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Tri-Agencies Report MHPAEA Compliance Lacking, But Don't Name and Shame Plans and Issuers . . . Yet

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On January 25, the U.S. Department of Labor (DOL), Department of Health and Human Services (HHS), and the Treasury (collectively the Tri-Agencies) published the first annual report on group health plans' and health insurance issuers' compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA) as amended by the Consolidated Appropriations Act, 2021 (CAA). The Report noted that *none* of the comparative analyses reviewed "contained sufficient information upon initial receipt." The Tri-Agencies made preliminary determinations of non-compliance for many plans and issuers, but the Report stressed that no final determinations had been made yet. Instead, plans and issuers may still take corrective action and, in so doing, avoid the triple-whammy of being named in next year's report, having notice of noncompliance sent to plan participants and enrollees (essentially rolling out a red carpet for class action litigation), and the Tri-Agencies notifying the state regulator. Plans and issuers should not count on the Tri-Agencies exercising such restraint in the future.

As detailed previously, the CAA codified prior guidance and expressly required plans and issuers to document comparative analyses demonstrating that the processes, strategies, evidentiary standards, and other factors used to apply each non-quantitative treatment limitation (NQTL) to mental health and substance use disorder benefits, both as written and in operation, are comparable to and applied no more stringently than those used to apply each NQTL to medical/surgical benefits in the same benefit classification. Health plans and issuers had to comply with the new requirements by February 10, 2021. The Tri-Agencies issued additional guidance about what constitutes a minimum, sufficient comparative analysis on April 2, 2021. The Report notes that one week later, on April 9, DOL began issuing letters requesting comparative analyses from plans and issuers.

But many plans and issuers were not prepared to respond. One reason is the continuing lack of a standardized format or template from the Tri-Agencies for exhibiting a sufficient comparative analysis. The iterations of the DOL's MHPAEA Self-Compliance Tool and multiple FAQs, have provided guidance on certain questions to ask and general orientation, but stopped short of identifying exactly how and what must be done to satisfy regulators. This concern is exacerbated by the fact that states may have additional and variable expectations, particularly during market conduct exams. Nonetheless, the Report's summaries of common missteps—such as mere conclusory assertions devoid of analyses, failure to explain how factors were measured and applied, and explanation of who was involved and how in the design and implementation of an NQTL—provides more grist for

iterating an effective comparative analysis model.

Another reason many plans and issuers struggled to produce sufficient comparative analyses, however, is that some plans believed their third-party administrators or service providers would provide the analyses. This highlights one of the complexities in MHPAEA compliance (as well as ERISA, more generally). In general, a plan may contract with a service provider or a third-party administrator to provide administrative services for the plan, such as utilization management, network development, and other activities that may limit the scope or duration of covered services—and so constitute NQTLs. DOL has jurisdiction over the plan, but not necessarily over the service provider or TPA; to enforce MHPAEA compliance against the service provider or TPA, DOL has to determine whether they are a fiduciary under ERISA and bring an action against the plan and its fiduciaries. That is a fact and labor intensive exercise.

It is no surprise, then, that DOL recommends that Congress amend ERISA to provide a direct line of attack to enforce parity compliance against service providers, TPAs, or other entities that provide administrative services to ERISA group health plans. Health insurance issuers, that is health insurers that are licensed and regulated by the states, often provide such administrative services. Historically, and as recounted in the Report, DOL seeks "to obtain voluntary global corrections . . . where a violation relates to an insurance product, prototype document, or systemic operation affecting multiple plans." Amending ERISA would enable mandatory global corrections and add additional enforcement teeth.

Likewise, the Report once again requests that Congress provide DOL authority to assess civil monetary penalties for MHPAEA violations. Currently, there are no such penalties. But DOL may require reprocessing of affected claims for benefits and, if the entity breached a fiduciary duty under ERISA, DOL may impose a penalty equal to 20% of the amount recovered under resolution with DOL or court order. And plan participants have brought claims to recover for alleged wrongful denials of benefits. A related recommendation asks Congress to make this recovery of denied benefits more explicit, amending "ERISA to expressly provide that participants and beneficiaries, as well as DOL on their behalf, may recover amounts lost by participants and beneficiaries who wrongly had their claims denied in violation of MHPAEA."

The Report also explains that DOL has increased staff and training to bring more resources to bear on MHPAEA compliance. Likewise, the NAIC, state insurance regulators, and state attorneys general have not been idle. Mental health access and equity, in addition to MHPAEA compliance, continue to be a focal point and a bipartisan political issue in both federal and state governments. Over the summer, the Biden Administration is expected to publish a new proposed rule on MHPAEA addressing the legislative changes made by the 21st Century Cures Act and CAA as well as the evolving guidance. It may be that those rules will give clearer instruction on NQTL comparative analyses and articulate additional standards for certain NQTLs.

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