

Compendium of the NC DOI Market Reform Technical Advisory Group's ("TAG") Assessment of Most Favored Nation ("MFN") Issue

Date	Action	Reference(s)
January 5, 2012	<ul style="list-style-type: none"> TAG members raise MFN issue as a potential "Tier 1 Issue for Consideration" at the first TAG meeting 	<ul style="list-style-type: none"> <i>Appendix A of this Compendium</i>
January 24, 2012	<ul style="list-style-type: none"> TAG member, Fred Joyner, submits an email to the NC DOI inquiring whether the TAG will take up the MFN issue in a future meeting 	<ul style="list-style-type: none"> <i>Appendix B of this Compendium</i>
March 9, 2012	<ul style="list-style-type: none"> TAG member, Fred Joyner, reads a prepared statement to the TAG advocating that the group take up the MFN issue in a future meeting TAG Chair, Ted Hamby, acknowledges a letter from the North Carolina Association of Health Plans (received on March 7) similarly advocating that MFN clauses be added to the agenda of a future TAG meeting 	<ul style="list-style-type: none"> <i>Appendix C – E of this Compendium</i>
March 28, 2012	<ul style="list-style-type: none"> NC DOI adds MFN issue to TAG Meeting #5 agenda and invites TAG members to submit materials on the MFN issue (either prior to the meeting for distribution to the TAG or at the TAG meeting as hard copies) 	<ul style="list-style-type: none"> <i>Appendix F of this Compendium</i>
March 28-29, 2012	<ul style="list-style-type: none"> TAG Members submit materials on MFN clauses to the NC DOI for distribution to TAG members TAG member Tracy Baker submits email to NC DOI on TAG's consideration of the MFN issue (<i>March 28</i>) NC DOI distributes submitted materials on MFN issue to TAG members for review prior to TAG Meeting #5 (<i>via email on March 29</i>) 	<ul style="list-style-type: none"> <i>Appendix G – I of this Compendium</i>
March 30, 2012	<ul style="list-style-type: none"> TAG Members discuss at TAG Meeting #5: 1) whether the TAG should review the implications of MFN clauses in light of the ACA and 2) if so, what items related to MFN clauses should be addressed by the group TAG members agree that NC DOI Project Staff will draft a statement on MFN clauses that captures the majority viewpoint on the issue, based on meeting discussion, which the TAG will vote on at its next meeting 	<ul style="list-style-type: none"> <i>Appendix J of this Compendium</i>
April 5, 2012	<ul style="list-style-type: none"> NC DOI distributes via email a draft statement on MFN clauses for TAG members' review in advance of TAG Meeting #6 	<ul style="list-style-type: none"> <i>Appendix K- L of this Compendium</i>

April 5-9, 2012	<ul style="list-style-type: none"> • TAG member Linwood Jones submits written comments on behalf of the North Carolina Hospital Association to NC DOI on the draft MFN statement via email 	<ul style="list-style-type: none"> • <i>Appendix M of this Compendium</i>
April 9, 2012	<ul style="list-style-type: none"> • TAG members discuss draft statement expressing majority viewpoint on use of MFN clauses and approves statement with minor revisions • At the request of two TAG members opposed to the MFN statement (one on procedural grounds, one on procedural and substantive grounds), TAG members agree to permit acknowledgement of the minority viewpoint in meeting notes and in the Issue Brief that will contain the MFN statement 	<ul style="list-style-type: none"> • <i>Appendix N of this Compendium</i>
April 10, 2012	<ul style="list-style-type: none"> • TAG member Barbara Morales-Burke submits to the NC DOI a statement of the minority viewpoint on the MFN issue 	<ul style="list-style-type: none"> • <i>Appendix O of this Compendium</i>
April 14, 2012	<ul style="list-style-type: none"> • NC DOI distributes draft notes from TAG Meeting #6 and new version of Issue Brief #2, revised to incorporate approved statement on MFN clauses and minority viewpoint on MFN clauses, for TAG review 	<ul style="list-style-type: none"> • <i>Appendix P- Q of this Compendium</i>
April 14-18, 2012	<ul style="list-style-type: none"> • TAG members submit written comments on draft notes from TAG Meeting #6 and revised Issue Brief #2 	<ul style="list-style-type: none"> • <i>Appendix R of this Compendium</i>
April 25, 2012	<ul style="list-style-type: none"> • NC DOI revises draft notes from TAG Meeting #6 and Issue Brief #2 based on TAG member feedback • NC DOI creates compendium to document history of TAG assessment of MFN issue 	<ul style="list-style-type: none"> • <i>Appendix S –T of this Compendium</i>

Appendix A: Excerpt from TAG Meeting #1 Notes on MFN Issue

Before turning to Topic Area #2, a workgroup member asked whether “Most Favored Nation” clauses in provider contracts should be a topic that is addressed by the TAG due to its potentially adverse impact on competition within the Exchange. DOI responded that it is not sure whether the TAG would be the most appropriate forum in which to address the issue and would further consider where the issue should be addressed.

Appendix B: Email Statement from TAG Member, Fred Joyner, Inquiring Whether TAG Will Address MFN Issue (January 24, 2012)

I have raised the question about the MFN Clause at both the TAG meeting and the HBE Workgroup and it seems neither group wants to take the issue up as part of the topics important for the establishment of the Exchange or implementation of ACA. *It would be helpful for the DOI and others to address why this issue is not important enough to discuss in the deliberations of one or both groups. If not appropriate in the TAG or HBE Workgroup forum, then where?*

Appendix C: Excerpt from TAG Meeting #4 Notes on MFN Issue

Before adjourning the meeting, Mr. Hamby stated that TAG member, Mr. Fred Joyner, had prepared a statement on the issue of Most Favored Nation clauses and had asked for permission to read his statement to the TAG. Mr. Hamby then turned the floor over to Mr. Joyner to read his statement to the group.

Mr. Joyner started his statement by emphasizing that his comments represented his own perspective and were not being made on behalf of the organizations he represents. Mr. Joyner stated his concern that despite being brought up at previous meetings of the TAG and the NCIOM exchange workgroup and seeming consensus that it is a critical topic in need of further analysis, the issue of carriers' use of "Most Favored Nation" (MFN) clauses in network provider contracts has not made it onto either group's agenda for discussion. As one of the goals of the exchange will be to increase competition and provide more choice to the consumer and he believes MFN clauses can negatively impact this effort, Mr. Joyner thinks that this issue is an integral component of each group's ongoing deliberations.

Further, Mr. Joyner posits that if the TAG and NCIOM exchange workgroup were to take up the issue in a public forum and possibly develop related recommendations, it would allow for increased transparency on the issue and provide guidance to the NCGA as they contemplate Senate Bill 517. Mr. Joyner stated his belief that these most-favored nation clauses can negatively impact network expansion and produce an unlevel playing field, while prohibiting them would encourage new competitors to enter the marketplace, aid consumers by promoting competition and lower rates, and help providers diversify their insurer mix and enjoy increased autonomy. For these reasons, Mr. Joyner concluded his statement by asking the TAG to set aside time before its work concludes to discuss the issue of MFN clauses and develop related recommendations to be shared in a TAG issue brief or final report.

Mr. Hamby thanked Mr. Joyner for sharing his statement. Mr. Hamby went on to reference a letter to him from the North Carolina Association of Health Plans, Inc. in which similar interest in the MFN was voiced. The letter requested that the subject of SB-517 (i.e. MFN) be added to the TAG agenda for discussion. Mr. Hamby acknowledged receipt of the requests and stated that SB-517 on the matter of MFN was already being considered in the North Carolina General Assembly. Mr. Hamby further indicated that consideration would be given for inclusion in discussions at the next meeting of the TAG. Without further discussion, Mr. Hamby adjourned the TAG meeting.

Appendix D: Statement on MFN Clauses from TAG Member, Fred Joyner (March 9, 2012)

As a member of the TAG and the HBE Workgroup I would like to make a statement to the group and in doing so, Please understand that this statement reflects my personal opinions and does not necessarily reflect the opinions of the two agent trade associations of which, I am a member .

During the TAG & HBE Workgroup meetings, the issue of carriers use of “Most Favored Nation” clauses in their network provider contracts has been brought up as an issue to discuss along with the possible impact it has on carriers that do not have those clauses in their contracts and the effect these clauses have on competition in the marketplace on an ongoing basis.

To this point neither the TAG nor the HBE Workgroup has elected to put this on their agendas to discuss and the impact pro or con, “MFN” clauses have and will have on plans sold inside or outside the Exchange.

If one of the goals of the Exchanges is increase competition and provide more choice for the consumer, I'm not sure I understand why this is not an integral part of the discussion of these two groups. A public discussion and possible recommendation by these two groups would certainly allow for full disclosure and transparency on this issue and provide guidance to the General Assembly as they contemplate Senate Bill 517. This bill has passed the Senate and resides in the House and is eligible for action by that body in the upcoming legislative session.

Most Favored Nation clauses can be a benefit to the consumer and help lower rates, but when one or more insurance companies have large market shares, it appears that such clauses can negatively impact network expansion by inhibiting providers from contracting with other carriers with a smaller market shares.

It further appears, in my opinion, that the continued use of these clauses in provider contracts by carriers as products are sold both in and outside of the Exchanges, will continue to produce an unlevel playing field which will be exacerbated for QHP's in the Exchange.

In my view, prohibiting the use of “Most favored Nation” clauses would:

- Encourage new competitors to enter the insurer/provider marketplace
- Help providers diversify their insurer mix.
- Aid consumers by promoting competition and lower rates
- Promote increased provider autonomy

I would ask the TAG to consider setting aside some time, before we conclude our meetings, to discuss this issue, to allow stakeholders to voice their opinions on the merits of continuing to allow the use of these clauses, and to include a recommendation on these clauses as part of the TAG's final report.

**Appendix E: Letter from North Carolina Association of Health Plans Requesting TAG's
Consideration of the MFN Issue (March 7, 2012)**

Dear Mr. Chairman:

The members of the N.C. Association of Health Plans have been pleased to participate in the TAG meetings. We feel these meetings are taking the logical steps necessary to establish a health benefits exchange in North Carolina, in accordance with federal statutes and regulations established in the PPACA legislation and by HHS.

The NCAHP strongly supports, as a matter of policy, the establishment of a North Carolina-based health insurance exchange. As you know, we forcefully advocated on behalf of House Bill 115, which was passed by the House of Representatives last year and now awaits deliberation in the Senate.

However, the NCAHP has concerns about the insurance marketplace that we believe could seriously undermine the effectiveness of such an exchange.

We support the establishment of an effective health benefits exchange as a competitive marketplace yielding high value, innovative and affordable coverage options for North Carolinians. These coverage options must be presented to consumers in a way that allows them to make informed choices that will be in the best interest of consumers as well as market stakeholders. An essential precursor to the effective operation of the health benefits exchange is the elimination of anti-competitive market practices such as those that would be outlawed by the passage of Senate Bill 517 and that function currently to impair fair competition and limit innovation.

For the above reasons, we believe that the fair-market, pro-competition objectives embodied in Senate Bill 517 should be discussed and, we hope, supported by the TAG group because they are critical to the success of exchange. Failing to address this concern will result in an exchange that cannot function to fully achieve the goals of the federal regulations established in PPACA.

Therefore, NCAHP respectfully requests that, either at this week's TAG meeting or the following meeting, the subject of Senate Bill 517 be added to the agenda for discussion. We look forward to your prompt response to our request.

Sincerely,



Kenneth J. Lewis
President, NCAHP

Appendix F: Email from Lauren Short of the NC DOI Adding MFN Issue to TAG Meeting #5 Agenda and Inviting Members to Submit MFN Materials

Dear TAG Member and Interested Persons,

We are sending this email to alert you to changes in the agenda for the TAG #5 meeting. The revised agenda, including specific questions we will be looking for the TAG to address, is noted below:

I. Revisit Risk Adjustment

- Should North Carolina administer the federal risk adjustment model in the state for the first year or monitor the federal risk adjustment process for future administration?
- If the state elects to administer, should the NC DOI or another entity take on these administration responsibilities?
- If the state elects to administer, should the state use a distributed model in the first year?

II. Revisit Reinsurance

- Should North Carolina administer reinsurance in the state or defer administration to the federal government?
- If the state elects to administer, should the NC DOI or another entity be tasked with establishing the reinsurance entity?

III. Discuss Group Participation Requirements

- Should North Carolina have a participation rate in the SHOP exchange?
- If North Carolina has a participation rate in the SHOP, who should determine that rate?

IV. Discuss Points of Consensus & Issue 2 Brief

- Assess if final regulations change any existing points of consensus
- Discuss comments/revisions to the Issue #2 brief

V. Discuss Most Favored Nation (MFN) Contracts

- Should the TAG review the implications of MFN clauses in health care provider/insurer contracts in the North Carolina marketplace in light of the ACA?
- If MFN requires TAG review, what items should specifically be addressed by the TAG during that review to assess the impact of MFN on the post-ACA marketplace?

At this time, there are no formal materials prepared for the discussion on MFN. However, if TAG members have materials about MFN that they would like to share with the TAG in advance of the meeting, please send those materials to me (lauren.short@ncdoi.gov) for distribution electronically. Materials can also be brought to the TAG meeting. If you bring materials to the meeting, please bring 45 copies. While we prefer that materials be distributed to the TAG in advance of the meeting, it is not required.

As a reminder, **comments on the Issue Brief #2, sent on Monday, are due today**. Please submit those comments today to myself or Allison Garcimonde at agarcimonde@manatt.com.

Finally, if you have not already done so, **please RSVP for the TAG #5 in-person meeting scheduled for Friday, March 30th** to lauren.short@ncdoi.gov. The meeting will be held from 9:30 AM- 12:30 PM at the North Carolina Institute of Medicine located at 630 Davis Dr. Ste. 100, Morrisville, NC 27650. Call-in

capabilities for the meeting will be available at: US/CAN Toll Free: 1-866-922-3257 - Participant Passcode: 2487362.

Thank you, and we hope to see you on Friday.

Best,
Lauren

Lauren Short
Health Benefit Exchange Coordinator
NC Department of Insurance
Lauren.short@ncdoi.gov
(919)807-6867

Appendix G: Articles on MFN Issue Submitted by TAG Members in Advance of Meeting #5

- Burns, James M. and Joseph R. Pope. "Ohio Legislative Commission Recommends that Most Favored Nation Clauses be Prohibited in All Health Care Contracts." TAGLaw. Available at: <http://tinyurl.com/6s7yy96>
- Connecticut State Medical Society. "Victory for CSMS and physicians: Most Favored Nation clauses ban signed." Available at: <http://tinyurl.com/7u7ayt6>
- Doherty, James F. and Monique Ras. "Most Favored Nation Clauses in Payor/Provider Agreements." Available at: <http://tinyurl.com/859koxo>
- Dudley, Renee. "Repeal Benefits Blue Cross Blue Shield." *The Post and Courier*. July 3, 2011. Available at: <http://tinyurl.com/6sn6euf>
- Harris, Steven M. "Most Favored Nation Clauses Don't Favor Physicians." *American Medical Association News*. August 6, 2007. Available at: <http://tinyurl.com/797p8bn>
- McCann, Robert W. "Most favored nation clauses can create antitrust liability." *Managed Healthcare Executive*. February 1, 2004. Available at: <http://tinyurl.com/7nkc6rr>
- Medical Association of Georgia. Letter to Commissioner Ralph T. Hudgens. June 2011. Available at: <http://tinyurl.com/777kbu8>
- Ohio Joint Legislative Commission on Most Favored Nation Clauses in Health Care Contracts. "Final Report of the Ohio Joint Legislative Commission on Most Favored Nation Clauses in Health Care Contracts." March 2010. Available at: <http://tinyurl.com/6q4n3o4>

Appendix H: Email Statement from TAG Member, Tracy Baker, on TAG's Consideration of MFN Issue (March 28, 2012)

As the Technical Advisory Group (TAG) is organized to propose legislation during this next session, it is timely to consider topics which are viewed as being on the "critical path" and should be considered along with the HBE in the 2012 legislative session. The TAG is focused on reviewing issues to enable the successful operation of the Exchange and the connection to an improved marketplace. The group, including consultants, is well organized and capable of addressing topics related to creating an open and competitive environment to support the Exchange.

These topics are directly pertinent to the "Statement of Values to Guide TAG Deliberations" that was discussed in the initial meeting and subsequently endorsed:

- Improve affordability of coverage;
- Provide high-value coverage options to the HBE;
- Support predictability for market stakeholders, competition among plans and long-term sustainability of the HBE; and
- Support innovations in benefit design, payment, and care delivery that can control costs and improve the quality of care.

A key question for the TAG group now becomes: Do we address all of the critical issues that could compromise the Statement of Values, or just certain issues? There are several controversial issues which require resolution in order to support the Exchange in being as successful as possible:

Most Favored Nations (MFN) contract clauses

It is inconsistent to have "Competition among plans" in the TAG values statement and ignore the MFN issue. There is no other issue that we can discuss that is more important to competition than MFN. In geographies where MFN contracts are present, any semblance of competition will be eradicated in 2014 when the ability to underwrite is eliminated and rates are modified for risk scores. Premiums will be generally set with unit cost structures being a key determinant. By definition, the use of an MFN (which frequently actually includes provisions requiring that competitors pay more than the "most favored" rate) guarantees a cost advantage to the one carrier utilizing that provision. That cost advantage, while creating difficulties and imbalances in the current marketplace, completely precludes effective competition in the post-reform marketplace in 2014 (see diagram).

Restrictive Provider Contract Provisions

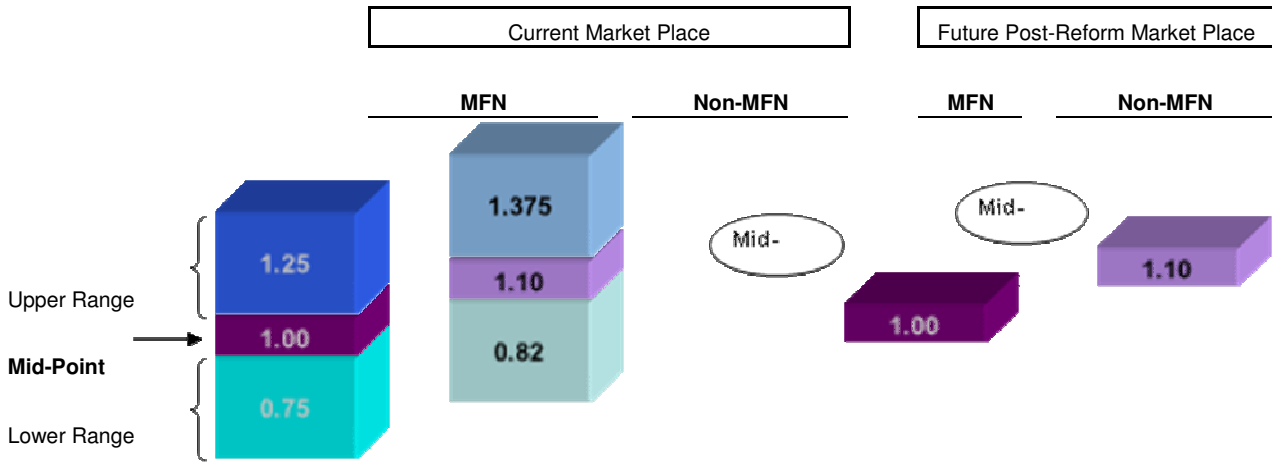
There are multiple large and small provider systems in North Carolina that have mandated language in contracts with all carriers that restrict the carrier from building products wherein the provider system is disadvantaged to other provider systems. The language prohibits any carrier from offering products that do not include the contracted provider and/or includes language that prohibits any carrier from offering a product that steers members away from the provider system. This language in effect kills the ability to build ACO or Patient Centered Medical Home models in areas where the provider system has providers and accordingly has the impact of stifling innovation in "care delivery" in the markets where a substantive portion of North Carolinians reside.

Commission Standardization

Commission standardization is another critical topic worthy of discussion by the TAG. First, commission needs to be addressed to keep carriers and/or agents from creating adverse risk between the Exchange and products sold outside the Exchange. Secondly, Commission needs to be regulated inside the Exchange so that there are no unusual incentives to promote one product over another. By the way, both Utah and Massachusetts have set commissions in their Exchange. Unlike the first two topics, the timing of this topic is not as essential for handling in the 2012 legislative session.

Submitted by: Tracy Baker March 28, 2012

"Most Favored Nation" (MFN) Diagram



Takeaway:

Underwriting and variation in plan design allow for continued presence of non-MFN plans in the current market place in spite of the inherent unit cost disadvantage.

The post-reform marketplace eliminates the existence of both factors and promotes underlying unit costs as the predominant factor in premium pricing.

Note 1: For illustrative purposes, assume that the MFN plan has pricing mandates that provide the MFN with a unit cost advantage equal to 10% of premium favorability.

Note 2: Plans move to the mid-point due to community rating in the Future Post-Reform Market Place.

Appendix I: Email from Lauren Short of the NC DOI Distributing Member-Submitted Materials on MFN Issue to TAG for Review

Dear TAG members and Interested Persons,

Below (and attached) you will find several resources on MFN submitted by TAG members to DOI. Also attached is the final presentation for tomorrow's meeting and copies of Issue Briefs #1 and #2.

As a reminder our meeting tomorrow will be held from 9:30 AM- 12:30 PM at the North Carolina Institute of Medicine located at 630 Davis Dr. Ste. 100, Morrisville, NC 27650. Call-in capabilities for the meeting will be available at: US/CAN Toll Free: 1-866-922-3257 - Participant Passcode: 2487362.

Thank you, and we look forward to seeing you tomorrow.

Best,
Lauren

Lauren Short
Health Benefit Exchange Coordinator
NC Department of Insurance
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(919)807-6867

Appendix J: Excerpt from TAG Meeting #5 Notes on MFN Issue

Discussion of Most Favored Nation Issue

Should the TAG review the implications of Most Favored Nation (MFN) clauses in health care provider/insurer contracts in the North Carolina marketplace in light of the ACA? If MFN requires TAG review, what items should specifically be addressed by the TAG during that review to assess the impact of MFN on the post-ACA marketplace?

- The TAG discussed whether the group should address the issue of MFN clauses in health care provider/insurer contracts in the North Carolina marketplace in light of the ACA. A significant majority of members expressed a strong desire for the TAG to address the issue of MFN clauses, arguing that because ACA-required market reforms eliminate the ability of carriers to underwrite, the impact of such clauses in the market will be intensified. TAG members noted that in a post-ACA environment, MFN will severely limit: competition among carriers; consumer choice; the ability to implement innovations in benefit design, payment and care delivery; and could impact the long-term success and sustainability of the Exchange. Because the TAG is charged with addressing ACA-required reforms that impact the market, and because MFN clauses are inconsistent with the TAG's statement of values, these members asserted that MFN clauses should fall within the TAG's scope of work.
- A minority of members did not believe MFN clauses should fall within the TAG's scope of work. These members countered that the issue is being addressed in several other forums, including in an ongoing investigation by the Department of Justice and in the context of a bill currently before the NCGA, and thus does not necessarily need to be evaluated by the TAG. These members also posited that there are a variety of other market reforms that impact TAG values, and noted that the purpose of the values is not to define the TAG's scope of work, but to assess policy options for those matters that have been determined appropriate and necessary for TAG consideration. These members also expressed concern about expanding the TAG's scope of work in such a way that too many issues that are indirectly impacted by the ACA could be considered worthy of consideration by the group.
- The group was unable to come to a full consensus on the topic and agreed that in the interest of time, the TAG would draft a statement capturing the group's discussion of and concerns about MFN clauses which would then be voted on at the next TAG meeting. If the statement about MFN clauses is endorsed by the group, it will be included in Issue Brief #2 (which addresses the need to "level the playing field" to mitigate adverse selection in the exchange and between the exchange and non-exchange markets).

Appendix K: Email from Jean Holliday of the NC DOI Requesting that TAG Members Review Draft Statement on MFN Issue

Dear TAG Members and Interested Persons,

As a reminder, we will meet for a TAG #6 in-person meeting next **Monday, April 6th from 12:30- 3:30 PM at the North Carolina Institute of Medicine (NCIOM)**. Directions to the NCIOM are available at: <http://www.nciom.org/directions/>. Please RSVP for the meeting by Friday, April 6th to Lauren Short lauren.short@ncdoi.gov. For individuals who will be unable to participate in-person, call in capabilities will be available at: 866-922-3257 - Participant Passcode: 2487362.

Attached please find the draft TAG #5 meeting notes for your review. We hope to discuss and approve these notes at the TAG #6 in-person meeting.

Here is draft language related to MFN to be included in Issue Brief #2. Please review and prepare to discuss on Monday.

Monday's presentation will be sent prior to the meeting.

Thank you and we look forward to seeing you Monday.

Jean W. Holliday, CPM, HIA
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Appendix L: Draft Statement on MFN Issue for TAG's Review (*April 9 Version*)

The TAG supports effective implementation of the Patient Protection and Affordable Care Act (ACA) in North Carolina, which includes anticipating and addressing any potential adverse interactions between ACA and current state law. A significant majority of TAG members expressed serious concerns about strategies utilized in health care provider contracting, known as Most Favored Nation (MFN) clauses. These clauses limit most health insurers' ability to negotiate service rates with certain health care providers in the NC market. Currently, insurers are able to mitigate some of the impact of these clauses on market competition by utilizing available product underwriting and pricing flexibility. Much of that flexibility will be eliminated under ACA. Certain TAG members observed that the anti-competitive impact of MFN clauses will be intensified in a post-ACA environment, further limiting competition among carriers and creating barriers to market entry for new carriers, thus restricting consumer choice. Although there was not a consensus by the TAG, a significant majority of TAG members strongly believe that the ACA increases the need for the NCGA to act to prohibit the use of MFN and other health care provider contract clauses which inhibit insurers' ability to negotiate competitive service rates with health care providers.h

Appendix M: Email Statement from TAG Member, Linwood Jones, on Behalf of the North Carolina Hospital Association Regarding Draft MFN Statement (April 9, 2012)

I cannot be at today's meeting because of a conflicting meeting with the State Treasurer, but we have an issue with the following part of the MFN statement:

"Although there was not a consensus by the TAG, a significant majority of TAG members strongly believe that the ACA increases the need for the NCGA to act to prohibit the use of MFN and other health care provider contract clauses which inhibit insurers' ability to negotiate competitive service rates with health care providers."

We have no issue with the MFN part of that because it has been thoroughly discussed and is an insurer versus insurer issue when you get down to it. However, the phrase "prohibit...other healthcare provider contract clauses which inhibit insurer's ability to negotiate competitive service rates with healthcare providers" is problematic, and we are opposed to it. There has been little discussion of "other provider contract clauses" in the TAG other than a brief mention of an "all products participation" clause, and that's what "other healthcare provider contract clauses" appears to be referring to. Pricing and competitive services rates are more complex than just healthcare provider contract clauses -- particularly just the all products participation clause -- and there are other issues that need to be reviewed that in the end impacting pricing -- for example, insurer market practices with providers. Network adequacy is also a big issue that the current draft MFN statement overlooks.

NCHA is OK with recommending that the legislature look at ALL issues impacting insurer and provider participation, pricing, network adequacy, etc. We would suggest that the sentence be revised as follows:

"Although there was not a consensus by the TAG, a significant majority of TAG members strongly believe that the ACA increases the need for the NCGA to act to prohibit the use of MFN clauses. The TAG also acknowledges the need for an Exchange with a broad selection of competitively-priced products and adequate provider networks and recommends that the legislature review the impact of contractual provisions, market practices, and other factors impacting pricing, product availability, and network adequacy."

Appendix N: Excerpt from Draft TAG Meeting #6 Notes on MFN Issue

Discussion of Most Favored Nation Issue

- The TAG reviewed the draft statement addressing Most Favored Nation (MFN) clauses in provider contracts (*see slide deck for additional details*). Members debated the extent to which the MFN statement should be tied to considerations related to implementation of the Affordable Care Act (ACA). Some members expressed concern that the statement was too tightly coupled with the ACA, which implies that the negative impact of MFN clauses would be eliminated in the absence of federal health reform law (i.e., if the ACA is repealed). Since the NCGA is currently considering a bill addressing MFN clauses separate and apart from the ACA lends credence to the notion that these two issues do not necessarily need to be grouped together. Other members countered that the reason for tying the MFN issue to the ACA in the statement was because the impact of MFN clauses becomes more of an imperative in a post-ACA environment, per the group's discussion at TAG Meeting #5. Some also noted that tying the statement to ACA-related considerations may provide a better opportunity for the statement to be reviewed by the NCGA.
- The group discussed how "consensus" was being defined in the context of the statement. Some members pointed out that only a very small number of TAG members had opposed the group's addressing the issue of MFN clauses. These members argued that while there was not unanimous agreement, it was fair to say that the group had reached consensus since the significant majority of members were in agreement. However, other members disagreed, and pointed to past TAG deliberations in which an inability to reach unanimous consent on an issue was characterized in TAG discussions and related meeting notes as a lack of consensus.
- A minority of members were opposed to the TAG's draft statement on the issue of MFN clauses. One member's primary reason for opposing the TAG issuing a statement on the MFN issue was based on concerns that development of the statement deviates from the TAG process to date (e.g., in past deliberations the group was presented with detailed, data-based analysis on both sides of an issue to inform consideration rather than anecdotal evidence, lack of unanimous approval by members has to date meant lack of consensus, etc.). Another member pointed out substantive concerns with the analysis of MFN clauses on which the statement is based. These concerns include: the impact of MFN clauses requires comprehensive, market-specific analysis and should not be based on speculation regarding what could potentially happen in the market after 2014; available evidence of MFN's impact on competition and price is limited and contradictory; MFNs may have positive impact by reducing costs for consumers; MFN-type clauses are common in other industries and existing federal and state law provide protection from their improper use. This member advocated for the inclusion of the minority's perspective to be captured in the meeting minutes and in the issue brief that will contain the TAG's statement on MFN clauses, in line with the TAG's past approach to other issues under the group's consideration.
- Several TAG members representing the provider community expressed concern over the last clause of the statement ("and other health care provider contract clauses which inhibit insurers' ability to negotiate service rates with health care providers"), which they deemed overly vague and therefore problematic. Members who had participated in developing the draft statement noted that the intent of the clause was to ensure that the full range of MFN-

type clauses/contracting mechanisms were addressed by the statement. The group agreed that this part of the sentence was not critical to the statement and agreed to strike it from the statement.

Points of Consensus:

- There was consensus among a significant majority of TAG members to approve the statement on MFN clauses, pending the removal of the sentence on “other health care provider contract clauses” as described above.
- The group also agreed that the minority perspective (both with regard to the substantive and procedural concerns outlined above) should be noted in the meeting minutes and the related issue brief.

Appendix O: Email Statement from TAG Member, Barbara Morales-Burke, Regarding Minority Viewpoint on MFN Issue (April 10, 2012)

I appreciate the opportunity to provide a statement regarding MFN for inclusion in the TAG Brief which will include the MFN topic.

As shown below, in addition to submitting a “minority statement”, I am submitting for your consideration a point for inclusion in the introductory language that I assume will precede the actual TAG Majority and Minority Statements. I am also suggesting a needed correction to the Majority statement.

I. Introductory portion of MFN section needed:

An introductory statement should be included to disclose that (as observed by more than one TAG member) “[T]he TAG did not formally define MFN for purposes of its discussion and did not analyze the use of MFN clauses in the North Carolina market. Nonetheless, a majority of the TAG determined that it was an issue on which the group should comment.”

II. Correction to Current Statement:

The TAG supports effective implementation of the Patient Protection and Affordable Care Act (ACA) in North Carolina, which includes anticipating and addressing any potential adverse interactions between ACA and current state law. A significant majority of TAG members expressed serious concerns about strategies utilized in health care provider contracting, known as Most Favored Nation (MFN) clauses. These clauses limit most health insurers’ ability to negotiate service rates with certain health care providers in the NC market. Currently, insurers are able to mitigate some of the impact of these clauses on market competition by utilizing available product underwriting and pricing flexibility. Much of that flexibility will be eliminated under ACA. Certain TAG members ~~observed~~ believe that the anti-competitive impact of MFN clauses will be intensified in a post-ACA environment, further limiting competition among carriers and creating barriers to market entry for new carriers, thus restricting consumer choice. Although there was not a consensus by the TAG, a significant majority of TAG members strongly believe that the ACA increases the need for the NCGA to act to prohibit the use of MFN and other health care provider contract clauses which inhibit insurers’ ability to negotiate competitive service rates with health care providers.

[Rationale for correction: Observation requires the consequences to have already occurred. Rather, these are beliefs about what will occur in the future.]

III. Minority Statement:

“Efforts in other states to impose restrictions on MFN-type provisions have yielded little evidence of the actual impact of these provisions on prices or competition, and there is no consensus by experts that general prohibitions of MFN clauses benefit consumers. In fact,

both economists and courts have repeatedly acknowledged the benefits of such clauses in keeping consumer costs low. Thus, it is critical that any consideration of MFN in North Carolina be based on information specific to our market.

Concerns expressed by some TAG members regarding MFN clauses and their interaction with ACA changes in 2014 are not based on any study or analysis of the impact of MFN clauses in the North Carolina health care market, but instead are based on pure speculation. Federal and State laws already exist to regulate the use of MFN clauses. Given the volatile health care market, there should not be any prohibition on MFN use without a thorough assessment of the impact of such change, including the impact to health care cost and quality.”

**Appendix P: Email from Lauren Short of the NC DOI Requesting Comments on Draft Meeting #6
Notes and Revised MFN Statement in Issue Brief #2**

Dear TAG Members and Interested Persons,

Attached please find the draft TAG #6 meeting notes for your review. Also attached please find revised versions of Issue Briefs #1 and #2, as well as a draft of Issue Brief #3. We request that you review each of the attachments and send comments to me at lauren.short@ncdoi.gov. We will receive comments until **Wednesday, April 18th at noon**.

Thank you for participating in the TAG #6 in-person meeting. At this time, there is no additional input for the TAG to provide on the essential health benefits (EHBs). NCDOI and its contractors will complete the analysis of the eligible benchmark plan options for consideration in the EHB package in North Carolina. The final analysis will be documented in a paper which will be shared with TAG members for review and comment prior to broader release. NCDOI has elected to not develop an issue brief at this time on the EHBs, but will be looking for the TAG to reconvene on the EHB topic in subsequent sessions.

As a reminder, the TAG will break from meeting in person for the near term while the NC General Assembly is in session. NCDOI will provide details for future meetings once they are available. Thank you for your continued participation.

Best,
Lauren

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Appendix Q: Statement on MFN Issue from Revised Issue Brief #2 (April 14 Version)

Most favored nation (MFN) clauses were raised as an issue for discussion in light of ACA implementation. Unlike other issues addressed by the TAG, independent information and analysis was not provided to define considerations related to MFN. The TAG informally defined MFN as contract clauses between a provider and an insurer which give the insurer the ability to do one or more of the following: 1) audit contracts providers have with other insurers to determine if the rates offered to other insurers are more favorable; 2) apply the best rate identified in the audit and 3) mandate that a corridor exist between the insurer's contracted rate with a provider and the provider's negotiated rates with other insurers, such that if the corridor is breached the insurer would get a price reduction to maintain the corridor.

The TAG did not reach consensus on the impact that MFN clauses will have in a post-ACA environment. A significant majority of TAG members approved the statement below:

"The TAG supports effective implementation of the Patient Protection and Affordable Care Act (ACA) in North Carolina, which includes anticipating and addressing any potential adverse interactions between ACA and current state law. A significant majority of TAG members expressed serious concerns about strategies utilized in health care provider contracting, known as Most Favored Nation (MFN) clauses. According to this majority, use of these clauses, particularly in markets that are dominated by a single insurer, limit most other health insurers' ability to negotiate health service rates with certain health care providers. Currently in North Carolina, insurers are able to mitigate some of the impact of these clauses on market competition by utilizing available product underwriting and pricing flexibility. Much of that flexibility will be eliminated under ACA. Many TAG members believe that the anti-competitive impact of MFN clauses will be intensified in a post-ACA environment, further limiting competition among carriers and creating barriers to market entry for new carriers, thus restricting consumer choice. Although there was not a consensus by the TAG, a significant majority of TAG members strongly believe that the ACA increases the need for the NCGA to act to prohibit the use of MFN clauses which inhibit insurers' ability to negotiate competitive service rates with health care providers."

The minority viewpoint is conveyed below:

"Efforts in other states to impose restrictions on MFN-type provisions have yielded little evidence of the actual impact of these provisions on prices or competition, and there is no consensus by experts that general prohibitions of MFN clauses benefit consumers. In fact, both economists and courts have repeatedly acknowledged the benefits of such clauses in keeping consumer costs low. Thus, it is critical that any consideration of MFN in North Carolina be based on information specific to our market."

Concerns expressed by some TAG members regarding MFN clauses and their interaction with ACA changes in 2014 are not based on any study or analysis of the impact of MFN clauses in the North Carolina health care market, but instead are based on pure speculation. Federal and State laws already exist to regulate the use of MFN clauses. Given the volatile health care market, there

should not be any prohibition on MFN use without a thorough assessment of the impact of such change, including the impact to health care cost and quality.”

Appendix R: TAG Member Feedback on MFN Section of Revised Issue Brief #2 (April 14 Version)

Email Statement by: Tracy Baker (April 15, 2012)

My only comment is in regard to the MFN write-up. Here are my thoughts:

- 1) While the write up says that the majority of the people in the room supported the MFN language, the write up spends more time on the procedural issues raised by BCBS than on the thoughts raised by everyone else.
- 2) The write up gives more detail regarding the opposing opinion, than by the majority opinion. There were almost no points in favor of the majority in the write up.
- 3) The write up does not clearly identify the "white elephant" in the room. First there was only one person out of 20 who opposed this. Adam did not oppose this, and said so on the phone. He simply raised the question as to whether or not this topic should be discussed in the TAG. The write up did not disclose that the opposing viewpoint was held only by the carrier using MFN's. This is important if you were not in the room.

At the end of the write up, I realized that had I not been in the room, I wouldn't have been able to follow this at all. What happened to all of the points made over the course of 2 meetings:

- Ken notes that many states have already banned MFN's.
- What about the technical issues surrounding underwriting and the ACA.
- What about Allen's comments about his California experience.
- A description of the different MFN's being used in NC.

Maybe some of this is in other meeting notes, but I'm trying to figure out how the NCGA could follow this the way it is written.

Email Statement by: Fred Joyner (April 16, 2012)

Fellow TAG Members,

I have a problem with the wording of the "Minority Viewpoint" as shown on pg.6 of the attached "TAG Issue Brief 2 Revised" regarding MFN Clauses (highlighted in yellow). In my opinion, this is merely a delaying tactic by the carrier that has expressed the "Minority Viewpoint" . A bill was introduced in 2004 to prohibit the use of MFN Clauses and this same carrier used similar tactics at that time to allow them to continue the use of these clauses to the detriment of "Real Competition" and competitive choices for the consumer. This carrier controls a vast majority of the insured lives in the individual and group markets in this state and will only dominate more as 2014 approaches.

I was in favor of allowing a "Minority Viewpoint" on the MFN issue, which we have not allowed with other issues taken up by TAG, but the carrier is making statements like , "Federal and State

laws already exist to regulate the use of MFN Clauses", which only serve to cloud the issue to readers of this brief. The Federal and State laws to regulate the use of MFN Clauses are not cited and how these laws curb the dominance of one or more carriers in a given state and thus restricting choices for the consumer.

I would request that this "Minority Viewpoint" be revised to state merely that "BCBS of NC disagrees with the views of the majority on the impact of the use of MFN Clauses in North Carolina."

Email Statement by Ken Lewis (April 16, 2012)

I would be embarrassed by the consultant's wording in this document regarding the MFN and the majority and minority viewpoint.

First and foremost only one, or should I correctly say, a minority of one disagreed with the final recommended wording in the report. The TAG group was gracious enough to suggest that it would be fine to note such in the report. But if we are including the complete hogwash that was included in favor of the MFN, then let's identify the only opposition to the wording being that of the company that uses the MFN in this State, i.e. BCBSNC.

It was your choice to not have an extended discussion on the issue or I would have been happy to rebut each and every item from BCBS just as the NCAHP did in the NC Senate discussions. As far as leaving the issue in the purview of the federal government, doesn't that go counter to exactly what we are doing on the TAG committee, i.e. trying to come up with a State solution? And what about BCBSNC's party to a Federal settlement in Pennsylvania (2007) banning the use of MFN's? If it is not a problem why agree with the Feds that it is a problem?

Lastly, the facts of the issue are **very** clear. The ACA and its related requirements create an environment in which MFN will threaten the viability, access, competitiveness, and sustainability of an exchange and insurance products in North Carolina. Let's get that on the record, so if the exchange fails we can at least see that it was predicted.

Most recently the Commissioner was quoted in my local paper as taking credit for expansion of insurance competition in North Carolina. He must have been speaking about auto insurance, because there has been no increase in health insurance competition, only a decrease. If we are truly serious about increasing competition we must stop treating this issue (MFN) like it is a sacred cow. It is not!

Email Statement by Barbara Morales-Burke (April 16, 2012)

I offer the following points to you and am glad to send to the entire group if you believe that is best, but I hesitate to do anything that may turn the conversation into arguing" back and forth at a time when the TAG will not be meeting again to discuss. (I do understand that this communication is public either way.)

1. It is not true that this is the only case where a minority view will be captured in writing. In each case where the TAG members did not reach agreement, the Issue Brief and meeting minutes conveyed all views. Since this is the only case where the TAG is making a "statement" (thus requiring a statement of minority view), it may feel a little different to some at first blush - but it is not. Including a minority view is consistent with the handling of all other issues addressed by the TAG..

2. The existence of state and federal laws to address antitrust laws which are available to address potential anticompetitive impacts of MFN clauses is a fact, not opinion. I do not believe that providing facts "clouds" the issues. When reviewing the majority statement, I resisted the urge to correct - or object to - statements of opinion which with which BCBSNC disagrees or believes is incorrect. It is distressing to hear a suggestion that the minority view should not be able to be explained, as well as expressed. (I.e., just saying "BCBSNC disagrees." would be unfair.)

3. As the Brief acknowledges, the TAG was unable to truly analyze MFN. No research was conducted to support or refute either view.

With the exception of the MFN issue, which was an add-on to the planned slate of issues for the TAG, the group was successful in reaching agreement on the majority of issues. For a few issues, there was respectful disagreement. It is unfortunate that this issue has resulted in such a difficult ending to this first wave of our work.

Email Statement by Allen Feezor (April 18, 2012)

Good job on all of this work by DOI folks and consultants. A lot of substantive stuff...and a full set of items that NC will have to deal with in effort to assure the ultimate success of ACA within NC.

My only observation/comments which are personal and not a policy of DHHS:
Having seen some of the comments from the non-BCBSNC healthplans relative to their objection to having a "minority report" on the MFN --let alone allowing it to be crafted so as to bring up info not presented in the TAG meetings -- I tend to agree with their objections. (I never understood "consensus" to be unanimity. Indeed there were other areas of the TAG reports that I personally did not agree with, but feel they are appropriately included in the report since they represented what seemed to be the general agreement by most folks present).

Hence, I think any publically available record of the TAG meetings relative to MFN, should simply reflect that "one carrier..." or "BCBSNC ...did not concur with (strongly opposed?) the recommendation that MFN....."

Appendix S: Excerpt from Revised/Final TAG Meeting #6 Notes on MFN Issue

Discussion of Most Favored Nation Issue

- TAG members reiterated their substantive concerns with Most Favored Nation (MFN) clauses in provider contracts, noting their belief that in a post-ACA environment, MFN will severely limit: competition among carriers; consumer choice; the ability to implement innovations in benefit design, payment and care delivery; and could impact the long-term success and sustainability of the Exchange. Members also reiterated their belief that MFN clauses can negatively impact network expansion and produce an unlevel playing field, while prohibiting these types of contract clauses would encourage new competitors to enter the marketplace, aid consumers by promoting competition and lower rates, and help providers diversify their insurer mix and enjoy increased autonomy.
- The TAG reviewed the draft statement addressing MFN clauses (*see slide deck for additional details*). Members debated the extent to which the MFN statement should be tied to implementation of the Affordable Care Act (ACA). Some members expressed concern that the statement was too tightly coupled with the ACA, which implies that the negative impact of MFN clauses would be eliminated in the absence of federal health reform law (i.e., if the ACA is repealed). Since the NCGA is currently considering a bill addressing MFN clauses separate and apart from the ACA, these two issues do not necessarily need to be grouped together. Other members countered that the reason for tying the MFN issue to the ACA in the statement was because the impact of MFN clauses becomes more of an imperative in a post-ACA environment, per the group's discussion at TAG Meeting #5. Some also noted that tying the statement to ACA-related considerations tied the issue to the TAG's scope and may provide a better opportunity for the statement to be reviewed by the NCGA.
- The group discussed how "consensus" was being defined in the context of the statement. Some members pointed out that only a very small number of TAG members had opposed the group's addressing the issue of MFN clauses. These members argued that while there was not unanimous agreement, it was fair to say that the group had reached consensus since the significant majority of members were in agreement. However, other members disagreed, and pointed to past TAG deliberations in which an inability to reach unanimous consent on an issue was characterized in TAG discussions and related meeting notes as a lack of consensus.
- A minority of members were opposed to the TAG's draft statement on the issue of MFN clauses. One member's primary reason for opposing the TAG issuing a statement on the MFN issue was based on concerns that the substance was outside of the TAG's purview and that development of the statement deviates from the TAG process to date (e.g., in past deliberations the group was presented with detailed, data-based analysis on both sides of an issue to inform consideration rather than anecdotal evidence, lack of unanimous approval by members has to date meant lack of consensus, etc.). Another member echoed these procedural concerns, and also pointed out substantive concerns with the analysis of MFN clauses on which the statement is based. These concerns include: the impact of MFN clauses requires comprehensive, market-specific analysis and should not be based on speculation regarding what could potentially happen in the market after 2014; available evidence of MFN's impact on competition and price is limited and contradictory; MFNs may have positive impact

by reducing costs for consumers; MFN-type clauses are common in other industries and existing federal and state law provide protection from their improper use. This member advocated for the inclusion of the minority's perspective to be captured in the meeting minutes and in the issue brief that will contain the TAG's statement on MFN clauses, in line with the TAG's past approach to other issues under the group's consideration.

- Several TAG members representing the provider community expressed concern over the last clause of the statement (“and other health care provider contract clauses which inhibit insurers’ ability to negotiate service rates with health care providers”), which they deemed overly vague and therefore problematic. Members who had participated in developing the draft statement noted that the intent of the clause was to ensure that the full range of MFN-type clauses/contracting mechanisms were addressed by the statement. The group agreed that this part of the sentence was not critical to the statement and agreed to strike it from the statement.

Points of Consensus:

- There was consensus among a significant majority of TAG members to approve the statement on MFN clauses, pending the removal of the sentence on “other health care provider contract clauses” as described above.
- The group also agreed that the minority perspective (both with regard to the substantive and procedural concerns outlined above) should be noted in the meeting minutes and the related issue brief.

Appendix T: Revised Statement on MFN Issue from Final Issue Brief #2

Most favored nation (MFN) clauses in light of ACA implementation was raised as an issue for discussion. Because this issue was not under the original scope of the TAG, independent information and analysis was not provided to define considerations related to MFN, unlike other issues addressed by the TAG. The TAG defined MFN for the purposes of its discussion as contract clauses between a health care provider and an insurer which give the insurer the ability to do one or more of the following: 1) audit contracts providers have with other insurers to determine if the rates offered to other insurers are more favorable; 2) apply the best rate identified in the audit; and 3) mandate that a corridor exist between the insurer's contracted rate with a provider and the provider's negotiated rates with other insurers, such that if the corridor is breached the insurer would get a price reduction to maintain the corridor.

The TAG supports effective implementation of the ACA in North Carolina, which includes anticipating and addressing any potential adverse interactions between ACA and current State statute.

A significant majority of TAG members expressed serious concerns about strategies utilized in health care provider contracting, known as MFN clauses. According to this majority, use of these clauses, particularly in markets that are dominated by a single insurer, inhibits market competition by limiting most other health insurers' ability to negotiate satisfactory health service rates with certain health care providers. Currently in North Carolina, insurers are able to mitigate some of the impact of these clauses on market competition by utilizing available product underwriting and pricing flexibility. Much of that flexibility will be eliminated under ACA. Most TAG members believe that the anti-competitive impact of MFN clauses will be intensified in a post-ACA environment, further limiting competition among carriers and creating barriers to market entry for new carriers, thus restricting consumer choice. Although there was not unanimity within the TAG, a significant majority of TAG members strongly believe that the ACA increases the need for the North Carolina General Assembly to act to prohibit the use of MFN clauses which inhibit insurers' ability to negotiate competitive service rates with health care providers.

The health insurer TAG member with the largest health insurance market share in North Carolina expressed concerns that the TAG was not the forum for MFN consideration. This TAG member further asserted that there was little evidence of the impact of these provisions on prices or competition, and indicated that such clauses may help keep consumer costs low. This TAG member concluded that any consideration of MFN in North Carolina should be based on a thorough assessment of the impact of such change specific to the State's 2014 market, including the impact to health care cost and quality.