

do not apply to health insurance issuers. A taxpayer that fails to comply with these provisions may be subject to an excise tax under section 4980D of the Code.

## II. Overview of MHPA

The MHPA provisions are set forth in section 2705 of the PHS Act, section 712 of ERISA, and section 9812 of the Code. MHPA applies to a group health plan (or health insurance coverage offered by issuers in connection with a group health plan) that provides both medical/surgical benefits and mental health benefits. MHPA's original text included a sunset provision specifying that MHPA's provisions would not apply to benefits for services furnished on or after September 30, 2001. On December 22, 1997, the Departments of Health and Human Services, Labor, and the Treasury issued interim final regulations under MHPA in the **Federal Register** (62 FR 66931). The interim final regulations included this statutory sunset date.

On January 10, 2002, President Bush signed H.R. 3061 (Pub. L. 107-116), the 2002 Appropriations Act for the Departments of Labor, Health and Human Services, and Education ("Appropriations Act").<sup>1</sup> This legislation extended MHPA's original sunset date under the PHS Act, ERISA, and the Code, so that MHPA's provisions in all three statutes would not sunset until December 31, 2002. The Appropriations Act did not specifically address whether MHPA's provisions in any of the three statutes applied retroactively during the "gap" that began upon the expiration of the original legislation (September 30, 2001) and ended on the day before enactment of the Appropriations Act (January 9, 2002).

On March 9, 2002, President Bush signed H.R. 3090 (Pub. L. 107-147), the Job Creation and Worker Assistance Act of 2002 ("Job Creation Act"). That legislation amended section 9812 of the Code (the mental health parity provisions), but did not amend the corresponding MHPA provisions in the PHS Act or ERISA. The Job Creation Act extended the sunset date under the

Code to December 31, 2003. However, for services furnished "on or after September 30, 2001, and before January 10, 2002" it specifically precluded retroactive application of the Code's MHPA provision. In other words, the Code's provisions would not apply to services furnished during the "gap" between the original sunset date and the enactment of the Code's sunset extension in the Appropriations Act.

Because the Job Creation Act did not amend the MHPA provisions of the PHS Act or ERISA, we conclude that the MHPA provisions of the PHS Act apply during the "gap," based on language in the Joint Committee on Taxation's technical explanation of H.R. 3090, the underlying bill that became the Job Creation Act. The Joint Committee report essentially explained that H.R. 3090 was undoing that part of the Appropriations Act that had "restored" the Code's MHPA provisions retroactively to September 30, 2001. Since the Appropriations Act made identical changes to the MHPA provisions of the Code, the PHS Act, and ERISA, that observation made by the Joint Committee on Taxation report clearly supports the conclusion that the Appropriations Act had "restored" the MHPA provisions of the PHS Act and ERISA as well. In other words, because the MHPA provision contained in the PHS Act was made retroactive by the Appropriations Act, and was not amended by the Job Creation Act, the PHS provisions were "restored" retroactively to September 30, 2001.

On December 2, 2002, President Bush signed H.R. 5716 (Pub. L. 107-313), the Mental Health Parity Reauthorization Act of 2002. This legislation further extends MHPA's sunset date under the PHS Act and ERISA so that MHPA's provisions will apply to any services furnished before December 31, 2003. The new legislation does not contain any language that conflicts with the technical explanation of the Joint Committee on Taxation, described above, and therefore does not change our conclusion that the PHS Act's MHPA provisions are retroactive to September 30, 2001.

These various amendments have not altered MHPA's scope. It continues to apply to a group health plan (or health insurance coverage offered by issuers in connection with a group health plan) that provides both medical/surgical benefits and mental health benefits.<sup>2</sup> As

a result of the statutory amendments, and to assist employers, plan sponsors, health insurance issuers, and workers, the Department is publishing this amendment to the interim final regulations, conforming the regulatory sunset date to the new statutory sunset date. The Department is making the effective date of this amendment to the interim final regulations effective as of July 28, 2003. The Department is also making conforming changes extending the duration of the increased cost exemption to be consistent with the new sunset date.

Since the extension of this sunset date is essentially self-implementing, this amendment to the MHPA regulations is published on an interim final basis under section 2792 of the PHS Act.

This amendment to the interim final regulations is adopted under 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 added by HIPAA (Pub. L. 104-191), and amended by MHPA (Pub. L. 104-204, as amended by Pub. L. 107-116, and Pub. L. 107-313).

## III. Regulatory Impact Statement

### A. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 16, 1980, Pub. L. 96-354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), and Executive Order 13132.

Executive Order 12866 (as amended by Executive Order 13258, which merely reassigns responsibility of duties) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (\$100 million or more in any 1 year). Pursuant to the terms of the Executive Order, it has been determined that this action is not a "significant regulatory action" within the meaning of the Executive Order. Rather, it is an amendment to the 1997 interim final

<sup>1</sup> During the 107th Congress, legislation was passed by the Senate to substantively amend and expand the provisions of MHPA already in place. This legislation was offered as an amendment to the provisions of H.R. 3061. The Conference Report accompanying the underlying provisions of H.R. 3061 states that instead of the amendment proposed by the Senate, the amendment to MHPA contained in H.R. 3061 extends the original sunset date of MHPA, so that MHPA's provisions will not apply to benefits for services furnished on or after December 31, 2002. H.R. Rep. 107-342, at 170 (2001).

<sup>2</sup> The parity requirements under MHPA, the interim regulations, and the amendment to the interim regulations do not apply to any group health plan (or health insurance coverage offered in connection with a group health plan) for any plan year of a small employer. The term "small

employer" is defined as an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year.