**Navigating the Changing Landscape of Mental Health Parity Compliance: Why Plans Need to Get Ahead of Proposed Rules and Implications**

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Synopsis: Proposed changes to Mental Health Parity compliance significantly expand requirements, making the process more challenging and costlier. Audits to date have revealed that few, if any, plans and issuers met requirements. The proposed rules introduce stricter NQTL standards and emphasize the importance of comparative analyses. Given the impending finalization of these rules and active enforcement, prioritizing compliance is imperative; waiting to act may result in financial and reputational repercussions.

ATTAC's Mental Health Parity experts have helped plans of all sizes, including regional health plans, Blue organizations and ERISA sponsors and administrators, build or rebuild NQTL analyses to meet requirements. In many instances, prior to engaging ATTAC, our clients invested a great deal of time and money and ended up with NQTL analyses that were insufficient to meet statutory requirements. These clients turned to ATTAC to efficiently help build or rebuild NQTLs — resulting in comprehensive NTQLs that anticipate and address requirements of the proposed rules.

Health plans and issuers need to ramp up compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA) in response to the new proposed rules from the Departments of Labor, Health and Human Services ("the Departments"). The proposed rules represent a significant shift in compliance measures, and plans will need to re-review their non-quantitative treatment limitation (NQTL) comparative analyses to assess if they can demonstrate compliance under the new requirements.

If the rules are adopted, achieving compliance will become more challenging and costlier. Stricter and more extensive requirements for NQTL content and designs will be in place, and specific data will be required to be constructed, maintained, and reported by plans and issuers. If finalized as proposed, the new rules take effect on the first day of the plan year beginning on or after January 1, 2025.

Prior regulatory audits have revealed that few, if any, plans and issuers met MHPAEA requirements, and it's anticipated that the additional guidance will help plans understand what's necessary to satisfy regulators. However, new regulations can create operational challenges and are often costly to implement. The proposed regulations also place higher expectations on plan sponsor oversight and validation of their administrators.

Three actions plans should take to prepare for new regulations:

1. **Revisit any existing NQTLs to assess what enhancements are required to meet compliance and avoid regulatory penalties under proposed regulations.** It will be essential for plans and issuers to address how benefit plans and products are designed, how benefit plan changes are evaluated, and how access, availability, and utilization management functions and provider

networks are administered. Plans will need to document this information in writing, make it part of their operations, and demonstrate they are measuring outcomes.

2. **Establish governance structures to ensure ongoing parity activities and oversight.** Comparative analyses can't be an afterthought or a check-the-box exercise to identify NQTLs on mental health and substance-use disorder (MH/SUD) benefits and comparing them to medical and surgical (M/S) benefits. Nor should a plan or issuer only update the analyses after impactful decisions are made. Parity is an ongoing organization-wide exercise to maintain plan compliance.

3. **Establish mechanisms to capture process changes (even if only for medical benefits) and ensure no parity impact.** To achieve greater compliance, it will be vitally important for plans and issuers to create a top-down culture of Mental Health Parity compliance that's woven into the fabric of every decision and action taken from design to the interrelated operational processes. Even if staff only work on medical operations, their actions may impact the plan's compliance.

The proposed rules are substantive and broader than previous guidance. Here's our view on the key aspects of the proposed rules:

**Imposing NQTLs on MH/SUD Benefits Requires a Three-part Test**
The proposed regulation introduces a comprehensive framework for determining when NQTLs can be applied to MH/SUD benefits without violating the tenets of MHPAEA. Under the proposed regulation, three key prerequisites must be met for NQTLs to be applied to MH/SUD benefits:

1. **The Substantially All and Predominant Test**. Plans or issuers must provide evidence that the NQTLs applied to MH/SUD benefits within a specific benefit classification are applied separately and are not more restrictive (both in written terms and in operation) than the predominant NQTLs applied to substantially all (e.g., two-thirds) Medical/Surgical (M/S) benefits in the same benefit classification. This rule would require an assessment of the anticipated dollar amount of all plan payments for M/S benefits in each classification to determine whether the NQTL applies to at least two-thirds of all M/S benefits.

2. **Design and Application Requirements.** Plans or issuers must show that no factor or evidentiary standard used in designing or applying the NQTLs to MH/SUD benefits was applied more rigorously than those used for designing and applying the NQTLs to M/S benefits in the same category. Additionally, the proposed regulation would prevent plans or issuers from relying on any factor or evidentiary standard if it discriminates against MH/SUD benefits compared to M/S benefits.

3. **Relevant Data Evaluation.** Plans or issuers must gather, assess, and contemplate the impact of pertinent outcomes data (e.g., prior authorization denial rates and network composition) on access to MH/SUD benefits in relation to access to M/S benefits. If the data collected reveals substantial disparities in access, the plan must undertake reasonable measures to address these disparities. The proposed regulation clearly defines "material differences" in outcomes data as a strong indicator of noncompliance, especially when the outcomes are more stringent for MH/SUD benefits compared to M/S benefits.

ATTAC's Opinion

The impact of applying substantially all and predominance testing to NQTLs has the greatest impact on plans' and issuers' current benefit designs and how the plans apply limits on benefits. The new regulations could greatly reduce the ability of plans to apply NQTLs. In our experience, plans and issuers do not have prior authorization or concurrent review requirements on two-thirds of the benefits for inpatient and outpatient in-network and out-of-network M/S benefits. Therefore, they would not be permitted to impose limits on MH/SUD in the same classification. Additionally, plans and issuers currently struggle with what the Departments would consider a warning sign within their current difference in data. The regulation, as proposed, defines "material differences" in outcomes data as a strong indicator of noncompliance, but does not actually define what is considered "material," leaving room for auditor interpretation — which may not be consistent among the Departments.

The proposed regulation would introduce limited exceptions to the aforementioned requirements. For instance, an NQTL would be exempt from all three requirements if it impartially adheres to established professional medical or clinical standards or aims to prevent and detect fraud, waste and abuse.

Another key aspect and concern related to the proposed rules is the meaningful benefits requirement. The proposed regulation necessitates the provision of meaningful benefits for the treatment of specific MH/SUD benefits within each classification, as evaluated against the benefits provided for M/S conditions in the same classification. The proposed regulation provides examples of exclusions, such as applied behavior analysis (ABA) therapy for autism and nutrition counseling for treating eating disorders, which do not meet the requirement for substantial benefits.

ATTAC's Opinion
Plans and issuers must first ensure each benefit offering is classified and documented correctly as an M/S or MH/SUD benefit. The proposed rule requires ABA therapy and nutrition counseling related to eating disorders be classified as MH benefits and not as M/S. Further, plans and issuers will need to ensure access to meaningful benefits for all MH/SUD diagnoses in all six benefit classifications. According to the example provided in the proposed regulation, if a plan covers outpatient, out-of-network diagnostic evaluations for autism spectrum disorder (ASD) but excludes all other benefits for outpatient treatment of ASD including ABA therapy when provided on an out-of-network basis, the plan will violate the meaningful benefit rule.

**ERISA Plan Fiduciaries' Certification of Comparative Analysis**
Self-insured plans under ERISA jurisdiction must include a certification by one or more named fiduciaries in their comparative analyses. Fiduciaries must affirm they have reviewed the analysis and state whether it complies with the content requirements of the proposed regulation.

ATTAC's Opinion
Issuers currently struggle to find the balance between disclosure of confidential and proprietary information, and the risk associated with disclosing and meeting expectations of their ERISA plan sponsors' need for information to conduct NQTL comparative analyses. As the regulation is proposed, even more information that's usually considered confidential and proprietary is expected to be disclosed to plan sponsors, putting greater risk on the issuers. This also puts notable risk on the ERISA plan fiduciaries if they are not able to obtain the information necessary to affirm compliance in writing.

**Final Determination of Noncompliance**
Plans or issuers that receive a final determination of noncompliance, including a final determination based on failure to provide sufficient comparative analyses because of the NQTL comparative analyses review process, will be ordered not to apply the noncompliant NQTL until the plan or issuer can demonstrate compliance.

ATTAC's Opinion
Plans and issuers are expected to conduct the NQTL comparative analyses to identify any areas of noncompliance and take swift and meaningful action to remedy. The proposed rules state that a plan that has received a final determination of noncompliance cannot impose the noncompliant NQTL, potentially exposing the plan or issuer to significant financial impacts. If an NQTL on prior authorization is found to be noncompliant, the plan would have to remove the prior authorization requirement on the impacted MH/SUD benefit, therefore reducing the plan's oversight of quality care, member outcomes, and financial risk associated with that NQTL until it's found to be compliant. To prevent benefit and operational changes that cause noncompliance, plans and issuers must assess the impact to parity before implementing any change.

Demonstrating compliance has posed substantial challenges for plans and issuers. Extensive investigations have been ongoing, particularly following the enactment of the Consolidated Appropriations Act, 2021. If finalized as currently drafted, these new rules may surpass current documentation requirements, potentially restricting common medical management practices, and introducing considerable additional compliance hurdles and investigation risks.

With the impending final version of these expansive and stricter proposed rules, in addition to the active enforcement activities of the Departments, plans and issuers must prioritize compliance. Current benefit, network, and formulary plan designs and the corresponding NQTL comparative analyses should be assessed for compliance both in writing and in operation. If noncompliance or risks are identified during the assessment, quick and meaningful corrective actions are required. This may mean updates to plan documents, operational processes, access to providers, or data requirements. Plans and issuers should review access and availability to MH/SUD providers and work to close network gaps in 2024.

The proposed rules provide valuable and actionable insight into the interpretation and focus of Mental Health Parity compliance. Though the rules are not final and may change following the comment period, the requirement to perform and document NQTL comparative analyses has been in effect since 2021, and plans should have already acted in accordance with current regulatory expectations.

The Mental Health Parity experts at ATTAC Consulting Group have helped plans of all sizes, including Blues, build or rebuild NQTL analyses to meet compliance requirements. Our team can meet you where you are in the compliance journey. Contact us to talk with a Mental Health Parity expert or to learn how access and availability surveys can help address parity-related gaps in your provider network.