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# Sweeping Changes in Guidance – DOL's Proposed MHPAEA Rule

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# Agenda

- Background on MHPAEA
- The Proposed Rules
  - List of NQTLs
  - New NQTL test
  - Comparative analyses content requirements
  - Additional requirements
  - Applicability date
- DOL Technical Release
- What Does This Mean for Plan Sponsors?

# Background on MHPAEA

# Background - MHPAEA

- **Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA)** provided for parity for treatment limits and financial requirements.
- **Interim Final Regulations (2010)** established parity standards for financial requirements, quantitative treatment limits and non-quantitative treatment limits (NQTLs) on a classification-by-classification basis.
- **Final Regulations (2013)** added sub-classifications for benefits furnished on an outpatient basis for (1) office visits and (2) all other items and services and added additional examples of NQTLs.

# Background - NQTLs

- **NQTL rule in IFR/Final Regulations:** *Any processes, strategies, evidentiary standards or other factors used in applying the NQTL to MH/SUD benefits must be comparable to and applied no more stringently than the processes, strategies, evidentiary standards or other factors used in applying the limitation with respect to M/S benefits.*
- **Illustrative list of NQTLs in IFR:**
  - Medical management standards
  - Prescription drug formulary design
  - Standards for provider admission to a network, including reimbursement rates
  - Plan methods for determining usual, customary, and reasonable charges
  - Fail-first policies or step-therapy protocols
  - Exclusions based on failure to complete a course of treatment
  - Restrictions based on geographic location, facility type, provider specialty

# Background - CAA

- Plans and issuers must make available to the Secretaries of Labor, Treasury and Health and Human Services, upon request, a comparative analysis.
  - Requirement effective February 10, 2021 - 45 days after enactment of the Consolidated Appropriations Act, 21 (CAA).
- Each Secretary must request a least 20 comparative analysis from plans or issuers “that involve potential violations of [MHPAEA] or complaints of NQTLs and any other instances the Secretary deems appropriate.”

# Background – DOL Enforcement

- MHPAEA is a priority enforcement issue for the Department of Labor (DOL).
- DOL is utilizing its existing enforcement processes to enforce the CAA provisions.
- The DOL has issued **182 requests** for comparative analysis documentation sufficient to show compliance with the CAA's comparative analysis requirement.
- Following the submissions for the comparative analyses, the DOL has:
  - followed up with insufficiency findings, providing plans an opportunity to address specific questions;
  - Issued initial determinations of noncompliance which required corrective action plans (CAPs) within 45 days; and
  - Issued three (3) final determinations of noncompliance.

# **DOL Issues Set of MHPAEA Guidance**

New tri-agency guidance on MHPAEA:

- Proposed Rules
  - Comments due October 2
- Technical Release on Data Requirements for Network Composition NQTL and Enforcement Safe Harbor for
  - Comments due October 2
- 2023 Report to Congress (Report)
- 2022 Enforcement Fact Sheet



# The Proposed Rules

# Current Rules/Guidance v. Proposed Rules

## 2013 Final Rule and Current Guidance

NQTL rule = process-oriented, comparable/no more stringent, in writing & in operation

If cover MH/SUD in a benefit classification, must cover MH/SUD benefits in all classifications

NQTL comparative analysis content – FAQ 45 describes 9 elements

Fairly discreet illustrative list of NQTLs

If DOL makes final determination of non-compliance, notice to enrollees and plan listed in Report to Congress

## Proposed Rules

NQTL rule now 3-part test:

1. substantially all/predominant (math) test;
2. design & application/non-discrimination test; and
3. outcomes data (material difference=strong indicator of non-compliance; special rule for network composition NQTL – material difference=noncompliance);

Narrow exceptions; significant implications for use of medical management

If cover MH/SUD condition in a benefit classification, must cover “meaningful benefits” for that condition in every classification, as compared to M/S

NQTL comparative analysis content & list/description of NQTLs – MANY MORE required elements as well as certification by fiduciary

Much longer illustrative list of NQTLs in regulations PLUS additional NQTLs discussed in preamble

If DOL makes final determination of non-compliance, notice to enrollees and plan listed in Report to Congress AND DOL can order plan to not apply NQTL to MH/SUD benefits

VS

# NQTL - Defined

- **What is an NQTL?**
  - An NQTL is defined as a limitation on the scope or duration of benefits that is not quantitative.
- **What NQTLs has the DOL identified as a priority?**
  - Prior authorization
  - Concurrent review
  - Provider admission to a network, including reimbursement rates
  - Out-of- network reimbursement
  - Impermissible exclusions of key treatments for mental health conditions and substance use disorders (*NEW* in Report)
  - Adequacy standards for MH/SUD provider networks (*NEW* in Report)

# List of NQTLs


- **Proposed Rules**
  - Clarify that the list of NQTLs is a non-exhaustive list of examples, which may be updated as part of future guidance or rulemaking.
  - Replace the existing NQTL “standards for provider admission to participate in a network, including reimbursement rates” with a much broader definition:
    - “standards related to network composition, including but not limited to, standards for provider and facility admission to participate in a network or for continued network participation, including methods for determining reimbursement rates, credentialing standards, and procedures for ensuring the network includes an adequate number of each category of provider and facility to provide covered services under the plan or coverage.”
  - Replace the existing NQTL “usual, customary, and reasonable charges” with an expanded NQTL:
    - “methods for determining out-of-network rates, such as allowed amounts; usual, customary, and reasonable charges; or application of other external benchmarks for out-of-network rates.”

# More NQTLs ...

- Plans must have an NQTL comparative analysis for NQTLs that are *not* included on the list in the regulation.
- Examples of additional NQTLs listed in the preamble include:
  - concurrent care review;
  - billing restrictions (e.g., licensed provider must bill through or under the supervision of another type of licensed provider);
  - retrospective review;
  - treatment plan requirements;
  - refusal to cover treatment until comprehensive assessment by specific providers;
  - outlier management; and
  - limitations based on expectation of improvement, likelihood of progress, or demonstration of progress.

# New Proposed 3-Part Test for NQTLs

- Plans and issuers not permitted to impose an NQTL unless they meet a new, 3-part test:
  1. “Substantially all/predominant” test;  
**and**
  2. “Design and application” requirement;  
**and**
  3. “Relevant data evaluation” requirement.



## Part 1: “Substantially All/Predominant” Test

- *Newly applies the QTL test to NQTLs.*
- A plan or issuer may not apply any NQTL to MH/SUD benefits in any classification that is more restrictive, as written or in operation, than the **predominant** NQTL that applies to **substantially all** M/S benefits in the same classification.
- **Exception** for use of independent professional medical or clinical standards, or standards related to fraud, waste, and abuse.





## Part 2: “Design and Application” Requirement

- Plan or issuer must satisfy requirements related to the “design and application” of the NQTL.
  - Comparable to IFR standard
- Must ensure that no factor or evidentiary standard “discriminates” against MH/SUD benefits as opposed to M/S benefits.
  - **Exception** for independent professional medical or clinical standards, or standards related to fraud, waste, and abuse.





## Part 3: “Relevant Data Evaluation” Requirement

- **Required use of outcomes data**
  - Mandates that plans collect and evaluate outcomes data in a manner reasonably designed to assess the impact of the NQTL on access to MH/SUD benefits.
- **Material differences in outcomes data**
  - Material differences in outcomes data will be viewed as a “strong indicator” of non-compliance to the extent that outcomes are more stringent for MH/SUD benefits as opposed to medical/surgical benefits.
  - Plan must take “reasonable action” to address the material differences, and document the action.
- **Exception** for independent professional medical or clinical standards.



## **Part 3: “Relevant Data Evaluation” Requirement (cont.)**

- Special Rule for Network Composition NQTL.
  - If the network composition outcomes data show “material” differences, the plan is determined to be noncompliant with the NQTL rule.

# Comparative Analysis Content Requirements

- For each NQTL, the comparative analysis must include, at a minimum, the following elements:
  - Description of the NQTL;
  - Identification and definition of the factors used to design or apply the NQTL;
  - Description of how factors are used in the design and application of the NQTL;
  - Demonstration of comparability and stringency as written;
  - Demonstration of comparability and stringency in operation;
  - Findings and conclusions; and
  - For ERISA plans: Certification by named fiduciaries.

# Fiduciary Certification

- Under the Proposed Rules, plans subject to ERISA would be required to include a certification by one or more named fiduciaries who have reviewed the comparative analysis.
  - The certification must state whether the fiduciary found the comparative analyses to be in compliance with the content requirements of the Proposed Rules.
- As per DOL, this is to ensure that plan fiduciaries meet their obligations under ERISA to review the comparative analyses and properly monitor their plans for compliance with MHPAEA.

# Requests & Findings of Noncompliance

- 10 business days to respond to an **initial request**.
- 10 business days to respond when an initial **response is found insufficient** and DOL requests supplemental information.
- If an **initial determination of noncompliance**, 45 calendar days to respond with corrective action plan and additional comparative analyses that demonstrate compliance.
- If **final determination of noncompliance** is issued, 7 calendar days to provide notice to participants and beneficiaries.
  - Proposed Rule includes content requirements for notice.

# Comparative Analysis Disclosures

- Disclosure requirements related to the NQTL comparative analyses:
  - Comparative analyses are considered to be ***instruments under which a plan is established or operated*** and, therefore, ERISA plans generally must furnish those documents to plan participants and beneficiaries upon request within 30 days (existing requirement); and
  - Comparative analyses qualify as documents ***relevant to the claimant's claim for benefits*** (i.e., adverse benefit determination) and must be provided to participants or beneficiaries, and providers or other individuals acting as a participant's or beneficiary's authorized representative, upon request (*NEW* requirement).





## “Meaningful Benefits”

- Require provision of “**meaningful benefits**” for the treatment of a particular mental health condition or substance use disorder in each classification, as determined in comparison to the benefits provided for M/S conditions in the classification.
- **Examples**: ABA therapy, nutritional counseling.



## Applicability Date

- Proposed Rules, if finalized, would apply on **first day of first plan year beginning on or after January 1, 2025.**



# DOL Technical Release

# Technical Release: Data Requirements and Enforcement Safe Harbor

- For **network composition NQTLs**, includes two components:
  - 1. Required data collection (under Proposed Rules)**
    - Out-of-network utilization;
    - Percentage of in-network providers actively submitting claims;
    - Time and distance standards; and
    - Reimbursement rates.
  - 2. Potential safe harbor *if* meet or exceed specific data-based standards**
    - Enforcement relief for two calendar years.

What Does This Mean for Plan Sponsors?

# Implications for Plan Sponsors

- Be prepared to turn over an NQTL analysis to DOL upon request.
  - DOL clarifies in the Proposed Rules, plans should *not* wait for a request to develop NQTL comparative analyses.
- Fiduciary certification.
- Changes in Proposed Rules, if finalized, will likely require a change in benefits and increase in costs.
- Plans will need to coordinate with service providers for information to support NQTL analysis.

Questions?

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