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March 17, 2010

The Honorable Tom Harkin
Chairman
The Honorable Michael B. Enzi
Ranking Minority Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable George Miller
Chairman
The Honorable John Kline
Ranking Minority Member
Committee on Education and Labor
House of Representatives

Subject: *Department of the Treasury, Internal Revenue Service; Department of Labor, Employee Benefits Security Administration; Department of Health and Human Services, Centers for Medicare and Medicaid Services: Interim Final Rules Under the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of the Treasury, Internal Revenue Service; Department of Labor, Employee Benefits Security Administration; Department of Health and Human Services, Centers for Medicare and Medicaid Services (the Departments), entitled "Interim Final Rules Under the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008" (MHPAEA) (RINS: 1545-BJ05; 1210-AB30; 0938-AP65). We received the rule on March 3, 2010. It was published in the *Federal Register* as interim final rules with request for comments on February 2, 2010. 75 Fed. Reg. 5410.

The interim final rule requires parity between mental health or substance use disorder benefits and medical/surgical benefits with respect to financial requirements and treatment limitations under group health plans and health insurance coverage offered in connection with a group health plan. These interim final regulations replace regulations implementing the Mental Health Parity Act of 1996 (MHPA 1996). The interim final rule also makes conforming changes to reflect modifications MHPAEA made to the original MHPA 1996 definitions and provisions

regarding parity in aggregate lifetime and annual dollar limits, and incorporates new parity standards. Comments are due on or before May 3, 2010. These interim final regulations generally apply to group health plans and group health insurance issuers for plan years beginning on or after July 1, 2010.

The interim final rule has an effective date of April 5, 2010. The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The rule was published in the *Federal Register* on February 2, 2010, but we did not receive the rule until March 3, 2010. Therefore, the final rule does not have the required 60-day delay in its effective date.

Enclosed is our assessment of the Departments' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that, with the exception of the effective date, the Departments complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: LaNita Van Dyke
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ENCLOSURE

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE;
DEPARTMENT OF LABOR, EMPLOYEE BENEFITS SECURITY ADMINISTRATION;
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
CENTERS FOR MEDICARE AND MEDICAID SERVICES
ENTITLED
"INTERIM FINAL RULES UNDER THE PAUL WELLSTONE
AND PETE DOMENICI MENTAL HEALTH PARITY
AND ADDICTION EQUITY ACT OF 2008"
(RINS: 1545-BJ05; 1210-AB30; 0938-AP65)

(i) Cost-benefit analysis

The Departments analyzed the costs and benefits of the rule. According to the Departments, the costs include costs associated with increased utilization of mental health and substance use disorder benefits and costs associated with cumulative financial requirements and quantitative treatment limitations, including deductibles. Additionally, the Departments include compliance review costs and costs associated with MHPAEA disclosures.

The Departments expect that the largest benefit associated with MHPAEA and these regulations will be derived from applying parity to cumulative quantitative treatment limitations such as annual or lifetime day or visit limits (visit limitations) to help ensure that vulnerable populations—those accessing substantial amounts of mental health and substance use disorder services—have better access to appropriate care. The Departments cannot estimate how large this benefit will be, because sufficient data is not available to estimate the number of covered individuals that had their benefits terminated because they reached their coverage limit. The Departments state that another potential benefit associated with MHPAEA and these regulations is that use of mental health and substance use disorder benefits could improve. The Departments note that the finding that treatment can help increase the productivity of those suffering from mental illness suggests that increasing access to treatment of mental disorders could have a beneficial impact on lost productivity cost and lost earnings that stem from untreated and under treated mental health conditions and substance use disorders. The Departments, however, do not have sufficient data to determine whether this result will occur, and, if it does, the extent to which lost productivity cost and lost earnings could improve. According to the Departments, because expenditures on mental health and substance use disorder benefits only comprise 3–6 percent of the total benefits covered by a group health plan and 8 percent of overall healthcare costs, the Departments expect that group health plans will lower cost-sharing on mental health and substance use disorder benefits instead of raising cost-sharing on medical/surgical benefits.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 551 et seq.) and that are likely to have a significant economic impact on a substantial number of small entities. Under section 553(b) of the Administrative Procedures Act, a general notice of proposed rulemaking is not required when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. These interim final regulations are exempt from APA, because the Departments made a good cause finding that a general notice of proposed rulemaking is not necessary earlier in this preamble. Therefore, the RFA does not apply and the Departments are not required to either certify that the rule would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis. Nevertheless, the Departments carefully considered the likely impact of the rule on small entities in connection with their assessment under Executive Order 12,866. The Departments expect the rules to reduce the compliance burden imposed on plans and insurers by clarifying definitions and terms contained in the statute and providing examples of acceptable methods to comply with specific provisions. The Departments believe that the rule's impact on small entities will be minimized by the fact that MHPAEA does not apply to small employers who have between 2 and 50 employees.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

The Departments state that these rules are not subject to the Unfunded Mandates Reform Act because they are being issued as interim final rules. However, the Departments note that consistent with the policy embodied in the Act, the regulation has been designed to be the least burdensome alternative for state, local, and tribal governments, and the private sector, while achieving the objectives of MHPAEA.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

The Departments issued this rule as an interim final rule. Under section 553(b) of the Administrative Procedure Act, a general notice of proposed rulemaking is not required when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. Section 9833 of the Internal Revenue Code of 1986 (the Code), section 734 of the Employee Retirement Income Security Act of 1974 (ERISA), and section 2792 of the Public Health Service Act (PHS Act) authorize the Secretaries of the Treasury, Labor, and HHS (the Secretaries) to promulgate any interim final rules that they determine are

appropriate to carry out the provisions of Chapter 100 of Subtitle K of the Code, Part 7 of Subtitle B of Title I of ERISA, and Part A of Title XXVII of the PHS Act, which include the provisions of MHPAEA. The Departments state that these rules are being adopted on an interim final basis because the Secretaries have determined that without prompt guidance some members of the regulated community may not know what steps to take to comply with the requirements of MHPAEA, which may result in an adverse impact on participants and beneficiaries with regard to their health benefits under group health plans and the protections provided under MHPAEA. The Departments note that the interim final rule takes into account comments received in a request for information soliciting comments on the requirements of MHPAEA published on April 28, 2009. 74 Fed. Reg. 19,155. For the foregoing reasons, the Departments finds that the publication of a proposed regulation, for the purpose of notice and public comment thereon, would be impracticable, unnecessary, and contrary to the public interest.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The Departments state that MHPAEA disclosures are information collection requests (ICRs) subject to the Act. The Departments state that they are not soliciting comments concerning an ICR pertaining to the claims denial notice, because the Department of Labor's ERISA claims procedure regulation (29 CFR 2560.503–1) requires (among other things) ERISA-covered group health plans to provide such disclosures automatically to participants and beneficiaries free of charge. For purposes of this analysis, the Departments assume that non-ERISA plans will satisfy the safe harbor, because the same third-party administrators and insurers are hired by ERISA- and non-ERISA covered plans, and these entities provide the same claims denial notifications to participants covered by ERISA- and non-ERISA-covered plans. Therefore, the Departments hereby determine that the hour and cost burden associated with the claims denial notice already is accounted for in the ICR for the ERISA claims procedure regulation that is approved under OMB Control Number 1210–0053.

Statutory authorization for the rule

The Department of the Treasury temporary and final regulations are adopted pursuant to the authority contained in sections 7805 and 9833 of the Internal Revenue Code of 1986. The Department of Labor interim final regulations are adopted pursuant to the authority contained in 29 U.S.C. §§ 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L. No. 104–191, 110 Stat. 1936; sec. 401(b), Pub. L. No. 105–200, 112 Stat. 645 (42 U.S.C. § 651 note); sec. 512(d), Pub. L. No. 110–343, 122 Stat. 3765; Pub. L. No. 110–460, 122 Stat. 5123; Secretary of Labor's Order 6–2009, 74 Fed. Reg. 21,524. The Department of Health and Human Services interim final regulations are adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 U.S.C. § 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

Executive Order No. 12,866 (Regulatory Planning and Review)

The Departments have determined that this regulatory action is economically significant within the meaning of section 3(f)(1) of the Executive Order, because it is likely to have an effect on the economy of $100 million or more in any one year.

Executive Order No. 13,132 (Federalism)

In the Departments' view, these regulations have federalism implications, because they have direct effects on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among various levels of government. However, in the Departments' view, the federalism implications of these regulations are substantially mitigated because, with respect to health insurance issuers, the Departments expect that the majority of states have enacted or will enact laws or take other appropriate action resulting in their meeting or exceeding the federal MHPAEA standards.