THE 21ST CENTURY CURES ACT: TITLE XIII MENTAL HEALTH PARITY – WHAT YOU NEED TO KNOW

This is the sixth article in a series on the 21st Century Cures Act (the "Cures Act"), which was signed into law on December 13, 2016. We will continue publishing a series of articles summarizing various components under the Cures Act. The articles in our series are located here.

This article highlights the provisions of Title XIII of the Cures Act, which calls for greater education on compliance and enforcement related to federal and state mental health parity laws (Sections 13001-13004) and clarifies the application of current parity laws to eating disorder benefits (Sections 13005-13007). Assuming these new rules remain intact under the Trump administration, plan sponsors and insurers must be prepared for increased enforcement and audit activity.

The Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA")[1] requires parity in coverage for mental health and substance use disorder treatment, meaning that coverage must be provided in substantially the same manner as the plan's medical and surgical benefits with respect to annual and lifetime dollar limits, financial requirements (e.g., co-pays and deductibles), treatment limitations (e.g., number of visits or the scope or duration of treatment) and out-of-network coverage. This standard applies to large group health plans, and separate statutory requirements have expanded the standard's application to the individual health insurance market and other plan types, including most large non-federal government plans, Medicare, CHIP and Medicaid managed care plans.

The MHPAEA further requires that the criteria used by a health plan to determine medical necessity and denial of mental health and substance use disorder benefits must be disclosed to beneficiaries and other specified parties upon request. Enforcement of mental health parity laws is the responsibility of both the federal government (jointly through the U.S. Departments of Health and Human Services ("HHS"), Labor and Treasury) and state governments due to differing jurisdictions over various health plan types.

I. COMPLIANCE PROGRAM GUIDANCE AND ENFORCEMENT ACTION PLANS

Section 13001 of the Cures Act requires the Secretary of HHS, the Secretary of Labor and the Secretary of Treasury in consultation with the inspectors general of their respective agencies to develop compliance program guidance to ensure parity compliance. The compliance program guidance will assist health plans in complying with the requirements of the MHPAEA and subsequent regulations by providing illustrative de-identified descriptions of previous findings of compliance and noncompliance.

The resulting compliance document must also include recommendations that encourage the implementation of internal controls to monitor compliance by the plans and examples of compliant and non-compliant non-quantitative treatment limitations ("NQTLs", e.g., medical management, step therapy, prior authorizations, geographic limitations, etc.) that take into consideration the 2016 publication from the Departments of HHS and Labor, "Warning Signs – Plan or Policy Non-Quantitative Treatment Limitations (NQTLs) that Require Additional Analysis to Determine Mental Health Parity Compliance." The compliance program must be released no later than December 13, 2017 and updated every two years to include examples of more recent findings of compliance and non-compliance.

The development of this guidance was urged by the Mental Health and Substance Use Disorder Parity Task Force (the "Task Force") that was created in March 2016 under the Obama administration. The Task Force was charged with identifying opportunities to increase transparency around MHPAEA compliance and to increase awareness of its protections. In their Final Report, the Task Force recommended assistance from the relevant federal agencies to guide health plans and issuers in the identification of "red flag" plan provisions given the evolving standards for mental health parity, particularly with regard to NQTLs.

The HHS Secretary is further tasked with convening a public meeting of specified stakeholders to produce an enforcement action plan that reflects the Task Force's Final Report and other stakeholder input. The public meeting must be convened by June 13, 2017, with the resulting action plan published on the HHS website within six months of the public stakeholder meeting. The goal of the HHS action plan is to improve federal and state coordination on the enforcement of the MPHAEA and comparable state parity laws and facilitate public education on the parity laws' protections through, for example, the development of a consumer toll free phone and website and the monitoring of consumer complaints.

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Lastly, the Departments of HHS, Labor and Treasury are required to issue additional guidance by December 13, 2017 to group health plans and issuers of individual or group health insurance with respect to medical necessity and benefit denial disclosures. The guidance must include clarifying information and illustrative examples of disclosures related to NQTL criteria for both medical and surgical benefits and mental health and substance use disorder benefits. HHS is required to provide a public comment period of not less than 60 days on the draft guidance before issuing a final version. Public feedback on how to improve the beneficiary disclosure process must be solicited by the secretaries of each agency, which will be shared with the National Association of Insurance Commissioners.

II. AUDITS AND REPORTS ON INVESTIGATIONS

Upon determining that a group health plan or issuer of individual or group health insurance has violated the MHPAEA five times, Section 13001 of the Cures Act requires the applicable secretary of HHS, Labor or Treasury to audit relevant plan documents in the following plan year to help improve compliance. In other words, if a plan or issuer is cited five violations, then the applicable agency will audit applicable plan documents to improve compliance. However, this requirement is not to be construed as to limit the secretaries' existing authority to audit health plan issuers or plan documents.

The Cures Act also requires a GAO study (Section 13004) and a report from the Employee Benefits Security Administration (Section 13003) to be submitted to the House of Representatives Committee on Energy and Commerce and the Senate Committee on Health, Education, Labor, and Pensions. The GAO study must be transmitted by December 13, 2019 and detail the extent to which various health plans and federal and state agencies are complying with the MHPAEA, as well as include recommendations for additional enforcement, coordination and education. The required report from the Employee Benefits Security Administration must summarize specific data on all closed federal investigations finding serious violations of the MHPAEA in the preceding 12-month period. The first report is due December 13, 2017, and subsequent reports are required annually thereafter for a period of five years.

III. EATING DISORDER TREATMENTS: COVERAGE PARITY AND EDUCATION

The Cures Act (Section 13007) also clarifies that any group health plan or individual health plan that covers eating disorder services, including residential treatment, must provide benefits in compliance with existing mental health parity laws. The HHS Secretary is also permitted, but not required, to facilitate the identification of model programs and materials for teaching health care providers effective strategies for the prevention and treatment of eating disorders, including identification, early intervention and referral of patients (Section 13006). In the past, a similar health care provider training program has been required under existing statute, but the program was never implemented due to lack of funding.

The HHS Secretary is further permitted to advance public awareness on the various types of eating disorders, including symptoms and methods of identification, intervention and referral and make available updated fact sheets and public information related to eating disorders on the website of the National Women's Health Information Center and in appropriate obesity prevention programs (Section 13005).

If you have any questions or if you would like additional information on this topic, please contact:

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[1] Codified at 42 U.S.C. 300gg-26, 29 U.S.C 1185a, and 26 U.S.C. 9812.

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