COMPLIANCE **ALERT**

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Agencies Issue Guidance on New CAA "Gag Clause" Reporting Requirement

March 3, 2023

Action Required:

- Confirm that no prohibited provisions remain in service agreements.
- Ensure submission of GCPCA form by Dec. 31, 2023.

On February 23, 2023, the Departments of Labor, Health and Human Services, and the Treasury ("Agencies") issued FAQ Guidance ("Guidance") under the Consolidated Appropriations Act, 2021 (CAA) requiring group health plans and insurers to annually attest that they have not included any "gag clauses" in their contracts with healthcare providers, TPAs and other plan service providers.

Under the new guidance, group health plans and insurers would be required to certify to the Agencies that they are not using gag clauses on a "Gag Clause Prohibition Compliance Attestation" (GCPCA) form which must be submitted by December 31 each year (with the first GCPCA form due December 31, 2023).

What Are "Gag Clauses" and How Does This New Guidance Change the Law?

Gag clauses are provisions of group health plan agreements that prevent providers from sharing certain cost, quality and claims information with plan participants. The CAA prohibits group health plan agreements from precluding disclosure of this information.

What Should Employers and Plan Sponsors Do Next?

Most of the gag clause provisions have likely been removed since the gag clause prohibition took effect with the CAA on December 27, 2020. Submission of the GCPCA form is likely to fall on insurers and TPAs.

Nevertheless, employers and plan sponsors should still review their plans' service agreements to confirm that no prohibited provisions remain in their agreements and ensure that submission of the GCPCA form will be completed in a timely manner.

Your Corporate Synergies Account Manager can assist with this process. ■

↓ Full Explanation Follows ↓

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What Are "Gag Clauses" and How Does This New Guidance Change the Law?

Gag clauses are provisions of group health plan agreements that prevent providers from sharing certain cost, quality and claims information with plan participants. The CAA prohibits group health plan agreements from precluding disclosure of this information. Prior to the new Guidance, the Agencies had indicated that pending the issuance of guidance, group health plans and insurers were required to implement the requirements prohibiting these "gag clauses" using a good faith, reasonable interpretation of the statute.

The new Guidance provides additional clarification regarding this prohibition and the new annually required compliance attestation. What follows is a summary of the key provisions of the Guidance:

- **Gag Clause Prohibition (Q&As-1 through -4):** The CAA's gag clause prohibition applies to agreements between group health plans or insurers and providers, third-party administrators (TPAs), or other plan service providers. The Guidance explains that a gag clause is a "contractual term that directly or indirectly restricts specific data and information that a plan or issuer can make available to another party," and indicates that this includes restrictions on disclosing provider-specific cost or quality-of-care information, restrictions on electronic access to de-identified participant and beneficiary claim information (consistent with applicable privacy protections), and restrictions on sharing these types of data or information. An example of a prohibited gag clause would be a TPA's attempts to restrict disclosure of provider rates because it considers them "proprietary," or a provision indicating that provider-specific cost and quality-of-care information can only be disclosed at the TPA's discretion. It should be noted that while the Guidance notes (in Q&A-2) that "reasonable restrictions" may be placed on public disclosure of this information, it fails to elaborate on what that means or give specific examples of such restrictions.
- **Compliance Attestation (Q&As-5 through -12):** The CAA requires plans and insurers to annually attest to their compliance with the gag clause prohibition on the GCPCA form that will be submitted to the Agencies online. Specifically, the FAQs provide that the first GCPCA form covering the period from December 27, 2020 (or, if later, the effective date of the plan or insurance coverage) through the date of attestation, is due no later than December 31, 2023. Subsequent attestations are due each December 31. This requirement applies to health insurers offering group or individual coverage and to insured and self-insured group health plans, including ERISA plans, non-federal governmental plans, and church plans subject to the Internal Revenue Code (Code), regardless of whether the plans are grandfathered or grandmothered under the ACA.
- **Submitting the GCPCA Form (Q&A-7):** The GCPCA attestation forms are submitted through a Centers for Medicare & Medicaid Services' (CMS) Health Insurance Oversight System portal (HIOS). Detailed instructions, a user manual, and a reporting template are provided on a CMS GCPCA webpage and are also linked in a DOL/EBSA bulletin.
- **Reporting Violations (Q&A-13):** The Guidance provides information on how to report suspected violations of the gag clause prohibition by a plan or insurer, and includes a website for providers to submit billing complaints.

Do These Rules Apply Differently for Fully Insured vs. Self-Insured Health Plans?

Yes. As with other CAA requirements, a sponsor of a self-insured plan (including partially self-insured plans) can enter into an agreement to have their TPA, PBM or other third-party service provider submit the GCPCA form on their behalf, but the legal responsibility to submit a timely attestation remains with that self-insured plan.

Sponsors of fully-insured group health plans may place the responsibility for submission of the GCPCA form on the health insurance insurer/carrier, if done in writing. An insurer that both offers group health insurance and acts as a TPA for self-insured group health plans can submit a single GCPCA on behalf of itself, its fully-insured group health plan policyholders, and its self-insured group health plan clients (the Guidance recommends that the insurer coordinate with each plan to avoid duplication).

Are There Any Exceptions, Exemptions or Waivers Applicable to This New Reporting Requirement?

Yes. Entities not required to attest on the GCPCA form are issuers of only excepted benefits plans or short-term limited-duration insurance, Medicare and Medicaid plans, CHIP, TRICARE, Indian Health Service Program, and Basic Health Program Plans. Also, the Agencies will not enforce the requirement to submit a GCPCA form against plans that consist solely of health reimbursement arrangements (HRAs), or other account-based health and welfare plans.

What Should Employers and Plan Sponsors Do Next?

While most of the heavy lifting associated with submission of the GCPCA form is likely to fall on insurers and TPAs, and while most of the gag clause provisions have likely been removed by these types of entities in light of the fact that the gag clause prohibition took effect upon enactment of the CAA on December 27, 2020, employers and plan sponsors should still review their plans' service agreements to confirm that no prohibited provisions remain in their agreements and ensure that submission of the GCPCA form will be completed in a timely manner. Your Corporate Synergies Account Manager can assist with this process. ■

If you have any additional questions, please call your Corporate Synergies Account Manager or 866.CSG.1719.