



LEGAL ADVICE FOR HEALTH PLANS

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## ***HEALTH LAW ALERT***

***August 22, 2021***

### **Compliance Dates for Transparency in Coverage, CAA Requirements Postponed**

#### **Departments Issue Guidance Delaying Enforcement for Some Requirements Describe Good-Faith Compliance for Others**

On Friday, August 20, the Departments of Health and Human Services, Labor, and the Treasury (the Departments) published formal guidance postponing compliance deadlines for several provisions of the Transparency in Coverage Rule and the Consolidated Appropriations Act, 2021 (the CAA). The guidance also provided direction on how to comply with various CAA requirements before formal rules for those requirements go into effect (or in the absence of such rules).

The guidance is set out in a set of FAQs published by the Departments in their series of FAQs on the Affordable Care Act and other legislation affecting group health plans (Implementation Part 49). The FAQs are published on the Department of Health and Human Services' website ([click here](#)); virtually identical guidance is published on the Department of Labor website. [Click here](#) for my table summarizing aspects of the guidance.

**Note on Compliance Dates.** Compliance dates listed below apply (in most cases) to plan (or policy) years that begin on or after the date listed. For example, an employer group with a July 1 – June 30 plan year, would not need to comply with a January 1, 2022, compliance date until July 1, 2022—the start of the first plan year on or after the compliance date.

#### **Transparency in Coverage Requirements**

**Prescription Drug Machine Readable File.** The Transparency in Coverage Rule requires Plans and Issuers to publish a Machine-Readable File with negotiated rates and historical net prices for prescription drugs covered under each coverage option, effective January 1, 2022. *The Departments will defer enforcement* of [this] requirement” until they have reconsidered the current Rule in light of provisions of the CAA (see the paragraph headed “Reporting on Pharmacy Benefits and Prescription Drug Costs,” below). This reconsideration will be conducted “through notice and comment rulemaking.” The requirement to publish Prescription Drug Machine Readable Files is therefore postponed *until new rules are published* on the subject.

**In-Network and Out-of-Network Machine Readable Files.** The Transparency in Coverage Rule requires Plans and Issuers to publish Machine-Readable Files with negotiated rates for In-Network Providers and allowed amounts for Out-of-Network Providers for covered items and services beginning on January 1, 2022. As “an exercise of enforcement discretion, *the Departments will defer enforcement* of [these] requirement[s] . . . *until July 1, 2022*’ for plan (policy) years beginning on or after January 1, 2022. Plans and issuers will therefore have *a six-month extension* on the deadline for publishing these files.

**Price Comparison Tool.** The Transparency in Coverage Rule requires Plans and Issuers to offer a Price Comparison Tool that allows members to compare costs for items and services furnished by In-Network Providers. The Tool must be available for 500 covered items and services by *January 1, 2023*, and for all covered items and services by *January 1, 2024*. The *compliance dates for this requirement remain the same*—the Departments did not make any change to these compliance dates. The CAA requires Plans and Issuers to make a similar Tool available effective January 1, 2022. See the next paragraph for the Departments’ guidance on that requirement.

### **Consolidated Appropriations Act, 2021 Requirements**

**Price Comparison Tool and Telephone Access.** The CAA requires Plans and Issuers to offer a Price Comparison Tool that allows members to compare costs for items and services furnished by In-Network Providers and to make such comparisons available over the telephone. This provision is to go into effect on January 1, 2022. The Departments acknowledge that the CAA requirements “are largely duplicative of the [Price Comparison] tool component of the [Transparency in Coverage] Rule,” except that the CAA also requires the information to be available via a telephone service. In order to align the enforcement date of the CAA Price Comparison Tool with the enforcement date of the Transparency in Coverage Tool, “*the Departments will defer enforcement* of [*the CAA price comparison tool*] *requirement . . . until January 1, 2023.*” In the meantime, “the Departments intend to propose rulemaking and seek public comment regarding . . . whether compliance with the [Transparency in Coverage Rule] satisfies the analogous requirements [of the CAA].” In addition, the Departments will propose rules to ensure that cost-comparison information will “also be provided over the telephone upon request.”

**Advanced Explanations of Benefits.** The CAA requires Plans and Issuers to provide “Advanced Explanations of Benefits” to members upon receipt of a health care provider’s “good-faith estimate” of the cost of services to be furnished to the member (as required under another provision of the CAA). The CAA requires this feature to be offered beginning on January 1, 2022. Due to “the challenges of developing the technical infrastructure necessary for providers . . . to transmit [these] good faith estimates,” the Departments have determined that compliance with this provision “is likely not possible by January 1, 2022.” Accordingly, “*the Departments will defer enforcement* of the [Advanced EOB] requirement” *pending a rulemaking process* “to implement this provision, including establishing appropriate data transfer standards.”

**Reporting on Pharmacy Benefits and Prescription Drug Costs.** The CAA requires Plans and Issuers to report to the Departments certain information about prescription drug costs. The first reports are required by December 27, 2021, and later reports are due by June 1 of each subsequent year. “*The Departments will defer enforcement of [this] requirement . . . pending issuance of regulations or further guidance.*”

**Other Provisions.** The Departments also describe their plans for enforcement of several other provisions of the CAA and future rules or guidance related to those provisions. These include:

- **Identification Cards.** The CAA requires Plans and Issuers to include specific information on members’ Identification Cards. The Departments intend to issue rules concerning these requirements, but do not expect those rules to be published by the compliance date (*January 1, 2022*) and *did not postpone the compliance date*. The Departments provide some guidance concerning required “good-faith compliance” with this provision.
- **Prohibition on Gag Clauses Related to Price and Quality Data.** The CAA prohibits Plans and Issuers from entering into provider agreements that contain “gag clauses” that forbid disclosures of data related to price or quality of care. This provision went into effect upon enactment of the CAA (*December 27, 2020*). *The Departments describe this provision as “self-implementing,”* such that they “*do not expect to issue regulations*” (at least for now). They will, however, “issue implementation guidance to explain how plans and issuers should submit attestations of compliance [with the Gag Clause provision].” The Departments expect to begin collecting the attestations in 2022.
- **Provider Directory Requirements.** The CAA imposes standards on Plans and Issuers for their provider directories. These standards go into effect on *January 1, 2022*. The *guidance does not change this compliance deadline*. Although the Departments plan to issue rules on these provider directory requirements, the rules will not be published before the compliance date. Nevertheless, *the Departments expect* Plans and Issuers “to implement these provisions using *a good faith, reasonable interpretation* of the statute.” Good-faith compliance must include a policy to ensure that a member who receives services from a non-participating provider as the result of inaccurate information published in a provider directory, is responsible only for “a cost-sharing amount that is not greater than the cost-sharing amount that would be imposed [by] a participating provider.”
- **Balance Billing Disclosure Requirements.** Effective *January 1, 2022*, the CAA requires Plans and Issuers to provide disclosures to members (in affected EOBs and elsewhere) concerning balance billing requirements, such as the requirements in the No Surprises Act. *The Departments are not postponing*

*this compliance date* but may address the “requirements in more detail in future guidance or . . . rulemaking.” *The Departments expect* Plans and Issuers to “implement these requirements using *a good faith, reasonable interpretation of the statute.*” The Departments have published a Model Notice to facilitate compliance with these requirements. ([Click here](#) for link to Zip file containing Model Notice and related instructions from HHS website.)

- **Continuity of Care Requirements.** The CAA establishes certain continuity of care requirements, which are to go into effect on *January 1, 2022*. The *guidance does not change this compliance deadline.* Although the Departments plan to issue rules on these continuity of care requirements, the rules will not be published before the compliance date. The Departments do, however, expect Plans and Issuers “to *implement* these provisions using a *good faith, reasonable interpretation* of the statute.”

### State Enforcement of Transparency in Coverage and CAA Requirements

State Insurance Commissioners generally “have primary enforcement authority [over Insurers] with respect to the requirements of [the Transparency Rule and the CAA],” as they do for most Federal insurance market requirements. The Departments’ guidance refers to this enforcement scheme in several places and the Departments “encourage[] states that are primary enforcers of [these] requirement[s] . . . to take a similar enforcement approach” to that adopted by the Departments. It is unlikely that a State Insurance Commissioner would enforce a Federal Rule in a manner inconsistent with guidance from the Departments. Nevertheless, Issuers may wish to contact Insurance Commissioners to ensure they are aware of this guidance and that they plan to “take a similar enforcement approach.”

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