



Preparing Your Firm For New Broker and Consultant Compensation Disclosures

September 27, 2021

NEW ERISA BROKER TRANSPARENCY REGIME

- Except as provided in section 408, a plan fiduciary shall not contract with a service provider to provide plan services (ERISA § 406(a))
- Old Section 408: Fiduciary can contract with a service provider if the payment for such services is “reasonable” (Former ERISA § 408(b)(2))
- Now: After December 27, 2021, can only contract with a service provider if the new compensation disclosure rules are satisfied (New ERISA § 408(b)(2))



THE COUNCIL'S EFFORTS

- Transparency Working Group has been meeting since January
- Final work product – Disclosure Compliance Outline
- Department of Labor – Staged Enforcement Meeting/Request



Preparing your firm for
**New Broker & Consultant
Compensation Disclosures**

COMPLIANCE OUTLINE

BROUGHT TO YOU BY

Step toe

 **THE COUNCIL**
The Council of Insurance Agents & Brokers



WHAT PLANS ARE COVERED?

- “Group benefit plans” but only “to the extent the plan provides medical care”
- No disclosure obligations for non-medical benefits like disability and group life



WHO MUST DISCLOSE?

- Any “covered service provider” that expects to receive – “directly or indirectly” – at least \$1,000 in compensation
- “Services” broadly defined/all-encompassing and includes all “broker” & “consulting” related to:
 - plan design, benefit selection, medical management, stop loss insurance, third-party administrator services, pharmacy benefits management services, wellness design and services, plan-related agreements services, employee assistance programs, etc.



WHEN MUST DISCLOSURE BE MADE?

- “No later than the date that is reasonably in advance of the date on which *the contract or arrangement* is entered into, [or] extended or renewed.”
- Applies to “contracts or arrangements” with the broker/consultant entered into on or after December 27, 2021
- Explicit transition rule does not apply to pre-December 27 broker/consultant contracts or arrangements



WHAT MUST BE DISCLOSED?

- The services to be provided
- All *expected* “direct” compensation (i.e. from the plan)
- All *expected* “indirect” compensation from **ALL plan-related sources** (including: vendor incentive payments and other payments from third-parties, a description of the arrangement under which the compensation is paid, the payer of the compensation, and any services for which the compensation will be received)
- Subcontractors / Affiliated Entities Included In The Disclosures



WHAT MUST BE DISCLOSED? (cont)

- Any transaction-based compensation (e.g., commissions, finder's fees) for services and the payers and recipients of the compensation
- Any compensation related to contract termination (and how any prepaid amounts will be calculated/refunded)
- If applicable – if are providing fiduciary services (TPAs? PBMs?)



NATURE & SCOPE OF SERVICES TO BE PROVIDED

List all services that you will perform and/or provide to the plan...

- Placement
- Enrollment
- Account management
- Plan servicing
- Compliance
- Consulting
- Referral
- Etc.



HOW SHOULD *EXPECTED* COMPENSATION BE DESCRIBED?

Anything of “monetary value” (excludes non-monetary compensation received by the firm that is less than \$250 per year in the aggregate)

- Dollar amounts
- Formulas
- Per capita charges
- If these methods cannot reasonably be used, any good-faith estimate and supporting explanations, methodologies and assumptions.

Description must permit **overall compensation reasonableness** evaluation



INDIRECT COMPENSATION ARRANGEMENT ISSUES

1. Compensation Among Affiliated Entities

- Services to be provided
- Payors and recipients of the compensation
- How compensation will be received

2. Formula Based Compensation Issues (Contingent Compensation and Overrides)

- Generic formula + Prior Performance Range?

3. Non-Cash Compensation



LATEST: PROPOSED RULE

INDIVIDUAL & SHORT-TERM LIMITED DURATION MARKETS

- Effectuates individual market/STLD **insurer** agent/broker CAA compensation disclosure requirements
- Requires insurers to disclose “direct” and “indirect” compensation paid by insurer –
 - Specify commissions paid to producer for **all** offered products (Chart is required)
 - Distinguish between new enrollment and renewal commissions
 - Explain qualifying thresholds for “indirect” compensation
- Insurers submit reports to HHS detailing their direct and indirect payment arrangements (placing producer, managing general agent and/or other intermediaries)
- Applies to contracts executed on or after December 27, 2021
- “Addenda or revisions to the material terms of a pre-existing contract” = New Contract
- **Comments due October 18, 2021**



WHAT IF DISCLOSURES CONTAIN MISTAKES OR REQUIRE UPDATES?

- Any disclosure error or omission made in good faith and with reasonable diligence must be corrected within 30 days of discovery
- Any plan-related compensation or cost changes must be reported to the plan within 60 days of the change



WHAT IF A PLAN FIDUCIARY REQUESTS COMPENSATION INFORMATION?

Upon written request of the responsible plan fiduciary or covered plan administrator and within 90 days of such request, a covered service provider must furnish:

“any other information relating to the compensation received in connection with the contract or arrangement that is required for the covered plan to comply with the reporting and disclosure requirements under” ERISA (e.g., Form 5500 disclosures)



OTHER POTENTIAL CONTRACT PROVISIONS

You also may want to consider including one or more of the following “stock” contract provisions:

- Not Responsible for Other Party’s Disclosures
- Sign/Return Instructions
- Period of Engagement
- Arbitration
- Confidentiality
- Indemnification Clause
- Applicable Law
- Entire Understanding



LONG-TERM INDUSTRY IMPLICATIONS?

- Simplified contingency formulas from carriers
- Streamlined client communication
- Transparency on non-medical products
 - A firm can choose to have its disclosures cover the entire employee benefits portfolio with a client and many Council member firms already deploy agreements and disclosures in this space that do encompass all of the benefits included in the plan.
- Intersection with pricing transparency rules





QUESTIONS?