Fiduciary Check In: Rights & Responsibilities Related to Service Provider Disclosure

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National Alliance
of Healthcare Purchaser Coalitions
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Speakers

Michael Thompson
President & CEO
National Alliance of Healthcare Purchaser Coalitions

Jamie Greenleaf
TILT
Managing Director/Founder

Tony Sorrentino
President
Health Plan Fiduciary Compliance, LLC

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of Healthcare Purchaser Coalitions
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The Consolidated Appropriations Act (CAA) and Fiduciary Responsibilities

Tony Sorrentino JD CPA
Health Plan Fiduciary Compliance, LLC
President/Chief Compliance Officer
tsorrentino@hpfid.com

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Health plan sponsors have a fiduciary obligation to disperse plan assets in a prudent manner for the exclusive benefit of plan participants and beneficiaries.

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The standard to carry out such obligation for a health plan is simply a “good faith compliance effort”.

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Unfortunately, there are not hard and fast "safe harbors" as to what constitutes a "good faith compliance effort " for health plans so plan sponsors are left to exercise their responsibilities in a "prudent" manner.

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Peters vs Aetna Inc

- Fourth Circuit revived ERISA breach of fiduciary duty and prohibited transaction claims against Aetna.
- Significance is that a plan participant brought a Class Action suit alleging violations of the exclusive benefit rule.
- This is a sneak peak and what plan sponsors risk if they do not follow a plan fiduciary compliance process!!

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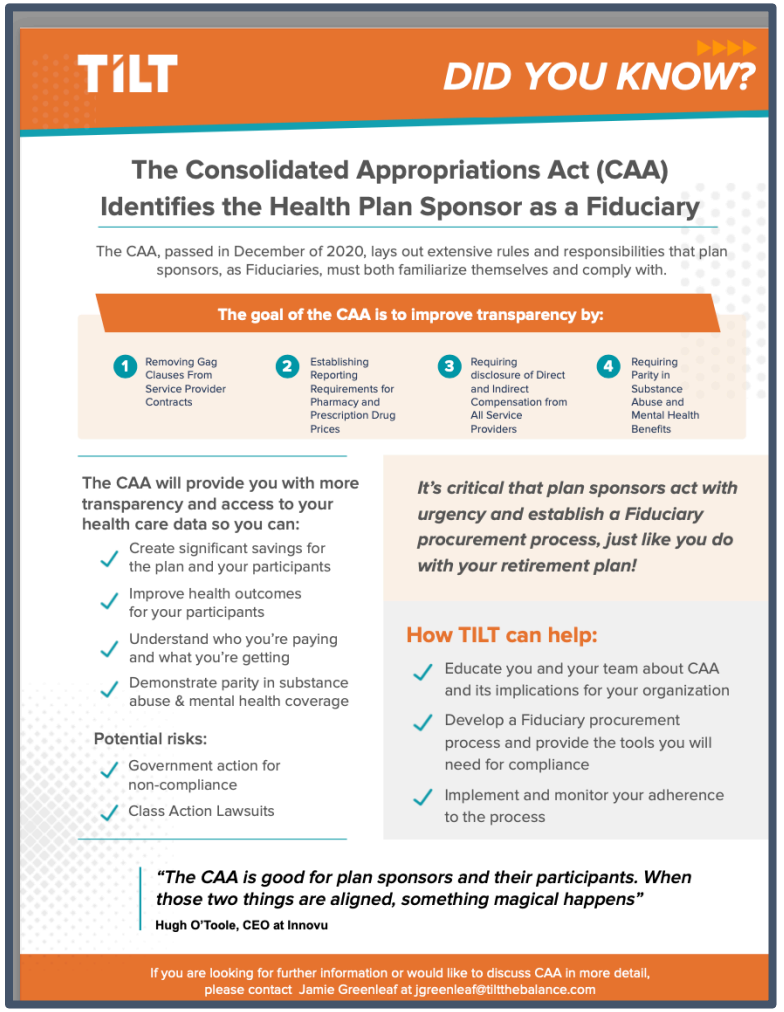
The Consolidated Appropriations Act (CAA)

- The CAA, passed in December of 2020, lays out extensive rules and responsibilities that plan sponsors, as Fiduciaries, must comply with.
- The goal of the CAA is to improve transparency by:
  - Removing gag clauses from service provider contracts
  - Establishing reporting requirements for pharmacy and prescription drug prices
  - Requiring disclosure of direct and indirect compensation from All Service Providers
  - Requiring parity in substance abuse and Mental Health Benefits
- As Fiduciaries, plan sponsors are required to demonstrate a prudent decision-making and oversight process.
- Plan sponsors must document their processes in order to demonstrate that they have met their Fiduciary responsibilities.



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The Consolidated Appropriations Act (CAA)

Compensation Disclosure Requirements

It creates significant compensation disclosure requirements for health insurance brokers and other benefit plan service providers, effective for contracts issued after **December 27, 2021.**

This requirement only applies to contracts where the ***service provider*** reasonably expects to receive **$1,000 or more in compensation (direct or indirect)** in connection with providing the services

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Compensation Disclosure Requirements

Who is a "covered service provider"

- Any involvement in insurance or insurance product selection (including vision and dental)
- Development or implementation of plan design
- 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
- Third-party administration services

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Compensation Disclosure Requirements

What Information to Disclose?

- Direct compensation
  - Finder fees
  - Contracted fees
  - Commissions
- Indirect compensation
  - Compensation based on a structure not solely related to the contract with the covered plan
  - Reasonable estimate of any indirect compensation they or any affiliates or subcontractors reasonably expect to receive
- Transactional fees
  - A description of all transaction-based compensation.
  - A description of any compensation payable in connection with termination and, if applicable, how any prepaid amounts may be refunded and calculated.
- Written description of all the services they provide
- Fiduciary Status

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Compensation Disclosure Requirements

How Compensation Information Needs to be Disclosed

- Monetary Amount
- A Formula
- Per Capita charge per enrollee (PEPM)

When Information Needs to be Disclosed

- “reasonably in advance of the date on which the contract or arrangement is entered into, extended, or renewed.”
- No longer than 60 days from change

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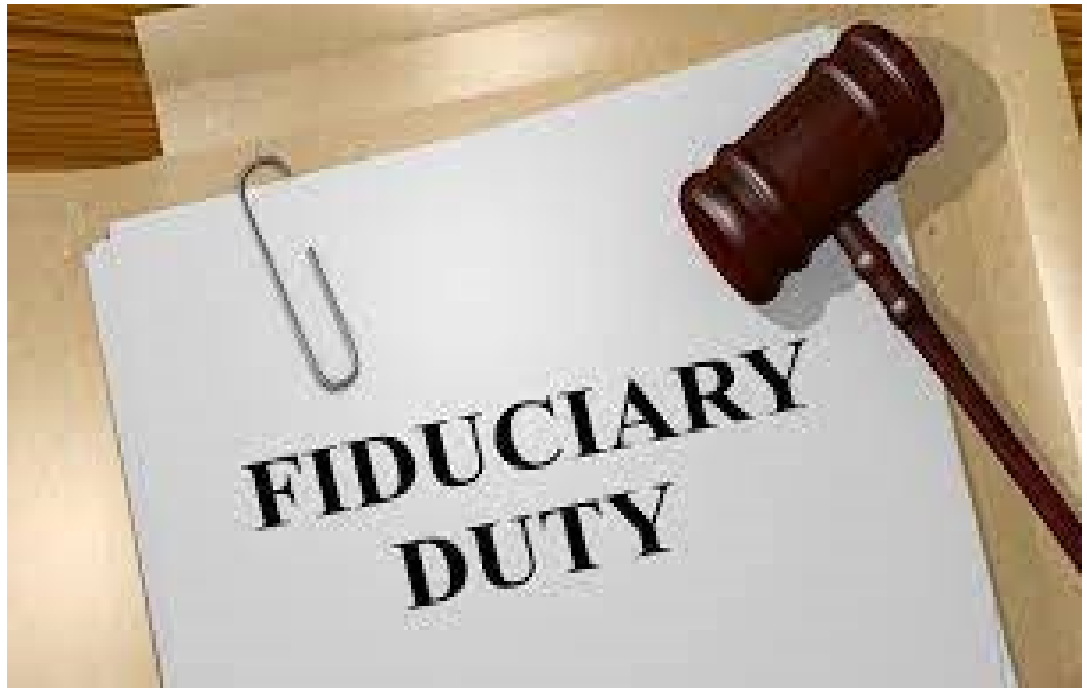
Compensation Disclosure Requirements

Why?

- Determine “reasonableness” of fees
- ERISA section 408(b)(2) permits plans to enter into reasonable plan service arrangements for reasonable compensation
- The CAA amends ERISA section 408(b)(2) (“Amendment”) to ERISA-covered group health plans to provide written information about their fees and services to a “responsible plan fiduciary”
- The “responsible plan fiduciary” is a plan fiduciary with authority to cause a plan to enter into, extend, or renew a contract or arrangement for plan services. Any involvement in insurance or insurance product selection (including vision and dental)



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Compensation Disclosure Requirements

Liability of Complacency

- If the covered service provider does not meet its obligation to disclose, then the plan fiduciary needs to ask for the information in writing.
- Notify the DOL and consider termination of the contract
- Prohibited transaction - The DOL could enforce civil monetary penalties under ERISA Section 502(i). There is the potential for triggering a 15% excise tax under Internal Revenue Code Section 4975 too, which could become 100% if the plan fiduciary does not correct their actions on a timely basis.
- Class Action law suites

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Compensation Disclosure Requirements

Take Action NOW!

- Identify ALL Covered Service Providers (CSP)
- Gather ALL required fee and service disclosures from CSP's
- Compile ALL Contracts and Conflict of Interests statements
- Establish a process to evaluate & determine "reasonableness" of fees & services
- Perform independent benchmarking of CORE broker services
- Document your process

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Compensation Disclosure Requirements

Contact Information –

Jamie Greenleaf

jgreenleaf@tiltthebalance.com

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Questions?

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