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DOL's new group health plan compensation disclosure rule highlights fiduciary responsibilities

The U.S. Department of Labor's (DOL) new service provider compensation disclosure rule applicable to group health plans (New Disclosure Rule) not only adds a new item to the list of concerns for group health plan fiduciaries but also serves as an excellent reminder to group health plan fiduciaries and service providers that the Employee Retirement Income Security Act's (ERISA) onerous prohibited transaction rules are not exclusive to their pension plan brethren. This *FYI* discusses the fiduciary implications of the New Disclosure Rule and serves as a reminder of the host of fiduciary requirements that attach to group health plans covered by ERISA.

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Background

ERISA sections 406(a)(1)(C) and 408(b)(2) are the primary prohibited transaction rules governing an ERISA plan's service provider arrangements. In general, plan fiduciaries must make sure that any arrangement between a plan and a service provider is reasonable and that no more than "reasonable compensation" is paid.

The New Disclosure Rule

The Consolidated Appropriations Act, 2021 (CAA) amended the ERISA 408(b)(2) exemption with respect to group health plans, requiring persons providing "brokerage services" or "consulting" to ERISA-covered group health plans to disclose detailed information to plan fiduciaries about the compensation they are to receive in connection with such services. (Similar disclosure requirements have applied to ERISA governed retirement plan service providers since 2012.)

The gist of the New Disclosure Rule is to require that covered brokers and consultants provide certain plan fiduciaries with the information necessary to (i) assess the reasonableness of the compensation to be received and (ii) be better positioned to identify potential conflicts of interest relative to a broker

or consultant's receipt of indirect compensation from sources other than the plan or plan sponsor. As explained by the DOL's Employee Benefits Security Administration (EBSA), because the New Disclosure Rule is aimed at helping plan fiduciaries guard against potentially unknown conflicts of interest, it focuses heavily on identifying broker and consultant compensation received from third parties (i.e., "indirect compensation"). However, the New Disclosure Rule applies to virtually all forms of group health plan broker and consultant service compensation.

Buck comment. Under the New Disclosure Rule, "indirect compensation" means broker or consultant compensation received from a source other than the group health plan, the plan sponsor or the service provider. "Direct compensation" means compensation paid to the broker or consultant directly from the plan itself. Certain limitations and exceptions apply. Importantly, the New Disclosure Rule does not apply to broker or consultant arrangements where compensation is paid exclusively from the plan sponsor's general assets or where direct or indirect compensation is reasonably expected to be less than \$1,000.

Implications for plan fiduciaries

While the New Disclosure Rule makes it the responsibility of brokers and consultants to provide plan fiduciaries with the required information, the consequences of noncompliance directly impact plan fiduciaries. Where a service provider fails to make the required disclosure, the New Disclosure Rule requires that fiduciaries make a written request to the service provider. If the disclosure is not provided within 90 days of the written request, fiduciaries have 30 days to report the service provider's failure to the DOL. Failure to comply with the New Disclosure Rule means that the service provider arrangement is not reasonable under ERISA section 406(b)(2) and, as a result, is not eligible for the prohibited transaction exemption.

A prohibited transaction exposes plan fiduciaries to direct liability for any losses to the plan, potentially including a mandatory 20% civil penalty imposed upon the "amount involved" pursuant to ERISA section 502(l). It is helpful that some protection is afforded to plan fiduciaries who become aware of noncompliance and satisfy the conditions set forth in the New Disclosure Rule.

Buck comment. Prudent plan fiduciaries will establish and adhere to a formal, written policy to ensure compliance with the New Disclosure Rule. Indemnification and limitation of liability provisions in service provider contracts should also be revisited relative to this new rule.

Effective date and enforcement

The New Disclosure Rule became effective on December 27, 2021, with respect to covered service contracts executed on or after that date. Importantly, preexisting service arrangements are not subject to the New Disclosure Rule until a contract renewal or extension occurs.

While the DOL has no immediate plans for issuing implementing regulations, on December 30, 2021, EBSA released Field Assistance Bulletin 2021-03, announcing a temporary enforcement policy as to the New Disclosure Rule. The FAB guidance includes Q&As intended to assist plan fiduciaries and

service providers in understanding the DOL’s view regarding what constitutes a reasonable, good faith interpretation of the New Disclosure Rule. Key compliance issues addressed in the Q&As include confirmation that:

- Group health plan stakeholders may look to existing pension plan disclosure regulations at 29 CFR § 2550.408b-2(c) for guidance in complying with the New Disclosure Rule (Q&A1);
- The New Disclosure Rule applies to both insured and self-insured group health plans, including limited scope dental and vision only plans (i.e., “excepted benefits” aren’t excepted for this purpose) (Q&A3);
- No small plan exception exists for fully insured plans covering fewer than 100 participants (Q&A7); and
- Where a “broker of record” (BOR) agreement is involved, the date the contract or arrangement will be considered effective for purposes of the New Disclosure Rule is the earlier of (i) the date the BOR agreement is submitted to the carrier, or (ii) the date on which a group application is signed for the following plan year (Q&A6).

The FAB also provides clarifying guidance regarding determining whether a group health plan service provider is covered by the New Disclosure Rule (Q&A4) and addresses disclosure of compensation under arrangements where the exact compensation amount cannot reasonably be known in advance (Q&A5). Group health plan fiduciaries and their service providers should review the FAB for these and other important insights in implementing the New Disclosure Rule.

Buck comment. While similar in many respects, group health plan compensation arrangements differ from those of pension plans. Nonetheless, the FAB’s reference to prior DOL guidance developed for service providers of pension plans is welcomed by covered service providers and plan fiduciaries attempting to comply with these new group health plan requirements.

In closing

The DOL’s group health plan enforcement actions are on the rise, as are ERISA class actions and other costly litigation involving group health plans. While the New Disclosure Rule requires immediate attention from affected group health plans and their covered service providers, it also serves as a good reminder of the host of fiduciary requirements that attach to health and welfare plan arrangements under ERISA, including ERISA’s prohibited transaction rules. Plan fiduciaries should use this reminder as an opportunity to review group health plan governance, policies, and practices with an eye toward compliance with ERISA’s fiduciary rules and the avoidance of costly violations.

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