



CAA Benefits Alert: 2021 Appropriations Bill Adds New ERISA Disclosure Requirements for Health Plan Brokers and Consultants

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The Consolidated Appropriations Act, 2021 (CAA) includes rules requiring brokers and consultants to disclose compensation that those service providers receive to steer health plan sponsors to certain insurance carriers, benefits administrators, and other vendors. These new comprehensive disclosure rules add a layer of transparency to what has otherwise been a gray area for many employer plan sponsors and are more comprehensive than limited disclosures in effect December 29, 2020, on the Form 5500.

Background

ERISA's prohibited transaction rules limit the types of transactions a plan can enter into with "parties in interest," including persons providing services to the plan. The service provider exemption (section 408(b)(2) of ERISA) to the prohibited transaction rules permits a plan to pay reasonable compensation to a party in interest providing necessary services for the plan. Beginning in mid-2012, Department of Labor (DOL) regulations required certain service providers to disclose information about their compensation to a covered retirement plan's fiduciary to enable the fiduciary to determine whether the arrangement is "reasonable." The DOL regulations reserved a section for welfare plan disclosures that were originally proposed by the DOL but not included in the final 2012 rules applicable to retirement plans, and regulators have long indicated that fee disclosure for welfare plans is a priority. The CAA amends the section 408(b)(2) statutory exemption to impose compensation disclosure requirements on health plan service providers that are similar to the requirements applicable to retirement plan service providers.

New ERISA Disclosure Requirements

The CAA changes the service provider prohibited transaction exemption to add disclosure requirements specific to ERISA group health plans. Once these new rules take effect, no contract or arrangement for brokerage or consulting services is considered reasonable unless certain disclosure requirements are met.

The new rules apply to any service provider that reasonably expects to receive \$1,000 (adjusted for inflation) or more in direct or indirect compensation for:

- Brokerage services provided to an ERISA-covered group health plan with respect to the selection of health insurance products (including vision and dental), recordkeeping services, medical management vendor, benefits administration, stop-loss insurance, pharmacy benefit management services, wellness services, transparency tools and vendors, group purchasing organization preferred vendor panels, disease management vendors and products, compliance services, employee assistance programs, or third party administration services, or
- Consulting services related to the development or implementation of plan design, insurance selection (including vision and dental), record- keeping, medical management, benefits administration selection, stop-loss insurance, pharmacy benefit management services, wellness design and management services, transparency tools, group purchasing organization agreements and services, participation in and services from preferred vendor panels, disease management, compliance services, employee assistance programs, or third party administration services for an ERISA-covered group health plan.

The \$1,000 compensation threshold includes amounts paid to a service provider's affiliate or subcontractor. Note that this threshold is much lower than the \$5,000 threshold required by the Form 5500's Schedule C.

"Compensation" includes both cash and non-monetary compensation valued at more than \$250 (adjusted for inflation) paid, in the aggregate, during the term of the arrangement.

Similar to the disclosure rules applicable to retirement plan service providers, these rules require a covered service provider to disclose, in writing, the following information to the group health plan fiduciary:

- A description of the services to be provided to the covered plan pursuant to the contract or arrangement.
- If applicable, a statement that the service provider (or an affiliate or subcontractor) will provide, or reasonably expects to provide, fiduciary services to the covered plan.
- A description of all direct compensation the service provider (or an affiliate or subcontractor) reasonably expects to receive in connection with the provision of services.
- With respect to indirect compensation, a description of all indirect compensation the service provider (or an affiliate or subcontractor) reasonably expects to receive in connection with the provision of services (including incentives paid to a brokerage firm not solely related to the contract with the covered plan), a description of the arrangement between the payer of the indirect compensation and the recipient service provider; a description of the services for which the indirect compensation is received, and the identity of the payer of the indirect compensation.
- To the extent compensation is paid among a service provider, the service provider's affiliate, or the service provider's subcontractor on a transaction basis (such as commissions or finder's fees), a description of any such arrangement and identification of the payers and recipients of such compensation (including the status of a payer or recipient as an affiliate or a subcontractor).
- A description of any compensation that the service provider (or an affiliate or subcontractor) reasonably expects to receive in connection with termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination.
- A description of the manner in which any direct or indirect compensation will be received by the service provider (or an affiliate or subcontractor).

This information must be disclosed to the responsible plan fiduciary before the contract or arrangement is entered into, extended, or renewed. In addition, the service provider has an affirmative obligation to notify the plan fiduciary of any change to the above required disclosures as soon as practicable, but generally not later than 60 days from the date the service provider is informed of the change. The service provider must also provide other compensation information requested by the plan fiduciary in order for the plan to comply with its annual Form 5500 reporting and disclosure requirements.

As is the case under the retirement plan disclosure regulations, a health plan fiduciary that meets certain requirements would still satisfy the prohibited transaction exemption if the plan fiduciary relied in good faith on a service provider's disclosures that later turned out to be incomplete or inaccurate. In such a case, the plan fiduciary

must take reasonable steps to obtain the missing or incorrect information upon discovery, must inform the DOL, and must consider whether to terminate or continue the arrangement if the service provider fails to comply with a request for information within 90 days.

These disclosure rules apply to any contract executed on or after December 27, 2021 (one year after enactment).

Winston Takeaway: *These new transparency rules potentially apply to any vendor providing brokerage or consulting services to a group health plan funded with plan assets, such as through a trust or separate account or for which employees pay a portion of the cost of coverage (i.e., through premium contributions). Plan sponsors should consider including disclosure language in contracts with any service provider that could be subject to these requirements, and incorporating this disclosure obligation in any requests for proposal. In addition, plan fiduciaries should include review of health plan vendor compensation disclosures as part of their regular monitoring obligations. We expect the DOL will issue further guidance on these new disclosure requirements.*

This article is part of our “Unpacking the Employee Benefits Provisions in the Consolidated Appropriations Act, 2021” series. Click [here](#) for other CAA-related articles. Please contact a member of the Winston & Strawn Employee Benefits and Executive Compensation Practice Group or your Winston relationship attorney for further information.

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