National Association of Benefits and Insurance Professionals

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Executive Summary of NABIP's Comment Letter on the Proposed Rule: "Requirements Related to the Mental Health Parity and Addiction Equity Act."

On August 3, 2023, the federal Department of Health and Human Service, Labor, and Treasury ("the Departments") released a proposed regulation addressing compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA) and adding additional requirements to implement the requirement included in the Consolidated Appropriations Act of 2021 (CAA, 2021) that all issuers and group health plans subject to the MHPAEA complete and maintain analyses of how any non-quantitative treatment limitations (NQTLs) included in their coverage offerings were created and are applied in parity between medical/surgical (M/S) and mental health/substance use disorder (MH/SUD) benefits.

The members of NABIP work daily to help millions of people and businesses purchase, administer and utilize health insurance coverage. Ensuring fair and complete access to mental health and substance use disorder is paramount to the members of our association and their clients, and our members routinely work to help employer group health plan sponsor clients ensure that their plans are MHPAEA-compliant. As such, we submitted detailed comments on the proposed rule to the Departments on September 28, 2023, which are summarized as follows:

Overall Recommendation to the Departments

Self-funded group health insurance plans attempting to comply with the CAA, 2021's requirement for plans to regularly analyze the appropriateness of their NQTLs have struggled to obtain group-specific data needed for testing from their relevant service providers. NABIP members suggest that in any final rule that the Departments acknowledge that individual group plan sponsors have little to no direct recourse against plan service providers that have operational issues with regard to the direct application of NQTLs to MH/SUD benefits as compared to M/S benefits.

Since it often takes a considerable amount of time to obtain the data necessary for a complete NQTL analysis from plan service providers, it would be helpful for the final rule to specify a compliance safe harbor for plans that are in the process of collecting relevant operational data related to new NQTLs and/or NQTLs being administered by new issuers or service providers. Additionally, specifying an appropriate window of time for such data collection would be very helpful. As for cases when the plan sponsor cannot obtain the necessary operational data from their service provider, NABIP urges the Departments to directly specify in any final rule that a plan sponsor can meet their compliance obligation and fiduciary duty by simply requesting such information from their service provider, clearly documenting such requests, and advising service providers who do not provide such data needed for the plan to meet their MHPAEA

comparative analysis and plan evaluation requirements that they will consider the vendor's refusal to provide data negatively when conducting their routine reviews of plan service providers.

Similarly, if a self-funded plan determines that there are potential operational issues with an NQTL that is administered by a service provider, the group plan sponsor often has little to no ability to compel their service provider to investigate problems and make improvements or operational changes that might be necessary, particularly when it comes to Plan network vendors. Accordingly, any final rule should include a compliance safe harbor for group plan sponsors who can document that they attempted to collect operational data from their vendor(s), provided written notice of potential operational issues, and asked their network provider(s) for explanations of all identified concerns and a written plan for improvement actions if necessary.

In order to ensure better cooperation from all plan service providers, NABIP members ask that any final rule include the following provisions:

- Specification that group-specific data is needed to conduct operational stringency testing of NQTLs that are administered on a group specific basis (e.g., prior authorization, step-therapy, concurrent review);
- A mandate that service providers have a fiduciary responsibility to provide their clients with access to their own data as needed for NQTL and QTL testing. Further, a requirement they provide up-to-date information to plan sponsors in a timely fashion.
- Examples of categories of information service providers must provide to ensure adequate operational testing of NQTLs developed and maintained by service providers (e.g., number of total MH/SUD and M/S claims subject to prior authorization, numbers approved, numbers denied, numbers appealed, results of appeals, processing time, etc.).

Finally, NABIP members appreciate the specificity the Departments have provided regarding their content expectations for NQTL comparative analyses. In the preamble, the Departments indicate that their content expectations are based in part on the "2020 MHPAEA Self-Compliance Tool" issued by the DOL. However, this tool is already out-of-date, as it was developed prior to the passage of the CAA, 2021. It certainly does not reflect all of the substantial content requirements outlined in the proposed rule, and NABIP members request it be updated as possible following the publication of any final rule.

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Provisions of the Proposed Rule Supported by NABIP

NABIP members support the following changes to existing MHPAEA requirements proposed in the draft measure:

- Amendments to the existing regulatory definitions of the terms "medical/surgical benefits,"" mental health benefits," and "substance use disorder benefits" to clearly specify what is medical/surgical (M/S), mental health (MH), or a substance use disorder (SUD) benefit for purposes of complying with the MHPAEA. NABIP members support the new proposed clarifications to the definitions, but proposed suggested to the draft language to ensure that these definitions remain "evergreen," and thereby reduce need for employer group health plans to make plan document amendments.
- The addition of a definition of "treatment limitation" to both provide an official illustrative list of NQTLs, and also officially establish that the examples included in the proposed rule are just that — examples, and not an exhaustive list. Departments make it clear that the NQTLs delineated specifically in the proposed rule are non-exhaustive and that the CFR is not to be taken as the only source of potential NQTLs plans should consult when evaluating and maintaining their parity compliance status.
- A change to the specification that plan exclusions are not NQTLS, as long as it is "a *complete* exclusion of all benefits for a particular condition or disorder," rather than using the old term of permanent exclusion.
- The specification that a plan may only be required to remove a NQTL after a final determination of noncompliance. Further, since immediate removal of an NQTL may not be practical or appropriate for a plan on an overall basis, the Departments will review all facts and circumstances involved in the specific violation and nature of the underlying NQTL before requiring its removal.
- Addition of clarifying language explaining that a plan or issuer may not impose any financial requirement or treatment limitation that is applicable only to MH/SUD benefits and not to any M/S benefits in the same benefit classification and remain in parity.
- A specification that if a plan excludes MH/SUD services or treatments due to the expression of another NQTL, such as medical necessity requirements or experimental or investigational exclusions, and that NQTL is applied to M/S benefits in the same classification, then it would not be considered a separately applicable treatment limitation.
- An amendment to currently regulatory language to make it explicit that is a plan provides any benefits for a MH/SUD condition or disorder, then benefits would be required to be provided for *that condition or disorder* in each classification for which any M/S benefits are provided.
- The specification that MHPAEA comparative analyses and any other applicable information required under the CAA, 2021 are considered to be instruments under which a plan is established or operated. Therefore, ERISA plans generally must furnish those documents to plan participants and beneficiaries upon request within 30 days,

free of charge. Additionally, under these proposed rules, plans subject to ERISA would be required to make these comparative analyses available to participants and beneficiaries upon request, as these proposed rules are instruments under which a plan is established or operated. If a provider or other person is acting as a participant's or, beneficiary's, authorized representative, plans subject to ERISA would be required to make this analysis available to the provider or other authorized representative.

- Technical amendments related to MHPAEA's small employer exemption and increased cost exemption, issuers offering non-grandfathered health insurance coverage in the individual or small group market and the relationship between compliance with the essential health benefit requirements and the MHPAEA, and the elimination of the MHPAEA exemption for state and local government plans not subject to ERISA included in the Consolidated Appropriations Act, 2023.
- A clarification that the comparative analysis requirements apply to health insurance issuers offering individual health insurance coverage in the same manner that those provisions apply to group health plans and health insurance issuers offering coverage in connection with such plans. These provisions would apply to health insurance issuers offering individual health insurance coverage for policy years beginning on or after January 1, 2026.

Provisions Where NABIP Believes Additional Clarification or Changes to Proposed Language is Necessary

The proposed rules include many changes and additions to existing MHPAEA. In order to implement these changes successfully, NABIP members believe the following provisions will require more clarifications or content modifications in any final rule:

- The new measure defines the terms “processes,” “strategies,” “evidentiary standards,” and “factors,” which are all terms related to NQTLs and the development of sufficient comparative analyses required under the CAA, 2021. NABIP members appreciate the specificity in these definitions, but we would like to see the final rule include examples of processes, standards, what the Departments consider to be the differences between factors and evidentiary standards, what the Departments will consider to be a complete definition of a factor, and how to assign and specify weight to factors, especially if the health plan has not previously assigned a weight to factors.
- Plans and issuers may not rely on any factor or evidentiary standard that discriminates against MH/SUD benefits as opposed to M/S benefits. NABIP members understand and appreciate the Departments’ hard stance against the use of discriminatory data, information, factors, or standards, but it will be difficult for the typical plan sponsor, and even third-party compliance vendors to judge if a source is discriminatory. We request the inclusion of other direct examples of discriminatory and nondiscriminatory data sources in any final regulation.

- Plans and issuers must collect and evaluate relevant outcomes and operational data and then address any material differences in access between MH/SUD and M/S benefits. NABIP members appreciate this specification, but suggest that any final regulation make it clear if the data being analyzed needs to be group-specific, if aggregate-level data will suffice in any circumstance (such as when group-specific data is too sparse to be in any way statistically significant), and if there is a difference in the level of data needed for fully-insured versus self-funded plans.
- The Departments make it clear that plans and issuers may apply the three-pronged test in any order they deem appropriate. NABIP members support this approach, as many entities need to review and analyze NQTLs that have been in place for some time. However, given the flexibility that the proposal gives to issuers and plan sponsors, NABIP members believe it would be appropriate for the Departments to make it clear how often and when NQTL analyses need to be completed, and how long they should take.
- Under the revised rule, a plan or issuer would not be considered to provide MH/SUD benefits unless they are meaningful benefits, as determined in comparison to the benefits provided for M/S conditions in the applicable benefit classification. NABIP members support this change, but we note that any final regulation will need to include explicit compliance examples to demonstrate what the Departments mean by meaningful coverage on a practical level.
- For purposes of these proposed rules, independent professional medical or clinical standards, as well as standards related to fraud, waste, and abuse would not be considered to discriminate against mental health or substance use disorder benefits. If a plan or issuer imposes an NQTL that impartially applies independent professional medical or clinical standards to both MH/SUD and M/S benefits, then those standards would not be considered a violation of the no more restrictive requirement or the relevant data evaluation requirements. However, the plan or issuer would still need to comply with the rule's design and application requirements. NAHU members find the wording of these exceptions to the rule's NQTL design and application requirements for independent professional medical or clinical standards and standards related to fraud, waste, and abuse to be confusing and somewhat contradictory. NABIP members request clarification in any final rule, as well as multiple detailed examples about the appropriate application of these exceptions, including detailed information about how a plan could appropriately document an NQTL that only relies on independent professional medical or clinical standards and standards related to fraud, waste, and abuse in an NQTL analysis, as well as examples of how a plan could appropriately document and test an NQTL that relies on these and other factors and standards.
- These proposed rules would establish that if the Departments or a relevant state authority requests a comparative analysis, plans and issuers must provide it, and for federal agencies it must be provided within ten business days of receipt of the request. NABIP members support the determination by the Departments to not impose the

federal response timelines on state-level requests. These timelines should be determined by the relevant state regulators. Regarding the federal response timelines in the proposed rule, NABIP members believe the ten-day windows specified are very short. Therefore, we request in any final rule that either the potential for extensions be clearly delineated, or that the response windows be lengthened to at least 30 days, or both.

- If a group health plan or issuer receives a final determination of NQTL non-compliance from the Departments, it needs to provide all plan participants with a notice. The proposed rule includes numerous specific content requirements for a compliant notice. We suggest that any final rule be accompanied by sub-regulatory guidance and online compliance resources to guide affected plans and issuers in drafting their own compliance notices, should they be required to produce and distribute them.
- Under these proposed rules, a plan or issuer would be required to make the notice available in paper form. Regarding notice distribution, NABIP members ask the Departments to reconsider the proposed paper distribution requirement. In our membership's considerable experience dealing with plan participants and providing them with required notices, paper copies of notices are very unlikely to go unread. In addition, there are the environmental and cost impacts of producing and distributing paper notices. Instead, NABIP members support the electronic notice distribution requirements in the proposed rule. Also, we note that the seven-day distribution requirement is very short. At minimum, this should be changed from simply days to business days, but preferably it will be extended in any final rule to 30 days.

Requirements That NABIP Believes the Departments Should Revisit

Predominance Testing

One of the three tests to determine the appropriateness of NQTLs created by the proposed rule is that any such treatment limitation may be no more restrictive for MH/SUD benefits, as written or in operation, than the predominant NQTL that applies to substantially all M/S benefits in the same classification.

To aid plan sponsors and issuers in determining if NQTLs meet this test, the proposed rule specifies how the terms "restrictive," "substantially all," and "predominant" would apply in the context of the no more restrictive requirement. If the proposed rules are finalized as written, plans and issuers would be required to follow similar steps to those that apply when analyzing the parity of quantitative treatment limitations (QTLs). These steps would involve determining the portion of plan payments for M/S benefits subject to an NQTL in a classification, then calculating whether the NQTL applies to substantially all M/S benefits in the classification; the predominant variation of the NQTL that applies to M/S benefits in the classification; and whether the NQTL, as applied to MH/SUD benefits in the classification, is more restrictive than the predominant variation of the NQTL as applied to substantially all M/S benefits in the classification.

NABIP members understand the intention behind the Departments proposed approach to determining what "substantially all" means when it comes to M/S versus MH/SUD benefits. However, despite the sound idea behind the Departments proposed approach to testing NQTLs for predominance, restrictiveness, and scope of applicability, NABIP members have significant concerns about the methodologies proposed. NABIP members working on the behalf of plan sponsor clients have direct experience trying to obtain claims cost data for QTL analyses, and they report that obtaining accurate and useable data is laborious process, even though the QTL categories should directly correlate with claims dollars spent.

NABIP members have very direct reasons to believe that attempting to obtain the data necessary to determine the scope and predominance of the application of most NQTLs will be even more challenging. A significant concern is that the data needed to test the applicability and predominance of most of the NQTLs that do not apply to all benefits is typically housed by entirely different vendors than those who maintain a plan's claims data. In applying the proposed methodology, NABIP members are concerned that any one of the following scenarios will happen, thereby stymieing and/or significantly burdening already overwhelmed plan sponsors.

1. One or more of the involved vendors is unwilling or unable to provide the necessary data to perform the calculations.
2. One or more of the involved vendors will only cooperate and release the plan sponsor's own data for a substantial additional fee.
3. The data provided by one or more vendors is formatted in such a way as to render it unusable to a typical employer who sponsors a self-funded plan.
4. The data provided by the multiple separate entities involved with collecting incidence and applicability and claims expenditure data does not correlate due to the use of different definitions, data elements used, terms, coding schemes, or other factors.
5. The data able to be provided by separate involved data spans different timeframes.
6. The data is provided by the multiple involved vendors at drastically different rates of speed due to claims run-out periods and other factors, thereby delaying the necessary testing for long periods of time.
7. A plan sponsor does not have the resources to mesh together the vary quality of data provided by different vendors.

An occurrence of any one of these situations will significantly limit a plan sponsor's ability to perform accurate assessments of the prevalence and predominance of NQTLs to M/S services and benefits and thereby determine if these NQTLs apply to MH/SUD benefits in parity. It is entirely possible based on our membership's experience with QTL testing today that many of the above scenarios will happen.

Beyond our serious data collection concerns, NABIP members do not believe that simply relying on claims data cross referenced with incidence is the best way to determine the stringency of application when it comes to NQTLs that typically are not applied across the board to all M/S and MH/SUD benefits.

Additionally, in the proposed examples, the facts presented indicate the predominance or lack thereof of the NQTL to M/S benefits. However, there are no direct examples showing how a plan would go about making those calculations. While NABIP opposes the use of the proposed methodology to determine predominance, as discussed in our comments relative to that specific regulatory change, if the change is to be finalized, then our members request multiple specific examples as to how that methodology is to be applied in practice.

Another amendment to existing regulatory language in the proposed rule is a specification that plans and issuers may use the permissible sub-classifications under the 2013 final regulations when applying all of the rules for financial requirements and treatment limitations, including NQTLs. While this change is not terribly significant on a standalone basis, it is relevant when applied to the proposed changes to the NQTL scope, applicability, and predominance tests proposed in 26 CFR 54.9812–1(c)(4)(i), 29 CFR 2590.712(c)(4)(i), and 45 CFR 146.136(c)(4)(i). As stated in our comments related to this proposal above, NABIP members do not believe the application of tests like those used to evaluate the applicable stringency of QTLs to NQTLs is a good idea.

Due to all these issues, our membership urges the Department to entirely revisit and revise the approach to NQTL stringency, applicability, and predominance testing.

Changes to the NQTL Analysis Content Requirements
Beyond the new proposed predominance testing, the CAA, 2021 amended MHPAEA, in part, to expressly require plans and issuers that offer both M/S and MH/SUD through coverage plans that impose NQTLs to perform and document comparative analyses of the design and application of all plan NQTLs to MH/SUD and assess their parity status. This measure would add new rules to existing MHPAEA regulatory requirements regarding the CAA, 2021's NQTL comparative analyses requirements, including specific rules relative to the content of such analyses and distribution requirements.

Our association cannot overstate the reliance virtually all employer group plan sponsors have on their service providers to give them the information necessary to complete their NQTL analyses. Additionally, our members cannot stress strongly enough about the lack of cooperation exhibited by many common health plan service providers (including some of the country's largest entities that provide assistance to millions of Americans and group health plan sponsors) regarding providing their group plan clients with access to the information they need to complete and maintain their comparative analyses. Some vendors are not even equipped to

provide plan sponsors with information about the factors and evidentiary standards they use in designing and administering NQTLs on behalf of plan sponsors.

Due to the limits on the amount of data available to all group health plan sponsors, and the absolute need for cooperation by all plan service providers in providing written procedural information, documentation of the factors and evidentiary standards used to develop and apply NQTLs on behalf of the plan sponsor, and relevant, accurate, and timely operational data, NABIP members believe that any final regulation needs to include both enforcement relief and clear compliance standards for plan sponsors who are generally making a good faith effort to comply with their comparative analyses obligations. We request that the Departments explicitly specify what group plan sponsors need to do to meet their compliance obligations when they are unable to obtain all or part of the information they need from service providers, including what documentation is required. NABIP also requests confirmation that concluding that the plan sponsor simply does not have enough information to make a complete determination of NQTL parity either in writing, operationally, or both is an acceptable determination for a plan sponsor to make in a comparative analysis when they are unable to obtain necessary data from a service provider, despite making a good faith effort to collect it.

Implementation Timeframe

The members of NABIP appreciate the Departments' recognition that implementing policy changes of this magnitude will take plans and issuers time and the inclusion of an implementation delay of new requirements until plan years beginning on or after January 1, 2025. However, we also note that the process of finalizing any new parity rules will take time, and in all likelihood, at least some of the potential new requirements offered in this measure will be altered. Plans, issuers, and other service providers who are not directly affected by the MHPAEA rules, but on whom plan sponsors especially must rely on for compliance purposes need at least one year, if not more to make the substantial changes any new rules will mandate. As such, we request a transition period of at least one plan year for all plans, including those whose plan years reset on a non-calendar year basis. So, unless any final rule is fully issued before then end of 2023, NABIP request an implementation timeframe for new and revised provisions of plan years beginning on or after January 1, 2026.