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AMENDMENT NO. \_\_\_\_\_

Calendar No. \_\_\_\_\_

Purpose: To provide for a complete substitute.

IN THE SENATE OF THE UNITED STATES—108th Cong., 2d Sess.

**S. 486**

To provide for equal coverage of mental health benefits with respect to health insurance coverage unless comparable limitations are imposed on medical and surgical benefits.

Referred to the Committee on \_\_\_\_\_  
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended  
to be proposed by \_\_\_\_\_

Viz:

- 1 Strike all after the enacting clause and insert the fol-
- 2 lowing:
- 3 SECTION 1. SHORT TITLE.
- 4 This Act may be cited as the "Senator Paul
- 5 Wellstone Mental Health Equitable Treatment Act of
- 6 2004".

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1 SEC. 2. AMENDMENT TO THE EMPLOYEE RETIREMENT IN-  
2 COME SECURITY ACT OF 1974.

3 (a) IN GENERAL.—Section 712 of the Employee Re-  
4 tirement Income Security Act of 1974 (29 U.S.C. 1185a)  
5 is amended—

6 (1) in subsection (a), by adding at the end the  
7 following:

8 “(3) DAY OR VISIT LIMITS.—In the case of a  
9 group health plan (or health insurance coverage of-  
10 fered in connection with such a plan) that provides  
11 both medical and surgical benefits and mental health  
12 benefits:

13 “(A) NO DAY OR VISIT LIMITS.—If the  
14 plan or coverage does not include day or visit  
15 limits on substantially all medical and surgical  
16 benefits, the plan or coverage may not impose  
17 any day or visit limits on mental health bene-  
18 fits.

19 “(B) DAY OR VISIT LIMIT PERMITTED.—If  
20 the plan or coverage includes a day or visit  
21 limit on substantially all medical and surgical  
22 benefits the plan or coverage shall either—

23 “(i) apply the applicable day or visit  
24 limits both to the medical and surgical  
25 benefits to which they otherwise would  
26 apply and to mental health benefits and

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1 not distinguish in the application of such  
2 limits between such medical and surgical  
3 benefits and mental health benefits; or

4 “(ii) not apply any day or visit limits  
5 to mental health benefits that are less than  
6 the day or visit limits applied to medical or  
7 surgical benefits.

8 “(C) RULE IN THE CASE OF DIFFERENT  
9 LIMITS.—In the case of a plan or coverage that  
10 is not described in subparagraph (A) or (B)  
11 and that includes no or different day or visit  
12 limits on different categories of medical and  
13 surgical benefits, the Secretary shall establish  
14 rules under which subparagraph (B) is applied  
15 to such plan or coverage with respect to mental  
16 health benefits by substituting for the applica-  
17 ble day or visit limits average day or visit limits  
18 that are computed taking into account the  
19 weighted average of each of the day or visit lim-  
20 its applicable to such categories.

21 “(4) DEDUCTIBLES.—In the case of a group  
22 health plan (or health insurance coverage offered in  
23 connection with such a plan) that provides both  
24 medical and surgical benefits and mental health ben-  
25 efits:

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1                   “(A) NO DEDUCTIBLE.—If the plan or cov-  
 2                   erage does not include a deductible on substan-  
 3                   tially all medical and surgical benefits, the plan  
 4                   or coverage may not impose any deductible on  
 5                   mental health benefits.

6                   “(B) DEDUCTIBLE PERMITTED.—If the  
 7                   plan or coverage includes a deductible on sub-  
 8                   stantially all medical and surgical benefits, the  
 9                   plan or coverage shall either—

10                   “(i) apply the deductible both to the  
 11                   medical and surgical benefits to which it  
 12                   otherwise would apply and to mental  
 13                   health benefits and not distinguish in the  
 14                   application of such deductible between  
 15                   such medical and surgical benefits and  
 16                   mental health benefits; or

17                   “(ii) not include any deductible on  
 18                   mental health benefits that is more than  
 19                   the deductible applicable to medical and  
 20                   surgical benefits.

21                   “(C) RULE IN CASE OF DIFFERENT  
 22                   DEDUCTIBLES.—In the case of a plan or cov-  
 23                   erage that is not described in subparagraph (A)  
 24                   or (B) and that includes no or different  
 25                   deductibles on different categories of medical

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1 and surgical benefits, the Secretary shall estab-  
 2 lish rules under which subparagraph (B) is ap-  
 3 plied to such plan or coverage with respect to  
 4 mental health benefits by substituting for the  
 5 applicable deductible an average deductible that  
 6 is computed taking into account the weighted  
 7 average of the deductibles applicable to such  
 8 categories.

9 "(5) COPAYMENT.—In the case of a group  
 10 health plan (or health insurance coverage offered in  
 11 connection with such a plan) that provides both  
 12 medical and surgical benefits and mental health ben-  
 13 efits:

14 "(A) NO COPAYMENT.—If the plan or cov-  
 15 erage does not include a copayment on substan-  
 16 tially all medical and surgical benefits, the plan  
 17 or coverage may not impose any copayment on  
 18 mental health benefits.

19 "(B) COPAYMENT PERMITTED.—If the  
 20 plan or coverage includes a copayment on sub-  
 21 stantially all medical and surgical benefits, the  
 22 plan or coverage shall either—

23 "(i) apply the copayment both to the  
 24 medical and surgical benefits to which it  
 25 otherwise would apply and to mental

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1 health benefits and not distinguish in the  
2 application of such copayment between  
3 such medical and surgical benefits and  
4 mental health benefits; or

5 “(ii) not include any copayment on  
6 mental health benefits that is more than  
7 the copayment limit for medical and sur-  
8 gical benefits.

9 “(C) RULE IN CASE OF DIFFERENT COPAY-  
10 MENTS.—In the case of a plan or coverage that  
11 is not described in subparagraph (A) or (B)  
12 and that includes no or different copayments on  
13 different categories of medical and surgical ben-  
14 efits, the Secretary shall establish rules under  
15 which subparagraph (B) applies to such plan or  
16 coverage with respect to mental health benefits  
17 by substituting for the applicable copayments  
18 an average aggregate copayment that is com-  
19 puted taking into account the weighted average  
20 of the aggregate copayment applicable to such  
21 categories.

22 “(6) COINSURANCE.—In the case of a group  
23 health plan (or health insurance coverage offered in  
24 connection with such a plan) that provides both

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1 medical and surgical benefits and mental health ben-  
2 efits:

3 "(A) NO COINSURANCE.—If the plan or  
4 coverage does not include coinsurance on sub-  
5 stantially all medical and surgical benefits, the  
6 plan or coverage may not impose any coinsur-  
7 ance on mental health benefits.

8 "(B) COINSURANCE PERMITTED.—If the  
9 plan or coverage includes coinsurance on sub-  
10 stantially all medical and surgical benefits, the  
11 plan or coverage shall either—

12 "(i) apply the coinsurance both to the  
13 medical and surgical benefits to which it  
14 otherwise would apply and to mental  
15 health benefits and not distinguish in the  
16 application of such coinsurance between  
17 such medical and surgical benefits and  
18 mental health benefits; or

19 "(ii) not include any coinsurance on  
20 mental health benefits that is more than  
21 the coinsurance applicable to medical and  
22 surgical benefits.

23 "(C) RULE IN CASE OF DIFFERENT COIN-  
24 SURANCE.—In the case of a plan or coverage  
25 that is not described in subparagraph (A) or

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1 (B) and that includes no or different coinsur-  
2 ance on different categories of medical and sur-  
3 gical benefits, the Secretary shall establish rules  
4 under which subparagraph (B) is applied to  
5 such plan or coverage with respect to mental  
6 health benefits by substituting for the coinsur-  
7 ance amount an average coinsurance amount  
8 that is computed taking into account the  
9 weighted average of the coinsurance amount ap-  
10 plicable to such categories.

11 “(7) OUT-OF-POCKET PAYMENT.—In the case  
12 of a group health plan (or health insurance coverage  
13 offered in connection with such a plan) that provides  
14 both medical and surgical benefits and mental health  
15 benefits:

16 “(A) NO OUT-OF-POCKET PAYMENT.—If  
17 the plan or coverage does not include an out-of-  
18 pocket payment requirement on substantially all  
19 medical and surgical benefits, the plan or cov-  
20 erage may not impose any out-of-pocket pay-  
21 ment requirement on mental health benefits.

22 “(B) OUT-OF-POCKET PAYMENT PER-  
23 MITTED.—If the plan or coverage includes an  
24 out-of-pocket payment requirement on substan-



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1 tially all medical and surgical benefits, the plan  
2 or coverage shall either—

3 “(i) apply the out-of-pocket payment  
4 requirement both to the medical and sur-  
5 gical benefits to which it otherwise would  
6 apply and to mental health benefits and  
7 not distinguish in the application of such  
8 payment requirement between such medical  
9 and surgical benefits and mental health  
10 benefits; or

11 “(ii) not include any out-of-pocket  
12 payment requirement on mental health  
13 benefits that is more than the out-of-pock-  
14 et payment requirement applicable to med-  
15 ical and surgical benefits.

16 “(C) RULE IN CASE OF DIFFERENT LIM-  
17 ITS.—In the case of a plan or coverage that is  
18 not described in subparagraph (A) or (B) and  
19 that includes no or different out-of-pocket pay-  
20 ment requirements on different categories of  
21 medical and surgical benefits, the Secretary  
22 shall establish rules under which subparagraph  
23 (B) is applied to such plan or coverage with re-  
24 spect to mental health benefits by substituting  
25 for the out-of-pocket payment requirement an

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1 average aggregate out-of-pocket payment that is  
2 computed taking into account the weighted av-  
3 erage of the aggregate out-of-pocket payments  
4 applicable to such categories.

5 “(8) OTHER FINANCIAL OR TREATMENT LIMITATIONS.—In promulgating regulations to imple-  
6 ment the amendments made by the Senator Paul  
7 Wellstone Mental Health Equitable Treatment Act  
8 of 2004, the Secretary <sup>shall</sup> ~~may~~ include additional re-  
9 strictions relating to the imposition of financial or  
10 treatment limitations on mental health benefits  
11 where similar financial or treatment limitations are  
12 not imposed with respect to medical or surgical ben-  
13 efits <sup>to the extent necessary to achieve the purposes</sup>  
14 <sub>of this Act.</sub>

15 “(9) RULE OF CONSTRUCTION RELATING TO  
16 MEDICAL MANAGEMENT OF MENTAL HEALTH BENE-  
17 FITS.—Nothing in this subsection shall be construed  
18 to prevent the medical management of mental health  
19 benefits, including through concurrent and retro-  
20 spective utilization review and utilization manage-  
21 ment practices, preauthorization, and the application  
22 of medical necessity and appropriateness criteria ap-  
23 plicable to behavioral health and the contracting.”;

24 (2) in subsection (b)—

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1 (A) in paragraph (1), by striking "or" at  
2 the end; and

3 (B) by striking paragraph (2) and insert-  
4 ing the following:

5 "(2) in the case of a group health plan (or  
6 health insurance coverage offered in connection with  
7 such a plan) that provides mental health benefits, as  
8 affecting the terms and conditions (including re-  
9 quirements relating to medical necessity) relating to  
10 the amount, duration, or scope of mental health ben-  
11 efits under the plan or coverage, except as specifi-  
12 cally provided in subsection (a) (with respect to par-  
13 ity in the imposition of aggregate lifetime limits, an-  
14 nual limits, day or visit limits, deductibles, copay-  
15 ments, coinsurance, ~~or~~ out-of-pocket payments for  
16 mental health benefits); <sup>or provided for in (a) (3)</sup> or

17 "(3) as requiring a group health plan (or health  
18 insurance coverage offered in connection with such a  
19 plan) that provides in-network mental health bene-  
20 fits, to provide out-of-network mental health benefits  
21 under the requirements of this section, if the plan or  
22 coverage provide reasonable access to in-network  
23 providers and facilities.";

24 (3) by striking subsection (c) and inserting the  
25 following:

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1       “(c) SMALL EMPLOYER EXEMPTION.—

2               “(1) IN GENERAL.—This section shall not apply  
3 to any group health plan (and group health insur-  
4 ance coverage offered in connection with a group  
5 health plan) for any plan year of a small employer.

6               “(2) SMALL EMPLOYER.—For purposes of sub-  
7 paragraph (A), the term ‘small employer’ means, in  
8 connection with a group health plan with respect to  
9 a calendar year and a plan year, an employer who  
10 employed an average of at least 2 but not more than  
11 50 employees on business days during the preceding  
12 calendar year and who employs at least 2 employees  
13 on the first day of the plan year.

14               “(3) APPLICATION OF CERTAIN RULES IN DE-  
15 TERMINATION OF EMPLOYER SIZE.—For purposes of  
16 this paragraph:

17                       “(A) APPLICATION OF AGGREGATION RULE  
18 FOR EMPLOYERS.—Rules similar to the rules  
19 under subsections (b), (c), (m), and (o) of sec-  
20 tion 414 of the Internal Revenue Code of 1986  
21 shall apply for purposes of treating persons as  
22 a single employer.

23                       “(B) EMPLOYERS NOT IN EXISTENCE IN  
24 PRECEDING YEAR.—In the case of an employer  
25 which was not in existence throughout the pre-

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1 ceding calendar year, the determination of  
2 whether such employer is a small employer shall  
3 be based on the average number of employees  
4 that it is reasonably expected such employer  
5 will employ on business days in the current cal-  
6 endar year.

7 “(C) PREDECESSORS.—Any reference in  
8 this paragraph to an employer shall include a  
9 reference to any predecessor of such em-  
10 ployer.”; and

11 (4) by striking subsection (f).

12 (b) EFFECTIVE DATE.—The amendments made by  
13 subsection (a) shall apply with respect to group health  
14 plans (or health insurance coverage offered in connection  
15 with such plans) for plan years beginning on or after Jan-  
16 uary 1, 2006.

17 **SEC. 3. AMENDMENT TO THE PUBLIC HEALTH SERVICE ACT**  
18 **RELATING TO THE GROUP MARKET.**

19 (a) IN GENERAL.—Section 2705 of the Public Health  
20 Service Act (42 U.S.C. 300gg?095) is amended—

21 (1) in subsection (a), by adding at the end the  
22 following:

23 “(3) DAY OR VISIT LIMITS.—In the case of a  
24 group health plan (or health insurance coverage of-  
25 fered in connection with such a plan) that provides

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1 both medical and surgical benefits and mental health  
2 benefits:

3 "(A) NO DAY OR VISIT LIMITS.—If the  
4 plan or coverage does not include day or visit  
5 limits on substantially all medical and surgical  
6 benefits, the plan or coverage may not impose  
7 any day or visit limits on mental health bene-  
8 fits.

9 "(B) DAY OR VISIT LIMIT PERMITTED.—If  
10 the plan or coverage includes a day or visit  
11 limit on substantially all medical and surgical  
12 benefits the plan or coverage shall either—

13 "(i) apply the applicable day or visit  
14 limits both to the medical and surgical  
15 benefits to which they otherwise would  
16 apply and to mental health benefits and  
17 not distinguish in the application of such  
18 limits between such medical and surgical  
19 benefits and mental health benefits; or

20 "(ii) not apply any day or visit limits  
21 to mental health benefits that are less than  
22 the day or visit limits applied to medical or  
23 surgical benefits.

24 "(C) RULE IN THE CASE OF DIFFERENT  
25 LIMITS.—In the case of a plan or coverage that

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1 is not described in subparagraph (A) or (B)  
2 and that includes no or different day or visit  
3 limits on different categories of medical and  
4 surgical benefits, the Secretary shall establish  
5 rules under which subparagraph (B) is applied  
6 to such plan or coverage with respect to mental  
7 health benefits by substituting for the applica-  
8 ble day or visit limits average day or visit limits  
9 that are computed taking into account the  
10 weighted average of each of the day or visit lim-  
11 its applicable to such categories.

12 “(4) DEDUCTIBLES.—In the case of a group  
13 health plan (or health insurance coverage offered in  
14 connection with such a plan) that provides both  
15 medical and surgical benefits and mental health ben-  
16 efits:

17 “(A) NO DEDUCTIBLE.—If the plan or cov-  
18 erage does not include a deductible on substan-  
19 tially all medical and surgical benefits, the plan  
20 or coverage may not impose any deductible on  
21 mental health benefits.

22 “(B) DEDUCTIBLE PERMITTED.—If the  
23 plan or coverage includes a deductible on sub-  
24 stantially all medical and surgical benefits, the  
25 plan or coverage shall either—

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1           “(i) apply the deductible both to the  
2           medical and surgical benefits to which it  
3           otherwise would apply and to mental  
4           health benefits and not distinguish in the  
5           application of such deductible between  
6           such medical and surgical benefits and  
7           mental health benefits; or

8           “(ii) not include any deductible on  
9           mental health benefits that is more than  
10          the deductible applicable to medical and  
11          surgical benefits.

12          “(C) RULE IN CASE OF DIFFERENT  
13          DEDUCTIBLES.—In the case of a plan or cov-  
14          erage that is not described in subparagraph (A)  
15          or (B) and that includes no or different  
16          deductibles on different categories of medical  
17          and surgical benefits, the Secretary shall estab-  
18          lish rules under which subparagraph (B) is ap-  
19          plied to such plan or coverage with respect to  
20          mental health benefits by substituting for the  
21          applicable deductible an average deductible that  
22          is computed taking into account the weighted  
23          average of the deductibles applicable to such  
24          categories.



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1           “(5) COPAYMENT.—In the case of a group  
2 health plan (or health insurance coverage offered in  
3 connection with such a plan) that provides both  
4 medical and surgical benefits and mental health ben-  
5 efits:

6           “(A) NO COPAYMENT.—If the plan or cov-  
7 erage does not include a copayment on substan-  
8 tially all medical and surgical benefits, the plan  
9 or coverage may not impose any copayment on  
10 mental health benefits.

11           “(B) COPAYMENT PERMITTED.—If the  
12 plan or coverage includes a copayment on sub-  
13 stantially all medical and surgical benefits, the  
14 plan or coverage shall either—

15           “(i) apply the copayment both to the  
16 medical and surgical benefits to which it  
17 otherwise would apply and to mental  
18 health benefits and not distinguish in the  
19 application of such copayment between  
20 such medical and surgical benefits and  
21 mental health benefits; or

22           “(ii) not include any copayment on  
23 mental health benefits that is more than  
24 the copayment limit for medical and sur-  
25 gical benefits.

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1           “(C) RULE IN CASE OF DIFFERENT COPAY-  
2           MENTS.—In the case of a plan or coverage that  
3           is not described in subparagraph (A) or (B)  
4           and that includes no or different copayments on  
5           different categories of medical and surgical ben-  
6           efits, the Secretary shall establish rules under  
7           which subparagraph (B) applies to such plan or  
8           coverage with respect to mental health benefits  
9           by substituting for the applicable copayments  
10          an average aggregate copayment that is com-  
11          puted taking into account the weighted average  
12          of the aggregate copayment applicable to such  
13          categories.

14          “(6) COINSURANCE.—In the case of a group  
15          health plan (or health insurance coverage offered in  
16          connection with such a plan) that provides both  
17          medical and surgical benefits and mental health ben-  
18          efits:

19               “(A) NO COINSURANCE.—If the plan or  
20               coverage does not include coinsurance on sub-  
21               stantially all medical and surgical benefits, the  
22               plan or coverage may not impose any coinsur-  
23               ance on mental health benefits.

24               “(B) COINSURANCE PERMITTED.—If the  
25               plan or coverage includes coinsurance on sub-

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1           stantially all medical and surgical benefits, the  
2           plan or coverage shall either—

3                   “(i) apply the coinsurance both to the  
4                   medical and surgical benefits to which it  
5                   otherwise would apply and to mental  
6                   health benefits and not distinguish in the  
7                   application of such coinsurance between  
8                   such medical and surgical benefits and  
9                   mental health benefits; or

10                   “(ii) not include any coinsurance on  
11                   mental health benefits that is more than  
12                   the coinsurance applicable to medical and  
13                   surgical benefits.

14                   “(C) RULE IN CASE OF DIFFERENT COIN-  
15                   SURANCE.—In the case of a plan or coverage  
16                   that is not described in subparagraph (A) or  
17                   (B) and that includes no or different coinsur-  
18                   ance on different categories of medical and sur-  
19                   gical benefits, the Secretary shall establish rules  
20                   under which subparagraph (B) is applied to  
21                   such plan or coverage with respect to mental  
22                   health benefits by substituting for the coinsur-  
23                   ance amount an average coinsurance amount  
24                   that is computed taking into account the

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1 weighted average of the coinsurance amount ap-  
2 plicable to such categories.

3 "(7) OUT-OF-POCKET PAYMENT.—In the case  
4 of a group health plan (or health insurance coverage  
5 offered in connection with such a plan) that provides  
6 both medical and surgical benefits and mental health  
7 benefits:

8 "(A) NO OUT-OF-POCKET PAYMENT.—If  
9 the plan or coverage does not include an out-of-  
10 pocket payment requirement on substantially all  
11 medical and surgical benefits, the plan or cov-  
12 erage may not impose any out-of-pocket pay-  
13 ment requirement on mental health benefits.

14 "(B) OUT-OF-POCKET PAYMENT PER-  
15 MITTED.—If the plan or coverage includes an  
16 out-of-pocket payment requirement on substan-  
17 tially all medical and surgical benefits, the plan  
18 or coverage shall either—

19 "(i) apply the out-of-pocket payment  
20 requirement both to the medical and sur-  
21 gical benefits to which it otherwise would  
22 apply and to mental health benefits and  
23 not distinguish in the application of such  
24 payment requirement between such medical

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1 and surgical benefits and mental health  
2 benefits; or

3 "(ii) not include any out-of-pocket  
4 payment requirement on mental health  
5 benefits that is more than the out-of-pock-  
6 et payment requirement applicable to med-  
7 ical and surgical benefits.

8 "(C) RULE IN CASE OF DIFFERENT LIM-  
9 ITS.—In the case of a plan or coverage that is  
10 not described in subparagraph (A) or (B) and  
11 that includes no or different out-of-pocket pay-  
12 ment requirements on different categories of  
13 medical and surgical benefits, the Secretary  
14 shall establish rules under which subparagraph  
15 (B) is applied to such plan or coverage with re-  
16 spect to mental health benefits by substituting  
17 for the out-of-pocket payment requirement an  
18 average aggregate out-of-pocket payment that is  
19 computed taking into account the weighted av-  
20 erage of the aggregate out-of-pocket payments  
21 applicable to such categories.

22 "(8) OTHER FINANCIAL OR TREATMENT LIM-  
23 TATIONS.—In promulgating regulations to imple-  
24 ment the amendments made by the Senator Paul  
25 Wellstone Mental Health Equitable Treatment Act

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1 of 2004, the Secretary <sup>shall</sup> ~~may~~ include additional re-

2 strictions relating to the imposition of financial or

3 treatment limitations on mental health benefits

4 where similar financial or treatment limitations are

5 not imposed with respect to medical or surgical ben-

6 efits <sup>to the extent necessary to achieve the</sup> ~~to the extent necessary to achieve the~~ <sup>purposes of this Act.</sup> ~~purposes of this Act.~~

7 “(9) RULE OF CONSTRUCTION RELATING TO

8 MEDICAL MANAGEMENT OF MENTAL HEALTH BENE-

9 FITS.—Nothing in this subsection shall be construed

10 to prevent the medical management of mental health

11 benefits, including through concurrent and retro-

12 spective utilization review and utilization manage-

13 ment practices, preauthorization, and the application

14 of medical necessity and appropriateness criteria ap-

15 plicable to behavioral health and the contracting.”;

16 (2) in subsection (b)—

17 (A) in paragraph (1), by striking “or” at

18 the end; and

19 (B) by striking paragraph (2) and insert-

20 ing the following:

21 “(2) in the case of a group health plan (or

22 health insurance coverage offered in connection with

23 such a plan) that provides mental health benefits, as

24 affecting the terms and conditions (including re-

25 quirements relating to medical necessity) relating to

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1 the amount, duration, or scope of mental health ben-  
2 efits under the plan or coverage, except as specifi-  
3 cally provided in subsection (a) (with respect to par-  
4 ity in the imposition of aggregate lifetime limits, an-  
5 nual limits, day or visit limits, deductibles, copay-  
6 ments, coinsurance, ~~or~~ out-of-pocket payments for  
7 mental health benefits); <sup>or provided for in (a) (8)</sup> or

8 “(3) as requiring a group health plan (or health  
9 insurance coverage offered in connection with such a  
10 plan) that provides in-network mental health bene-  
11 fits, to provide out-of-network mental health benefits  
12 under the requirements of this section, if the plan or  
13 coverage provide reasonable access to in-network  
14 providers and facilities.”;

15 (3) by striking subsection (c) and inserting the  
16 following:

17 “(c) SMALL EMPLOYER EXEMPTION.—

18 “(1) IN GENERAL.—This section shall not apply  
19 to any group health plan (and group health insur-  
20 ance coverage offered in connection with a group  
21 health plan) for any plan year of a small employer.

22 “(2) SMALL EMPLOYER.—For purposes of sub-  
23 paragraph (A), the term ‘small employer’ means, in  
24 connection with a group health plan with respect to  
25 a calendar year and a plan year, an employer who

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1 employed an average of at least 2 but not more than  
2 50 employees on business days during the preceding  
3 calendar year and who employs at least 2 employees  
4 on the first day of the plan year.

5 “(3) APPLICATION OF CERTAIN RULES IN DE-  
6 TERMINATION OF EMPLOYER SIZE.—For purposes of  
7 this paragraph:

8 “(A) APPLICATION OF AGGREGATION RULE  
9 FOR EMPLOYERS.—Rules similar to the rules  
10 under subsections (b), (c), (m), and (o) of sec-  
11 tion 414 of the Internal Revenue Code of 1986  
12 shall apply for purposes of treating persons as  
13 a single employer.

14 “(B) EMPLOYERS NOT IN EXISTENCE IN  
15 PRECEDING YEAR.—In the case of an employer  
16 which was not in existence throughout the pre-  
17 ceding calendar year, the determination of  
18 whether such employer is a small employer shall  
19 be based on the average number of employees  
20 that it is reasonably expected such employer  
21 will employ on business days in the current cal-  
22 endar year.

23 “(C) PREDECESSORS.—Any reference in  
24 this paragraph to an employer shall include a

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1 reference to any predecessor of such em-  
2 ployer.”; and

3 (4) by striking subsection (f).

4 (b) EFFECTIVE DATE.—The amendments made by  
5 subsection (a) shall apply with respect to group health  
6 plans (or health insurance coverage offered in connection  
7 with such plans) for plan years beginning on or after Jan-  
8 uary 1, 2006.

9 SEC. 4. PREEMPTION.