

FAQS ABOUT MENTAL HEALTH AND SUBSTANCE USE DISORDER PARITY IMPLEMENTATION AND THE 21ST CENTURY CURES ACT PART 38

June 16, 2017

Set out below is an additional frequently asked question (FAQ) regarding implementation of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), as amended by the Affordable Care Act and the 21st Century Cures Act (Cures Act). This FAQ has been prepared jointly by the Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury (collectively, the Departments). Like previously issued FAQs (available at www.dol.gov/ebsa/healthreform/index.html and www.cms.gov/ccio/resources/fact-sheets-and-faqs/index.html), the FAQ answers questions from stakeholders to help people understand the law and benefit from it, as intended. This FAQ also contains two separate requests for comments, as described below.

Mental Health Parity and Addiction Equity Act of 2008 and the 21st Century Cures Act

Generally, MHPAEA requires that the financial requirements and treatment limitations imposed on mental health and substance use disorder (MH/SUD) benefits cannot be more restrictive than the predominant financial requirements and treatment limitations that apply to substantially all medical and surgical benefits. MHPAEA also imposes several disclosure requirements on group health plans and health insurance issuers. The Cures Act was enacted on December 13, 2016. Among other things, the Cures Act contains provisions that are intended to improve compliance with MHPAEA by requiring the Departments to solicit feedback from the public on how to improve disclosure of the information required under MHPAEA and other laws.

Disclosures with Respect to MH/SUD Benefits, Including Request for Comments

The Departments have issued multiple pieces of guidance to address disclosure obligations under MHPAEA and other laws. The MHPAEA provisions and implementing regulations expressly provide that a plan or issuer must disclose the criteria for medical necessity determinations with respect to MH/SUD benefits to any current or potential participant, beneficiary, or contracting provider upon request and must make available the reason for any denial of reimbursement or payment for services with respect to MH/SUD benefits to the participant or beneficiary. The Departments, however, recognize that additional information regarding medical/surgical benefits is necessary to perform the required MHPAEA analyses.¹ Accordingly, the Departments have

¹ See Internal Revenue Code (Code) section 9812(a)(4), Employee Retirement Income Security Act (ERISA) section 712(a)(4); Public Health Service Act (PHS Act) section 2726(a)(4). See also 26 CFR 54.9812-1(d); 29 CFR 2590.712(d); 45 CFR 146.136(d) and 147.160.

clarified in previous regulations and guidance the breadth of disclosure required, as well as which documents participants, beneficiaries, and their authorized representatives have a right to receive (and generally may find helpful) under MHPAEA, the Employee Retirement Income Security Act (ERISA),² and the Affordable Care Act.³ For example, plans subject to ERISA are required to provide participants, upon request, with information about the processes, strategies, evidentiary standards, and other factors used to apply a nonquantitative treatment limitation (NQTL) with respect to medical/surgical benefits and MH/SUD benefits under the plan.

On October 27, 2016, the Departments issued Affordable Care Act Implementation FAQs Part 34, which, among other things, solicited feedback regarding disclosures with respect to MH/SUD benefits under MHPAEA and other laws.⁴ In the FAQs, the Departments indicated that they had received questions and suggestions regarding disclosures with respect to NQTLs. This feedback included requests for model forms that group health plan participants, beneficiaries, covered individuals in the individual market, or persons acting on their behalf could use to request relevant disclosures. The feedback also included requests for guidance on other ways in which disclosures, or the process for requesting disclosures, could be more uniform, streamlined, or otherwise simplified.

In addition, the Departments indicated that they had received requests to explore ways to encourage uniformity among State reviews of health insurance issuers' compliance with the NQTL standards. The Departments indicated that various stakeholders stated that model forms to report NQTL information will help facilitate uniform implementation and enforcement of MHPAEA, and relieve some complexity that MHPAEA compliance poses for issuers operating in multiple States. Furthermore, other stakeholders highlighted that the use of such model forms may also benefit consumers, as consumers will be entitled to request the analysis performed to complete the model forms.

Accordingly, in Affordable Care Act Implementation FAQs Part 34, the Departments requested specific comments on:

² ERISA's general disclosure obligation in section 104(b) and the accompanying disclosure regulation at 29 CFR 2520.104b-1 provide that, for plans subject to ERISA, instruments under which the plan is established or operated must generally be furnished to plan participants within 30 days of request.

³ See Code sections 9812(a)(4) and 9815; ERISA sections 104(b), 502(c), 503, 712(a)(4) and 715; PHS Act sections 2726(a)(4) and 2719; See also 26 CFR 54.9812-1(d)(3) and 54.9815-2719; 29 CFR 2520.104b-1, 2560.503-1, 2590.712(d)(3) and 2590.715-2719; 45 CFR 146.136(d)(3), 147.136 and 147.160; See also 78 FR 68240, 68247 (Nov. 13, 2013); See also Affordable Care Implementation FAQs, Part V, Q&A-10, available at <https://www.dol.gov/ebsa/faqs/faq-aca5.html> and https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs5.html; See also Affordable Care Act Implementation FAQs, Part XVII, Q&A-8, available at <https://www.dol.gov/ebsa/faqs/faq-aca17.html> and https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs17.html; See also Affordable Care Act Implementation FAQs, Part XXIX, Q&A-12 and 13, available at <https://www.dol.gov/ebsa/faqs/faq-aca29.html> and <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQs-Part-XXIX.pdf>; See also Affordable Care Implementation FAQs, Part 31, Q&A-9, available at <https://www.dol.gov/ebsa/faqs/faq-aca31.html> and https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQs-31_Final-4-20-16.pdf.

⁴ See Affordable Care Act Implementation FAQs, Part 34, Q&A-1, available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-34.pdf> and https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQ-part-34_10-26-16_FINAL.PDF.

- a) Whether issuance of model forms that could be used by participants and their representatives to request information with respect to various NQTLs would be helpful and, if so, what content the model forms should include. For example, is there a specific list of documents, relating to specific NQTLs, that a participant or his or her representative should request?
- b) Do different types of NQTLs require different model forms? For example, should there be separate model forms for specific information about medical necessity criteria, fail-first policies, formulary design, or the plan's method for determining usual, customary, or reasonable charges? Should there be a separate model form for plan participants and other individuals to request the plan's analysis of its MHPAEA compliance?
- c) Whether issuance of model forms that could be used by States as part of their review would be helpful and, if so, what content the model form should include. For example, what specific content should the form include to assist the States in determining compliance with the NQTL standards? Should the form focus on specific classifications or categories of services? Should the form request information on particular NQTLs?
- d) What other steps can the Departments take to improve the scope and quality of disclosures or simplify or otherwise improve processes for requesting disclosures under existing law in connection with MH/SUD benefits?
- e) Are there specific steps that could be taken to improve State market conduct examinations and/or Federal oversight of compliance by plans and issuers?

Requirements in the 21st Century Cures Act Related to MHPAEA Disclosures

Federal or State law requires group health plans and health insurance issuers to disclose certain documents to participants and beneficiaries, contracting providers, or authorized representatives to ensure compliance with MHPAEA. Section 13001(c)(1) of the Cures Act directs the Departments to solicit feedback from the public on how to improve this disclosure request process, while ensuring consumers have access to all information required to be disclosed. Section 13001(c)(2) of the Cures Act directs the Departments to make this feedback publicly available by December 13, 2017.⁵

Solicitation of Comments

⁵ In addition, section 13001(c)(3) of the Cures Act directs the Departments to share this feedback with the National Association of Insurance Commissioners (NAIC) to the extent it includes recommendations for the development of simplified information disclosure tools to provide consistent information to consumers. Such feedback may be taken into consideration by the NAIC and other appropriate entities for the voluntary development and voluntary use of common templates and other sample standardized forms to improve consumer access to plan information.

As required under the Cures Act, the Departments are again soliciting comments on the questions and issues listed above that were previously raised in Affordable Care Act Implementation FAQs Part 34.

In addition, in furtherance of the questions raised in (a) and (b) above, the Departments are soliciting comments on a draft model form that participants, enrollees, or their authorized representatives could -- but would not be required to -- use to request information from their health plan or issuer regarding NQTLs that may affect their MH/SUD benefits, or to obtain documentation after an adverse benefit determination involving MH/SUD benefits to support an appeal. A copy of that draft model form, as well as instructions and deadlines for commenting on it, can be found at <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html> or <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/mental-health-and-substance-use-disorder-parity>. Comments are requested on any aspect of the draft model form, including ways to reduce burden on individuals, families, health care providers, States, group health plans, health insurance issuers, and other stakeholders, as well as the use of alternate means of receiving information requests from consumers.

Please send comments on these disclosure issues to e-ohpsca-mhpaea-disclosure@dol.gov by September 13, 2017. All comments will be shared among the Departments.

Treatment for Eating Disorders, Including Request for Comments

Section 13007 of the Cures Act requires that if a group health plan or a health insurance issuer provides coverage for eating disorder benefits, the group health plan or issuer must provide the benefits consistent with the requirements of MHPAEA. In light of this provision of the Cures Act, the Departments are issuing the following FAQ and soliciting comments regarding whether any additional clarification is needed regarding how the requirements of MHPAEA apply to treatment for eating disorders.

Q1: Does MHPAEA apply to any benefits a plan or issuer may offer for treatment of an eating disorder?

Yes. The Departments' regulations implementing MHPAEA define "mental health benefits" as benefits with respect to items or services for mental health conditions, as defined under the terms of the plan or health insurance coverage and in accordance with applicable Federal and State law, which must be defined to be consistent with generally recognized independent standards of current medical practice.⁶ Eating disorders are mental health conditions and therefore treatment of an eating disorder is a "mental health benefit" within the meaning of that term as defined by MHPAEA.

Furthermore, in light of section 13007 of the Cures Act, the Departments request comments on

⁶ 26 CFR 54.9812-1(a); 29 CFR 2590.712(a); 45 CFR 146.136(a).

whether any additional clarification is needed regarding how the requirements of MHPAEA apply to treatment for eating disorders.

Please send comments with respect to eating disorders to e-ohpsca-mhpaea-eating-disorders@dol.gov by September 13, 2017. All comments will be shared among the Departments.