

October 17, 2023

The Honorable Xavier Becerra Secretary of Health and Human Services 200 Independence Avenue SW Washington, DC 20201

The Honorable Janet Yellen Secretary of the Treasury 1500 Pennsylvania Avenue NW Washington, DC 20220 The Honorable Julie Su Acting Secretary of Labor 200 Constitution Avenue NW Washington, DC 20210

## Re: Comments on the Requirements Related to the Mental Health Parity and Addiction Equity Act; Proposed Regulations

To Whom it May Concern:

The Society for Human Resource Management (SHRM) appreciates the opportunity to provide comments on the Proposed Regulations on Requirements Related to the Mental Health Parity and Addiction Equity Act (MHPAEA) issued by the U.S. Departments of Health and Human Services (HHS), Labor and Treasury (collectively "the Departments") published in the Federal Register on August 03, 2023 (the "Proposed Regulations").

Founded in 1948, SHRM is the world's largest HR membership organization devoted to human resource management. The Society for Human Resource Management's mission is to create better workplaces where employers and employees thrive together. As the voice of all things work, workers, and the workplace, SHRM is the foremost expert, convener, and thought leader on issues impacting today's evolving workplaces. With nearly 325,000 members in 165 countries, SHRM impacts the lives of more than 235 million workers and families globally. Because a sizable portion of our membership includes small employers, this letter comments on the anticipated changes

to the benefit requirements under the MHPAEA that will significantly burden a sizeable sector of SHRM member organizations.

We begin by emphasizing that SHRM and its members agree with the Departments that mental health is essential to personal and societal wellbeing and that America is experiencing a mental health and substance use disorder crisis. We share the view of other policy groups that the Proposed Regulations are well-intended, with the goals of supporting access to mental health and substance use disorder benefits and bolstering MHPAEA compliance. Even so, the Proposed Regulations are complex, convoluted and will impose significant new burdens and costs on group health plan sponsors. We have identified several aspects of the Proposed Regulations that raise significant concerns because they could have unintended negative effects on participants and beneficiaries. While employers are more than willing to do their part to support the mental health of employees and their families, it is essential that any final regulations avoid undermining safe, effective affordable coverage and are clear, fair, and workable.

We appreciate the opportunity to offer comments, insights, and recommendations on the proposed regulations. The list below highlights our comments.

- **Impact to Small Employers.** The Proposed Regulations significantly underestimate the cost and time necessary to comply. The burden will be too great for most small employers. As a result, we ask that the Departments focus efforts regarding comparative analyses on the carriers and third-party administrators (TPAs) instead of the plan sponsors.
- **Benefit Design Safe Harbor.** A more direct avenue to ensure plans offer mental health and substance use disorder in a meaningful manner would be to create a baseline safe harbor benefit offering that serves as an alternative to the comparative analysis requirement.
- **Small Plan Carve Out.** SHRM supports a carve out specifically for health plans covering less than 500 participants, or at a minimum, a delay in the effective date for this population.

## **Impact to Small Employers**

The Proposed Regulations presume that third-party administrators will assume most of the MHPAEA compliance obligations. This has not been our experience. In fact, we are aware of no third-party administrator who has assumed such compliance obligation wholescale. Most specifically disclaim any such obligation. Further, most will not even offer the data and cooperation necessary to perform an operational analysis *unless and until* the plan sponsor is under Department of Labor audit.

Instead plan sponsors have been left to engage vendors in the private market to perform a comparative analysis. The market for vendors willing to perform this analysis is small. It is not uncommon for vendors to charge upwards of \$100,000 for a comprehensive analysis (and these analyses can easily exceed \$200,000 in many settings, even before implementation of the Proposed Regulations).

These expenses disproportionately impact small employers, for whom the analysis is no easier (or less expensive). But such an analysis would consume a much greater portion of the sponsor's health benefits budget, making it more likely the small employer may be forced to stop offering mental health and substance use disorder benefits rather than assume this ongoing compliance cost.

Beyond the fiscal impact is the reality that small employers often do not design their own health and welfare plans. Plan sponsors in this space typically defer entirely to their service providers, including TPAs and carriers — to prepare the comparative analyses, as their service providers have the requisite expertise. With the understanding that TPAs and carriers are central in preparing the comparative analyses, we agree with other commenters who have noted that it would be more efficient for the Departments to review and analyze TPA and carrier comparative analyses rather than auditing plan sponsors on a one-off basis.

## **Benefit Design Safe Harbor Recommendation**

SHRM supports the development of a benefits design safe harbor to allow plans to comply through meeting or exceeding a baseline mental health/substance use disorder benefit offering. This would offer the dual benefit of ensuring that plans offer meaningful mental health/substance use disorder benefits while easing the compliance burden. Plans that do not meet the benefits design safe harbor could still comply through performing a comparative analysis, so this proposal would provide an alternative for plans who simply desire a more clear path to compliance. To the extent the Departments are amenable to this request, SHRM would be happy to work with the Departments to offer suggestions on what should be included in the baseline safe harbor benefits offering.

## **Small Plan Carve Out**

Small employers may be particularly challenged in implementing the Proposed Regulations because they are often large enough to "self-fund" their health plan but could still be too small to be able to shoulder the cost burden of implementing a meaningful comparative analysis. As such, they are placed in a position where they cannot simply rely on the analysis performed by their insurance carrier (as would typically be the case for a fully-insured plan sponsor), but they do not have the resources to perform their own comparative analysis. Moreover, small employers sponsoring group health plans are

significantly less likely to come up with a "custom" plan design that would create a greater risk of disparity with respect to the medical/surgical v. mental health/substance use disorder benefits. Instead, they typically rely on the "off-the-shelf" benefit designs offered by their TPA.

Given this reality, we request that the Departments exempt small employer health plans from the requirements of the Proposed Regulations. There is precedent for such a carve out in that the regulations implementing the MHPAEA included such a carve out (later indirectly invalidated by the Affordable Care Act). While we would welcome any parameters the Departments deem appropriate, we propose a definition of "small employer" that covers health plans with less than 500 participants. If deemed necessary, the Departments could limit the carve out to those employers who have adopted a standard health plan design offered by their TPA, without material modification.

In the alternative, the Departments should delay the effective date of the Proposed Regulations for small employer plans. As noted above, the market currently offers few choices for vendors with the expertise necessary to perform a comparative analysis, and those vendors that do provide such a service do so at a premium. We expect that through the use of technology and leveraging pre-established resources, more vendors will emerge and the costs of performing a meaningful comparative analysis will eventually be reduced. If the Departments were to offer a delayed effective date for small employers, it would strike the balance of impacting a significant percent of the population (those enrolled in fully-insured plans or large employer plans who would still be subject to the earlier effective date), while easing the eventual burden on small employers through these market advancements.

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We appreciate the opportunity to offer comments on this important matter. Mental health and substance use disorder benefits are extremely important to plan participants and their families and are a valuable employment-based offering. We encourage the Departments to strike a balance that will encourage these offerings without creating a regulatory burden that has the unintended impact of driving employers away from offering health benefit plans.

Please feel free to contact us if you have any questions about our comments.

Sincerely,

Emily M. Dickens

Enly G. Dilen

Chief of Staff, Head of Public Affairs, and Corporate Secretary

Society for Human Resource Management

1800 Duke Street

Alexandria, VA 22314