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TO: Trust Fund Office for Health Fund Clients
FROM: Saltzman & Johnson
DATE: March 15, 2023
RE: Transparency Requirements - Guidance Annual Gag Clause Attestation

On February 23, 2023, the DOL, HHS, and Treasury (“Departments”) released *FAQs about Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation Part 57* (“FAQs 57”).¹ FAQs 57 provides guidance on the implementation of the prohibition on gag clauses on price and quality information in provider agreements as required under the Consolidated Appropriations Act, 2021 (CAA), Division BB, Section 201.² Specifically, FAQs 57 provides guidance to group health plans and insurance issuers about the annual attestation requirement of Section 201. Plans (self-funded and fully insured; grandfathered and non-grandfathered) and issuers must submit attestation of compliance with the prohibition of gag clauses by December 31, 2023, and subsequent attestations are due by December 31 of each year thereafter.

This memorandum provides the Trust Fund Office with guidance on how to submit these attestations.

Section 201 prohibits group health plans and group health insurance issuers from entering agreements with a health care provider, network of providers, third-party administrator (TPA), or other providers that offers access to a network of providers from including gag clauses that directly or indirectly restrict a plan or issuer from—

- (1) Providing provider-specific cost or quality of care data or information to referring providers, the plan sponsor, participants, beneficiaries, and individuals eligible to become enrollees of the plan;
- (2) Electronically accessing de-identified claims and encounter data or information for each enrollee upon request, including, on a per claim basis, financial information (e.g., the allowed amount), provider information, service codes, or other claim and encounter transaction elements), for participants, beneficiaries, or enrollees; or
- (3) Sharing (or directing the sharing of) information describe in (1) and (2) with a business associate.

In 2021, the Departments stated that plans and issuers were expected to implement the requirement for prohibitions on gag clauses using a good faith, reasonable interpretation of the statute, and the requirement for submission of attestation of compliance was delayed until 2022 after further guidance was released.³

¹ Available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/aca-part-57.pdf>; last accessed March 1, 2023.

² Consolidated Appropriations Act, 2021, Div. BB, Title II (Transparency), Section 201, Pub. L. No. 116-260 (December 27, 2020).

³ See *FAQs about Affordable Care Act and Consolidated Appropriations Act, 2021, Implementation Part 49* (August 20, 2021).

REVIEW ALL AGREEMENTS BETWEEN THE PLAN AND PROVIDERS, ISSUERS, NETWORKS

The Trust Fund Office should review and engage legal counsel to review all agreements between the plan and issuers, networks, TPAs, or other service providers who offer access to a network of providers for direct and indirect gag clauses.

ATTESTATIONS – WHO FILES, ONLINE REGISTRATION & SUBMISSION, DUE DATES

Further, FAQs Part 57 provides guidance about how plans and issuers must submit their attestations:

1. Attestation on behalf of the plan may be made by a plan administrator or service provider who is granted authorization to make the attestation:
 - a. Self-funded Plans. The Plan and service provider (e.g., a TPA, an issuer acting as a TPA, or PBM) may agree through written agreement for the service provider to submit the attestation for the self-insured (or partially self-insured) plan; however, the legal requirement to provide timely attestation remains with the plan.
 - b. Fully Insured Plans. Both the issuer and the Plan are required to submit the attestation; however, an issuer acting as a TPA for a self-funded or fully insured plan may attest on behalf of the plan.
2. Attestations must be submitted by plans and issuers electronically through an online portal: <https://hios.cms.gov/HIOS-GCPCA-UI>.
 - a. The attesting agent must obtain an authentication code before the attestation may be uploaded. To obtain an authentication code, access the website shown above and click the **“Don’t have a code or forgot yours?”** link and provide the attesting agent’s email address. The authentication code will be sent via email with further instructions.
 - b. If you are attesting on behalf of more than one plan or issuer, you may report using a single form, GCPCA Reporting Entity Excel Template, available for download at <https://www.cms.gov/files/document/gcpc-reporting-entity-template-download-112522.xlsx>.
 - c. Attestation instructions are available via the online portal and at <https://www.cms.gov/files/document/gag-clause-prohibition-compliance-attestation-instructions.pdf>.
 - d. Additional materials are available at <https://www.cms.gov/ccio/programs-and-initiatives/other-insurance-protections/gag-clause-prohibition-compliance>.
3. The first attestation is due December 31, 2023; subsequent attestations are due annually by December 31.

Please contact our office if you have any questions about reviewing provider and issuer agreements for gag clauses and the attestation filing requirements.