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“Red Flags” Mental Health Parity Guidance Provides Practical Tips for Plan Sponsors and Hints at Future Rulemaking Priorities

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On the same day the Department of Labor’s Employee Benefits Security Administration (“EBSA”) issued Field Assistance Bulletin No. 2026-03, EBSA also posted a companion “red flags” guidance document to assist plan sponsors in identifying mental health parity compliance issues (the “Guidance”), which we discussed here. The stated purpose of the Guidance is to provide “clearer and more streamlined expectations to plans and issuers for NQTL compliance.”

Background

The Mental Health Parity and Addiction Equity Act (MHPAEA) generally requires group health plans that provide mental health/substance use disorder (MH/SUD) benefits to ensure that the financial requirements and treatment limitations, as well as non-quantitative treatment limitations (NQTLs), applicable to such benefits are no more restrictive than those applied to medical/surgical (M/S) benefits. Building on prior self-assessment tools released for plan sponsors over the years and issued in conjunction with FAB 2026-03, the Guidance identifies specific “red flags” in written plan provisions and plan operations, as well as best practices for monitoring compliance and working with service providers.

Red flags in written plan provisions

The Guidance identifies specific examples of “red flags” in written plan provisions that have commonly surfaced during EBSA investigations, organized around the three NQTL enforcement priority areas announced in FAB 2026-03:

- **Blanket exclusions of MH/SUD benefits**: Examples of impermissible exclusions identified in the Guidance include a blanket exclusion of applied behavior analysis (“ABA”) therapy, speech therapy, or occupational therapy for autism spectrum

disorder (but no similar blanket exclusion for M/S conditions). Similarly, exclusions of residential treatment programs, intensive outpatient programs, or partial hospitalization programs for MH/SUD conditions where intermediate levels of care are covered for M/S conditions were also flagged as examples of impermissible exclusions.

- **Medical necessity standards and review processes**: Plan provisions requiring prior authorization or concurrent care review for all or almost all MH/SUD benefits but not for M/S benefits (or for only a few) were flagged as impermissible. Another example was maintenance of a separate "Mental Health Utilization Reviewer" or "Clinical Coordinator" for MH/SUD benefits (but not M/S benefits), which was a relatively common provision found in many older health plan documents. Finally, the Guidance also flagged as problematic the use of certain criteria to access MH/SUD care but not M/S care, such as required parental involvement, exhaustion of community resources, and repeated diagnostic testing for autism spectrum disorder.
- **Network adequacy standards**: Examples of impermissible plan provisions related to network adequacy standards focus on network admission standards and the processes by which MH/SUD providers are reimbursed. The Guidance flagged longer application processes for MH/SUD providers to join networks, different reimbursement methodologies for MH/SUD compared to M/S providers, and longer claims and appeals processes as examples of impermissible plan provisions. As most of these types of provisions are not found in official plan documents or other participant-facing communications, it seems reasonable to assume that these factors may also be considered problematic by EBSA from a plan operations standpoint.

The Guidance highlights additional "red flags" in written plan provisions separate from the FAB 2026-03 enforcement priorities, which can be reviewed here.

Red flags in plan operations

The Guidance also identifies "red flags" in plan operations. There are two points here for plan sponsors. The first, more immediate point is that the Guidance provides practical insight into EBSA's perspective on common NQTL compliance issues in plan operations, and so should be reviewed by plan sponsors and employers for that reason.

The second point is less immediate but potentially more significant in terms of the pending regulations set to be issued by the Departments of Labor, Health and Human Services, and the Treasury (the "Departments") in 2027. Here's why:

By way of quick reminder, the 2024 final regulations (the "2024 Final Regulations") sharpened the MHPAEA NQTL framework by requiring plans to demonstrate, through data and outcomes, that NQTLs do not restrict access to MH/SUD benefits more than they restrict access to M/S benefits. Although the "data and outcomes" provisions of the 2024 Final Regulations are currently on hold pending litigation, the Guidance flags the following issues (among others) as indicative of NQTL non-compliance—all of which seem squarely focused on data and outcomes:

- Participants in a given benefit classification rely on out-of-network providers far more often for MH/SUD care than for M/S care, a gap that, in EBSA's view, may "suggest[] potential discrepancies in the efforts, processes, and procedures to assemble MH/SUD networks as compared to M/S networks."
- Paying MH/SUD providers under a different reimbursement approach than M/S providers, or failing to engage in good-faith negotiations with MH/SUD providers who are considering joining or leaving the network.
- Using different yardsticks to measure whether the network includes enough MH/SUD providers than are used for M/S providers, or responding less aggressively when shortfalls in the MH/SUD network are identified.
- Calculating out-of-network payment rates for MH/SUD claims differently from the way they are calculated for M/S claims.

At this point, the Guidance is simply that—guidance for plan sponsors—and from our perspective, does not necessarily impose new or additional burdens on plan sponsors. That said, although the Guidance stops short of suggesting that plan sponsors must monitor and track this information now, it suggests strongly that any new regulations issued by the Departments may contain some type of outcomes analysis and that the Departments may expect this level of detail in any NQTL examination.

Best practices for monitoring service providers

Perhaps unsurprisingly, the Guidance recommends that plan fiduciaries consider MHPAEA compliance when selecting service providers and provides a detailed list of questions fiduciaries should ask existing and prospective service providers, such as: how often the provider reviews its MHPAEA compliance processes; the availability of compliance reports or analyses, including NQTL comparative analyses specific to the plan; and whether the provider will supply periodic reports and underlying data related to MH/SUD claims trends.

The Guidance's emphasis on service providers is well-placed because the quality of NQTL comparative analyses typically varies by service provider. Plan fiduciaries should consider pressing vendors on specifics, such as whether the analysis addresses NQTLs in operation and the data that the vendor is collecting.

Best practices for monitoring operations compliance

The Guidance also includes practical tips for plan fiduciaries when monitoring compliance for three common NQTLs. Similar to the discussion above, the majority of these best practices would seem to suggest that the plan sponsor consider collecting and assessing outcomes data for MH/SUD benefits access compared to M/S benefits access.

Tips for plans under DOL review and audit

The Guidance concludes with practical tips for plans that have been selected for an NQTL compliance review, including: having documentation ready (coverage documents, NQTL comparative analyses, and monitoring records); establishing an internal response process for communicating with DOL; re-reviewing comparative analyses for completeness and accuracy; responding to DOL inquiries with detailed answers; and proposing appropriate corrective action.

Proskauer's perspective

The Guidance is a valuable resource for plan sponsors and fiduciaries. At this point, we see two key takeaways: First, the Guidance provides extensive examples of plan provisions and plan operations that EBSA views as potential NQTL problems. That in and of itself is valuable. Second, the Guidance suggests that while the new provisions in the 2024 Final Regulations may be gone for now, they are not forgotten. The focus on outcomes data and analysis throughout the Guidance hints that some or all of the themes in the 2024 Final Regulations are important to EBSA and may return in future rulemaking from the Departments.

Stay tuned to our Compensation & Benefits Blog, as we will continue to monitor developments in this area and provide updates as additional guidance is issued.

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