May 4, 2018

Additional Insight on Mental Health Parity Requirements in Proposed FAQ Guidance

Given the emphasis being placed by the Department of Labor on compliance with the Mental Health Parity and Addiction Equity Act (the "MHPAEA"), health plan administration should be reviewed in light of the new proposed frequently asked question guidance ("Proposed FAQs"). The Departments have invited public comments on the Proposed FAQs through June 22, 2018.

The Proposed FAQs focus on examples of whether certain nonquantitative treatment limitations ("NQTLs") imposed on mental health and substance abuse disorder ("MH/SUB") benefits are more restrictive than those imposed on medical/surgical benefits. NQTLs include medical management standards, whether treatments are experimental, use of "fail-first" policies, and factors used in provider reimbursement methodologies. The Proposed FAQs also provide a reminder regarding the requirement to provide up-to-date network provider lists. A few of the pertinent takeaways relating to NQTLs from the Proposed FAQs are:

- A plan excludes benefits for experimental treatments, using professionally recognized treatment guidelines and generally requiring at least two randomized controlled trials to support use of a treatment. That same plan defines autism spectrum disorder as a mental health condition. Although the use of ABA treatment is supported by more than two randomized trials and by professionally recognized treatment guidelines, the Plan classifies ABA treatment as experimental. Because medical/surgical treatments with similar treatment guidelines are covered, this classification violates MHPAEA.

- A plan defines experimental or investigative treatments as those with a rating below "B" in the Hayes Medical Technology Directory. The plan cannot unconditionally deny every MH/SUB treatment below a "B" rating if it reviews and conditionally approves medical/surgical treatments with less than a "B" rating on a case-by-case basis.

- If a plan follows professionally-recognized treatment guidelines when setting dosage limits for prescriptions, limiting prescriptions for opioid use disorders to less than the professionally-recognized

treatment guidelines would be an impermissible NQTL.

- A plan that contains a general exclusion for benefits for bipolar disorder does not violate MHPAEA because excluding all benefits for a particular condition is permissible.

- A plan provides that in-network provider reimbursement rates are determined based on the providers' expertise. If the plan pays a reduced reimbursement rate to non-physician practitioners providing MH/SUB treatment but does not do the same for medical treatments, it would be imposing a more restrictive NQTL in violation of MHPAEA.

- Eating disorders are mental health conditions subject to MHPAEA, and restrictions on facility type are NQTLs. A plan that provides in-patient, out-of-network treatment outside of a hospital for medical/surgical conditions, if the treatment is medically appropriate, cannot categorically exclude residential treatment for eating disorders.