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VIA OVERNIGHT MAIL

Mr. Vince Micone
Acting Secretary of Labor
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

The Honorable Robert F. Kennedy Jr.
Secretary of Health and Human Services
United States Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

The Honorable Scott Bessent
Secretary of the Treasury
United States Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Re: "Parity Rule" Litigation

Dear Secretaries Micone, Kennedy, and Bessent:

I am counsel for the ERISA Industry Committee (ERIC) in litigation challenging the "Parity Rule" issued by the Departments of Labor, Health and Human Services, and the Treasury (the Departments).[1] I am writing to request that the Departments promptly use their authority under 5 U.S.C. § 705 to stay the Parity Rule while litigation regarding the Rule is pending. I respectfully request that the stay be entered no later than Tuesday, February 25.

I. The Rule at Issue

The Parity Rule vastly expands the Departments' statutory authority, in flat contradiction of a central premise of the congressional enactments it purports to implement. Under federal employee benefits laws, including the Mental Health Parity and Addiction Equity Act (MHPAEA) and the Employee Retirement Income Security Act (ERISA), few principles are more fundamental than that neither Congress nor federal regulators may dictate the particular benefits a company must

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[1] *See Requirements Related to the Mental Health Parity and Addiction Equity Act*, 89 Fed. Reg. 77,586 (Sept. 23, 2024) (the "Rule"); *The ERISA Industry Committee v. United States Department of Health and Human Services, et al.*, No. 1:25-cv-136 (D.D.C.) (ERIC's lawsuit).

offer its employees. Vesting this discretion in employers, who know their employees' needs and the costs of the benefits they might offer, has been critical to fostering the diverse, robust employee benefits plans offered by American employers today.

The Parity Rule takes direct aim at this principle, without any basis in law. In doing so, it threatens the ability of employers to offer high quality, affordable coverage for the mental health and substance use disorder (MH/SUD) needs of employees and their families.

ERIC's complaint spells out the numerous ways in which the Rule exceeds the authority granted to the Departments by Congress and runs rampant over the procedural requirements imposed by the Administrative Procedure Act to ensure transparent, reasoned decision-making by federal agencies. These include, but are not limited to:

The "Meaningful Benefits" Requirement. Under the Rule's "meaningful benefits" requirement, a plan that covers a MH/SUD condition in a benefit classification (*e.g.*, inpatient, outpatient, or emergency) must provide "meaningful benefits" for that condition in all classifications in which it offers medical surgical (M/S) benefits. 26 C.F.R. § 54.9812-1(c)(2)(ii)(A) (Treasury); 29 C.F.R. § 2590.712(c)(2)(ii)(A) (DOL); 45 C.F.R. § 146.136(c)(2)(ii)(A) (HHS). The Rule defines "meaningful benefits" by reference to independently formulated standards for current medical practice. So, for example, if a plan offers inpatient M/S benefits—as nearly every health plan does—and also offers inpatient MH/SUD benefits, the Departments have now arrogated to themselves authority to determine the adequacy of those inpatient MH/SUD benefits. Not only that, the Departments will now make that determination based on their own interpretation of "generally recognized" medical standards as set forth in third-party clinical literature, rather than by comparison with the plan's inpatient M/S coverage.

The "meaningful benefits" requirement exceeds the Departments' statutory authority because (among other things) it effectively imposes a benefits mandate, in unmistakable violation of clear statutory language in the MHPAEA recognizing that the statute is *not* intended to mandate any particular MH/SUD benefits. 29 U.S.C. § 1185a(b)(1).

The "Material Differences In Access" Standard. The Rule's "material differences in access" standard treats any "material differences in access" between MH/SUD benefits and M/S benefits as presumptive evidence of a violation. *See* 26 C.F.R. § 54.9812-1(c)(4)(iii)(B) (Treasury); 29 C.F.R. § 2590.712(c)(4)(iii)(B) (DOL); 45 C.F.R. § 146.136(c)(4)(iii)(B) (HHS). In other words, the standard essentially infers a parity violation every time a plan's coverage limitations have a greater impact on MH/SUD benefits than they have on M/S benefits, even if the limitations on both types of benefits are identical. For example, if a plan requires patients seeking both MH/SUD and M/S benefits to obtain a referral from a generalist before seeking treatment from a specialist—a common coverage requirement that has been included in health plans for decades—the Departments will now require plans to determine whether that limitation has a greater impact on access to MH/SUD benefits than on access to M/S benefits. If so, the limitation is presumptively

unlawful as applied to MH/SUD benefits. Such "disparate impact" liability is disfavored in the law, and is directly at odds with the MHPAEA's design. The MHPAEA merely requires parity in plan terms and the application of those terms—not in the outcomes they produce, which can be caused by factors outside of the plan's control, such as a shortage of providers in the area or regional variations in clinical practices.

The Comparative Analysis Requirements. The Rule requires plans to undertake a comparative analysis for every "non-quantifiable treatment limitation" (NQTL) adopted for MH/SUD benefits, in order to evaluate their compliance with the Rule's "material differences in access" standard, and to report these analyses to the Departments. This comparative analysis must include a description of the NQTL, an identification of the factors used to design the limitation, a description of how the factors were used in the design, a demonstration of the comparability to M/S benefits as written, a demonstration of the comparability to M/S benefits in operation, and the conclusions of the analysis. *See* 26 C.F.R. § 54.9812-2(c) (Treasury); 29 C.F.R. § 2590.712-1(c) (DOL); 45 C.F.R. § 146.137(c) (HHS).

The Departments rejected numerous requests to clarify these requirements in the Rule. As a result, several aspects of the requirements are exceedingly vague, giving plan sponsors no clear way to comply, and thus violating their rights under the Due Process Clause to notice of what the regulation requires.

The Oppressive Enforcement Regime. The errors in the Rule described above, and others that are challenged in the pending suit, are exacerbated by the highly subjective, oppressive enforcement regime under which the Rule will be administered by the Departments. That enforcement program fails to provide an adequate opportunity to be heard before a Department renders a "final determination" of non-compliance, yet the consequences of a noncompliance determination are severe—plans must send an inflammatorily-worded notice to participants that reads like an admission of wrongdoing, even when they deny wrongdoing and even though they had no chance to prove otherwise. 26 C.F.R. § 54.9812-2(d)(3) (Treasury); 29 C.F.R. § 2590.712-1(d)(3) (DOL); 45 C.F.R. § 146.137(d)(3) (HHS). This powerful (and constitutionally dubious) enforcement hammer greatly enhances the Departments' ability to compel adherence to their subjective interpretations of the Rule's unlawful new requirements.

II. A Section 705 Stay is Warranted

The Departments should immediately exercise their authority under 5 U.S.C. § 705 to stay the Parity Rule while litigation is ongoing. Section 705 provides: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705. Section 705 relief is immediate, since a "temporary stay under 5 U.S.C. § 705 to

preserve the status quo … is not subject to notice and comment requirements." *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 19 (D.D.C. 2012).

Section 705 is tailor-made for circumstances like this. As just explained, the Rule imposes onerous new requirements on employers that will fundamentally alter the mental health and substance use disorder coverage they voluntarily offer, and will dramatically increase the administrative cost and burden associated with providing that coverage. Many of these costly and controversial requirements began to take effect on January 1, 2025, with the remaining scheduled to take effect on January 1, 2026.[2] And several of these effective and soon-to-be effective provisions are being challenged in ERIC's pending lawsuit as contrary to the Departments' statutory authority, the Administrative Procedure Act, and the Due Process Clause.

In these circumstances, and with the current litigation pending, it makes no sense to require the estimated 50,000 affected plans to incur the hundreds of millions of dollars in costs that the Departments determined will be necessary to come into compliance with the Rule. And federal agencies have recognized the appropriateness of invoking Section 705 in similar circumstances. For example, the Department of Labor during the Obama Administration postponed the effective date of its "wage rule," stating: "Due to pending legal challenges, we are postponing the effective date of the Wage Rule … pursuant to the Administrative Procedure Act, 5 U.S.C. 705."[3] The Securities and Exchange Commission likewise postponed the "effective date for compliance with those portions of" its "conflict minerals rule" under challenge in ongoing litigation.[4] More recently, in April 2024, the Securities and Exchange Commission postponed its climate rule pursuant to Section 705 "pending the completion of judicial review."[5]

The interests of justice plainly are advanced by granting a stay here. Deferral of the Rule will immediately prevent significant costs from further accruing. The Departments themselves

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[2] 89 Fed. Reg. at 77,652. Although the Rule has a stated "effective date" of November 22, 2024, the January 1, 2025 and January 1, 2026 "applicability dates" in the Rule also operate as "effective dates" that may be postponed under Section 705. *Id*. at 77,586. As the Departments explained, "[u]ntil these rules are *applicable*, plans and issuers must continue to comply with the regulations implementing [the statute] as in effect prior to the *effective date* of these final rules[.]" *Id*. at 77,652 (emphases added). For the avoidance of doubt, the Departments should stay both the Rule's November 22, 2024 effective date and its corresponding applicability dates.

[3] *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program*, 76 Fed. Reg. 59,896, 59,896 (Sept. 28, 2011).

[4] *In the Matter of Exchange Act Rule 13p-1 and Form SD; Order Issuing Stay*, 79 Fed. Reg. 26,297, 26,297 (May 7, 2014).

[5] Securities and Exchange Commission, *Order Issuing Stay*, Release No. 11280 (April 4, 2024), https://www.sec.gov/files/rules/other/2024/33-11280.pdf.

estimated the costs to plans and issuers just from collecting and evaluating outcomes data and documenting comparative analyses to be ***over $656 million*** in the first year alone—and over $131 million in subsequent years.[6] These estimates do not include the $14.8 million annual costs to plans and issuers for preparing and mailing the comparative analyses, the $12.2 million in costs to maintain recordkeeping, or the $10.8 million in first-year regulatory review costs to plans and issuers for familiarizing themselves with the Rule's requirements.[7]

A stay is also warranted to give the regulated public additional time to prepare for compliance. As ERIC explained in challenging the Rule, if the Rule is permitted to take effect January 1, 2025, it will "leave[] plans too little time to take the steps necessary to come into compliance … and will have harmful consequences for plans and beneficiaries alike"—such as by "increas[ing] plan costs and divert[ing] resources away from covering MH/SUD benefits."[8] Those costs will only accrue further if the January 1, 2026 applicability date stays in place, which applies to the Rule's "meaningful benefits" requirement, the "material differences in access" standard and associated requirements regarding the evaluation of relevant data, and related provisions of the comparative analysis requirements.[9] This is because plans are already taking steps to prepare for the upcoming 2026 plan year. For example, to comply, plans must build new tools to collect and store the required data, reprogram their systems, reanalyze outcomes data, and redesign their benefits. Indeed, commenters estimated that just building the tools needed to collect and store the data would take at least 18 months. These requirements likewise "risk[] undermining plans' efforts to provide high-quality, safe, and effective medical care" and pose "multiple practical difficulties and irrationalities," among other issues.[10]

Even aside from granting stays under Section 705, federal agencies repeatedly have suspended enforcement of federal healthcare legislation, and adopted appropriate transition rules, to give the regulated community time to comply. As but one example, in 2013 under President Obama, the

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[6] 89 Fed. Reg. at 77,661.

[7] *Id.*

[8] Compl. ¶¶ 119, 137.

[9] *Id.* ¶ 74.

[10] *Id.* ¶¶ 58, 62.

Treasury Department delayed the Affordable Care Act's employer mandate to provide "transition relief" and enable employers to adjust to the new requirements.[11]

In sum, a stay will halt the Rule's hardships, facilitate compliance, and preserve the court's ability to provide meaningful relief if the Rule ultimately is invalidated in the pending legal challenge. It is in the public interest to immediately postpone the Rule.

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The burdens imposed by the Parity Rule mount rapidly each day. The Departments have the authority to halt them immediately by granting a stay under Section 705. We respectfully request that they do so by February 25. In the absence of a stay, my client will be forced to seek prompt relief from the Court, proceedings that will impose additional, avoidable costs on the Departments, my client, and its members.

Respectfully submitted,

/s/ Eugene Scalia
Eugene Scalia

Counsel for Plaintiff The ERISA Industry Committee

[11] I.R.S. Notice 2013-45 (July 29, 2013), available at https://www.irs.gov/pub/irs-drop/n-13-45.PDF.