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Department of Labor Begins Enforcing New Fee Disclosure Rules

January 10, 2022

As discussed in our January and November 2021 Client Alerts, the Consolidated Appropriations Act, 2021 (the "CAA") includes a number of new requirements for group health plans. One of the most significant changes is a new requirement that became effective December 27, 2021, which requires brokers and consultants to provide health plan fiduciaries with detailed information regarding their services and compensation. On December 31, 2021 the U.S. Department of Labor ("DOL") issued an enforcement policy clarifying these new disclosure obligations (the "DOL Policy").

This Client Alert summarizes the new disclosure rules and the DOL Policy, and identifies next steps for employers and plan fiduciaries to take to help ensure compliance.

What is the purpose of the new disclosure requirements?

ERISA requires plan fiduciaries to ensure that a health plan does not pay more than reasonable compensation for services necessary to operate it. The CAA amended ERISA to establish the requirements a contract or arrangement between a health plan and a broker or consultant must meet to be considered "reasonable."

The disclosures are intended to provide plan fiduciaries with sufficient information to determine whether a broker's or consultant's compensation is "reasonable" and assess potential conflicts of interest. The goal is to enhance fee transparency. The DOL Policy provides that the disclosures should be reasonably designed and implemented to meet those purposes and that brokers, consultants and fiduciaries must use a good faith, reasonable interpretation of the law.

What services are subject to the new disclosure requirements?

The disclosure requirements apply to brokers or consultants who enter into a contract or arrangement with a health plan for specified brokerage or consulting services and reasonably expect to receive at least $1,000 in direct or indirect compensation for those services. Even if a health plan is not a named party in a contract for brokerage or consulting services, an "arrangement" can exist between the broker or consultant to render services to the plan, thereby implicating the disclosure requirements. The DOL Policy clarifies that individuals do not have to be licensed as, or market themselves as, "brokers" or "consultants" to be subject to the disclosure requirements. Similarly, the nature of compensation a

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service provider receives is not a basis for defining or differentiating between brokerage and consulting services. The DOL expects service providers to use a reasonable, good faith interpretation of the law to determine whether they are subject to the disclosure requirements.

Brokerage and consulting services are broadly defined for this purpose. Brokerage services provided to a health plan include, for example, services with respect to the selection of insurance products, recordkeeping services, benefits administration, stop-loss insurance, pharmacy benefit management services, wellness services, and third-party administration services. Similarly, consulting services provided to a health plan include the development or implementation of plan design, insurance product selection, recordkeeping, benefits administration selection, stop-loss insurance, pharmacy benefit management services, wellness design and management services, and third-party administration services.

Which health plans are subject to the disclosure requirements?

The disclosure requirements apply to insured and self-insured group health plans (grandfathered and nongrandfathered). The disclosure requirements apply regardless of the size of a group health plan, so even small plans that are exempt from filing Form 5500 are subject. The DOL Policy clarifies that limited scope dental and vision plans are also subject to the disclosure requirements. However, qualified small employer health reimbursement arrangements ("QSEHRAs") are exempt.

What information must be disclosed?

The CAA establishes a detailed list of information that must be disclosed. Examples include the following:

- A description of all the services to be provided.
- Whether the broker or consultant is providing services as a fiduciary.
- A description of all direct and indirect compensation that the broker or consultant expects to receive.
- A description of any compensation that is paid on a transaction basis, such as commissions or finder's fees.
- A description of compensation the broker or consultant expects to receive in connection with termination of the contract or arrangement and how prepaid amounts are calculated and refunded.
- The manner in which the broker or consultant will receive compensation.

To whom must brokers and consultants provide the disclosures?

The disclosures must be provided in writing to a responsible plan fiduciary – a fiduciary with authority to cause the health plan to enter into, or extend or renew, the contract or arrangement with the broker or consultant.

What are the deadlines for a broker or consultant to provide the disclosures?

A broker or consultant must provide the disclosures not later than the date that is "reasonably in advance of" the date on which the contract or arrangement is entered into, extended, or renewed. The DOL expects the parties will make their own determination as to what is "reasonable" in this context.

The disclosure requirements apply beginning December 27, 2021. Under the DOL Policy, the date on which a contract or arrangement is entered into between a consultant or broker and a plan fiduciary will be considered the date the contract arrangement was "executed." For example, if a consulting contract

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is effective January 1, 2022 but was executed on December 15, 2021, it is not subject to the new disclosure requirements. However, if that contract is extended or renewed on December 1, 2022, it will be subject to the disclosure requirements. Special rules apply if a broker or consultant uses a "broker of record" agreement.

Are brokers and consultants required to provide updates to disclosures?

Yes. Brokers and consultants must update a disclosure if any information in it changes, or if a broker or consultant makes an error or omission in a disclosure. Brokers and consultants must also provide other specified compensation-related information if a responsible plan fiduciary or plan administrator requests it.

What are the consequences for failing to satisfy the disclosure obligations?

The DOL Policy emphasizes that failing to satisfy the disclosure obligations constitutes an ERISA prohibited transaction. It also notes that the duties of prudence and loyalty apply to a responsible plan fiduciary's decision to hire a service provider and to ongoing monitoring of service provider arrangements. Thus, failing to satisfy the disclosure obligations could constitute a breach of fiduciary duty, which could subject plan fiduciaries to personal liability. Fiduciaries must contact the DOL if a broker or consultant fails to satisfy the disclosure requirements and does not remedy the failure.

What steps should health plan fiduciaries take to start complying with the new disclosure requirements?

Fiduciaries should take the following steps to help comply with the disclosure requirements:

- Identify all health plans and the service providers who perform "brokerage" or "consulting" services for them.
- Determine the date each contract or arrangement for brokerage or consulting services will be entered into, extended, or renewed and request the broker or consultant provide the disclosures reasonably in advance of that date.
- Confirm and document receipt of all disclosures for each health plan and broker/consultant.
- Establish a process to review the disclosures to ensure they are accurate, correct, complete, and include all the required information. Contact the broker or consultant to answer any questions or provide additional information or clarifications.
- Consider whether the direct and indirect compensation is reasonable and whether there are any conflicts of interest.
- Document the process the fiduciaries used to obtain and review the disclosures and the reasonableness of the contract or arrangement.
- If an employer does not have a fiduciary committee in place for health and welfare benefits, the new disclosure requirements provide an excellent opportunity to consider forming a committee and delegating fiduciary responsibilities to it.

If you have any questions about the new disclosure requirements, the CAA, or need assistance with fiduciary issues, contact one of the members of Kutak Rock's Employee Benefits Practice Group.

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