JANUARY 5, 2022

EBSA Answers Key Compensation Disclosure Questions in Latest Bulletin

Section 202 of Title II of Division BB of the Consolidated Appropriations Act, 2021 ("CAA") added new ERISA Section 408(b)(2)(B) to be effective as of December 27, 2021. The new section requires persons who provide "brokerage services" and "consulting services" to group health plans to disclose specified information to a responsible plan fiduciary about the direct and indirect compensation that the service provider expects to receive in connection with its services to the plan. The direct and indirect compensation that is expected to be received in connection with a contract between a covered service provider and a covered plan must be disclosed reasonably in advance of the parties entering into such contract. On December 30, 2021, EBSA issued Field Assistance Bulletin 2021-03 ("FAB 2021-03") discussing the new CAA requirements. FAB 2021-03 provides a temporary enforcement policy, while EBSA considers whether any additional guidance is necessary.

Good Faith, Reasonable Interpretation Standard

FAB 2021-03 adopts a reasonable, good faith interpretation standard for compensation disclosures. Specifically, EBSA will not treat a person as having failed to make required disclosures to a plan fiduciary under ERISA Section 408(b)(2)(B) as long as the person made disclosures in accordance with a good faith, reasonable interpretation of ERISA Section 408(b)(2)(B). Further, EBSA provides that covered service providers and plan fiduciaries are expected to implement the ERISA Section 408(b)(2)(B) requirements using a good faith, reasonable interpretation of the CAA. Last, when analyzing a covered service provider's efforts to comply with the requirements, EBSA will consider whether the provider's disclosure of information is reasonably designed and implemented to provide the information and transparency required by the CAA.

Specific EBSA Guidance

FAB 2021-03 answers a number of specific questions regarding ERISA Section 408(b)(2)(B) compliance, among them are the following four issues.

1. Covered Service Providers may use Prior EBSA Guidance Developed for Pension Plans. EBSA notes that even though certain provisions in ERISA Section 408(b)(2)(B) are not identical to the pension plan disclosure provisions in regulation 29 CFR Section 2550.408b-2(c), EBSA would view it as a good faith and reasonable step for a group health plan covered service provider to take into account the pension plan disclosure provisions.

2. ERISA Section 408(b)(2)(B) Does Apply to "Excepted Benefits" such as Dental and Vision Only Plans. EBSA correctly notes that while dental and vision only plans are excepted from the requirements of ERISA Part 7 (e.g., mental health parity, Affordable Care Act mandates, etc.), dental and vision only plans are "covered plans" subject to the requirements of ERISA Section 408(b)(2)(B). Specifically, a "covered plan" in ERISA Section 408(b)(2)(B) refers to ERISA Section 733(a) (the definition of a "group health plan"), without any indication that the definition is limited by "excepted benefits" which are set

forth in other subsections of ERISA Section 733. In addition, the definition of a "covered service provider" in ERISA Section 408(b)(2)(B) specifically references dental and vision plans when defining covered brokerage and consulting services. Given that EBSA does not consider the "excepted benefits" exception to apply, other plans that satisfy the definition of a "group health plan," such as employee assistance programs, should also be covered by the new statute.

3. Covered Service Providers are not Limited to Providers who are Licensed as "Brokers" and "Consultants." ERISA Section 408(b)(2)(B) describes two categories of service providers – "brokers" and "consultants." Neither category is defined in ERISA Section 408(b)(2)(B). However, the categories are described in relationship to a list of services that constitute the subject matter of the brokerage services or consulting services. For example, "consulting services" include services related to the development or implementation of plan design, insurance or insurance product selection, recordkeeping, medical management, benefits administration selection, stop-loss insurance, pharmacy benefit management services, wellness design and management services, transparency tools, employee assistance programs, and third-party administration services. Thus, EBSA will examine the underlying services and not the labels that a service provider uses to describe itself to determine whether the new statute applies.

4. Contracts Entered into Prior to December 27, 2021 are not Subject to the New Statute. The CAA provides that "no contract executed prior to [December 27, 2021] by a group health plan subject to the requirements of Section 408(b)(2)(B) of [ERISA] … shall be subject to the requirements of such Section 408(b)(2)(B) …" Therefore, EBSA takes the position that only contracts or arrangements for services which are entered into, extended, or renewed on or after December 27, 2021 are required to comply with the new disclosure requirements. EBSA will consider the date on which a contract or arrangement is entered into between a broker or consultant and a plan fiduciary as the date the contract or arrangement was "executed."

FAB 2021-3 provides in an example that if a plan fiduciary enters into a new service contract with a service provider on December 15, 2021, for the plan year beginning on January 1, 2022, the service contract will be treated as having been "executed" on December 15, 2021. Therefore, the contract in this example is not subject to the new compensation disclosure requirements. However, if that contract is later renewed or extended, or a new contract is executed, on or after December 27, 2021, then the new disclosure requirements will apply.

Next Steps

Both group health plan fiduciaries and covered service providers should engage legal counsel in determining whether a particular service contract is covered by the new disclosure requirements and the types of indirect and direct compensation that must be disclosed under the new statute.