settings.

III. ALLEGED VIOLATIONS

1. Based on the Investigation, the AGO alleges that Harvard Pilgrim and Optum engaged in certain unlawful acts and practices, as described below. Harvard Pilgrim and Optum deny any wrongdoing and do not admit any violation of any law or regulation, also as described below.

A. Provider Directories Allegations

1. Harvard Pilgrim and Optum publish and maintain online Provider Directories that are intended to serve as a resource to Harvard Pilgrim Members to help them access health care services, including the phone numbers and addresses of Providers; whether Health Care Professionals are available to see new patients; and whether the Providers are “in network” for a Harvard Pilgrim Member’s plan.

2. Prospective Members refer to Provider Directories to review whether their current Providers are in Defendants’ networks before enrolling in a Harvard Pilgrim plan. Current Members refer to Provider Directories to select and/or contact Providers for themselves and their families when considering or seeking to obtain in-network Provider services.

3. The Commonwealth contends that Harvard Pilgrim and Optum have violated G.L. c. 93A by publishing and maintaining Provider Directories that are materially inaccurate and deceptive in a variety of ways that cause harm to consumers. The Commonwealth contends, for example, that these Provider Directories in some instances:

- a. do not accurately reflect certain Health Care Professionals’ availability to see new patients for outpatient services;
- b. contain inaccurate contact information for Providers, which may hinder Harvard Pilgrim Members’ ability to access these Providers for services; and

c. list Health Care Professionals at locations where they did not actually provide health care services, which could lead Harvard Pilgrim Members to believe that they have more substantial geographic access to Health Care Professionals than is actually the case.

4. Harvard Pilgrim and Optum deny the Commonwealth's allegations. Harvard Pilgrim and Optum each state that they employ, and have employed, reasonably diligent processes and procedures to update and maintain their Provider Directories in reliance on the information reported to them by their respective contracted Providers. Harvard Pilgrim and Optum each further state that they did not engage in any unfair act or deceptive practice, that they have and continue to maintain adequate provider networks in accordance with the regulatory requirements promulgated by the Commonwealth's Division of Insurance ("DOI"), and that, pursuant to DOI requirements, DOI has reviewed and accepted Harvard Pilgrim and Optum's network adequacy analyses.

B. Provider Reimbursement Rates Allegations

1. The Commonwealth contends that Harvard Pilgrim, directly and through Optum, used methods to establish Base Rates for outpatient Behavioral Health Care services that were not comparable to and were applied more stringently than the methods used to establish Base Rates for outpatient medical/surgical ("M/S") services, including by using a methodology that resulted in disparate Base Rates for Behavioral Health physician office visits compared to M/S physician office visits billed with the same evaluation and management codes.

2. The Commonwealth contends that Harvard Pilgrim's conduct described above violated MHPAEA and was an unfair act or practice under G.L. c. 93A, § 2.

3. Harvard Pilgrim and Optum deny the Commonwealth's allegations.

Harvard Pilgrim and Optum state that the methodology used to establish Base Rates for outpatient Behavioral Health services is comparable to, and not applied more stringently than, the methodology used to establish Base Rates for outpatient M/S services. Harvard Pilgrim and Optum state that, as set forth in MHPAEA, such comparability in methodology does not require that the provider reimbursement rates for outpatient Behavioral Health services and the provider reimbursement rates for outpatient M/S services be the same. Harvard Pilgrim and Optum state that, at all times relevant to this Investigation, they have and continue to fully comply with MHPAEA and that Harvard Pilgrim and Optum did not engage in any unfair act or practice under G.L. c. 93A, § 2.

4. To avoid the delay, uncertainty, inconvenience, and expense of litigation on this issue, Harvard Pilgrim and Optum agreed to change the methodology used to establish Base Rates for outpatient Behavioral Health Care services, which change generally resulted in increases to these Base Rates. They have further agreed to the provisions described below.

C. Utilization Management Allegations

1. The Commonwealth contends that Harvard Pilgrim, itself and through Optum, uses more stringent Utilization Management processes to manage Harvard Pilgrim Members' access to certain inpatient and outpatient Behavioral Health Care relative to the Utilization Management processes Harvard Pilgrim uses to manage Members' access to comparable M/S care. Specifically, the Commonwealth contends that:

a. Harvard Pilgrim, through Optum, has employed a Utilization Management algorithm that, after a certain predetermined number of outpatient office visits or services over a specified period of time, triggers detailed telephonic utilization reviews of a

Member's routine outpatient Behavioral Health Care office visits or services. Comparable telephonic utilization reviews are not triggered and conducted for routine outpatient M/S office visits or services.

b. In reliance on certain unclear Provider manual policies, Providers may have sought prior authorization for Harvard Pilgrim Members to be admitted for inpatient Behavioral Health Care after the Members received emergency treatment and stabilized. In comparison, Harvard Pilgrim made clear to Providers that Members do not need prior authorization for Harvard Pilgrim Members to be admitted for inpatient M/S care after the Members received emergency treatment and stabilized.

2. The Commonwealth contends that these Utilization Management processes violated MHPAEA and constituted unfair acts or practices under G.L. c. 93A, § 2.

3. The Commonwealth contends that Chapter 258 prohibits Harvard Pilgrim from requiring certain Members to obtain prior authorization for SUD treatment and further requires that Harvard Pilgrim cover up to fourteen days of certain medically necessary inpatient SUD treatment for certain Members before completing any utilization review. The Commonwealth contends that, through September 2018, Harvard Pilgrim implemented policies requiring prior authorization of outpatient and inpatient SUD treatment and allowing for premature Utilization Management of inpatient SUD treatment when Members with plans that did not have a Closed Network sought SUD treatment out-of-network and/or outside of the Commonwealth.

4. Harvard Pilgrim and Optum deny the Commonwealth's allegations and maintain that, at all times relevant to this Investigation and at present, Harvard Pilgrim's and Optum's Utilization Management processes for inpatient and outpatient Behavioral Health Care

were comparable to and not more stringently applied relative to the Utilization Management processes Harvard Pilgrim used to manage Members' access to comparable M/S care.

Specifically, Harvard Pilgrim and Optum state that:

a. consistent with standard industry practices, both Harvard Pilgrim and Optum maintain Utilization Management review procedures that trigger periodic outreach to its network providers for various reasons, including but not limited to for care coordination, disease management, Utilization Management, claims billing and payment monitoring, benefit administration, and fraud, waste and abuse detection, and that the procedures used to review Behavioral Health Care services are comparable to and applied no more stringently than the procedures used to review M/S services.

b. certain materials describing the notification procedures related to an inpatient admission following emergency treatment may have been unintentionally unclear, but in practice and operation, the notification procedures for Behavioral Health inpatient admissions were comparable to and applied no more stringently than the notification procedures for inpatient M/S admissions.

5. Harvard Pilgrim and Optum deny the Commonwealth's allegations that its Utilization Management processes violated MHPAEA or constituted unfair acts or practices under G.L. c.93A, § 2.

6. Harvard Pilgrim and Optum further deny that they administered the Chapter 258 requirements for plans without a Closed Network incorrectly and state that its Utilization Management policies concerning SUD treatment were implemented in accordance with their good faith understanding of Chapter 258 requirements based on health plan benefit documents filed and administratively approved by the DOI.

7. To avoid the delay, uncertainty, inconvenience, and expense of litigation on these issues, Harvard Pilgrim and Optum have agreed to the assurances set forth below.

IV. ASSURANCES

A. Generally

1. Harvard Pilgrim and Optum shall not engage in any unfair or deceptive acts or practices.

2. Harvard Pilgrim shall comply with all federal and Massachusetts laws and regulations pertaining to Behavioral Health Care parity, including MHPAEA, now in effect or later enacted.

B. Provider Directories and Networks

1. All Provider Directories

a. Generally. Harvard Pilgrim and Optum shall comply with all federal and Massachusetts laws and regulations pertaining to Provider Directories now in effect or later enacted, including any regulations promulgated by the DOI. Additionally, Harvard Pilgrim and Optum shall, as applicable, comply or continue to comply with the Assurances set forth in this Section.

b. Provider Directory Contents. Harvard Pilgrim's and Optum's Provider Directories shall:

i. Clearly and Conspicuously disclose the date on which the electronic Directory was last updated, and the date of printing of any paper Directory.

ii. Clearly and Conspicuously state the circumstances under which a Health Care Professional will be designated in the Provider Directories as "accepting new patients."

iii. Clearly and Conspicuously disclose (1) when information in an electronic Provider Directory has been designated “unverified” pursuant to Section IV(B)(1)(c) of this AOD, and (2) an explanation that such “unverified” information may not be current but updated information has not yet been obtained.

iv. Clearly and Conspicuously disclose the manner in which consumers should report Provider Directory inaccuracies, including a customer service telephone number and an electronic link that members may use to notify Harvard Pilgrim or Optum via e-mail of inaccurate Provider Directory information.

v. Clearly and Conspicuously provide notice to consumers that they may file complaints relating to Provider Directory inaccuracies or Provider network access issues to DOI, including the contact information and method for filing such a complaint with DOI.

vi. For each Health Care Professional, (1) list only his or her Practice Location(s), and (2) not list that Health Care Professional at other physical addresses of a Group Practice that are not that Health Care Professional’s Practice Locations.

vii. Clearly and Conspicuously state that Optum or, if applicable, such other delegate, maintains the Behavioral Health Care Provider network for Behavioral Health Care services.

c. Provider Directory Updates and Corrections

i. Within thirty days of the termination of a Provider’s agreement with Harvard Pilgrim or Optum, Harvard Pilgrim or Optum, as applicable, shall remove any applicable listing for that Provider from the Provider Directory.

ii. Within thirty days of receiving notice of potentially inaccurate information in their Provider Directories through their respective Designated Recipient(s) or through an Audit, Harvard Pilgrim or Optum, as applicable, shall investigate the potential inaccuracy with appropriate diligence, seek any information necessary to correct the inaccuracy, and, where such information is obtained, update the Provider Directory accordingly.

iii. If Harvard Pilgrim or Optum, as applicable, is unable to validate the accuracy of the Provider Directory listing that is the subject of the notice after a diligent investigation and/or is unable to obtain information necessary to correct the Provider Directory during the thirty day period in subsection ii, Harvard Pilgrim or Optum, as applicable, shall edit the Provider Directory as provided in the following subsections iv-vi.

iv. If the potential inaccuracy relates to the physical address(es) of the Provider, the telephone number to reach the Provider, and/or the plans accepted by the Provider, such information shall either be immediately removed from the Provider Directory until updated information is obtained, or designated as “unverified” for a period not to exceed ninety (90) days after receiving the notice of a potential inaccuracy, after which the information must be immediately removed until updated information is obtained. Harvard Pilgrim’s and Optum’s obligation to remove information or mark it as “unverified” under this section is limited to the specific Health Care Professional or Facility to which the potentially inaccurate information is related and shall not apply broadly to an entire Group Practice, Integrated Health System, or to any other Health Care Professional or Facility in a Group Practice or Integrated Health System.

v. If the potential inaccuracy relates to whether a Health Care Professional is “accepting new patients” (in accordance with their definition of that term),

Harvard Pilgrim or Optum, as applicable, shall remove from the online Provider Directory any designation that a Health Care Professional is “accepting new patients” until updated information is obtained.

vi. If the potential inaccuracy relates to whether a Provider is or continues to be a participating in-network Provider, Harvard Pilgrim or Optum, as applicable, shall remove the Provider listing from the online Provider Directory until updated information is obtained.

d. Provider Outreach

i. Practice Location Remediation. Within six months of the Effective Date, Harvard Pilgrim and Optum shall review their Provider Directories, and for any Health Care Professional listed at more than three locations, they shall (1) contact such Health Care Professional, or the Health Care Professional’s Designated Contact, and request that he or she verify the physical address(es) where the Health Care Professional is scheduled to regularly provide health care services and, where necessary, provide updated information, and (2) edit the Provider Directory in accordance with Section IV(B)(1)(c) above. Harvard Pilgrim and Optum shall use reasonably diligent efforts to obtain a response from the Health Care Professional (or his or her Designated Contact).

ii. At least quarterly, Harvard Pilgrim shall contact each network Health Care Professional who is not a Behavioral Health Care Provider (or, as applicable, his or her Designated Contact) via a targeted communication by mail or e-mail that has the sole focus of verifying Provider Directory information. In this communication, Harvard Pilgrim shall (1) request that the Health Care Professional (or his or her Designated Contact) review the information listed in the Provider Directory for that individual or, with respect to a

Designated Contact, the information listed in the Provider Directory for multiple Health Care Professionals, including the Health Care Professional's availability to see new patients, telephone number, physical address(es), and network status; (2) request that the Health Care Professional (or, as applicable, his or her Designated Contact) verify the accuracy of the information (including whether the physical addresses listed for the Health Care Professional(s) are locations where he or she is scheduled to regularly provide health care services), or provide any necessary updates to correct the listings; and (3) provide instructions as to how the Health Care Professional (or, as applicable, his or her Designated Contact) should verify Provider Directory information or communicate updates. Such notice may indicate that failure to respond in a timely fashion may result in the temporary removal of the Health Care Professional(s) from the Provider Directory until such time as the Health Care Professional or Designated Contact responds with corrected and complete information. With respect to the Health Care Professional/Designated Contact outreach described in this paragraph, it is insufficient for Harvard Pilgrim to seek verification of, for instance, whether a Group Practice as a whole is accepting new patients; Harvard Pilgrim must seek to verify and obtain updated information for each individual Health Care Professional identified in the Provider Directories who is not a Behavioral Health Care Provider.

iii. Harvard Pilgrim and Optum shall require Group Practices to provide prompt notification to them whenever a Health Care Professional leaves or joins the Group Practice or changes the location where he or she is regularly scheduled to provide health care services. Upon receiving such notification, Harvard Pilgrim and Optum shall edit the Provider Directories in accordance with the procedures set forth in Section IV(B)(1)(c).

iv. Harvard Pilgrim and Optum shall remind Providers or their Designated Contact at least quarterly that Harvard Pilgrim and Optum are obligated to provide members with Provider Directory information and that Providers either directly or through their Designated Contact are required to notify them about any inaccurate information in the Provider Directories so that appropriate corrections may be made. Such reminder may be provided in conjunction with other communications to Providers or their Designated Contact.

e. Employee Training. Harvard Pilgrim and Optum shall train their relevant member and Provider customer service employees regarding how to route issues concerning Provider Directories and Provider network access, including member complaints, to the appropriate personnel for monitoring and correction of Directory inaccuracies. Within ninety days after the Effective Date, Harvard Pilgrim and Optum shall obtain a written or digital certification from the relevant member and Provider customer service employees that they completed the training, to be retained for four years from the date of the training. Thereafter, Harvard Pilgrim and Optum shall re-train each relevant member and Provider customer service employee at least every two years and conduct the same certification process.

f. Member Complaints

i. Harvard Pilgrim and Optum shall track and monitor member complaints concerning their Provider Directories and/or access to their Provider networks, including without limitation, complaints alleging inadequate Provider networks or untimely access to care. Such tracking and monitoring shall include the date such complaint was submitted, the date such complaint was closed, and a record of actions taken in response to such complaint.

ii. Harvard Pilgrim and Optum shall take appropriate and timely action to resolve Provider Directory and network access issues as they arise, including but not limited to investigating complaints of Provider Directory inaccuracies in accordance with the terms of this AOD and applicable DOI and Massachusetts Health Policy Commission regulations.

2. Behavioral Health Care Provider Directories and Network Adequacy

a. Generally. Harvard Pilgrim and Optum shall adhere to all DOI regulations concerning the maintenance of a Behavioral Health Care Provider network that is adequate in numbers and types of Behavioral Health Care Providers to assure that all covered Behavioral Health services will be accessible to their members without unreasonable delay. Additionally, Harvard Pilgrim and Optum shall, as applicable, comply or continue to comply with the Assurances set forth in this Section.

b. Contents of Behavioral Health Care Provider Directory. Except where they are required to remove information in accordance with the provisions of this AOD, Harvard Pilgrim and Optum shall Clearly and Conspicuously list for each of their network plans, the following in their Behavioral Health Care Provider Directories:

- i. For each Health Care Professional,
 1. Name;
 2. Gender;
 3. Practice Location(s);
 4. Specialty, if applicable;
 5. Whether he or she is accepting new patients;

- applicable;
6. Medical group and/or facility affiliations, if applicable;
 7. Languages spoken other than English, if applicable;
 8. Areas of expertise reflecting the categories of service(s) the Health Care Professional actually provides to members;
 9. Whether he or she offers office visits or outpatient appointments at a Practice Location, or is only available through a hospital or inpatient facility;
 10. Telephone contact information; and
 11. Board certification(s).
- ii. For hospitals:
1. Hospital name;
 2. Hospital type;
 3. Participating hospital location;
 4. Hospital accreditation status; and
 5. Telephone contact information.
- iii. For Facilities other than hospitals:
1. Facility name;
 2. Facility type;
 3. Participating Facility location(s); and
 4. Telephone contact information.
- iv. For electronic Directories, items in (b)(i)(1)-(7); (b)(ii)(1)-(4); and (b)(iii)(1)-(3) must be made available in a searchable format or have the capability to filter search results.

c. Audits

i. Within three months of the Effective Date, Harvard Pilgrim and Optum shall contact each Health Care Professional in their Behavioral Health Care Provider Directories who has not submitted a claim within one year of the Effective Date (or the Designated Contact for such Health Care Professional). In such communication, Harvard Pilgrim and Optum shall seek to (1) verify with the Health Care Professional (directly or through a Designated Contact) his or her Provider Directory information (including all the information set forth in subsection b(i)) and/or (2) obtain from the Health Care Professional (directly or through a Designated Contact) any updates to the information in the Provider Directory. The communication may also indicate that failure to respond in a timely fashion may result in the temporary removal of the Health Care Professional(s) from the Provider Directory until such time as the Health Care Professional or Designated Contact responds with corrected and complete information. If the Health Care Professional's information cannot be verified, or updated information cannot be obtained after reasonable attempts to do so, Harvard Pilgrim and Optum shall edit the Behavioral Health Care Provider Directory in accordance with Section IV(B)(1)(c)(iv)-(vi). Thereafter, Harvard Pilgrim and Optum shall complete this audit process on a quarterly basis for any Health Care Professional in their Behavioral Health Care Provider Directories who has not submitted a claim to Harvard Pilgrim or Optum, as applicable, within one year of the audit date and who has not been audited at any time in the twelve months prior to the audit.

ii. Beginning with the first full quarter following the Effective Date, Harvard Pilgrim and Optum shall conduct a rolling quarterly audit of their Behavioral Health Care Provider Directories. The audit shall consist of a representative sample of not less

than 15% of the Behavioral Health Care Providers listed in the Directories (and exclude Providers who have previously been audited at any time in the twelve months prior to the audit) each quarter but in no event shall Harvard Pilgrim and Optum fail to audit 100% of their Behavioral Health Care Provider Directories annually. Harvard Pilgrim and Optum shall contact each Provider (or, as applicable, the Provider's Designated Contact) in the audit group and seek to (1) verify whether the Provider Directory information (including all the information set forth in subsection (2)(b)) is accurate; and/or (2) obtain from the Provider (directly or through a Designated Contact) any updates to the information in the Behavioral Health Care Provider Directory. If the information cannot be verified, or updated information obtained, after reasonable attempts to do so, Harvard Pilgrim and Optum shall edit the Behavioral Health Care Provider Directory in accordance with Section IV(B)(1)(c)(iv)-(vi).

iii. For a period of five years after each Audit, Harvard Pilgrim and Optum shall maintain documentation that identifies the Providers who were selected for the Audit and the results of each Audit.

iv. Harvard Pilgrim's obligations in this Audit section may be satisfied by Harvard Pilgrim itself, through Optum, or through Harvard Pilgrim's then current Behavioral Health delegate if not Optum.

C. Provider Reimbursement Rates

1. Generally. Harvard Pilgrim, itself and through any applicable agent, including Optum, shall use a methodology for establishing Provider reimbursement rates for outpatient Behavioral Health services that is comparable, as written and in operation, to the methodology used for establishing Provider reimbursement rates for outpatient M/S services in accordance with MHPAEA.

2. Methodology for Setting Base Rates. Harvard Pilgrim, itself and through any applicable agent, including Optum, shall:

a. use a methodology (inclusive of any and all of the factors used in the methodology) to set Base Rates for outpatient Behavioral Health Care services that is, as written and in operation, comparable to and applied no more stringently than the methodology used to set Base Rates for outpatient M/S services.

b. to the extent Harvard Pilgrim uses data or any other information published by the Centers for Medicare and Medicaid Services in any way to analyze, update, or set its Base Rates, the use of any such data or information in the methodology used to determine outpatient Behavioral Health Care Base Rates must be comparable to and no more stringent than in the methodology used to determine outpatient M/S services Base Rates.

3. Reporting

a. For a 4-year period, Harvard Pilgrim shall report to the AGO annually: (i) all substantive changes to the methodologies used to determine Base Rates; (ii) its Behavioral Health and M/S Base Rate fee-for-service schedules; and (iii) documents sufficient to identify the factors and processes used by Harvard Pilgrim and Optum to determine their annual Base Rates. Each annual report shall be due on or before July 1st of the reporting year for which the report is due (e.g., the annual report for the April 1, 2020 to March 31, 2021 reporting year shall be due on or before July 1, 2020) and reflect the then-current Base Rates. The information required under this subsection (a) has already been provided for the reporting period April 1, 2019 – March 31, 2020 and no further report of the materials required under this paragraph shall be due for that period. The last report shall be due on or before July 1, 2023.

b. For a 4-year period, Harvard Pilgrim shall report to the AGO annually the Average Allowed Amounts for Behavioral Health and M/S Providers paid on a fee-for-service basis for services rendered in the office setting (place of service code 11) for all CPT codes with Appreciable Utilization by Behavioral Health and M/S Providers. Average Allowed Amounts shall be reported separately by Harvard Pilgrim for physicians and nurse practitioners and separately by Optum for physicians, PhDs, masters level clinicians, and nurse practitioners for each billing code. Each annual report shall be due on or before July 1st of the year following the reporting year for which the report is due (e.g., the annual report for the April 1, 2019 to March 31, 2020 reporting year shall be due on or before July 1, 2020). The last report shall be due on or before July 1, 2023.

c. Harvard Pilgrim shall make good faith efforts to answer any reasonable inquiries from the AGO concerning the reports provided under this Section. The AGO may make reasonable requests for additional information as necessary to clarify information provided under this Section.

D. Utilization Management

1. Generally. Harvard Pilgrim and Optum shall, as applicable, comply or continue to comply with all laws and regulations now in effect or later enacted concerning the Utilization Management of Harvard Pilgrim Members' health care. Additionally, Harvard Pilgrim and Optum shall, as applicable, comply or continue to comply with the Assurances set forth in this Section.

2. Policy Disclosures. Harvard Pilgrim and Optum shall clearly and accurately disclose Utilization Management policies and procedures (including requirements relating to prior authorization, notification, and the review process under ALERT) in Member

documents, Provider manuals, internal policies, and on website subpages as applicable and appropriate (e.g., information regarding prior authorization for Non-Routine Outpatient Behavioral Health services need not appear on web subpages or internal policies dealing with inpatient benefits but shall appear in any web subpages or internal policies where outpatient benefits and Utilization Management of such benefits are discussed). These disclosures shall include the following:

- a. Notification that prior authorization is not required for routine outpatient Behavioral Health visits, such as therapy or psychopharmacology/medication management visits.
- b. Identification of all Non-Routine Outpatient Behavioral Health Services and, where applicable, disclosure that such services require prior authorization (unless subject to Chapter 258 requirements).
- c. For Harvard Pilgrim plans subject to Chapter 258 requirements, notification that Members' coverage for SUD is subject to the provisions of Chapter 258; that initial authorization for SUD treatment is not required; and that Acute Treatment Services ("ATS") and Clinical Stabilization Services ("CSS") treatment will be covered for up to a total of fourteen days without authorization or medical necessity review.

3. Inpatient Services. Harvard Pilgrim and Optum shall edit as necessary any applicable Utilization Management policy and Provider manual to make clear its existing policy that Members are not required to obtain prior authorization to be admitted to a Facility to receive mental health inpatient treatment from an emergency department and/or after receiving emergency services regardless of whether the Member has been stabilized.

4. Outpatient Services.

a. Harvard Pilgrim, itself and through any delegate, including Optum, shall discontinue the practice of issuing Adverse Benefit Determinations for routine Behavioral Health services including, but not limited to, office visits and services for therapy and psychopharmacology/medication management services.

b. ALERT. Harvard Pilgrim, through Optum, may continue to use ALERT for routine Behavioral Health services provided that:

i. the processes used to identify cases and then conduct Utilization Management under ALERT are consistent with Harvard Pilgrim's obligations under this AOD;

ii. a Clear and Conspicuous and complete description is set forth in Provider manuals and on Optum's website of the circumstances under which routine Behavioral Health office visits and services are subject to Utilization Management under ALERT;

iii. at the time of any initial outreach to Providers (in whatever form) to request clinical case information needed for Utilization Management, there is a Clear and Conspicuous disclosure to the Provider that (1) the Provider may choose to provide the requested information through a written form accessible online rather than through telephonic submission, and (2) the case may be subject to peer-to-peer review for further discussion regarding treatment plan options;

iv. Harvard Pilgrim and/or Optum shall not tell or otherwise suggest to Providers that ALERT-based reviews may result in an Adverse Benefit Determination;

v. the electronic form that Providers may use to submit clinical information is Clearly and Conspicuously identified and easily accessible on Optum's applicable online website subpage(s);

vi. once an individual's routine Behavioral Health treatment is subject to an ALERT-based utilization review, any further Utilization Management of that individual's routine Behavioral Health treatment under ALERT shall be suppressed for at least six months after the date the initial review is completed; and

vii. Non-Routine Behavioral Health treatment is not subject to ALERT.

c. Nothing in this AOD shall limit the ability of Harvard Pilgrim, itself and through any applicable agent, including Optum, to otherwise use an algorithm for various reasons that reflect generally accepted standards of practice in the industry including but not limited to for care coordination, disease management, Utilization Management (other than as set forth in subsections 4(a) and (b) above), claims billing and payment monitoring, benefit administration, and/or to identify and review potential instances of fraud, waste or abuse by a Member or Provider provided that the use of such algorithm complies with the provisions of this AOD and MHPAEA.

d. Harvard Pilgrim and any applicable agent, including Optum, shall apply Utilization Management processes, including Optum's ALERT program or any similar program or algorithm, for outpatient Behavioral Health Care in a manner that, as written and in operation, is comparable to, and no more stringent than, Harvard Pilgrim's application of Utilization Management processes for comparable outpatient M/S services. For example, Harvard Pilgrim shall ensure that the methods used to conduct Utilization Management of

outpatient Behavioral Health Care (e.g., communication and collection of information by telephone, email, fax, form, etc.) are comparable to and not more stringent than the methods used to conduct Utilization Management of outpatient M/S services and otherwise comply with state and federal law.

e. In accordance with MHPAEA, the processes, strategies, evidentiary standards, or other factors Harvard Pilgrim and any applicable agent, including Optum, considers in implementing and applying Utilization Management processes with respect to outpatient Behavioral Health Care shall be comparable to, and applied no more stringently than, those applied with respect to comparable M/S outpatient services. Further, Harvard Pilgrim shall document the processes, evidentiary standards, and other factors used to develop and apply Utilization Management techniques for outpatient Behavioral Health Care and how such processes, evidentiary standards, or other factors were applied comparably with respect to Utilization Management techniques used for comparable outpatient M/S care.

5. Compliance with Chapter 258. For Harvard Pilgrim Members with health benefit plans covered by Chapter 258, Harvard Pilgrim shall comply or continue to comply with the provisions of Chapter 258, including any future regulations promulgated by DOI concerning Chapter 258 as follows:

a. Harvard Pilgrim shall cover medically necessary ATS and CSS for up to a total of fourteen days without preauthorization and not initiate Utilization Management procedures until day seven of the treatment. For Members who do not have Closed Network Plans, these obligations apply even when the ATS or CSS is obtained from an out-of-network (“OON”) and/or out-of-state provider.

b. Harvard Pilgrim shall not require a Member to obtain preauthorization for SUD treatment other than ATS and CSS if the Provider is certified or licensed by the Massachusetts Department of Public Health. For Members who do not have Closed Network Plans, this obligation applies even when the treatment is obtained from an OON Provider, provided that such OON Provider is certified or licensed by the Massachusetts Department of Public Health.

6. Reporting.

a. Beginning on or before March 31, 2020, for purposes of reporting data from calendar year 2019, and on an annual basis thereafter for a three-year period, Harvard Pilgrim shall provide to the AGO:

i. Routine Behavioral Health Reporting: Harvard Pilgrim shall provide a list of each unique routine Behavioral Health service with a Provider for which Harvard Pilgrim, itself or through a delegate, issued an adverse determination and information sufficient to identify the CPT codes and services at issue and the basis of the adverse determination. Upon the AGO's request, Harvard Pilgrim shall provide the notices of the adverse determinations.

ii. Applied Behavior Analysis ("ABA") and SUD Partial Hospitalization Reporting: Harvard Pilgrim shall provide the AGO an aggregate report identifying all Utilization Management reviews of ABA services and SUD partial hospitalization services provided and/or requested by Providers during the reporting period and the disposition of each, i.e., whether the services were authorized, modified, or denied (in whole or in part). In addition, for each patient for whom Harvard Pilgrim (itself or through a delegate) conducted such Utilization Management that results in an Adverse Benefit Determination or an agreement

by the provider that the proposed treatment should be modified, the report shall provide the following detail: (1) a patient numerical identifier; (2) the CPT code(s) reflecting the service(s) subject to Utilization Management; (3) date(s) of review; (4) type of review (e.g., review relating to an initial request for prior authorization, concurrent review, or retrospective review); and (5) the nature of the disposition as a full denial, partial denial, or modification of the request. In the case of a modification, the detail shall also include the initial request of the Provider, and the agreed upon modifications to or limitations on the frequency of treatment or level of care; and/or, in the case of a full or partial denial, the reason for the denial. Upon the AGO's request, Harvard Pilgrim shall provide notices of Adverse Benefit Determinations for any or all of the Utilization Management reviews identified in the report.

b. Within three months from the Effective Date of this AOD, Harvard Pilgrim shall provide the AGO with copies of the Utilization Management policies and such other Member or Provider facing materials that have been updated for purposes of clarifying Harvard Pilgrim's existing practices and/or complying with this AOD.

c. For a period of three years after the Effective Date, Harvard Pilgrim shall report to the AGO on an annual basis, no later than March 31st each year, any material changes made to Utilization Management policies and practices relating to Behavioral Health Care, such as changes in prior authorization requirements.

7. Data Maintenance. Harvard Pilgrim, itself and through any applicable agent, including Optum, shall maintain and have the ability to produce data sufficient to monitor Harvard Pilgrim's compliance with the assurances in this AOD concerning Utilization Management, including, without limitation: denials and modifications of initial requests for authorization; outcomes resulting from concurrent reviews, including denials and modifications

of requests for continued treatment and days and/or visits authorized at each review; and frequency of concurrent reviews conducted.

V. PAYMENT TO THE COMMONWEALTH

Within thirty days after the filing of this AOD with the Superior Court of Suffolk County, Harvard Pilgrim and/or Optum shall pay \$275,000 to the Commonwealth by electronic funds transfer to an account identified by the AGO. This amount shall be deposited into a trust fund for the purpose of assisting the AGO to discharge its duties, in accordance with G.L. c. 12 § 4A, and to be used in the sole discretion of the AGO to promote initiatives designed to prevent or treat substance use disorders, increase access to Behavioral Health Care services, or otherwise assist Massachusetts Behavioral Health Care consumers.

VI. GENERAL PROVISIONS

1. This AOD represents the entire agreement between the AGO and the Defendants concerning the matters addressed herein. It supersedes any prior agreement, understandings, or stipulations between the parties regarding the subject matter hereof.

2. This AOD shall be binding on the Defendants, as well as their agents, servants, employees, successors, and assigns, including, specifically, any entity or entities that may succeed Harvard Pilgrim as a result of its proposed combination with Tufts Associated Health Plans, Inc.

3. This AOD shall be governed by and interpreted in accordance with the laws of the Commonwealth of Massachusetts.

4. Except for purposes of enforcing compliance with this AOD, no part of this AOD, including its allegations and commitments, shall constitute evidence of any liability, fault, or wrongdoing by Harvard Pilgrim or Optum. This document and its contents are not

intended for use by any third party for any purpose, including submission to any court for any purpose.

5. If the AGO believes Harvard Pilgrim or Optum to be in violation of this AOD, the AGO shall give them written notice of that alleged violation(s) and a reasonable opportunity to cure the alleged violation(s). Before commencing an action for breach of this AOD, the AGO will notify Harvard Pilgrim and/or Optum in writing of such breach, provided, however, that the AGO, in its sole discretion, may take immediate action at any time if it determines that there is a threat to the health or safety of the citizens of Massachusetts. Upon receiving said notice, Harvard Pilgrim and/or Optum shall then have twenty-one (21) days from receipt of such written notice to provide a good faith written response to the AGO's determination, during which time the AGO will not commence any action for breach of this AOD. The AGO agrees to discuss the response and engage in a good faith process to address any disagreements prior to commencing an action for breach of this AOD. The response shall contain, at a minimum, either:

- a. A statement explaining why Harvard Pilgrim and/or Optum believe that they are in full compliance with this AOD; or
- b. A detailed explanation of how the alleged breach(es) occurred; and
 - i. A statement that the alleged breach has been addressed and a description of the action taken by Harvard Pilgrim and/or Optum to address the breach; or
 - ii. A statement that the alleged breach cannot be reasonably addressed within twenty-one (21) days from receipt of the notice but Harvard Pilgrim and/or Optum have begun to take corrective action to address the alleged breach and are pursuing such

corrective action with reasonable due diligence, and a detailed and reasonable timetable for addressing the alleged breach.

6. Nothing in this AOD shall prohibit Harvard Pilgrim or Optum from challenging any future laws or regulations related to the issues addressed in this AOD. Further, nothing in this AOD shall be construed as a waiver by Harvard Pilgrim or Optum of its right to raise any other arguments or defenses in the future related to the issues included in this AOD.

7. This AOD shall be filed in the Superior Court of Suffolk County. The Superior Court of Suffolk County has and shall retain jurisdiction over this AOD.

8. This AOD shall not relieve the Defendants of any obligation to comply with applicable federal and state laws and regulations. Nothing in this AOD shall require Harvard Pilgrim or Optum to take any action that is in violation of applicable federal or state laws and regulations. If Harvard Pilgrim or Optum believes that there is a conflict between this AOD and applicable federal or state laws and regulations that prevents them from complying with this AOD, Harvard Pilgrim or Optum shall notify the AGO of its perceived inability to comply with the AOD and the parties will attempt to resolve any such conflict in good faith.

9. As relates to Section IV(C) (“Provider Reimbursement Rates”) and Section IV(D) (“Utilization Management”), if the U.S. HHS, DOL, and/or IRS issue interpretative guidance concerning non-quantitative treatment limitations including without limitation the “comparable to” and “applied no more stringently than” standards set forth under MHPAEA, the interpretations stated in the applicable guidance from these federal agencies shall control the meaning of those standards as used in this AOD.

10. This AOD shall terminate on the tenth anniversary of the Effective Date if not otherwise terminated in whole or in part, except that Sections IV(B)(1)(b)-(d) (“Provider

Directory Contents,” “Provider Directory Updates and Corrections,” and “Provider Outreach”) and IV(B)(2)(b)-(c) (“Contents of Behavioral Health Care Provider Directory” and “Audits”) shall terminate on the fifth anniversary of the Effective Date.

11. Compliance with this AOD resolves and settles all civil claims alleged by the AGO herein, or which the AGO alleged or could have alleged pursuant to Chapter 93A, MHPAEA, or Chapter 258 up to the date this AOD is fully executed, whether known or unknown, against Harvard Pilgrim or Optum, their parent corporations, affiliates, agents subsidiaries, subdivisions, officers, employees, successors, and assigns, relating in any way to the Investigation of Provider Directories, provider network adequacy, Utilization Management practices, and/or provider reimbursement rates. This AOD does not resolve and shall not be deemed a waiver of any other actual or potential claims the Commonwealth may have against Harvard Pilgrim or Optum. Notwithstanding any term of this AOD, specifically reserved and excluded from this release are (a) claims related to any merger, acquisition, or combination with any other entity, including but not limited to the proposed combination of Harvard Pilgrim with Tufts Health Plan, Inc., and (b) any civil or administrative liability that any person and/or entity, including Harvard Pilgrim and Optum, has or may have to the Commonwealth not expressly covered by the release in this paragraph, including, but not limited to (i) Medicaid claims; (ii) state false claims violations; and (iii) DOI administrative claims and proceedings.

12. Nothing in this AOD is to be construed as a waiver by Harvard Pilgrim of any rights it may have to assert that information it provides or provided pursuant to this AOD or the Investigation is not subject to public disclosure under applicable law. Harvard Pilgrim may assert at any time that any submission to the AGO, whether by Harvard Pilgrim or Optum, in

connection with this AOD is subject to exemption from disclosure under applicable public records law, including but not limited to G.L. c. 66 and its implementing regulations.

13. The Defendants shall comply with and respond to all reasonable inquiries and requests from the AGO regarding the implementation of the terms contained within this AOD.

14. In lieu of litigation, the Defendants hereby accept the terms and conditions of this AOD and waive any right to challenge it in any action or proceeding. Defendants acknowledge that each has conferred with counsel of its choice concerning the advisability of executing this AOD and that this AOD shall not be deemed prepared or drafted by one party or another.

15. This AOD, including any time period within which a party must perform, or begin to perform, or complete an obligation, may be amended upon written agreement of all parties for good cause shown. The AGO agrees to consider in good faith any request by Harvard Pilgrim and/or Optum to amend this AOD (a) to conform with any material provision or language that is included in any subsequent Assurance of Discontinuance, Consent Judgment, Letter of Agreement, or similar instrument between the AGO and any other health plan or agent thereof, relating to any matters set forth herein or (b) if Harvard Pilgrim and/or Optum believes there is or will be a material change to operations that will impact their ability to comply with this AOD.

16. Any notices or communications required to be transmitted between the AGO and the Defendants pursuant to this AOD shall be provided in writing by first-class mail, postage prepaid, and by electronic mail to the parties as follows, unless otherwise agreed in writing.

If to the Office of the Attorney General:

Lisa Gaulin, Assistant Attorney General

lisa.gaulin@mass.gov

Stephen Vogel, Assistant Attorney General

stephen.vogel@mass.gov

Health Care Division

Office of the Attorney General

One Ashburton Place, 18th Floor

Boston, MA 02108

If to Harvard Pilgrim:

Tisa K. Hughes, Chief Legal Officer

Harvard Pilgrim Health Care, Inc.

Tisa_hughes@harvardpilgrim.org

93 Worcester Street

Wellesley, MA 02481

Rosanna Pacella, Associate General Counsel

Harvard Pilgrim Health Care, Inc.

rosanna_pacella@harvardpilgrim.org

93 Worcester Street

Wellesley, MA 02481

If to Optum:


Katrina Giedt, Senior Associate General Counsel

katie_giedt@optum.com

P.O. Box 9472


Minneapolis, MN 55440-9472

17. The undersigned, Tisa K. Hughes, represents that she is duly authorized to execute this AOD on behalf of and to bind Harvard Pilgrim to all applicable provisions of the AOD, and that on behalf of Harvard Pilgrim, she voluntarily enters into this AOD.

By:  _____
Chief Legal Officer and Clerk

Date: 12/19/19

18. The undersigned, Rich Sharff, represents that he is duly authorized to execute this AOD on behalf of and to bind Optum to all applicable provisions of the AOD, and that on behalf of Optum he voluntarily enters into this AOD.

By: 
General Counsel, OptumHealth

Date: 12/18/19

COMMONWEALTH OF MASSACHUSETTS
ATTORNEY GENERAL MAURA HEALEY

By: 

Lisa Gaulin, Assistant Attorney General (BBO# 654655)
Stephen Vogel, Assistant Attorney General (BBO# 568735)

Date: 12-18-19