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Proposed Mental Health Parity Regulations Arrive: Key Changes for Plan Sponsors

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On Tuesday, the Departments of Labor, Treasury, and Health and Human Services issued proposed amendments to regulations implementing the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) and new regulations implementing the non-quantitative treatment limitation (NQTL) comparative analysis requirements under MHPAEA. The proposed regulations introduce sweeping changes that would affect virtually all group health plans that cover mental health and substance use disorder benefits.

By way of background, MHPAEA requires that group health plans provide mental health and substance use disorder (MH/SUD) benefits in parity with medical and surgical benefits. Evaluation of whether benefits are in parity is performed for each classification of benefits under the plan. Although seemingly simple in concept, the nuanced nature of the parity rules has made application challenging for many plan sponsors. Below are three key areas of focus in the proposed rules that would significantly impact group health plan administration:

New Framework For Non-Quantitative Treatment Limitations: Non-quantitative treatment limitations (NQTLs) refer to non-numerical limitations on the scope or duration of treatment under a plan, such as prior authorization requirements. Under the new framework for assessing NQTLs in the proposed rules, a plan cannot apply an NQTL without violating MHPAEA unless the NQTL concurrently meets three separate requirements:

- ***No More Restrictive***: NQTLs applied to MH/SUD benefits in a classification cannot be more restrictive, as written or in operation, than the predominant NQTL that applies to substantially all medical/surgical benefits in the same classification. As proposed, a plan will need to assess the expected dollar amount of all plan payments for medical/surgical benefits in the classification to determine whether the NQTL applies to “substantially all” medical/surgical benefits, and then identify the most common or frequent variation of the NQTL for purposes of determining whether it is “predominant.” Consistent with other elements of the proposed regulations, this prong will require that a plan collect and evaluate data to confirm compliance.

- ***Design and Application***: The processes, strategies, evidentiary standards, or other factors used in designing and applying the NQTL to MH/SUD benefits in the classification must be comparable to, and applied no more stringently, than those used for designing and applying

the NQTL to medical/surgical benefits in the same classification. Key to applying this prong is the new threshold requirement that a plan cannot use any factor or evidentiary standard for this purpose if such factor or standard "discriminates" against MH/SUD benefits as compared to medical/surgical benefits. Whether a factor or standard discriminates against MH/SUD benefits is defined as being based on information that is biased or not objective in a manner that results in less favorable treatment of MH/SUD treatment.

- ***Data Evaluation***: The plan must collect relevant data designed to assess the impact of the NQTL on access to MH/SUD benefits as compared to medical/surgical benefits and then use that data to analyze whether the plan meets the "no more restrictive" and "design and application" prongs. If the data collected reveals "material differences" in access to MH/SUD benefits as compared to medical/surgical benefits, the plan must take reasonable action to address the material differences to assure compliance and document such actions (subject to a special rule for network composition, which is explained below).

All three requirements are subject to a bypass exception for NQTLs that impartially apply generally recognized independent professional medical or clinical standards. In addition, the "no more restrictive" prong and the non-discrimination component of the "design and application" prong are subject to a bypass exception if the NQTL was reasonably designed to detect or prevent and prove fraud, waste, and abuse and is narrowly tailored to that purpose.

Focus on Network Composition: The proposed regulations introduce special rules for NQTLs related to network composition. These special rules are designed to assess whether there are sufficient providers in the plan network available to participants to provide MH/SUD benefits.

- ***Data Collection***: To comply with the "data evaluation" prong for NQTLs related to network composition, plans are required to collect data on in-network and out-of-network utilization rates, network adequacy metrics (time, distances, and new patient availability), and provider reimbursement rates (as compared to billed charges)—in addition to the general data collection requirements for NQTLs described above. The Departments issued a detailed request for comments on the types of data that should be collected for this purpose, meaning the scope and content requirements for this prong could change.

- ***Material Differences***: When applying an NQTL to network composition, if the relevant data shows material differences in access to in-network MH/SUD benefits as opposed to medical/surgical benefits, that NQTL is deemed to fail the "no more restrictive" and "design and application" prongs (subject to a couple narrow exceptions).

- ***Potential Federal Enforcement Safe Harbor***: The proposed rules refer briefly to a proposed safe harbor for NQTLs related to network composition. In Technical Release 2023-01P, the Departments outline their intention to create a federal enforcement safe harbor specifically for network composition NQTLs whereby plans that meet specific "data-based" standards (with details to come) will not be subject to enforcement action for network composition-related NQTLs for a set period.

New Details on Required Comparative Analyses: Under MHPAEA, a group health plan is required to prepare and make available comparative analyses detailing the design and application of NQTLs for the MH/SUD benefits covered by the plan. The proposed regulations include minimum standards

and detailed content requirements for the comparative analyses that may prove helpful to plan sponsors when preparing the analyses. The proposed rules also include a requirement whereby a plan fiduciary would need to certify that it had reviewed the analysis and concluded it complied with the content requirements.

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Takeaways for Group Health Plan Sponsors: For the time being, the proposed regulations are simply that—proposed. Given the wide scope of comments requested by the Departments in the proposed rulemaking, it is possible that the final regulations may incorporate additional requirements or revise certain portions of the proposed rules, meaning it may be impractical for plan sponsors to start making changes now. That said, the proposed regulations represent a serious enforcement effort by the Departments and it is possible that the proposed regulations will be finalized in substantially the same form as proposed. Group health plan sponsors should be prepared for a quick turnaround to confirm compliance once the regulations are finalized.

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