

Insights

Fiduciary Alert: New ERISA Group Health Plan Service Provider Fee Disclosures Require Plan Sponsor Attention

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If your company is the sponsor of a group health plan governed by the Employer Retirement Income Security Act of 1974 (“ERISA”), you may have already received a new compensation disclosure from providers of brokerage and consulting services to your health plan. If not, you soon should. The Consolidated Appropriations Act of 2021 (“CAA”) requires brokers and other consultants providing services to group health plans to provide a written disclosure of both direct and indirect compensation received for those services.

Background

Prior to the CAA, service provider compensation disclosures were required under ERISA Section 408(b)(2) only for qualified retirement plans. The CAA amended Section 408(b)(2) to include health plans in the definition of “covered plans” for purposes of the disclosure requirement. In addition, the definition of “covered service provider” was amended to include entities that provide brokerage or consulting services under a contract with a covered plan, if the service provider reasonably expects to receive compensation exceeding \$1,000 in a plan year. For this purpose, two types of compensation are included: 1) direct compensation, which is paid directly from the plan or plan sponsor, and 2) indirect compensation, which is from any other source other than the plan or plan sponsor. Indirect compensation sources include insurance companies, third party administrators, stop-loss carriers, and other providers of service to the health plan.

Details and Effective Date

The Section 408(b)(2) disclosure must provide the amount and source of any direct and indirect compensation expected to be received by a covered service provider from or related to a covered plan, as well as details about the services being provided for that compensation. The purpose is to give plan fiduciaries the information needed to assess the reasonableness of fees and commissions paid for services provided to the group health plan.

While technically effective December 27, 2021, a temporary non-enforcement policy issued under the Department of Labor’s Field Assistance Bulletin 2021-03 (the “FAB”) included a transition rule for when plan sponsors should expect to receive their first written disclosure. The FAB indicated that only contracts and engagements entered into, extended or renewed on or after December 27, 2021, are subject to disclosure. As a practical matter, this has been interpreted to mean that a group health plan’s first renewal negotiated after December 27, 2021, will trigger an initial disclosure. For calendar year plans, this means that disclosures should be provided prior to January 1, 2023.

Exclusions from the Disclosure Rule

It is important to note that only group health plans governed by ERISA are included in the new disclosure requirement. For this purpose, group health plans include those providing medical, dental, or vision care, as well as wellness programs, onsite clinics, and employee assistance programs that provide medical care. Disclosures are not required for government and church plans, both of which are exempt from ERISA. Disclosures are also not



required for other ERISA-covered welfare benefits, such as life and disability plans.

Next Steps for Plan Fiduciaries

Once a 408(b)(2) disclosure is received, it is important that fiduciaries review both the services outlined and the fees and commissions disclosed, to make a good faith determination about whether those fees and commissions are reasonable based on services provided. Although this is a somewhat subjective determination, any concerns should be raised with the broker or consultant so that a reasonable compensation agreement can be reached.

Finally, plan sponsors should confirm receipt of a fee disclosure from each covered service provider. Covered service providers generally include brokers and consultants providing services to the health plan.

Please reach out to Mark Canada, Katy Stowers, or any member of our Employee Benefits and Executive Compensation Group with any questions about this alert.

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