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# Strengthening Parity in Mental Health and Substance Use Disorder Benefits

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# Strengthening Parity in MH/SUD Benefits

- Signed into law on December 27, 2021
- Requires group health plans to perform and document comparative analyses of the design and application of nonquantitative treatment limitations (NQTLs)
- Plans must be prepared to make these comparative analyses available to the Departments of Labor and/or Health and Human Services upon request beginning 45 days after the date of enactment (February 10, 2021)

# Strengthening Parity in MH/SUD Benefits

**The new amendments also include requirements related to:**

- Updated compliance program guidance
- An approach to corrective action
- Annual reporting by the Departments regarding noncompliance
- Guidance regarding participant and beneficiary complaints
- Promotion of Federal and State information sharing

# Strengthening Parity in MH/SUD Benefits

- Plans will need to work with benefit administrators to gather information so that the NQTL comparative analyses can be performed and documented
- Plans must consider getting the information collection and analysis underway to advance good faith compliance with the new statutory requirements
- DOL, HHS, and Treasury issued initial guidance regarding the new requirements on April 2, 2021 under FAQ Set 45

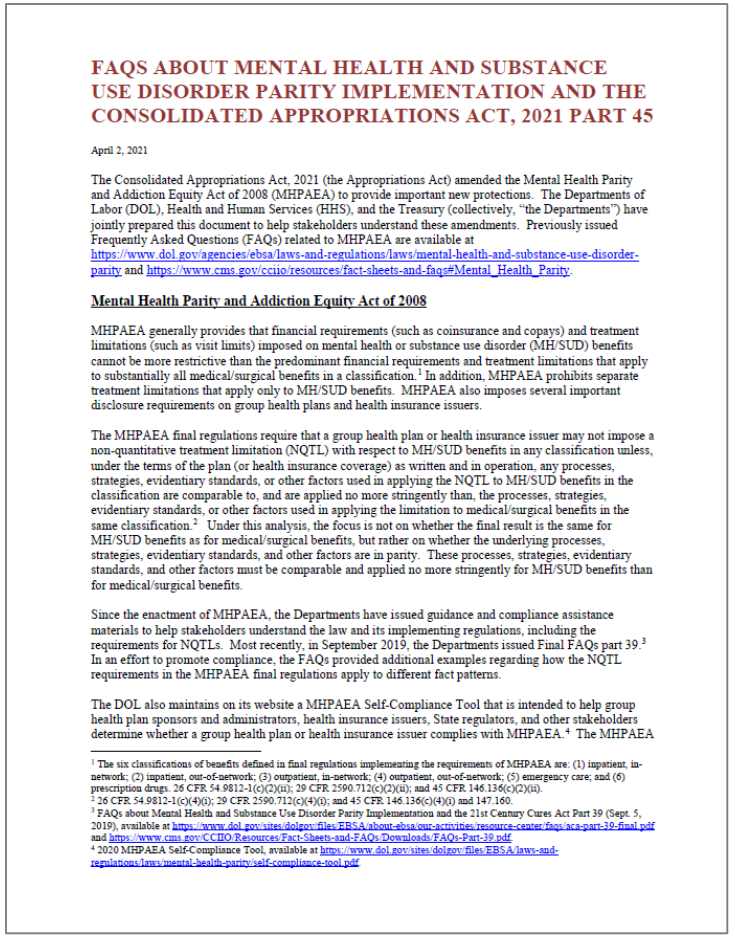
Additional guidance is expected. Once issued, a plan may need to do work to comply with any specific requirements provided by the agencies.

# Examples of NQTLs

- Prior authorization or ongoing authorization requirements
- Concurrent review standards
- Formulary design for prescription drugs
- Standards for provider admission to participate in a network, including reimbursement rates
- Refusal to pay for higher-cost therapies until it can be shown that a lower-cost therapy is not effective (also known as “fail-first” policies or “step therapy” protocols)
- Exclusions of specific treatments for certain conditions

# FAQ Set 45 NQTL Comparative Analysis Clarifications

The Departments clarify that a general statement of compliance, coupled with a conclusory reference to broadly stated processes, strategies, evidentiary standards or other factors related to NQTLs is insufficient to fulfill the new comparative analysis requirement.



**FAQS ABOUT MENTAL HEALTH AND SUBSTANCE USE DISORDER PARITY IMPLEMENTATION AND THE CONSOLIDATED APPROPRIATIONS ACT, 2021 PART 45**

April 2, 2021

The Consolidated Appropriations Act, 2021 (the Appropriations Act) amended the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) to provide important new protections. The Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury (collectively, "the Departments") have jointly prepared this document to help stakeholders understand these amendments. Previously issued Frequently Asked Questions (FAQs) related to MHPAEA are available at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/mental-health-and-substance-use-disorder-parity and https://www.cms.gov/cciio/resources/fact-sheets-and-faqs#Mental_Health_Parity.

**Mental Health Parity and Addiction Equity Act of 2008**

MHPAEA generally provides that financial requirements (such as coinsurance and copays) and treatment limitations (such as visit limits) imposed on mental health or substance use disorder (MH/SUD) benefits cannot be more restrictive than the predominant financial requirements and treatment limitations that apply to substantially all medical/surgical benefits in a classification.[1] In addition, MHPAEA prohibits separate treatment limitations that apply only to MH/SUD benefits. MHPAEA also imposes several important disclosure requirements on group health plans and health insurance issuers.

The MHPAEA final regulations require that a group health plan or health insurance issuer may not impose a non-quantitative treatment limitation (NQTL) with respect to MH/SUD benefits in any classification unless, under the terms of the plan (or health insurance coverage) as written and in operation, any processes, strategies, evidentiary standards, or other factors used in applying the NQTL to MH/SUD benefits in the classification are comparable to, and are applied no more stringently than, the processes, strategies, evidentiary standards, or other factors used in applying the limitation to medical/surgical benefits in the same classification.[2] Under this analysis, the focus is not on whether the final result is the same for MH/SUD benefits as for medical/surgical benefits, but rather on whether the underlying processes, strategies, evidentiary standards, and other factors are in parity. These processes, strategies, evidentiary standards, and other factors must be comparable and applied no more stringently for MH/SUD benefits than for medical/surgical benefits.

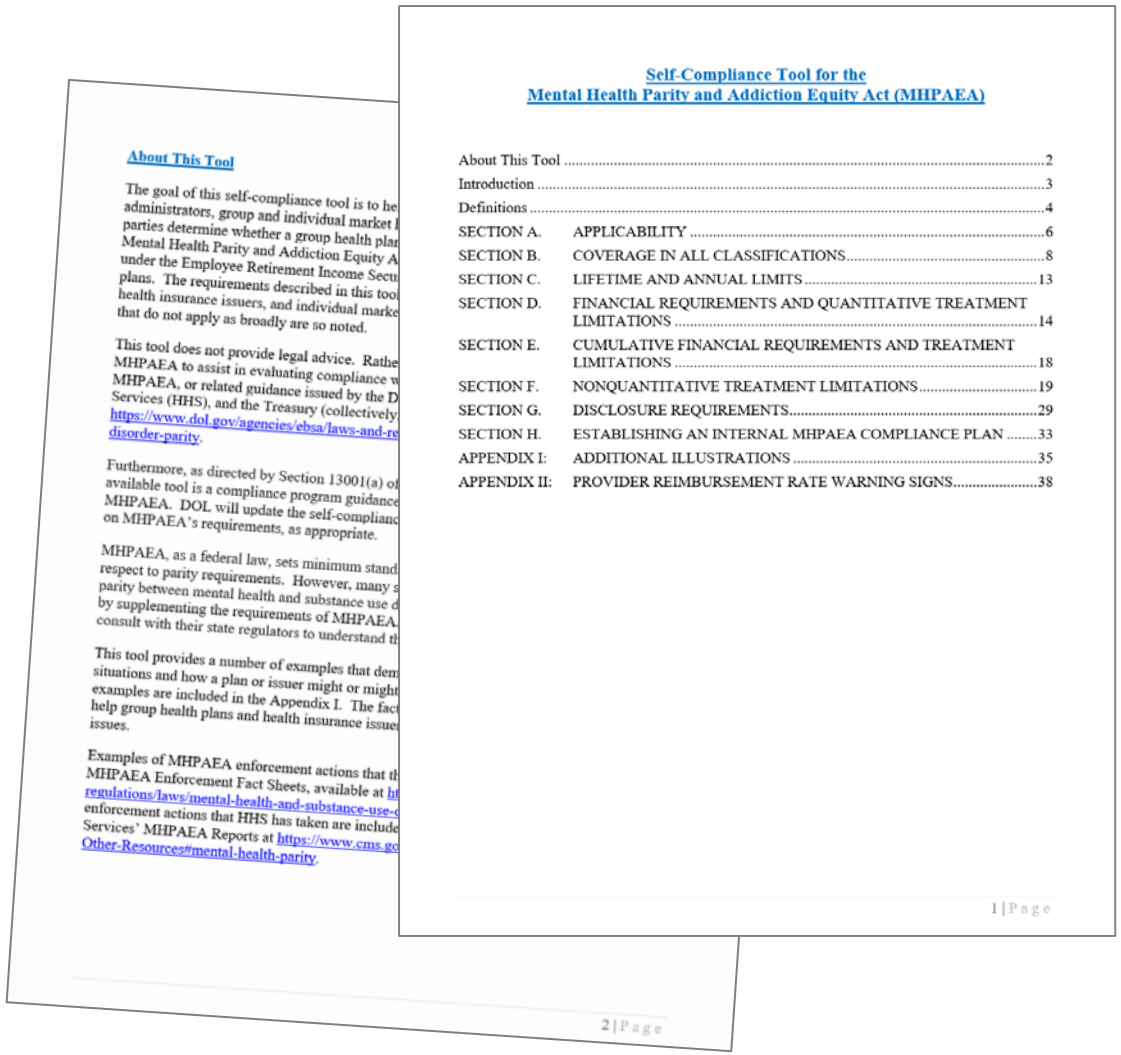
Since the enactment of MHPAEA, the Departments have issued guidance and compliance assistance materials to help stakeholders understand the law and its implementing regulations, including the requirements for NQTLs. Most recently, in September 2019, the Departments issued Final FAQs part 39.[3] In an effort to promote compliance, the FAQs provided additional examples regarding how the NQTL requirements in the MHPAEA final regulations apply to different fact patterns.

The DOL also maintains on its website a MHPAEA Self-Compliance Tool that is intended to help group health plan sponsors and administrators, health insurance issuers, State regulators, and other stakeholders determine whether a group health plan or health insurance issuer complies with MHPAEA.[4] The MHPAEA

[1] The six classifications of benefits defined in final regulations implementing the requirements of MHPAEA are: (1) inpatient, in-network; (2) inpatient, out-of-network; (3) outpatient, in-network; (4) outpatient, out-of-network; (5) emergency care; and (6) prescription drugs. 26 CFR 54.9812-1(c)(2)(ii); 29 CFR 2590.712(c)(2)(ii); and 45 CFR 146.136(c)(2)(ii).
[2] 26 CFR 54.9812-1(c)(4)(i); 29 CFR 2590.712(c)(4)(i); and 45 CFR 146.136(c)(4)(i) and 147.160.
[3] FAQs about Mental Health and Substance Use Disorder Parity Implementation and the 21st Century Cures Act Part 39 (Sept. 5, 2019), available at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-39-final.pdf and https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs-Downloads/FAQs-Part-39.pdf.
[4] 2020 MHPAEA Self-Compliance Tool, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/self-compliance-tool.pdf.

# FAQ Set 45 NQTL Comparative Analysis Clarifications

The Departments point to the DOL's MHPAEA Self-Compliance Tool as a source of guidance related to requirements for NQTLs, including a process for analyzing whether a particular NQTL
meets those requirements.



Self-Compliance Tool for the
Mental Health Parity and Addiction Equity Act (MHPAEA)



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About This Tool

The goal of this self-compliance tool is to he
administrators, group and individual market
parties determine whether a group health plan
Mental Health Parity and Addiction Equity A
under the Employee Retirement Income Secu
plans. The requirements described in this too
health insurance issuers, and individual marke
that do not apply as broadly are so noted.

This tool does not provide legal advice. Rathe
MHPAEA to assist in evaluating compliance w
MHPAEA, or related guidance issued by the D
Services (HHS), and the Treasury (collectively
https://www.dol.gov/agencies/ebsa/laws-and-re
disorder-parity.

Furthermore, as directed by Section 13001(a) of
available tool is a compliance program guidance
MHPAEA. DOL will update the self-compliance
on MHPAEA's requirements, as appropriate.

MHPAEA, as a federal law, sets minimum stand
respect to parity requirements. However, many s
parity between mental health and substance use d
by supplementing the requirements of MHPAEA.
consult with their state regulators to understand th

This tool provides a number of examples that dem
situations and how a plan or issuer might or might
examples are included in the Appendix I. The fact
help group health plans and health insurance issuer
issues.

Examples of MHPAEA enforcement actions that th
MHPAEA Enforcement Fact Sheets, available at ht
regulations/laws/mental-health-and-substance-use-d
enforcement actions that HHS has taken are include
Services' MHPAEA Reports at https://www.cms.go
Other-Resources#mental-health-parity.

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# Tips to Avoid as Insufficient Comparative Analysis

**The FAQs provide examples of reasons why the Departments might conclude that documentation of comparative analyses of NQTLs is insufficiently specific and detailed.**

- Production of a large volume of documents without a clear explanation of how and why each document is relevant to the comparative analysis
- Conclusory or generalized statements, including mere recitations of the legal standard, without specific supporting evidence and detailed explanations
- Identification of processes, strategies, sources and factors without the required or clear and detailed comparative analysis

# Tips to Avoid as Insufficient Comparative Analysis

- Identification of factors, evidentiary standards, and strategies without a clear explanation of how they were defined and applied in practice
- Reference to factors and evidentiary standards that were defined or applied in a quantitative manner, without the precise definitions, data, and information necessary to assess their development or application
- Analysis that is outdated due to the passage of time, a change in plan structure, or for any other reason

# Supporting Information

In addition, the Departments clarify that plan sponsors should be prepared to make available documents that support the analysis and conclusions of their NQTL comparative analyses.

**For example, they note:**

If comparative analyses reference studies, testing, claims data, reports, or other considerations in defining or applying factors (such as meeting minutes or reports showing how those considerations were applied), then the plan or issuer should be prepared to provide copies of all those items.

# Requests and Complaints

**A participant, beneficiary or enrollee (or their authorized representative) or a state regulator, may request an NQTL comparative analysis.**

The Departments note that in the instance of a specific complaint, they may request information related to the NQTL in question, such as the comparative analysis related to prior authorization. However, the Departments remind plan sponsors that, under the amendments to MHPAEA, the DOL or HHS may also request NQTL comparative analyses in any instance deemed appropriate.

# What to Expect from the Federal Departments

# DOL/HHS Collection of NQTL Analyses

- The Act permits the DOL and HHS to request these analyses in any circumstances the department finds appropriate.
- It requires the departments to collect them in instances of potential noncompliance or complaints regarding noncompliance.
- The departments are required to collect at least 20 NQTL analyses per year.
- Enforcement actions related to these requirements have begun and include very strict request timeframes.

# Enforcement Priorities

- The FAQs do not provide an exhaustive list of NQTLs regarding which the Departments may request the comparative analysis and reinforce the need to perform and document comparative analyses for all NQTLs imposed.
- In the near term, the DOL indicates that it expects to focus its enforcement efforts on:
  - Prior authorization requirements
  - Concurrent review requirements
  - Standards for provider admission to participate in a network (including reimbursement rates)
  - Out-of-network reimbursement rates

# Failure to Comply

The FAQs emphasize the consequences of failure to satisfy the comparative analysis requirements.

- The plan or issuer must submit additional comparative analyses that demonstrate compliance not later than 45 days after the initial determination of noncompliance.
- Following the 45-day corrective action period, if the Departments make a final determination that the plan or issuer is still not in compliance, the plan will then have seven days to notify covered individuals that the plan is not in compliance.

# Next Steps for Plan Sponsors

# What can plans do now?

- Develop an approach to good faith compliance with the statute.
  - Determine a plan to begin to collect and document relevant information. This will most commonly include coordination with benefit administrators (both medical and pharmacy) to help review the plan's NQTL compliance as written and in operation.
  - Plan sponsors should anticipate that some compliance issues may be identified and need to be resolved.
- Watch for forthcoming guidance.
  - This may include additional FAQs, regulatory guidance, updates to the DOL self-compliance tool, and/or other clarifying information that may be published by the Departments.

# MHPAEA Opt-Out

- Sponsors of some public sector plans have the option to opt out of compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA).
- Interest in the opt-out option is growing as in light of HHS's enforcement efforts focus on compliance with MHPAEA, lawsuits filed by private parties challenging plan compliance with MHPAEA, and new, additional obligations on plan sponsors imposed by recent amendments to the law.

# MHPAEA Opt-Out

- Sponsors of self-funded, non-federal governmental plans that would like to opt out MHPAEA must file an election electronically, notify each affected enrollee and ensure the election meets certain requirements specified by HHS.
- Opt-out must be elected before the first day of the plan year and must be renewed annually.
- Plans can still choose to cover mental health and/or substance use disorder benefits, and can seek to voluntarily achieve parity.
- Plans may consider adding language to opt-out notices that highlight the fact that mental health and substance use disorder benefits coverage is not being changed or reduced.

# Today's Presenters

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# Thank You!

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