



Society of Professional Benefit Administrators

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ERISA Advisory Council
Hearing on Outsourcing Employee Benefit Plan Services
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Testimony of
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Good Afternoon Members of the Council, Assistant Secretary Borzi, DOL Staff and guests,

I am Sandy Walters, Executive Vice President of Kelly and Associates Insurance Group, located in Hunt Valley, Maryland. I am here on behalf of the Society of Professional Benefit Administrators where I serve as Chairman.

SPBA is the national association of Third Party Administration (TPA) firms that are hired by employers and employee benefit plans to provide contract-based management of their employee benefit plans. All the members of SPBA provide services to health plans and some also service pension plans. Our comments today will focus on the services TPAs provide to health plans.

It is estimated that 55% of US workers in non-federal health coverage are in plans administered by TPAs in some form. Clients of TPA firms include every size and form of employment, including large and small employers, ACO, non-federal governmental plans, union, non-union, collectively bargained multiemployer plans, as well as plans representing religious entities. The majority of these clients are ERISA self-funded plans and sponsors, but our member TPAs also provide services to other types of plans, such as insured and HMO.

I am here to provide you with a look into the responsibilities of Third Party Administrators that provide outside administration for health benefit plans. ERISA imposes many obligations on non-pension benefits, referred to as welfare benefits. TPAs contract with plan sponsors to perform specific functions on behalf of health plans. Plan sponsors may select one TPA to handle the administration of the health plans offered, or plan sponsors may select multiple TPAs to handle varying functions. ERISA is complicated and detailed with many special rules and exceptions. SPBA members work closely with the Department of Labor and other relevant agencies to understand the goals and constant flow of regulations and interpretations. This knowledge is used to give perspective and education to plan sponsors, including trustees, but not legal advice. The government agencies have appreciated the insight from SPBA members and have shared with us that this interaction helps the agencies in understanding potential administrative issues that may arise.

Types of TPAs

Similar to the terms "consultant" and "accountant," which are used for a variety of professional services, it is important to recognize that the term "TPA" is used to cover a variety of functions. Below we provide a general explanation of the types of TPAs we know to exist:

1. **Comprehensive Service TPAs**—These TPAs provide a range of services to client plans and trustees. Due to the broad array of services offered, comprehensive service TPAs focus on educating clients about compliance issues and reminding them about their fiduciary responsibility. Most comprehensive service TPAs are members of SPBA.
2. **Administrative Services Only (ASO)**—This is a marketing term for TPA-type services created in the 1980's as insurers began to offer administrative services only for self-funded clients. I propose to you that legally there is no difference between a TPA arrangement and an ASO arrangement. However, the level of client service differs significantly. Entities that use the term ASO often do not provide the compliance education that comprehensive service TPAs offer. Insurance-trained legal staff of the insurer are more focused on fully-insured issues than on ERISA. It is important to recognize that insurers have purchased TPA firms and permit the TPA to operate under the TPA name because the name is known for high quality service. While the ASO arrangement and the TPA firm have the same owner, they function as separate entities and often compete with each other.
3. **Specialty TPAs**—These TPAs focus on just a few types of coverage, such as vision, prescription or HSA plans. Sometimes plan sponsors use multiple TPAs, such as a comprehensive service TPA for the major medical plan, and a specialty TPA for the vision plan.

4. Minimal TPAs—This type of TPA tends to be large entities such as a software firm that performs a limited TPA function that is not their primary line of business. Since the TPA role is a small percent of the overall unrelated business, the company tends to see the clients as a bi-product, rather than the focal points of the service. Government compliance and fiduciary issues are not priorities.

The Plan Administrator’s Role

Due to the many ways that ERISA plans can be configured, it is important to establish the general term “plan administrator” to describe who is responsible for most issues of legal compliance—every ERISA plan has a plan administrator. That designation is established in terms of the plan sponsor who assumes the numerous statutory responsibilities and who is ultimately liable for the statutory penalties that may be imposed for failure to properly discharge those responsibilities. Under ERISA, the plan administrator is typically responsible for most of the plan’s administrative functions (e.g. benefit claims determinations and hiring plan professionals). Although the plan administrator may delegate certain responsibilities to others, such as the TPA, it generally cannot avoid ultimate legal responsibility.

ERISA Fiduciary Duties

TPAs understand that the ERISA fiduciary rules are distinguished from many other rules of behavior by the following characteristics:

- The rules incorporate a broad, functional definition of the term “fiduciary”, which sweeps in individuals and business entities depending on the duties they undertake and actually perform in connection with ERISA plans;
- The standard of behavior expected from ERISA fiduciaries is very high;
- The broadly defined fiduciary responsibilities apply to acts taken in a fiduciary capacity;
- Certain specific transactions between an ERISA plan and “parties in interest” with respect to the plan are absolutely prohibited;
- ERISA fiduciaries that breach their duties can be personally liable for damages to the ERISA plan and for DOL penalties imposed in connection with fiduciary breaches.

Outsourcing Plan Administration

Employers and other fiduciaries often look to third parties for assistance in administering their ERISA plans. In general, plan administration using a TPA involves evaluating the need to outsource and generally involves selecting an appropriate TPA(s) for the plans involved. Once selected, the plan administrator and the TPA

execute a contract that sets forth the parties' obligations. The TPA service agreement establishes the responsibility of the plan administrator to monitor the TPA's performance.

To elaborate, while the ERISA plan administrator may delegate certain responsibilities to other parties, such as TPAs, it generally cannot avoid ultimate legal responsibility if the delegated responsibilities are not properly discharged. A third-party service provider that assists with the administration of the plan is typically not functioning as the ERISA plan administrator. (See ERISA Section 3 (29 USC Section 1002))

Advantages of Using a TPA

In deciding whether to use a TPA, the employer should consider certain factors, including the type and size of the plan(s) involved, the method of paying benefits (insured or self-funded), the complexity of plan administration required, the cost for services to be received and the expertise of the employer's in-house personnel to handle plan administrative needs.

TPAs undertaking a new client inquire about the level of claims adjudication involved, which services the plan requires to be performed by the TPA, and any other specific needs and concerns (such as multi-state operations, collectively bargained groups, non-English-speaking employee populations, etc.). Ultimately, evaluating whether the services of a TPA are needed will require a thorough understanding of the plan, and what is needed to make the plan work to the satisfaction of the plan sponsor and the plan participants. Ultimately, the TPA will remind the employer that it is the employer's responsibility and duty to manage the plan and that fiduciary duties are not specifically delegated to the TPA in the TPA service agreement.

In deciding whether to retain a TPA, the employer will weigh the strengths brought by the TPA to provide consistency in administration; the ability to provide continuity of administration for employees especially those in multi-state sites; the additional expertise available through the TPA including the ability to utilize and access the TPA's strategic partners, subcontractors and affiliates. Many TPAs also provide access to providers, products, and services at more favorable pricing levels (e.g. prescription drug programs or provider networks). TPAs superior technological ability is critical to many employers. TPAs permit the employer to provide greater in-house focus on plan design and "policy-related" benefit issues, rather than the day-to-day minutia of plan operations.

When an employer establishes that utilizing the skills of a TPA is necessary, they will want to select a TPA with the specialties and levels of expertise that reflect their business, and geographic area and plan type (e.g. self-insured medical plans). Selecting a TPA that fits the needs of the employer includes careful planning and

includes several stages, including consultation with brokers, consultants, attorneys, accountants and actuaries. Employers are encouraged to look to the State Departments of Insurance to determine whether TPAs are licensed or required to be under State law. One of the services provided by SPBA to member firms includes a comprehensive guide on State licensing requirements across the country.

TPA Service Agreements

Once the TPA is identified, the content of the TPA service agreement is important. The agreement should reflect the parties' intentions and it typically identifies which plan-related services will be provided, including any limitations or restrictions on those core services.

TPA service agreements often include a statement that the TPA only assumes responsibility for the services described within the agreement, and that the TPA does not assume responsibility other than those specifically described. This limitation is important because fiduciary status can attach on the basis of actions performed, even if fiduciary status has not been formally delegated or accepted.

Contract Provisions Dealing with Fiduciary Issues and TPA Duties

We understand that members of the Council are interested in learning about the TPA service contract provisions dealing with fiduciary issues. While all contracts are unique, SPBA reviewed a number of TPA service agreements in preparation for this testimony and will provide excerpts below.

Generally, the service agreement contract provisions include a section on employer duties and responsibilities that clearly states the plan sponsor's obligations.

" GENERALLY. The Employer shall make any and all final decisions about the interpretation of the Plan, and all final authority and responsibility for the Plan and its administration is retained by the Employer."

"PLAN ADMINISTRATOR DISCRETION. The Employer, on the advice of its counsel, shall ensure that the Plan's documents reserve to the Plan Administrator the full discretion to decide claims and make interpretations under the Plan, with this reservation being made in a manner that ensures that de novo judicial review of claims and other determinations made by the Plan Administrator will not be available to claimants."

"The Employer and the TPA agree that the TPA's role shall be limited to that of a non-discretionary, non-fiduciary service provider with respect to the Plan, that the services rendered by the TPA under this Agreement shall not include the power to exercise control over Plan assets, if any, or discretionary authority over Plan operations, and that the TPA will not for any purpose, under ERISA or otherwise, be deemed to be the

"Plan Administrator" of the Plan or a "fiduciary" with respect to the Plan. Furthermore, it is understood and agreed that the TPA will not provide medical or pharmacy opinions or services, nor will the TPA provide or be responsible for the expense and cost of legal counsel, certified public accountants, investment counselors, consultants, or similar type of services performed for Employer, and the TPA shall not be authorized to engage such services or incur any expense or cost therefore without written consent of Employer."

"The Employer, and not the TPA, shall be responsible for keeping the Plan, the Employer and the Plans fiduciaries in compliance with, to the extent applicable, federal and state tax statutes, ERISA, federal and state health care continuation rules and other laws, or for preparing the Plan's Annual Report (whether audited or unaudited). The TPA's obligations to assist the Employer with these compliance efforts are limited to those obligations set forth in this Agreement."

"TPA has no discretionary authority or control over the management or disposition of Plan assets, and no authority or responsibility for Plan administration other than the Services."

"The parties each acknowledge and agree that Client, and not TPA, has the final discretionary authority to determine what benefits will be paid by the Plan."

"TPA has no responsibility for any funding of Plan benefits, or decisions regarding Plan design, including adoption of or amendments to the Plan document or Summary Plan Description."

TPA Services

Comprehensive service TPAs offer a wide-range of health plan services. Below we list some of these services as examples.

- Assist in designing the Benefits Plan.
- Assist in the retention of other service partners such as PBMs, stop-loss providers and wellness program providers.
- Review claims and claims-related documents.
- Based strictly on information provided by a Client, confirm eligibility of participants to receive payments under the Plan.
- Calculate amounts payable under the Plan, utilizing industry-standard codes and tables (e.g., for diagnosis, procedure, place and type of service, etc.), in accordance with the terms of the Plan, including any summaries or other descriptions of the Plan as may be approved by the Plan Sponsor.
- Correspond with claimants and/or their providers to obtain any required additional information.
- Prepare and mail explanation of benefits and benefit payment checks.
- Provide Client a monthly accounting of payments made from its account.

- Provide any insurance carrier from which Client or the Plan obtains stop-loss or other coverage with information reasonably required by the carrier for payment of claims under such coverage; however, TPA assumes no responsibility or liability for the non-payment of such claims by any insurance carrier.
- Based on information received from Client, provide claimants and their health care providers with information concerning Plan eligibility and benefits provisions. Such information will not constitute a determination of benefits that are covered by the Plan or a certification or guarantee that any amount will be paid, and Client understands and agrees that TPA's provision of such information does not, under any circumstances, make TPA substantively responsible for the payment of Plan benefits.
- Coordinate with Client on any appeals of denied claims for review and decision by the Plan Administrator, who will make all final benefit determinations in such cases. Client delegates to TPA non-discretionary authority to assist in the coordination and administration of the appeals process.
- Coordinate with Client's utilization management vendor and/or preferred provider organization, if applicable.
- If requested by Client, provide sample Plan language for review and revision by Client. However, Client expressly acknowledges that it bears sole responsibility for the content of its Plan document, Summary Plan Description and other Plan-related communications.
- Provide COBRA administrative services.
- Issue certificates of coverage when a participant ceases to be covered under the Plan as required by the Health Insurance Portability and Accountability Act of 1996.
- Prepare Summary of Benefits and Coverage (SBC) to be issued by the Plan, to plan participants and as required by the Affordable Care Act of 2010.
- W-2 Health Coverage Reporting
- Prepare 5500 and SAR

We appreciate the opportunity to testify today and hope that this discussion will provide an opportunity to create a seat on the Council in future years for parties, such as TPAs, who provide service both to employer plan sponsors and their employees jointly.

If you have any questions or would like to discuss these comments further, please contact me through Anne Lennan, President of SPBA (Anne@spbatpa.org) and Elizabeth Ysla Leight, Director of Government Relations and Legal Affairs, SPBA (Elizabeth@spbatpa.org) at (301) 718-7722.