

# Publications

## MHPAEA Proposed Rulemaking and Technical Release

### Related Attorneys

Elizabeth Howard

Jennifer Bibart Dunsizer

Jacquelyn Meng Abbott

Rylee R. Snively

### Related Services

Employee Benefits and Executive Compensation

Labor and Employment

### AUTHORED ARTICLE | 8.16.2023

On July 25, 2023, the Departments of Treasury (Treasury), Labor (DOL), and Health and Human Services (HHS) (collectively, the Departments) issued a [notice of proposed rulemaking](#) with proposed amendments to the [2013 regulations](#) implementing the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). If finalized as proposed, the rules would expand requirements for health plans to document a comparative analysis that the plans' nonquantitative treatment limitations (NQTLs) on access to mental health and substance use disorder (MH/SUD) benefits are no more restrictive than the NQTLs imposed on medical/surgical (M/S) benefits. If finalized, the proposed rules would be effective the first plan year beginning on or after January 1, 2025.

### Proposed Rules

The proposed rules would strengthen existing MHPAEA protections and establish new requirements for plans. Below is a summary of the primary changes:

#### *Plan Fiduciary Obligation*

Under the proposed rules, named fiduciaries have an obligation to review completed NQTL analyses and certify that the plans are compliant.

#### *Data Collection and Evaluation*

The proposed rules would revise the process to demonstrate that a plan complies with MHPAEA. First, the NQTL as applied to MH/SUD benefits must be "no more restrictive" than the predominant limitation on M/S benefits. That is, under the proposed rules, a plan cannot apply any NQTL to a MH/SUD benefit in any classification that is more restrictive than the predominant NQTL applying to at least two-thirds of M/S benefits in the same classification.

Second, the plan must document that the design and application of each NQTL does not rely on factors and evidentiary standards that discriminate against MH/SUD benefits as compared to M/S benefits.

Third, the plan would be required to collect and evaluate data to assess the impact of NQTLs on access to MH/SUD and M/S benefits, and consider whether the NQTL, in operation, complies with the first and second requirements listed above. If this data shows that outcomes are more stringent for MH/SUD benefits than for M/S benefits, plans will need to act. The proposed rules take the position that a material difference in access to MH/SUD benefits as compared to M/S benefits is a strong indication of noncompliance. If a material difference in access is identified, plans must: (i) address the material difference in access by taking reasonable actions to ensure compliance, and (ii) document mitigation steps. An NQTL in any classification is not required to collect outcomes data if it impartially applies independent professional medical or clinical standards. An NQTL that is appropriately designed and uses standards to detect or prevent and prove fraud, waste, and abuse will not be considered to violate the requirements applicable to NQTLs.

The proposed rules also provide that a group health plan may not apply any NQTL that is only applicable to MH/SUD under the plan and not applicable to any M/S benefits in the same category.

### *Meaningful Benefit*

The proposed rules clarify that if a plan provides any type of benefits for a MH/SUD condition, then the plan must also provide meaningful treatment benefits for that condition in the other classifications in which it provides M/S benefits. For example, if a plan covers medications for treating a MH/SUD condition, then the plan must also cover counseling treatment for that condition (assuming that the plan would cover medication and counseling for a M/S benefit).

### *Examples*

The proposed rules include new examples to add clarity regarding prior authorization and other medical management techniques for MH/SUD benefits, network composition standards, and factors to determine out-of-network reimbursement rates.

### **Technical Release**

In addition to the proposed rules, the Departments published [Technical Release 2023-01P](#), Request for Comment on Proposed Relevant Data Requirements for Nonquantitative Treatment Limitations (NQTLs) Related to Network Composition and Enforcement Safe Harbor for Group Health Plans and Health Insurance Issuers Subject to the Mental Health Parity and Addiction Equity Act. The technical release outlines the type, form, and manner of data to be collected regarding network composition adequacy if the proposed rules were to be finalized. When assessing network composition compliance, plans must collect data on: (i) out-of-network utilization, (ii) percentage of in-network providers actively submitting claims, (iii) time and distance standards, and (iv) reimbursement rates. The technical release also states the Departments' intent to create an enforcement safe harbor for plans that meet or exceed specific data-based standards regarding network composition NQTLs. In the technical release, the Departments list twelve questions related to data that might be useful in creating a rule to measure network adequacy.

Comments in response to these questions would allow the Departments to determine what data would be helpful.

The technical release further discusses requiring plans to collect and evaluate relevant data on the percentage of in-network providers actively submitting claims from the full six calendar months that ended ninety days prior to the month in which the comparative analysis was conducted. If no MH/SUD claims were submitted during that period then that may indicate an insufficient network rather than a healthy population.

### Next steps

Currently, these are only proposed rules, but if finalized, the rules would be effective for plan years beginning on or after January 1, 2025. Plan sponsors should:

1. Evaluate the impact these proposed rules would have on their MHPAEA compliance;
2. Decide whether to submit comments on the proposed rules and/or technical release. Comments are due October 2, 2023.
3. Attend a Vorys in-person seminar to learn more. The Vorys 2023 Benefits Conferences will be hosted in Cincinnati on Sept. 12, 2023 and in Columbus on Sept. 19, 2023. To learn more and to register, [click here](#).