

Agencies Propose Regulations to Bolster Mental Health Parity Rules and Solidify NQTL Comparative Analysis Requirements

EBIA Weekly (July 27, 2023)

Requirements Related to the Mental Health Parity and Addiction Equity Act: Proposed Rules, 26 CFR Part 54; 29 CFR Part 2590; 45 CFR Parts 146 and 147, __ Fed. Reg. __ (____); DOL Technical Release No. 2023-01P (July 25, 2023)

Proposed Regulations

Technical Release

The DOL, IRS, and HHS have released an advance copy of proposed regulations that would amend existing rules under the Mental Health Parity and Addiction Equity Act (MHPAEA) and implement the nonquantitative treatment limitation (NQTL) comparative analysis requirement added by the Consolidated Appropriations Act, 2021 (CAA, 2021). The proposed regulations are the latest indication of increasing agency attention toward plan and insurer compliance with the parity rules—particularly with respect to the comparative analysis requirement. Here are highlights of the proposals:

- **Definitions.** Multiple definitions would be amended or added, including clarifications of the terms “medical/surgical,” “mental health,” and “substance use disorder.” The proposed definitions would confirm that eating disorders are considered mental health conditions, as is autism spectrum disorder (ASD). In addition, new definitions for the terms “processes,” “strategies,” “evidentiary standards,” and “factors” would provide clarity in the development of sufficient NQTL comparative analyses. And the definition of “treatment limitation” would be revised to clarify that the illustrative list of NQTLs to which the definition refers is non-exhaustive and to state that a complete exclusion of all benefits for a particular condition is not considered a treatment limitation.
- **NQTLs.** The proposed rules would add additional requirements for plans and insurers that apply NQTLs to mental health and substance use disorder (MH/SUD) benefits. Subject to narrow exceptions that allow the imposition of NQTLs consistent with generally recognized independent professional medical or clinical standards or standards related to fraud, waste, and abuse, the proposals would allow the imposition of an NQTL only if (1) the limitation is no more restrictive as applied to MH/SUD benefits than to medical/surgical benefits, (2) the plan or insurer satisfies requirements related to the design and application of the NQTL, and (3) the plan or insurer collects, evaluates, and considers the impact of relevant data on access to MH/SUD benefits relative to access to medical/surgical benefits and takes reasonable action to address any material differences. The proposed regulations set forth extensive guidance on each of the three conditions and examples of their application to certain NQTLs. Also included are new examples of NQTLs commonly applied by group health plans, including prior authorization and peer-to-peer concurrent review requirements, provider network admission

standards, and limitations on ASD and applied behavioral analysis (ABA) therapy, eating disorders, and residential treatment.

- **Comparative Analyses.** The proposals would codify in regulations the requirement to conduct meaningful NQTL comparative analyses, provide additional details on their form and content, and explain when and how plans and insurers would be required to provide them to participants, beneficiaries, and state or federal agencies. The proposed content requirements are based on the process set forth in the 2020 MHPAEA Self-Compliance Tool (see our article), as well as the express requirements of the CAA, 2021. The analysis would have to demonstrate that, in any classification, under the terms of the plan, both as written and in operation, any processes, strategies, evidentiary standards, or other factors used in designing and applying the NQTLs to MH/SUD benefits are comparable to, and applied no more stringently than, those used with respect to medical/surgical benefits. The analysis would be required to include relevant data and an evaluation of the outcomes that result from the NQTL's application. For plans subject to ERISA, one or more named fiduciaries would have to certify that they have reviewed the analysis and that it does (or does not) comply with the content requirements.

A Technical Release issued in conjunction with the proposed regulations indicates that NQTLs related to network composition are a particular focus for the agencies. The release outlines related principles and solicits comments (by October 2, 2023) on future guidance that would address the type, form, and manner of data collection and evaluation for a comparative analysis of a plan's network composition. Four types of required data are under consideration: (1) out-of-network utilization of certain inpatient and outpatient services during two calendar years prior to the plan year for which the analysis is prepared, (2) the percentage of in-network providers actively submitting claims for MH/SUD services as compared to those submitting claims for medical/surgical services, (3) time and distance standards reflecting practical network availability based on services offered and geographic location, and (4) reimbursement rates for specified in-network and out-of-network services. The agencies are considering requiring all data to be collected and evaluated by a TPA or other service provider in the aggregate for all plans or policies using the same network or schedule of reimbursement rates. The release also discusses a potential enforcement safe harbor for NQTLs related to network composition.

EBIA Comment: The proposed regulations are extensive, and this article highlights only a few of the provisions. Plan administrators and insurers will want to familiarize themselves with the proposals and consider submitting comments within 60 days after publication in the Federal Register. The agencies have also released their [2023 MHPAEA Comparative Analysis Report to Congress](#), along with the DOL and HHS [FY 2022 MHPAEA Enforcement Fact Sheet](#). These reports will be covered in future editions of the EBIA Weekly. For more information, see EBIA's Group Health Plan Mandates manual at Section IX ("Mental Health Parity"). See also EBIA's Self-Insured Health Plan Mandates manual at Section XIII.C.2 ("MHPA and MHPAEA: Mental Health Parity").

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