

Group Health Plan Service Contracts Trigger Compensation Disclosures

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Among the new requirements that are, or soon will be, imposed on employer-sponsored group health plans subject to ERISA ("**GHPs**") by the Consolidated Appropriations Act of 2021 (the "**CAA**") are compensation disclosure requirements which apply to GHPs and certain of their third-party service providers. Background ERISA contains prohibitions on certain transactions between an employee benefit plan, including a GHP and a party-in-interest, such as a third-party service provider. Section 408(b)(2) of ERISA provides an exemption from the prohibited transaction rules for reasonable contracts entered into by a plan and a service provider for necessary plan-related services ("**Contract**"), provided that no more than reasonable compensation is paid for such services (the "**Prohibited Transaction Exemption**"). The relevant fiduciary of the plan under ERISA (the "**Fiduciary**") is responsible for determining whether compensation to be paid under the Contract is reasonable in order to comply with the Prohibited Transaction Exemption. Disclosure Requirement under the CAA DOL regulations issued in 2012 require retirement plan service providers to make compensation disclosures to the Fiduciary to facilitate compliance with the Prohibited Transaction Exemption. The CAA amends Section 408(b)(2) of ERISA to require similar disclosures with respect to GHP service providers. In particular, Section 202 of the CAA requires a service provider that enters into a Contract with a GHP and that expects to receive, pursuant to such Contract, \$1,000 or more in compensation in connection with providing either "brokerage" or "consulting" services (a "**Covered Service Provider**") to disclose to a Fiduciary of the GHP, in writing, various items of information (collectively, the "**Disclosure**"). Such items include (i) the services to be provided to the GHP (the "**Services**"); (ii) all direct and indirect compensation the Covered Service Provider, an affiliate, or a subcontractor expects to receive in connection with the Services; and (iii) any transaction-based compensation, such as commissions, that will be paid among the Covered Service Provider, an affiliate, or a subcontractor in connection with the Services. A Covered Service Provider must furnish the Disclosure by a date that is reasonably in advance of the date on which the Contract is entered into, extended, or renewed. No Contract will be considered "reasonable" for purposes of the Prohibited Transaction Exemption unless the related Disclosure requirements are met. Effective Date The Disclosure requirement takes effect with respect to Contracts that are executed on or after December 27, 2021. Actions for Plan Sponsors to Take Now

- Begin identifying the sponsored GHPs for which brokerage or consulting service providers have been (or will be) retained under a Contract.
- Determine (i) whether the service providers with respect to such Contracts reasonably expect to receive direct or indirect compensation, or both, and (ii) if so, whether such compensation exceeds the \$1,000 threshold.
- Anticipate the execution date of any new, renewed, or extended Contracts that will occur on or after December 27, 2021, and ensure the required Disclosure is obtained from the applicable Covered Service Provider by a date that is reasonably in advance of the Contract's execution date. The advance timeframe must be sufficient to permit a Fiduciary to evaluate and determine the reasonableness of any compensation before the Contract is executed.
- Develop procedures for the Fiduciary's use in (i) evaluating the reasonableness of the Covered Service Provider's compensation, and (ii) documenting such evaluation.

- Amend any Contracts to which the Disclosure requirement may apply to provide for the necessary disclosures and for indemnification by the Covered Service Provider of the GHP and plan sponsor against any liability arising from the Covered Service Provider's non-compliance with the applicable Disclosure requirement.