

CLIENT ALERT

Mental Health Parity: What's Next for Plans and Issuers?

April 18, 2022

Now that the Tri-agencies have [drawn back the curtains](#) to reveal some of the inner workings of their developing Mental Health Parity and Addiction Equity Act (MHPAEA) comparative analysis enforcement efforts, the question is: What's next?

Insufficient Guidance

Group health plans and health insurance issuers have been operating on limited guidance ever since the 2021 Consolidated Appropriations Act (CAA) amendments to MHPAEA set in motion the current process of non-quantitative treatment limitation (NQTL) comparative analysis review. The Tri-agencies' 2022 MHPAEA Annual Report provided some additional clarity regarding enforcement priorities and the most common deficiencies identified during reviews (summarized in [Crowell's 2022 MHPAEA Annual Report Client Alert](#)). But guidance preceding the 2022 Report was limited: the statute sets forth five basic elements under 29 U.S.C. § 1185a(a)(8) and 42 U.S.C. § 300gg-26(a)(8), the Tri-agencies' [FAQs Part 45](#) provides some additional detail, and the [DOL Self-Compliance Tool](#)—which was released as a set of recommendations and best practices but not mandatory requirements—remains the best indication of what NQTL compliance should look like. The result of that limited guidance was predictable. The 2022 Report demonstrated that group health plans and health insurance issuers were not been able to divine government expectations for NQTL comparative analyses, and *not one* comparative analysis reviewed was found initially compliant.

Anticipated Rulemaking

Further clarification, in one form or another, appears to be on the way. One of the biggest next steps will be the issuance of additional guidance or agency rulemaking. The CAA MHPAEA amendment codified at 29 U.S.C. § 1185a(a)(8) and 42 U.S.C. § 300gg-26(a)(8) requires further “guidance” clarifying certain aspects of MHPAEA enforcement. The relevant statutory text, under the heading “*Compliance program guidance document update process*,” reads:

“Not later than 18 months after December 27, 2020, the Secretary shall finalize any draft or interim guidance and regulations relating to mental health parity under this section. Such draft guidance shall include guidance to clarify the process and timeline for current and potential participants and beneficiaries (and authorized representatives and health care providers of such participants and beneficiaries) with respect to plans to file complaints of such plans or issuers being in violation of this section, including guidance, by plan type, on the relevant State, regional, or national office with which such complaints should be filed.”

If the statutory deadline is followed, this means that the clarifying guidance or rules should be finalized by June 27 of this year. With that date rapidly approaching—and no clarifying guidance or regulations proposed as of yet—time is growing short for the full rulemaking process to run its course. This could mean that any additional guidance won't come in the form of formal regulation. It could mean that a clarifying rule will be proposed very soon. Or it could mean that clarifying guidance or regulation

will miss the statutory deadline. Recent precedent suggests that last option is a real possibility; the 2022 Report itself was delivered a month late.

For their parts, the Tri-agencies have put MHPAEA on their regulatory agendas for the summer of 2022. Both the Departments of [Health and Human Services](#) and [Labor](#) have noted that an upcoming notice of proposed rulemaking is planned for July of this year to clarify plans' and issuers' obligations under the law.

Even if this additional guidance is delivered after the statutory deadline, it is expected to mark an important step forward for the Tri-agencies. Considering the extensive data and analyses collected from plans and issuers so far, hopefully the Tri-agencies now have a more complete understanding of how the relevant NQTLs are structured, and can provide more granular explanations of how comparative analyses can achieve compliance without first facing insufficiency notices or noncompliance determinations. Although the only additional guidance *required* by statute relates to explaining the means by which “potential participants and beneficiaries” may file complaints regarding plan or issuer violations of the NQTL requirements, the Tri-agencies appear to be aware that plans and issuers need greater clarity on how to comply with MHPAEA, especially the CAA amendments.

In any event, the [Crowell Health Solutions](#) team will be monitoring any developments or proposed rules closely.

What is Crowell Health Solutions?

Crowell Health Solutions is a strategic consulting firm focused on helping clients to pursue and deliver innovative alternatives to the traditional approaches of providing and paying for health care, including through digital health, health equity, and value-based health care. Through our key services—strategic counseling, policy counseling and engagement, compliance counseling, and coalition building—we help clients bring pioneering products and services to market, structure results-driven collaborations and business arrangements, and advance policy priorities in the complex and rapidly evolving health care environment.

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