



LEGAL UPDATES

Call for Additional Regulations for Health Plan Compensation Disclosures

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In an April 15 Executive Order, entitled [“Lowering Drug Prices by Once Again Putting Americans First,”](#) the Trump Administration has called attention to an ERISA disclosure required by the Consolidated Appropriations Act of 2021 (CAA).

The CAA took a fee disclosure structure from retirement plans (408(b)(2) disclosures) and imposed it upon a much narrower subset of employer health plan providers – largely copying the regulations that were issued for the retirement plans and placing them, as modified for health plans, into the actual statute. As such, the Department of Labor felt it was unnecessary to issue a set of regulations specific to the health plan disclosures and declined to do so. An announcement in 2021 by the Department of Labor stated that compliance with a good faith interpretation of the statute is acceptable, and that it believed comprehensive implementation regulations were unnecessary.

This Executive Order calls for “improving transparency into pharmacy benefit manager fee disclosures” by requiring that the Department of Labor propose additional regulations specific to already existing employer health plan 408(b)(2) disclosures. The order does not specify whether these regulations must be limited to pharmacy benefit manager compensation, or whether they might also apply more broadly to other broker activities currently covered by employer health plan 408(b)(2) disclosures.

What Is the History of These Disclosures?

Retirement plan fiduciaries have been receiving so called “service provider fee disclosures,” or 408(b)(2) disclosures, for over a decade. These disclosures are a technical part of avoiding a prohibited transaction under the Employee Retirement Income Security Act of 1974 (ERISA), and are meant to provide transparency into direct and indirect compensation earned by entities providing services to retirement plans, such as recordkeepers, investment advisors, banks and others.

These disclosures came about under regulations rather than by statute, and involved a multi-year process to work through the various details. Receiving,

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reviewing and, in some cases, requesting revisions to these disclosures often initially entailed massive internal projects for retirement plans. As the initial disclosures were understood and providing new disclosures with new services became routine, overall time spent on these disclosures decreased.

What Are These Disclosures?

The 408(b)(2)(B) disclosures are provided to employer group health plans, whether fully insured or self-funded, and can apply to excepted benefit plans such as limited-scope dental and vision. Providers that expect to receive \$1,000 or more in connection with certain brokerage or consulting services are required to describe in advance the services they provide, whether the services are fiduciary in nature, a description of the direct compensation, and/or a description of indirect compensation payment structure.

Why Has My Plan Not Received These Disclosures?

Interestingly, in contrast to retirement plans, there was not the same volume or level of focus on the initial compensation disclosures for group health plans once Congress statutorily required them. Whether this is because the scope was narrower than the scope for retirement plans, because group health plans did not understand the need to ask for these, or because providers also did not understand the need to provide them is unclear.

Should My Employer Health Plan Be Taking Steps Before any Regulations Are Proposed?

Regulations are not required for these disclosures to be in effect. A plan that has not received a disclosure it believes is due should request one from its provider. Department of Labor audits began requesting these disclosures or explanations of why these disclosures are not in the possession of the employer health plan over the past years since the initial passage of the disclosure requirement in 2021.

If you have questions about this Executive Order, require assistance in determining whether a disclosure is due to your plan, or are unsure whether the disclosure you received is complete, please contact [Allie Itami](#) or your regular Lathrop GPM attorney.