

Mental Health Parity Remains a Priority for Tri-Agency: MHPAEA Compliance in Response to the CAA

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The Mental Health Parity and Addiction Equity Act of 2008's ("MHPAEA") provisions of the Consolidated Appropriations Act, 2021 (the "CAA") became effective February 10, 2021 and added a requirement for group health plans and health insurance issuers to prepare an analysis demonstrating compliance with MHPAEA's nonquantitative treatment limitation ("NQL") requirements. The CAA specifically requires the Secretaries of the Departments of Health and Human Services ("HHS"), Labor ("DOL") and the Treasury (collectively, the "Secretaries" or "Tri-Agencies") to request at least twenty analyses per year **starting this year**. In fact, the DOL has already started to collect the NQL analyses mandated by the CAA and *is already issuing findings letters based on their initial reviews*. The CAA further requires the Secretaries to submit to Congress, and make publicly available, a report that identifies each group health plan or health insurance issuer that is determined not to be in compliance.

MHPAEA has increasingly been the focus of regulatory and enforcement activity at the federal and state levels, as well as private litigation. The DOL, in particular, has emphasized that MHPAEA compliance is one of their top enforcement priorities. Given the focus on MHPAEA compliance and the complexity in preparing the NQL comparative analyses, employers and health insurers must prioritize preparing the NQL analyses as a number one compliance issue.

MHPAEA Background

The MHPAEA Final Regulations, published on November 13, 2013, require group health plans and health insurance issuers to ensure that any processes, strategies, evidentiary standards or other factors

If you have any questions, please do not hesitate to contact your regular Groom attorney or the authors listed below:

Lisa Campbell

lcampbell@groom.com

(202) 861-6612

Zack Hoffmann-Richards

zhoffmann-

richards@groom.com

(202) 861-6620

Viv Hunter Turner

vturner@groom.com

(202) 861-6324

Ryan Temme

rtemme@groom.com

(202) 861-6659

used in applying NQTLs to mental health or substance use disorder (“MH/SUD”) benefits are comparable to, and applied no more stringently than, the processes, strategies, evidentiary standards or other factors used in applying the limitation with respect to medical/surgical (“M/S”) benefits in the same “classification.” The focus of the NQTL analysis is not on the outcome, but on the process used to determine and apply the NQTL.

On October 23, 2020, the DOL’s Employee Benefits Security Administration (“EBSA”) released an updated self-compliance tool to help employers comply with MHPAEA. The self-compliance tool provides an overview of MHPAEA’s requirements, including the NQTLs; summarizes guidance issued through Frequently Asked Questions; includes examples of how a group health plan can come into compliance if it identifies certain MHPAEA violations; includes compliance examples and warning signs; and provides best practices for establishing an internal MHPAEA compliance plan. We expect that the DOL will update the self-compliance tool next year to incorporate the CAA’s new requirements.

Overview of the Tri-Agencies’ April 2, 2021 FAQs and Enforcement Activity Related to the Comparative Analysis Document Requirement

On April 2, 2021, the Tri-Agencies released a set of FAQs to provide guidance with respect to the MHPAEA requirements added by the CAA.

The FAQs explain that the comparative analyses must be sufficiently “specific, detailed and reasoned” to demonstrate that the processes, strategies, evidentiary standards or other factors used in applying NQTLs to MH/SUD benefits are comparable to, and applied no more stringently than, the processes, strategies, evidentiary standards or other factors applicable to M/S benefits within the same classification.

The FAQs include a list of very specific, granular evidence and data that must be produced to meet the disclosure requirement, which includes a robust discussion of *each* of the nine elements outlined below:

- a clear description of the specific NQTL, plan terms, and policies at issue;
- identification of the specific MH/SUD and M/S benefits to which the NQTL applies within each benefit classification, and a clear statement as to which benefits identified are treated as MH/SUD and which are treated as M/S;
- the factors, evidentiary standards or sources, or strategies or processes considered in the design or application of the NQTL and in determining which benefits are subject to the NQTL (an explanation should be provided if any factors were given more weight than others and the specific reasons for doing so, including any data used in the determination);
- if any factors, evidentiary standards, strategies, or processes are defined quantitatively, the precise definitions used and any supporting sources must be included;

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- an explanation as to any variations in the application of a guideline or standard used for MH/SUD benefits versus M/S benefits and the process and factors used for establishing that variation;
- if the application of the NQTL turns on specific decisions in administration of the benefits, then the nature of the decisions, the decision maker(s), the timing of the decisions, and the qualifications of the decision maker(s) should be identified;
- if the analyses rely on any experts, an assessment of each expert's qualifications and the extent to which the expert's evaluations in setting recommendations were relied upon;
- a reasoned discussion of the findings and conclusions as to the comparability of the processes, strategies, evidentiary standards, factors, and sources identified within each affected classification, and their relative stringency, both as applied and as written, including citations to any specific evidence considered and any results of analyses indicating that the plan or coverage is or is not in compliance with MHPAEA; and
- the date of the analyses, name, title and position of the person(s) who performed or participated in the analyses.

Additionally, the FAQs outline a list of documents and relevant information that plans and issuers should have available to support the comparative analyses. The list of documents tracks the list of documents the DOL may ask for when auditing a plan for MHPAEA compliance under the DOL's more general subpoena authority, as outlined in the self-compliance tool: including records documenting NQTL processes (including any materials that may have been prepared for compliance with any applicable reporting requirements under State law), documentation the plan or issuer relied upon in determining the NQTLs are applied no more stringently to MH/SUD benefits than to M/S benefits, samples of covered and denied MH/SUD and M/S benefit claims, and documents related to MHPAEA compliance with respect to service providers (if a plan delegates management of some or all MH/SUD benefits to another entity).

The FAQs specify that the Tri-Agencies will focus on NQTLs involving potential MHPAEA violations or complaints as well as the following NQTLs in its enforcement efforts:

- prior authorization requirements for in-network and out-of-network *inpatient* services;
- concurrent review for in-network and out-of-network *inpatient and outpatient* services;
- standards for provider admission to participate in a network, including reimbursement rates; and
- out-of-network reimbursement rates (plan methods for determining usual, customary, and reasonable charges).

However, the Tri-Agencies indicated that plans and issuers must perform and document comparative analyses for *all* NQTLs imposed, and the Tri-Agencies or applicable State authorities may request or review different or additional NQTL analyses for MHPAEA compliance. The Tri-Agencies also indicated that plans and issuers should be prepared to make a list available of all NQTLs for which they have prepared a comparative analysis and a general description of any documentation that exists

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regarding each analysis. In this regard, we note that the DOL has requested, in some cases, as part of its requests for analyses under the CAA, a list of all NQTLs for which the plan has conducted a comparative analysis.

Based on the FAQs, it appears that in the short-term the DOL will be folding enforcement of the CAA into its existing enforcement work and structure, and is not creating a separate process to address the CAA's new MHPAEA's requirements. The DOL has already prepared a template letter request for documents sufficient to show compliance with the CAA's NQTL analysis requirement — and the DOL is quickly following up with insufficiency findings for some of the documentation they have received to date.

Some Concluding Thoughts

Plans and issuers should prioritize the MHPAEA NQTL analyses as a number one compliance activity. In our experience, the level of detail demanded by regulators surrounding the evidentiary factors — including numeric support for parity — is very detailed, and has not typically been maintained by plans or issuers. Because of the complexity and length of the analyses it is important to take early action to ensure that responses are adequate in the event of a request from the DOL. Comparative analyses must be prepared now by plans and issuers to be prepared to submit upon request by a State, the Secretaries, participants, beneficiaries, authorized representatives or enrollees. The DOL is prioritizing MHPAEA NQTLs as a top area for enforcement. Accordingly, plans and issuers should be actively working on a plan to develop the comparative analyses required under the CAA to be sure they are prepared to respond to a request for the NQTL comparative analyses. Plans and issuers should also work on developing an internal MHPAEA compliance plan that involves training, periodic reviews of MH/SUD and M/S claim denials and regular updates to the NQTL comparative analyses.

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