COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

December 14, 2022

The Honorable Lisa M. Gomez
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Assistant Secretary Gomez:

We write to encourage the Employee Benefits Security Administration (EBSA) to take action to ensure that important requirements of the *Consolidated Appropriations Act, 2021* (CAA)[1] are implemented in a manner consistent with the bipartisan intent of Congress. Specifically, we encourage EBSA to issue guidance clarifying that the compensation disclosure requirements of CAA Division BB, Title II, Section 202 fully apply to covered service providers performing any of the activities enumerated in the statute, including pharmacy benefit management, third party administration, and other consulting services. Such guidance is not only consistent with congressional intent, but it also greatly assists plan fiduciaries in ensuring that the compensation paid is reasonable and that service providers are free of conflicts of interest that could result in higher health care costs for both workers and employers.

A central goal of Congress in enacting many of the provisions applicable to group health plans in Division BB of the CAA was to limit growth in health care spending through increased transparency. Accordingly, the CAA amended Section 408(b)(2) of the *Employee Retirement Income Security Act of 1974* (ERISA)[2] to provide that any "covered service provider" who enters into a contract or arrangement with a group health plan must disclose to a responsible plan fiduciary a description of the direct and indirect compensation they expect to receive in connection with the services they provide to the plan. This requirement is nearly identical to legislation that we coauthored during the 116th Congress,[3] and it is, in part, an effort to codify a similar regulation that was proposed, but never finalized, by the Bush Administration in 2007.[4]

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[1] Pub. L. No. 116-260 (2020).
[2] 29 U.S.C. § 1144 *et seq*.
[3] H.R. 5800, Ban Surprise Billing Act; H. Rep. No. 116-615 (2020).
[4] U.S. Dept. of Labor, 72 Fed. Reg. 70987, Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure (Dec. 13, 2007), https://www.govinfo.gov/content/pkg/FR-2007-12-13/pdf/E7-24064.pdf.

It applies to the provision of brokerage services, which have been found to be at risk of conflicts of interest that drive up costs for plans,[5] as well as to service providers who engage in the following:

> Consulting, for which the covered service provider, an affiliate, or a subcontractor reasonably expects to receive indirect compensation or direct compensation … *related to the development or implementation* of plan design, insurance or insurance product selection (including vision and dental), recordkeeping, medical management, benefits administration selection (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness design and management services, transparency tools, group purchasing organization agreements and services, participation in and services from preferred vendor panels, disease management, compliance services, employee assistance programs, or third party administration services.[6]

The statutory text makes clear that this disclosure requirement applies broadly to the provision of any of the services listed. Specifically, the language indicates that a covered service provider receiving indirect or direct compensation "related to the development or implementation of" the specified activities must disclose any expected compensation of $1,000 or more.[7] For example, a group health plan may contract with a third-party administrator or a pharmacy benefit manager (PBM) who is responsible for designing the plan by developing a provider network or a prescription drug formulary; such service providers may also implement the plan design by processing claims, maintaining records, and negotiating reimbursement rates.[8] Covered service providers engaging in any of these activities as part of a contract or arrangement with a covered group health plan are providing "consulting" services, and as such are subject to the law's disclosure requirements.

Previously issued guidance by EBSA correctly implied, but did not make explicit, that service providers should interpret the applicability of these requirements broadly. On December 30, 2021, Field Assistance Bulletin No. 2021-03 (FAB No. 2021-03) provided limited guidance to the regulated community and a temporary enforcement policy allowing stakeholders to rely on good faith and reasonable interpretations of the law.[9] FAB No. 2021-03 specifically encouraged plan sponsors and service providers to rely upon regulations and guidance previously issued with respect to similar disclosure requirements applicable to ERISA-covered retirement plans.[10] As

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[5] Marshall Allen, *Lavish Bonus? Luxury Trip? Health Benefits Brokers Will Have to Disclose What They Receive From the Insurance Industry*, ProPublica (Jan. 6, 2021), https://www.propublica.org/article/lavish-bonus-luxury-trip-health-benefits-brokers-will-have-to-disclose-what-they-receive-from-the-insurance-industry.

[6] 29 U.S.C. § 1108(b)(2)(B) (emphasis added).

[7] *Id*.

[8] WestLaw, *Third-Party Administrator (TPA)*, Thomson Reuters Practical Law, https://content.next.westlaw.com/practical-law/document/I8b78d20587b211e9adfea82903531a62/Third-Party-Administrator-TPA(last visited Nov. 14, 2022); WestLaw, *Pharmacy Benefit Manager (PBM)*, Thomson Reuters Practical Law, https://content.next.westlaw.com/practical-law/document/Ia63f5e8a77eb11e9adfea82903531a62/Pharmacy-Benefit-Manager-PBM (last visited Nov. 14, 2022).

[9] U.S. Dept. of Labor, Field Assistance Bulletin No. 2021-03 (2021), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2021-03.

[10] *Id*. (citing 29 C.F.R. § 2550.408b-2(c); U.S. Dept. of Labor, 77 Fed. Reg. 5632 (Feb. 3, 2012), Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure (Final Rule), https://www.govinfo.gov/content/pkg/FR-2012-02-03/pdf/2012-2262.pdf; and U.S. Dept. of Labor, 75 Fed. Reg 41600 (Jul. 16, 2010), Reasonable Contract or Arrangement Under

you are aware, the retirement disclosure requirements apply broadly and include services such as insurance, recordkeeping, and third party administration.[11] Pursuant to EBSA's guidance, group health plan service providers looking to these regulations should rightly conclude that the analogous requirements of the CAA apply in a similar fashion.

However, due to ongoing confusion, we believe additional guidance is needed to make explicit the scope of entities subject to the CAA requirements. This guidance would be highly beneficial to the regulated community. For example, there is widespread lack of transparency regarding compensation earned by PBMs, particularly sources of indirect compensation that can create conflicts of interest and contribute to higher drug prices.[12] Specifically, many PBMs receive rebates from drug manufacturers that do not appear to be reflected in the costs a health plan pays for those drugs.[13] Higher cost drugs offer potentially higher rebates, which in turn influence plan formulary design decisions and contributes to rising prescription drug spending.[14] Detailed disclosures of these and other compensation practices, including "sufficient information to permit the evaluation of the reasonableness of the compensation or cost,"[15] are required by the statute and will assist plan fiduciaries in assessing their contracts with service providers.

Thank you in advance for your response. We look forward to working with you on this and other issues in order to improve transparency and lower health care costs for the American people. If you have any questions or you wish to discuss this matter further, please contact Daniel Foster (Majority Staff) at Daniel.Foster@mail.house.gov or Taylor Hittle (Minority Staff) at Taylor.Hittle@mail.house.gov. Please direct all official correspondence and information relating to this request to the Committee's Chief Clerk, Rasheedah Hasan, at Rasheedah.Hasan@mail.house.gov.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

VIRGINIA FOXX
Ranking Member

cc: Joe Canary, Director, Office of Regulations and Interpretations

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Section 408(b)(2)—Fee Disclosure (Interim Final Rule), https://www.govinfo.gov/content/pkg/FR-2010-07-16/pdf/2010-16768.pdf).

[11] "Accounting, auditing, actuarial, appraisal, banking, consulting (i.e., consulting related to the development or implementation of investment policies or objectives, or the selection or monitoring of service providers or plan investments), custodial, insurance, investment advisory (for plan or participants), legal, recordkeeping, securities or other investment brokerage, third party administration, or valuation services provided to the covered plan." 29 C.F.R. § 2550.408b-2(c)(1)(iii)(C).

[12] California Department of Managed Healthcare, *Task Force on Pharmacy Benefit Management Reporting Report to the Legislature* at 6, https://www.dmhc.ca.gov/Portals/0/Docs/DO/PharmacyBenefitManagementLegislativeReportAccessible.pdf.

[13] *Id*.

[14] *Id*.

[15] 29 U.S.C. § 1108(b)(2)(B)(ii)(II).