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Proposed Mental Health Parity and Addiction Equity Act Rules Clarify Technical Compliance Requirements, But Practical Challenges Remain

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On July 25, the Departments of Labor, Health and Human Services, and the Treasury (Departments) jointly issued highly anticipated guidance on mental health and substance use disorder benefits. The guidance takes the form of proposed amendments to regulations implementing the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, as amended (MHPAEA), as well as new regulations implementing MHPAEA nonquantitative treatment limitation (NQTL) comparative analyses requirements (Proposed Rules).

Noting the national mental health and substance use disorder crisis, the Departments state that the Proposed Rules are intended to ensure that individuals with mental health conditions and substance use disorders can benefit from the full protections afforded to them under MHPAEA, while also providing clear guidance to health plans and issuers (Health Plans) on how to comply with MHPAEA's requirements. Consistent with this intent, the Proposed Rules do provide clear guidance on *what* is required for Health Plans to demonstrate MHPAEA compliance, including clarified definitions, specific compliance requirements, and detailed examples.

What remains unclear, however, is *how* Health Plans can demonstrate MHPAEA compliance. The Departments expressly recognize plan sponsors' reliance on service providers in designing and implementing the coverage terms that are subject to MHPAEA and in providing comparative analyses (or the information required to perform the comparative analyses) for the NQTLs they design and/or administer. In addition, the Departments specifically solicit comments on how best to ensure that all entities involved in Health Plan design and administration provide the necessary information to support Health Plans' MHPAEA compliance. Reading between the lines, it's clear that the Departments recognize the difficulties many plan sponsors have faced in obtaining the information required to demonstrate MHPAEA compliance. And, pending issuance of the final regulations, this inherent tension between plan sponsors' MHPAEA compliance obligations and their ability to comply remains.

Notwithstanding this continued uncertainty, there are important take-aways for plan sponsors with regard to MHPAEA compliance embedded within the Proposed Rules. In addition, the Proposed Rules extend the already complex MHPAEA rules into other compliance requirements, heightening the stakes of noncompliance. This article highlights key provisions of the Proposed Rules impacting plan sponsors and possible action steps pending issuance of final guidance.

Background

MHPAEA generally prohibits Health Plans from:

- Applying greater financial requirements or treatment limitations on mental health and substance use disorder (MH/SUD) benefits than are applied to medical/surgical benefits;

- Imposing separate financial requirements and treatment limitations only on MH/SUD benefits; and

- Imposing NQTLs on MH/SUD benefits in any classification unless any processes, strategies, evidentiary standards, or other factors used in applying the NQTL to MH/SUD benefits are comparable to, and applied no more stringently than, the processes, strategies, evidentiary standards, or other factors used in applying the NQTL with respect to medical/surgical benefits in the classification.

Since 2013, the Departments have engaged in significant efforts to bolster MHPAEA compliance through the issuance of Frequently Asked Questions, fact sheets, compliance assistance tools, templates, reports, and publications. Despite these efforts, Health Plans have continued to struggle with MHPAEA compliance, including with respect to the NQTL comparative analyses requirements.

The wide disparity between MHPAEA's compliance requirements and current market practice is evidenced by the Departments' 2022 MHPAEA Report to Congress, which indicated that ***every single*** NQTL comparative analysis reviewed by the Departments was insufficient in some way when initially submitted. The Proposed Rules are an attempt to bridge this compliance gap.

The Proposed Rules Clarify Key Compliance Terms

The Proposed Rules clarify many existing definitions in the current regulations, such as medical/surgical benefits and MH/SUD benefits. In addition to providing clarity for Health Plans, these revised definitions also are intended to close loopholes with respect to several mental health conditions that have been the subject of frequent litigation in recent years.

Eating Disorders and Autism Spectrum Disorder	• Since the implementation of MHPAEA, some stakeholders have taken the position that eating disorders and autism spectrum disorder are "medical/surgical benefits" that are not protected by MHPAEA. • The Proposed Rules make it clear that eating disorders and autism spectrum disorder should be considered "mental health benefits" that are protected under MHPAEA.

The Proposed Rules also add new definitions for key terms, such as processes, strategies, evidentiary standards, and factors, that were previously undefined and created confusion with respect to the application of NQTLs.

The Proposed Rules Establish Three Clear NQTL Compliance Requirements

In reviewing plan sponsors' comparative analyses in recent years, the Departments have observed that while NQTLs may appear to satisfy applicable MHPAEA requirements on paper, they frequently impose greater limits on access to MH/SUD than medical/surgical benefits in practice. As a result, the Proposed Rules prohibit Health Plans from imposing an NQTL unless it satisfies three requirements — the "No More Restrictive Requirement", the

"Design and Application Requirement," and the "Relevant Data Evaluation Requirement".

New! No More Restrictive Requirement
A Health Plan may not apply any NQTL with respect to MH/SUD benefits in any classification that is more *restrictive*, in writing or in operation, than the *predominant* NQTL applied to *substantially all* medical/surgical benefits in the same classification. *The Proposed Rules explain how "restrictive," "substantially all," and "predominant" should be applied in an NQTL context, and generally takes the mathematical concepts that have historically applied only in the context of MHPAEA financial requirements and quantitative treatment limitations and applies those concepts to NQTLs.*
Design and Application Requirement
The Proposed Rules still provide that Health Plans may not impose an NQTL with respect to MH/SUD benefits in any classification unless, under the terms of the plan, as written and in operation, any processes, strategies, evidentiary standards, or other factors used in *designing and applying* the NQTL to MH/SUD benefits in the classification are comparable to, and are applied no more stringently than, the processes, strategies, evidentiary standards, or other factors used in *designing and applying* the limitation with respect to medical/surgical benefits in the classification. *The design and application requirement is generally the same rule that has historically applied to NQTLs, although the Proposed Rules make it clear that a Health Plan may not rely on any factor or evidentiary standard if the information, evidence, sources, or standards on which the factor or evidentiary standard is based discriminates against MH/SUD benefits as compared to medical/surgical benefits.*
New! Relevant Data Evaluation Requirement
The Proposed Rules require Health Plans to collect and evaluate *relevant data* to assess the impact of an NQTL on access to MH/SUD benefits and medical/surgical benefits, and to consider the impact as part of the Health Plan's analysis of whether the limitation, in operation, complies with the Proposed Rules. Relevant data include the number and percentage of claim denials, any other data required by State law or private accreditation standards and, for NQTLs related to network composition, in-network and out-of-network utilization rates, network adequacy metrics, and provider reimbursement rates. Material differences in access to MH/SUD benefits as compared to medical/surgical benefits would be a "strong indicator" that the Health Plan violates MHPAEA, requiring the Health Plan to address the material differences and document the action. *Arguably the most notable change to the requirements, this portion of the Proposed Rules reflects the Departments' concern that Health Plans are currently able to show parity in NQTLs with careful wording in the plan documents and comparative analyses — under the Proposed Rules, Health Plans would actually have to demonstrate that there is parity between MH/SUD and medical/surgical benefits* ***in practice.***

The Proposed Rules Impose New Comparative Analyses Requirements on Plan Sponsors

The Proposed Rules retain the requirement that Health Plans that impose NQTLs on MH/SUD benefits perform comparative analyses on the design and application of all NQTLs and make the comparative analyses available to the Departments or any applicable State authority upon request, and outline the content requirements for the

comparative analyses.

The Proposed Rules also include new compliance obligations for Health Plans with respect to the comparative analyses.

What's new….

Notice of Noncompliance

- If a Department makes a final determination that a Health Plan is noncompliant, the Health Plan will be required to send a *stand-alone notice of noncompliance* to participants.
- Among other content, the participant notice must include the following: "Attention! The [Department of Labor/Department of Health and Human Services/Department of the Treasury] has determined that [insert the name of group health plan or health insurance issuer] is not in compliance with the Mental Health Parity and Addiction Equity Act."

ERISA Section 104(b)(4) Requests

- The Proposed Rules require Health Plans to provide the comparative analyses to participants, beneficiaries, or other authorized representatives in response to an ERISA Section 104(b)(4) request.
- Under ERISA Section 104(b)(4), Health Plans may be subject to penalties of up to $110 per day for each day of noncompliance if the comparative analyses aren't provided to a participant, beneficiary or other authorized representative within 30 days of such a request.

ERISA Claims Procedures

- The Proposed Rules require Health Plans to provide the comparative analyses, upon request, to a participant or beneficiary (or a provider or other person acting as a participant's or beneficiary's authorized representative) who has received an adverse benefit determination with respect to MH/SUD benefits.
- Failure to provide the comparative analyses in response to such a request may result in a claimant being deemed to have exhausted administrative remedies, allowing the claimant to file suit in court on the basis that the Health Plan has failed to provide or follow a reasonable claims procedure that would yield a decision on the merits of the claim.

If retained in the final regulations, these new requirements mean that Health Plans must be even more proactive in ensuring that they have their comparative analyses completed. It will not be sufficient to wait until the Departments request a comparative analysis in order to begin the process, which often takes months to complete and requires substantial input and cooperation with service providers. The new requirements also increase the risk of participant inquiries and litigation, particularly if a notice of noncompliance is required to be issued.

Next Steps for Plan Sponsors

The Proposed Rules, if finalized, will apply for plan years beginning on and after January 1, 2025. Until the Proposed Rules are finalized, plan sponsors are required to comply with the current guidance, which includes making comparative analyses available to the Departments or any applicable State authority upon request. Pending issuance of the final regulations, plan sponsors may wish to consider taking any or all of the following steps:

- Re-engage with insurers, third party administrators, and other third party service providers (Service Providers) to request the required comparative analyses or, at a minimum, the data necessary to complete them;

- Ensure that administrative services agreements require Service Providers to provide legally compliant comparative analyses or, at a minimum, all data required to perform legally compliant comparative analyses;

- Ensure that administrative services agreements require Service Providers to indemnify the plan sponsor for failing to provide legally compliant comparative analyses or, at a minimum, all data required to perform legally compliant comparative analyses;

- Engage with consultants and other external vendors with respect to their ability to conduct and prepare the required comparative analyses, and understand any associated timing requirements and cost; and

- Review any comparative analyses previously performed for legal compliance, update any comparative analyses previously performed to take design changes into account and perform all required comparative analyses, if not already completed.

If you have any questions, please contact any member of the Troutman Pepper Employee Benefits and Executive Compensation Practice Group.

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