

Code § 4980D and Violations of the NQTL Analysis Requirement Under the Proposed MHPAEA Regulations

Article By:

Alden J. Bianchi

This post continues our investigation of [proposed regulations](#) under the Mental Health Parity and Addiction Equity Act (MHPAEA) issued by the US Departments of Labor, Health and Human Services and the Treasury (the Departments). Our previous MHPAEA content is available [here](#).

The proposed regulations establish a formal structure for how the Departments will enforce the requirement that plans and issuers comply with their obligations to provide a nonquantitative treatment limitation (NQTL) analysis on request. The structure includes the following steps:

- Plans and health insurance issuers must provide the NQTL analysis within 10 business days of receipt of the request.
- If the Departments determine that the NQTL analysis is deficient, upon notification, the plan/issuer has 10 business days to furnish any additional information to the Departments.
- If the Departments determine that the NQTL analysis is deficient, plans/issuers must also undertake corrective actions and resubmit to the Departments a compliant NQTL analysis no later than 45 calendar days after notification of a noncompliant NQTL analysis.
- If the plan or issuer remains out of compliance following the 45-calendar-day corrective action period, the plan or issuer must notify the plan participants of the plan's/issuer's noncompliance within seven calendar days of the receipt of the final determination of noncompliance.
- The plan or issuer must also provide a copy of the notice to the Department of Labor or Health and Human Services, any service provider involved in the claims process and any fiduciary responsible for deciding benefit claims within the same seven calendar days.

These are not the only remedies or sanctions, however. Internal Revenue Code (Code) Section 4980D generally imposes a nondeductible excise tax of \$100 per day per affected individual for failure to comply with Code Chapter 100, group health plan requirements. Noncompliant plans must self-report the Section 4980D excise tax on Form 8928. MHPAEA amends the Code, the Employee

Retirement Income Security Act and the Public Health Service Act. The provisions amending the Code are in Section 9812, which is in Chapter 100. Thus, Code Section 4980D applies to violations of MHPAEA, including the requirement to prepare and provide NQTL analyses upon request.

According to a 2023 report to Congress, the Department of Labor alone sent some 182 requests, *none* of which were initially compliant. Shouldn't all these plans (and many others) be self-reporting violations and paying excise taxes under Section 4980D? The proposed regulation takes up 117 pages of the Federal Register. Section 4980D is mentioned only once in a footnote. The accompanying text says merely that "plan sponsors are generally responsible for ensuring compliance and could, in certain circumstances, be liable for penalties for any violations."

The application of Section 4980D to MHPAEA is an area that would benefit from regulatory attention and, hopefully, relief. For example, penalties should not at least in our view be enforced against plan sponsors acting in good faith whose NQTL analyses are initially deficient but are brought into compliance.

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