

The Proposed MHPAEA Regulations: Comments on Behavioral Health Carve-Out Vendors

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This post continues our focus on comment letters submitted in response to [proposed regulations](#) under the Mental Health Parity and Addiction Equity Act (MHPAEA). The proposed regulations were issued earlier this year by the US Departments of Labor, Health and Human Services and the Treasury (the Departments). Our previous MHPAEA content is available [here](#).

The MHPAEA generally requires parity between mental health/substance use disorder (MH/SUD) benefits and medical/surgical (M/S) benefits with respect to annual and lifetime dollar limits, financial requirements and treatment limitations. Treatment limitations may be quantitative (quantitative treatment limitations or QTLs) or nonquantitative (nonquantitative treatment limitations or NQTLs). As the names suggest, QTLs involve limits to which numbers may be applied, e.g., cost-sharing amounts or length of a hospital stay, while NQTLs involved limitations that are not so restricted. The Consolidated Appropriations Act, 2021 added a requirement that plans and issuers perform and document comparative analyses of the design and application of NQTLs on MH/SUD and M/S benefits. The proposed regulations focus on the regulation of NQTLs and compliance with the comparative analyses requirement.

The proposed regulations establish a three-prong test that plans and issuers must pass to impose an NQTL in a classification. To qualify, an NQTL:

- Must be no more restrictive when applied to MH/SUD benefits as compared to M/S benefits;
- The plan or issuer must meet specified design and applications requirements; and
- The plan or issuer must collect, evaluate and consider the impact of relevant data on access to MH/SUD benefits as opposed to M/S benefits and take reasonable action to address any material differences.

These requirements, if adopted as proposed, could make it difficult for group health plans to use third-party payers that manage their MH/SUD benefits under so-called “MH/SUD carve-out” vendor arrangements. Also referred to generically as “managed behavioral health organizations,” MH/SUD carve-out vendors are payers that claim specialized expertise with, and focus exclusively on the treatment of, mental health and substance use disorders. Plans contract with these providers for reasons of cost, quality and ease of administration. Even under current law, demonstrating compliance for a single NQTL involves a number of steps, each of which must be repeated for each additional NQTL. NQTLs designed and adopted by mainstream M/S providers and administrative services vendors and carve-out vendors will differ in their particulars. Layering on new, quantitative “no more restrictive” and “data collection” requirements will add a new level of complexity that may be prohibitively costly for plans that seek to use MH/SUD carve-out vendors.

Even if plans using MH/SUD carve-out vendors could manage to obtain and process all the required data, there is another concern: These entities typically design and adopt their own NQTLs that are presumably informed by their expertise adjudicating MH/SUD claims.

These NQTLs will at least in some if not many instances bear little resemblance to the NQTLs adopted by a plan's M/S benefit vendors, networks and payers. The proposed regulations include exceptions under which an NQTL applied to MH/SUD benefits in any classification would not be considered to violate the no more restrictive requirement if the NQTL impartially applies independent professional medical or clinical standards or applies standards related to fraud, waste and abuse that meet specific requirements. We suppose that it's possible that these exceptions could support even material differences in NQTL designs.

There is a great deal riding on, and more than a little controversy over, the scope of any independent professional medical or clinical standards/fraud, waste and abuse exceptions that might be adopted in a final regulation. If these exceptions are narrowly construed, a final rule might doom carve-out arrangements or at least make them far more challenging to maintain. But if the Departments are persuaded that MH/SUD carve-outs have some merit, then the exceptions might tolerate some level of difference. Notably, the exceptions apply only to the no more restrictive requirement, *i.e.*, where an NQTL applied to MH/SUD benefits is otherwise determined to be more restrictive, as written or in operation, than the predominant NQTL applied to substantially all M/S benefits in the same classification. The data collection requirement is not affected.