



TO: Our Valued Clients
FROM: Health Plans, Inc.
DATE: October 12, 2023
RE: Compliance *eBlast*: Gag Clause Prohibition Compliance Attestation

Health Plans, Inc. (HPI) is issuing this Compliance *eBlast* to notify you of HPI's understanding of the Federal Gag Clause Prohibition Compliance Attestation (GCPCA) and the steps our clients need to take to comply.

I. Background

The Gag Clause Requirement of the 2021 Consolidated Appropriations Act (CAA) prohibited plans and issuers from entering into an agreement offering access to a network of providers that would directly or indirectly restrict the plan or issuer from providing provider cost or quality of care information; from electronically accessing claims data; and providing an attestation of compliance. This was done in part to allow functionality in data collection pursuant to the requirements of Machine Readable Files as part of the [Transparency in Coverage Final Rules \(Tic\)](#). The "gag clause" is defined as a contractual term that directly or indirectly restricts specific data and information that a plan or issuer can make available to another party.

In early 2021, HPI reached out to our preferred provider network partners to request confirmation of compliance. The networks did report back to HPI that they are in compliance with the Gag Clause prohibition requirement. At that time, the Departments of Labor, Health and Human Services, and the Treasury (collectively, "the Departments") indicated that the Gag Clause requirements were "self-administering" meaning the Federal government was not going to implement and enforce the requirements and it was the responsibility of plans and issuers to comply.

II. The Gag Clause Attestation Requirement

In late February 2023 the Departments changed the self-administering aspect of the regulation and released an [FAQ](#) which added a new Federal annual attestation of compliance – this is referred to as The Gag Clause Prohibition Compliance Attestation ("GCPCA" or "Attestation"). The submission date for the first Attestation is no later than December 31, 2023. The FAQ also clarified that, until any further guidance is issued, plans and issuers are expected to implement the requirements prohibiting gag clauses using a good faith, reasonable interpretation of the statute. Further guidance may be issued with additional information, but as of the date of this e-Blast no new guidance has been issued.

III. Plan Responsibility for Attestation

The GCPCA is applicable for fully insured and self-insured group health plans. The burden of providing the Attestation is on the plan. Self-insured plans may satisfy the requirement to provide an Attestation by submitting Attestations directly to the Department through the Health Insurance Oversight System (HIOS).

IV. Can HPI Provide the Attestation for our Clients? Unfortunately Not.

If HPI were to attest on behalf of our self-funded clients that each client's contracts meet the Gag Clause prohibitions, we would be attesting to ALL CONTRACTS FOR THAT CLIENT that are subject to the Gag Clause prohibitions. HPI is not able to provide the Attestations since:

- We will not know the validity of all the contracts for our clients since, in many cases, we have no contractual relationship with other entities used by our clients (e.g., direct networks and PBMs, carve-out vendors, etc.) that are subject to the Gag Clause prohibitions.
- The PPO networks, PBMs and carve-out vendors are the only entities that can actually fully and factually attest when working with a self-funded client.

HPI can, however, provide a formal statement to our clients, if requested, that HPI's administrative services agreement with the client meets the Gag Clause Requirement of the 2021 Consolidated Appropriations Act.

V. What Do Our Clients Need to Do to Comply With the GCPCA?

Clients must submit the Attestation using a federally supplied document and through the Federal Health Insurance Oversight System (HIOS) – see links below. **The submission date for the first Attestation will be no later than December 31, 2023, covering the period beginning December 27, 2020, or the effective date of the applicable plan (if later), through the date of attestation.** Subsequent Attestation submissions are due by December 31 of each year thereafter.

- The Federal CMS resource page for the Gag Clause Prohibition Compliance Attestation that includes the FAQs, instructions and user manual, the reporting template, and HIOS link can be found [here](#).
- The direct link to the HIOS portal for submission, along with HIOS instructions, can be found [here](#).

For additional assistance, please contact your HPI Account Service Team.

Regards,

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The information contained in this message is based on our current understanding of recent regulatory developments which may affect group benefit plans. It should not be construed as specific legal advice or legal opinion. The contents are for general informational purposes only and are not a substitute for the advice of legal counsel.