

October 31, 2023

The Honorable Janet Yellen
Secretary of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

The Honorable Xavier Becerra
Secretary of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

The Honorable Julie Su
Acting Secretary of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

**RE: Attestation Requirement Related to Section 201 of the 2021 Consolidated
Appropriations Act (CAA), Prohibiting Gag Clauses**

Dear Secretaries Yellen, Becerra and Su:

The Purchaser Business Group on Health (“PBGH”) writes on behalf of its member organizations to request further guidance from the Treasury, HHS and DOL (“Tri-Agencies”) regarding a requirement set forth in Title II, Section 201 of the Consolidated Appropriations Act of 2021 (“CAA”). Specifically, we write to encourage the Tri-Agencies to take further action to ensure the requirement for group health plans to submit an annual attestation of compliance with the gag clause prohibition is consistent with the original intent of the statute. The first attestation under the law is to be submitted by December 31, 2023.¹

PBGH is a non-profit health care purchaser coalition comprised of members that include the largest public and private purchasers of health care in the United States. Collectively, these organizations spend roughly \$350 billion annually buying health care for nearly 21 million employees and their families. PBGH supports its members in implementing innovative solutions to improve health care outcomes and value. PBGH’s members operate at the forefront of advancing affordability, accountability and equity in health care purchasing practices.

¹ (Tri-Agencies, Feb 2023) “FAQS About ACA and CAA, 2021 Implementation Part 57,” Q6 at [\[Link\]](#)

PBGH has long advocated for the critically needed health care transparency provisions that were included in the CAA. The organization’s president and CEO, Elizabeth Mitchell, represented our membership’s support of health care transparency in testimony at a June 2019 Senate Committee hearing on legislation entitled the “Lower Health Care Costs Act.”² Many of this bill’s provisions – including the ban on gag clauses – were transferred into the CAA’s transparency section (Title II of Division BB), which was passed into law effective December 27, 2020. PBGH strongly believes the health care data and other information that the CAA delivers to public and private purchasers has the potential to provide the insights our member organizations need to fulfill their fiduciary obligations to workers and their families. Specifically, the responsibility under ERISA is to purchase and provide high-quality benefits “solely in the interest” of plan participants at “only reasonable expense.”³

When Congress enacted the prohibition on gag clauses in Section 201, it did so to facilitate the unrestricted transparency purchasers have needed but have been unable to obtain to understand the price and quality of the health care services they provide to workers and their families. In banning contractual gag clauses that would restrict the ability of purchasers to access, analyze and share their health care data, Congress sought to level the playing field in the health care purchasing environment.

Unfortunately, the letter and spirit of the CAA has been systematically undermined by service providers. At every turn, PBGH has observed health insurance companies, third-party administrators and pharmacy benefit managers (collectively “service providers”) frustrating the ability of purchasers to realize the benefits of CAA Section 201 to fulfill their fiduciary obligations to plan members. Here is an illustrative list of obstacles we are aware of:

1. Service providers are offering thinly worded “confirmations of compliance” that certify the service provider has removed its gag clauses from its own network provider agreements, which does not address the administrative service agreement (“ASA”) between the purchaser and their service provider.⁴
2. Service providers are offering confirmations that their ASAs are consistent with requirements under CAA Section 201,⁵ but when pressed on this, have taken the

² (Mitchell, Jun 2019) “Testimony for Senate HELP Committee, Lower Health Care Costs: Creating Functional Markets and Purchasing Value for Patients.” PBGH, at [\[Link\]](#)

³ (DOL, Sep 2019) “Understanding Your Fiduciary Responsibilities Under a Group Health Plan” p. 2 at [\[Link\]](#)

⁴ See e.g., United Healthcare’s confirmation, which it offers as “support [for] customers [to do] their own attestation.” [\[Link\]](#); Blue Shield of CA’s confirmation, confirming only that BSCA, itself, is compliant. [\[Link\]](#)

⁵ See e.g., Anthem and UMR’s respective confirmations, which represent their ASAs are “consistent with the requirements set forth” in Section 201 of the CAA. [\[Link\]](#) and [\[Link\]](#)

position that nothing in CAA Section 201 obligates them, as service providers, to do anything at all with respect to ASAs they have with their purchaser clients.⁶

3. Service providers are offering to attest compliance on behalf of their self-insured purchaser clients without any accompanying discussion of whether all gag clauses have, in fact, been removed from their ASAs with purchaser clients.
4. Service providers are removing gag clauses from their ASAs only to then include them in supplemental agreements beyond the reach of CAA Section 201, such as confidentiality, data use or non-disclosure agreements.
5. Service providers are simply refusing to provide purchasers unconditional access to their health care data, regardless of the ASA being free of gag clauses.

We urge the Tri-Agencies to ensure that the full potential of Section 201’s ban on gag clauses is realized. Further clarification and guidance on enforcement of CAA’s Section 201 is needed. These examples of obstacles and resistance to full transparency that our members are encountering illustrate the difficult situation purchasers face. As the attestation deadline looms, they struggle when offered a binary choice that presents equally risky courses of action.

Despite the hard work the Tri-Agencies have done to date, current guidance does not offer public and private purchasers clarity on what course of action they should take if uncooperative vendors have rendered them unsure that they can accurately attest. FAQ guidance previously issued by the Tri-Agencies is silent on this matter, only providing clarification on affirmative attestations except for briefly noting potential “enforcement action” by the Tri-Agencies for plans that do not submit an attestation.⁷ Whereas a violation of CAA Section 202 constitutes an ERISA Prohibited Transaction – which carries clear and well-established implications – CAA Section 201 offers no such clarity on implications for purchasers in relationships with service providers that obstruct their ability to properly attest to compliance with the gag clause prohibition.

⁶ In Elevance’s (f/k/a Anthem) motion to dismiss *Bricklayers and Allied Craftworkers et al. v. Elevance*, Elevance writes “[The gag clause prohibition] does not prohibit Defendants, as service providers, from doing anything at all” because it “applies to Plaintiffs as the group health plans, not [service providers]” . . . “[the prohibition] does not impose any duty on Defendants.” See [\[Link\]](#) at p. 25. Likewise, in Anthem’s motion to dismiss *Owens & Minor Inc. v. Anthem Health Plans of Virginia*, Anthem writes “Because [the gag clause prohibition] does not prohibit Anthem, as an administrative services organization (i.e. service provider), from doing anything at all, Anthem simply is not within the ambit of . . . [the prohibition].” See [\[Link\]](#) at p. 12.

⁷ (Tri-Agencies, Aug 2021) “FAQs About ACA and CAA, 2021 Implementation Part 49” at [\[Link\]](#); (Tri-Agencies, Feb 2023) “FAQs About ACA and CAA, 2021 Implementation Part 57”, **Q7** at [\[Link\]](#); and (Tri-Agencies, Jun 2023) “Gag Clause Prohibition Compliance Attestation, Annual Submission Webform Instructions” at [\[Link\]](#)

On behalf of its membership, PBGH urges the Tri-Agencies to issue guidance that specifically allows purchasers to submit a more nuanced, narrative response describing their efforts to remove contractual gag clauses and obtain their health care data. We believe such guidance is well within the Tri-Agencies' existing authority and discretion and that a written explanation is a "good faith, reasonable interpretation of the statute."⁸ An explanation of a purchaser's circumstances would increase the context available for the Tri-Agencies to accurately survey the landscape of health plan fiduciary and service provider actions relating to CAA Section 201. Written explanation would also provide purchasers that have encountered obstacles from their service providers with a pathway to represent their particular circumstances when responding truthfully and fully to the December 31, 2023, attestation deadline.

While the statutory intent to increase purchasers' access to data is clear, PBGH notes there are current legislative proposals in Congress that have passed in committees in both the Senate and House of Representatives that would reiterate and build upon the rights and responsibilities of purchasers and service providers. Several of these proposals would increase audit and data access rights, introduce civil penalties against vendors for violation of the gag clause prohibition and in line with public policy, make gag clauses void. Indeed, one proposal would go so far as to allow purchasers unable to remove gag clauses or obtain data necessary to submit their gag clause attestation, to submit a "written statement in lieu of such attestation."⁹

The CAA and its implementing regulations and guidance, along with these abovementioned new proposals in Congress, are clear indication and recognition that service providers continue to be a real barrier to purchasers' ability to comply with and leverage CAA Section 201. We therefore encourage the Tri-Agencies to take swift action and address the issues we have raised in this letter before the December 31, 2023, deadline.

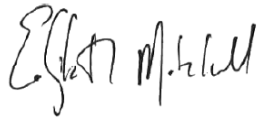
Thank you for your attention to this matter, and for advancing much needed transparency and accountability in health care. PBGH and its member companies are committed to lowering health care costs for workers and their families, and strongly support the goal of Congress and the Administration in enacting and implementing the CAA to limit growth in health care spending through increased transparency and accountability for all stakeholders. The continued focus and attention of the Tri-Agencies to ensure that the CAA is fully implemented is pivotal to these goals. We look

⁸ (Tri-Agencies, Aug 2021) "FAQs About ACA and CAA, 2021 Implementation Part 49", Q7 at [\[Link\]](#)

⁹ H.R. 5378 "The Lower Costs, More Transparency Act." *Title IV*, pgs. 200-209 at [\[Link\]](#) and especially pgs. 207-208.

forward to working with you on this and other issues of importance. If you have any questions or wish to discuss this issue, please contact Alan Gilbert, Vice President of Policy, at agilbert@pbgh.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth Mitchell". The signature is written in a cursive, flowing style.

Elizabeth Mitchell, President and CEO
Purchaser Business Group on Health