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# DOL Releases Field Assistance Bulletin On Disclosure Requirements for Brokerage and Consulting Service Providers Under ERISA 408(b)(2)

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## Background

On December 30, 2021, the Department of Labor ("DOL") released Field Assistance Bulletin No. 2021-03 ("FAB 2021-03"). FAB 2021-03 announces the DOL's temporary enforcement policy for group health plan service provider disclosures under ERISA section 408(b)(2)(B), the statutory prohibited transaction exemption added by the Consolidated Appropriations Act, 2021, Public Law 116-260 ("CAA") related to brokerage and consulting services provided to group health plans.

The CAA, signed into law on December 27, 2020, imposed new compensation disclosure requirements upon parties providing certain defined brokerage and consulting services to group health plans covered by the Employee Retirement Income Security Act of 1974 (ERISA). The new disclosure rules apply beginning on December 27, 2021, one year after the date of the CAA's enactment, though there is a helpful transition rule.

The new disclosure requirements, as set forth in ERISA section 408(b)(2)(B), apply to parties who reasonably expect to receive $1,000 or more in "direct" or "indirect" compensation in connection with providing "brokerage" or "consulting" services to ERISA-covered group health plans. More specifically, these new disclosure requirements apply to covered service providers who receive any significant compensation in connection with these services, and require these covered service providers to provide written information about

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their fees and services to the "responsible plan fiduciary" of an ERISA-covered group health plan that hires them. The section 408(b)(2)(B) disclosure rule relies on a detailed series of definitions and timing rules that largely mimic DOL's retirement plan service provider disclosure regulations codified at 29 C.F.R. 2550.408b-2(c).

These written disclosures must describe the direct and indirect compensation that is expected to be received in connection with a contract or arrangement between a covered service provider and a covered plan, as well as other details about the services relationship. Generally the disclosure must be made reasonably in advance of the parties entering into, extending or renewing the contract or arrangement. The purpose of the disclosure is to provide the responsible plan fiduciary with sufficient information to assess the reasonableness of the compensation and any potential conflicts of interest that may exist. Failure to comply with the disclosure requirements means that the service arrangement is a prohibited transaction to which the statutory ERISA section 408(b)(2) exemption does not apply, leading to potential legal consequences both for plan fiduciaries as well as the broker or consultant.

This alert summarizes the FAB 2021-03 temporary non-enforcement policy as related to the statutory exemption under the CAA.

## Guidance

The key announcement made in the FAB is a temporary non-enforcement policy. In this regard, the DOL acknowledged that group health plan service provider compensation structures are often complex and driven by state law, and that there are many interpretive questions under the new statute. As a result, DOL announced that it will not treat a covered broker or consultant as non-compliant as long as the party acted consistent with a good faith, reasonable interpretation of ERISA section 408(b)(2)(B).

In addition to this broad "good faith" relief, DOL also announced a handful of specific interpretations in FAB 2021-03, including the following:

- DOL states in the FAB that it views the statutory exemption for health plans as similar to the regulations it issued for retirement plan service provider relationships in 2012. Given the DOL's retirement plan service provider regulation uses much of the same terminology and structure as ERISA section 408(b)(2)(B), the FAB confirms that covered service providers may rely on the regulatory guidance issued in connection with retirement plan services arrangements in order to make good faith interpretations of the new law.
- DOL clarifies that ERISA section 408(b)(2)(B) applies to all group health plans as defined in ERISA section 733(a). Specifically, a group health plan in this context is defined as "an employee welfare benefit plan to the extent that the plan provides medical care … to employees or their dependents … directly or through insurance, reimbursement, or otherwise." Under this definition, fully-insured and self-insured plans of any size are included as covered plans. DOL also clarified that "Because ERISA section 733(a)(1) expressly excludes qualified small employer

health reimbursement arrangements from the definition of group health plan, such arrangements are not subject to these provisions."

- Given the statute's use of ERISA section 733(a) in defining group health plans for purposes of ERISA section 408(b)(2)(B), DOL clarifies that "excepted benefits" as defined by ERISA section 733(c)(2) are not categorically excluded from coverage under the rule. As a result, to the extent a covered service provider enters a relationship with a group health plan that provides excepted benefits, disclosure obligations may arise.
- DOL makes clear that it takes a broad view of when parties may be engaging in covered "brokerage" or "consulting" services subject to the disclosure rules. First, DOL stated that being licensed as a "broker" or "consultant" is not required in order to be a covered service provider. In addition, DOL added that calling oneself a "broker" or "consultant," or charging a specific fee for consulting or brokerage, is also not dispositive of whether the disclosure obligation is triggered. Instead, DOL appears focused on whether a service provider receives and discloses referral fees or other forms of indirect compensation in cases where it is not clear whether covered "brokerage" or "consulting" services (as defined in the statute) are provided. DOL specifically notes in the FAB that service providers that expect to receive indirect compensation from third-parties in connection with advice, referrals, or recommendations regarding any of the listed sub-categories of services should be prepared to explain the basis for their determination that they are not covered service providers on audit.
- DOL states that broker of record letters filed with an insurance company trigger the application of the disclosure statute, as will a group application for insurance coverage signed for a subsequent plan year.
- DOL provides some helpful guidance for covered brokers and consultants whose indirect compensation may not be known at the time the disclosures are required (generally, in advance of when a contract is entered with a group health plan) because the compensation turns on future events, including participant elections or usage. DOL notes that the statute provides flexibility in how compensation is disclosed, permitting compensation to be disclosed by an amount, formula or per capita charge, and by other reasonable methods such as estimates. Borrowing from guidance it issued on the retirement side, DOL provides that the use of ranges may be reasonable where a provider's compensation may fluctuate within a projected range.
- Although the ERISA section 408(b)(2)(B) disclosure rule became effective on December 27, 2021, the CAA provided a transition rule that clarified that "no contract executed prior to [December 27, 2021] by a group health plan…shall be subject to the requirements of such section 408(b(2)(B)… ." Clarifying the transition rule, DOL states that, "[t]herefore, only contracts or arrangement for services that fall within the scope of ERISA section 408(b)(2)(B) which are entered into, extended, or renewed on or after December 27, 2021 are required to comply with the disclosure requirements of ERISA section 408(b)(2)(B)."

- Finally, DOL states that it does not believe implementing regulations are needed and does not intend to issue them. However, DOL indicates that it will monitor feedback from stakeholders and enforcement activities to evaluate whether further guidance is needed in the future.

## Outlook

Because DOL addresses only a handful of interpretive issues under ERISA section 408(b)(2)(B), there remain significant grey areas and questions following the issuance of the FAB. Nonetheless, the broad "good faith" enforcement relief announced by DOL should give comfort to many service providers who have grappled with a host of issues under ERISA section 408(b)(2). Given DOL's statements in the FAB as well as our experience defending DOL investigations in recent years, one thing is clear. DOL will likely be adding compliance with ERISA section 408(b)(2)(B) to its enforcement activities both for plan sponsors and for service providers of brokerage and consulting services to ERISA plans in the near term. As a result, plan service providers as well as responsible plan fiduciaries should be prepared to articulate a reasonable and good faith basis for their conclusions in connection with implementing practices regarding section 408(b)(2)(B) disclosures.