

# update

## Federal Agencies Issue Guidance and Increase Enforcement of Mental Health Parity and Addiction Equity Act

The federal departments implementing the Mental Health Parity and Addiction Equity Act (MHPAEA) requires parity between medical/surgical benefits and mental health/substance use disorder (MH/SUD) benefits. Health plans must provide parity in quantitative financial requirements or treatment limits (e.g., cost sharing and day or visit limits).

Health plans must also provide parity in *non-quantitative* treatment limits (NQTs), tools to manage MH/SUD benefits. Examples of NQTs include medical management standards, formulary designs, step-therapy protocols, network admission standards and factors used in setting provider reimbursement methodologies.

The federal departments implementing MHPAEA — the Departments of Health and Human Services, Labor and Treasury (the Departments) — recently released guidance<sup>1</sup> required under the 21<sup>st</sup> Century Cures Act.<sup>2</sup> This *Update* summarizes the new guidance, most of which focuses on NQTs.

### DOL Tool for MHPAEA Self-Compliance

The Department of Labor (DOL) has issued an updated self-compliance tool for MHPAEA compliance. It revises a version that has been in circulation since 2014 and pre-dated by earlier versions.

The tool includes a four-step test for analyzing compliance with the NQTL requirements. The tool also includes additional examples of NQTs. Disclosure compliance tips are part of the tool.

<sup>1</sup> On April 23, 2018, the Department of Health and Human Services (HHS) issued its [Action Plan for Enhanced Enforcement of Mental Health and Substance Use Disorder Coverage](#) and the Departments jointly issued [Proposed FAQs about Mental Health and Substance Use Disorder Parity Implementation and the 21<sup>st</sup> Century Cures Act](#) and a [revised draft MHPAEA disclosure template](#). The Department of Labor (DOL) separately issued its 2018 Report to Congress, [Pathway to Full Parity](#), its [Fiscal Year 2017 MHPAEA Enforcement Fact Sheet](#) and its [2018 MHPAEA Self-Compliance Tool](#).

<sup>2</sup> The 21<sup>st</sup> Century Cures Act (Public Law 114-255), which was enacted in 2016, includes a number of requirements designed to improve compliance with MHPAEA. Specifically, the law called on the Departments to issue a compliance guide and additional clarifying guidance related to NQTs, as well as to solicit feedback regarding how to improve the disclosure request process under MHPAEA. In addition, the Departments were directed to provide greater transparency in enforcement activities. Public Law 114-255 is available online at the [Government Printing Office website](#). For more information about this law, see Segal Consulting's February 15, 2017 *Update*, "[21<sup>st</sup> Century Cures Act Enhances Mental Health Parity Oversight and Creates New Small Employer Health Reimbursement Arrangement](#)."



### Health Compliance News Highlights:

- Documents released by the Departments reaffirm their commitment to vigorous enforcement of MHPAEA.
- New FAQs are proposed, and plan sponsors are given the opportunity to comment before they are issued in final form.
- The revised DOL Self-Compliance Tool should help plan sponsors understand better how to comply with some aspects of MHPAEA.

## Proposed FAQs About MHPAEA

The Departments issued 12 answers to frequently asked questions (FAQs) addressing various issues under MHPAEA. The FAQs are proposed and comments are requested by June 22, 2018.

### FAQs on NQTLs

The majority of the FAQs addressed the application of NQTLs in various contexts. For example, the FAQs address the need to ensure that plans that exclude coverage for experimental or investigative treatment apply the exclusion in the same manner for medical/surgical and mental health/substance use disorder claims; in particular, with respect to professionally recognized treatment guidelines and controlled randomized trials for Applied Behavioral Analysis (ABA) therapy used to treat Autism Spectrum Disorder.

In addition, the FAQs address application of dosage limits for prescription medications (e.g., buprenorphine used to treat opioid use) and differences in step therapy protocols as applied to mental health/substance use disorder benefits. The FAQs also clarify that excluding residential treatment for eating disorders is impermissible if the plan covers inpatient treatment outside of a hospital for medical/surgical conditions.

### FAQs on Disclosure Requirements

The FAQs also address disclosure requirements under MHPAEA. Generally, plans governed by the Employee Retirement Income Security Act that have a provider network must include a general description in the Summary Plan Description (SPD) and provide a copy of the list upon request. Most plans use websites for provider network lists. The FAQ would change current regulations and require that a network directory be provided in hard copy unless the DOL's electronic disclosure requirements are met, meaning participants must have a computer and printer at their worksite. The proposed rule could require significant changes in disclosure for plans with participants who do not have a computer and printer at their worksite.

In addition, changes to the directory must be announced in a Summary of Material Modifications (SMM).

## Revised Draft MHPAEA Disclosure Template

In June 2017, the Departments published a draft model form that participants, enrollees or their authorized representatives may (but are not required to) use to request information from a group health plan or insurer regarding mental health or substance use disorder benefits and compliance with MHPAEA. The Departments solicited comments with respect to the first proposed model form and have now issued a slightly revised draft model form.

## DOL 2018 Report to Congress and HHS Action Plan

Under MHPAEA, the DOL is required to provide a bi-annual report to Congress regarding MHPAEA implementation. The 2018 Report summarizes activities undertaken by the Departments since the last report was issued, including activities of the White House Opioid Commission<sup>3</sup>, stakeholder listening sessions and HHS's launch of a MHPAEA web portal: [www.parity.hhs.gov](http://www.parity.hhs.gov).

The Report gives a comprehensive overview of DOL audit activities, including common plan documents that may be requested and global corrective actions that may be pursued particularly in the case of systemic violations by prototype insurer or third-party administrator policies or practices. Most notably, the Report announces two pilot programs, one focused on the application of MHPAEA to coverage of the treatment of

The DOL's Report to Congress notes, "EBSA has also instituted several pilot programs to further prioritize the enforcement of MHPAEA."

<sup>3</sup> The President's Commission on Combating Drug Addiction and the Opioid Crisis was initiated through an Executive Order signed by the President on March 29, 2017. The Commission's mission included identifying and describing federal funding used to combat drug addiction, identifying best practices for prevention and making recommendations to the President. Recommendations to inform the ongoing White House initiative were delivered in a [Final Report](#) on November 1, 2017.

opioid use disorders, including coverage of FDA-approved medications to treat these disorders, and another on potential parity violations through the targeting and evaluation of NQTLs imposed by large behavioral health providers and insurers.

HHS also issued an Action Plan, which describes already released consumer resources and tools, and technical assistance provided to state regulators. It also includes a timeline for additional action items, including a tool kit to assist state regulators with parity implementation and a report on *Assessing the Impact of Parity in the Large Group Employer-Sponsored Insurance Market*. These items are particularly important for governmental plan sponsors, where HHS enforces MHPAEA. Nothing, however, changes the current rules for non-federal governmental plan sponsors that opt-out of application of MHPAEA. These plans may still opt-out on an annual basis if they satisfy HHS's requirements for filing the opt-out and notice to participants.

Non-federal governmental plan sponsors may still choose to opt-out of application of MHPAEA.

## Implications for Health Plans

The materials issued by the Departments signal an ongoing commitment to vigorously enforce the requirements of MHPAEA. Plan sponsors that wish to look at their plan and MHPAEA compliance can use the self-compliance tool to examine their plan's language and operations. In addition, while the FAQ guidance also provides insights with respect to the Departments' interpretation of the law, the FAQs are proposed, providing opportunity for comment as to the practical implications of these interpretations.

## How Segal Can Help

Segal can assist in drafting and providing any comments to the Departments regarding this recent proposed guidance. We can also work through the self-compliance tool with a plan sponsor to ensure that their MHPAEA compliance plans are up-to-date. Segal works with trustees and their fund counsel on compliance issues and can assist plan sponsors in ensuring compliance with MHPAEA.

## Questions?

For more information about how this new guidance may affect your plan, please contact your Segal consultant or the [Segal office nearest you](#).

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