Gag Clause Prohibition Compliance Attestation

Entities Required to Attest (Reporting Entities)	Entities Not Required to Attest

• Issuers offering individual health insurance coverage, including:
  ○ Student health insurance plans
  ○ Grandfathered[1] and grandmothered[2] plans
  ○ Policies sold on or off Exchanges
  ○ Policies sold through an association
• Issuers offering group health insurance coverage, including:
  ○ Grandfathered and grandmothered plans
  ○ Policies sold on or off Exchanges
  ○ All other group health insurance plans
• Group health plans, including the following to the extent they are considered group health plans:
  ○ ERISA plans[3] (or sponsors of ERISA plans)
	• Account-based plans, such as health reimbursement arrangements (HRAs), including individual coverage HRAs[6]
	• Issuers and group health plans that offer only excepted benefits[7] coverage, including, but not limited to:
	  ○ Hospital indemnity or other fixed indemnity insurance
	  ○ Disease-specific insurance
	  ○ Dental, vision and long-term care
	  ○ Accident-only, disability and workers' compensation
	• Issuers that offer only short-term, limited-duration insurance
	• Medicare and Medicaid plans
	• State children's health insurance program plans
	• Basic Health Program plans

[1] In general, health coverage is considered grandfathered if it was in existence and has continuously provided coverage for someone (not necessarily the same person, but at all times at least one person) since March 23, 2010,
provided the plan (or its sponsor) or the issuer has not taken certain actions resulting in the plan relinquishing grandfathered status, as more fully described at 26 CFR 54.9815-1251, 29 CFR 2590.715-1251, and 45 CFR 147.140.

[2] Grandmothered plans are non-grandfathered plans in the individual and small group market that were issued prior to January 1, 2014, and for which CMS announced it will not take enforcement action with respect to certain
market requirements. See Bulletin: Extended Non-Enforcement of Affordable Care Act-Compliance With Respect to Certain Policies, available at https://www.cms.gov/files/document/extension-limited-non-enforcement-policy- through-calendar-year-2022.pdf

[3] The term "ERISA plan" refers to an employee welfare benefit plan established or maintained by a private-sector employer or by a private-sector employee organization (such as a union), or both, that provides medical or certain other benefits for participants or their dependents directly or through insurance, reimbursement, or otherwise.

[6] HRAs are generally group health plans that are subject to the group market reforms in the Code, ERISA, and the PHS Act, including the prohibition on certain gag clauses and the requirement to submit a GCPCA under Code section 9824, ERISA section 724, and PHS Act section 2799A-9. However, the Departments are not requiring GCPCAs from HRAs, or other account-based group health plans, as described in 26 CFR 54.9815-2711(d)(6)(i), 29 CFR 2590.715-2711(d)(6)(i), and 45 CFR 147.126(d)(6)(i). The Departments are exercising enforcement discretion with respect to HRAs (including individual coverage HRAs) and other account-based group health plans until the Departments can exempt such plans from the requirements of Code section 9824, ERISA section 724, and PHS Act section 2799A-9 through rulemaking. This approach is consistent with many other requirements that apply to group health plans and the existing applicability provisions in 26 CFR 54.9816-2T, 29 CFR 2590.716-2, and 45 CFR 149.20 with respect to other requirements of Division BB of the CAA.

[7] See Code Section 9832(c), ERISA Section 733(c), and PHS Act 2791(c).

Entities Required to Attest (Reporting Entities)	Entities Not Required to Attest
○ Non-Federal governmental plans, [4] such as plans sponsored by state or local governments ○ Church plans[5] ○ Grandfathered group health plans	

[4] PHS Act section 2791(d)(8)(C) defines the term "non-Federal governmental plan" as a governmental plan that is not a Federal governmental plan. Examples of non-Federal governmental plans include plans that are sponsored by states, counties, school districts, and municipalities. See https://www.cms.gov/CCIIO/Programs-and- Initiatives/Health-Insurance-Market-Reforms/nonfedgovplans.

[5] The term "church plan" refers to a plan established and at all times maintained for its employees by a church or by a convention or association of churches that is exempt from tax under section 501(a) of the Internal Revenue Code, provided that the plan meets the requirements of section 501(b) and (if applicable) section 501(c).

[8] Any controlled group of corporations or trades or businesses under common control within the meaning of Internal Revenue Code section 414(b) and (c) and related regulations.

Sources:

U.S. Department of the Treasury
U.S. Department of Labor
U.S. Department of Health & Human Services