

Summary of Braun and Marshall Amendments (4/26/23)

- **Fiduciary Duties of Pharmacy Benefit Managers**
 - This bill would deem that an entity providing pharmacy benefit manager services (PBM) to a group health plan a fiduciary under the ERISA and apply the responsibilities and disclosure requirements for fiduciaries otherwise regulated under ERISA.
 - This new requirement would mean that a PBM can contract with a service provider only if the following conditions are met: (1) the contract is *reasonable*; (2) the services are necessary for the operation of the plan; and (3) reasonable compensation or fees are paid – per ERISA § 408(b)(2).
 - This bill would permit PBMs to retain “bona fide service fees” if they are reasonable, but the bill also includes an open-ended list of examples where such fees are per se unreasonable. These examples include if the fees are: (1) based on drug price of drug benchmark price; (2) discounts, rebates, fees, or other remuneration; and (3) any other reason determined by the Secretary (likely Labor, though it is unspecified).
 - “Bona fide service fees” are defined as fees paid by a manufacturer, customer, or client (except a private health plan) of PBM to a PBM that are fair-market value for bona fide, itemized services actually performed that the manufacturer, customer, or client would otherwise perform or contract for in the absence of the service arrangement, and that are not passed on to a client or customer of a PBM.
 - A non-preemption clause is also included that ensures PBMs are subject to applicable State laws.
- **Disclosure of Direct and Indirect Compensation for Brokers and Consultants to Employer-Sponsored Health Plans**
 - This bill would require that covered service providers who offer pharmacy benefit manager services or third-party administration services to ERISA-covered group health plans furnish written information about their fees and services to the responsible plan fiduciary.
 - The new disclosure requirements would apply to parties who expect to receive \$1,000 or more in direct or indirect compensation related to these services, which would typically include PBMs and TPAs.
 - The written disclosures would need to include details about the compensation expected to be received from the contract or arrangement and other information about the service relationship. The purpose of these disclosures is to enable the responsible plan fiduciary to assess the fairness of the compensation and identify any potential conflicts of interest.
 - Non-compliance with these disclosure requirements would render the service arrangement a prohibited transaction, as the statutory ERISA § 408(b)(2) exemption would not apply.