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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
US Department of Labor
200 Constitution, NW
Washington, DC 20210

ATTN: 408(b)(2) Amendment

These comments on the proposed regulation for amendment of ERISA section 408(b)(2) are submitted on behalf of the Society of Professional Benefit Administrators (SPBA).

SPBA is the national association of Third Party Administration (TPA) firms that are hired by employers and employee benefit plans to provide outside professional management of their employee benefit plans. It is estimated that 55% of US workers in non-federal health coverage are in plans administered by some form of TPA. The clients of TPA firms include every size and format of employment, including large and small employers, state/county/city plans, union, non-union, collectively bargained multiemployer plans, as well as plans representing religious entities.

SPBA's comments draw on insights and feedback from the broad employee benefit community: plan sponsors, plan trustees, plan participants and administrators. In a mutual spirit of cooperation with the Department of Labor's invitation, SPBA offers real-world examples for consideration that we hope will widen the Department's perspective and result in a final rule that clarifies the entities and the types of arrangements subject to the disclosure rule.

Broker Placing a Group Health Plan with an Insurer

In the preamble to the proposed regulation, the Department notes that it does not consider the purchase of insurance, in and of itself, to be compensation to a service provider for purposes of this regulation. However, SPBA believes the Department intends for individuals recommending the placement of group health plans with a fully insured policy (known as brokers) to be considered service providers and subject to the disclosure rules under 408(b)(2). The broker functions in an advisory/consulting role to the plan sponsor and the employee benefit plan when he steers the plan sponsor toward a fully insured arrangement and away from other types of arrangements for the group health plan. Plan sponsors rely on brokers to survey the market and tell them what are the best potential arrangements for the health plan. Plan sponsors place their trust in brokers to give them impartial advice. Too often, the broker's advice is influenced by the size of the commission and/or other compensation or bonus the broker receives from the fully insured carrier and not the quality or quantity of the services available to the plan.

One of the goals of the proposed regulation is to assist plan fiduciaries in assessing the potential for conflicts of interest that may affect a service provider's performance of services.

The broker function of surveying the available options and selecting a number of options to present to the plan sponsor on the most advantageous arrangement for the group health

plan is fertile ground for potential conflicts of interest. The plan sponsor needs to know the total incentives influencing the broker's recommendations for the plan. If the plan sponsor is not informed of the insurer's commission and compensation structure for the broker, the plan sponsor will not be sufficiently enlightened to weigh the objectivity of the broker's recommendation.

The proposed amendment raises questions as to whether a broker serving in the capacity described above must comply with the disclosure rules. Please clarify in the final rule so there is no margin for confusion that an individual who recommends or presents options for insurance arrangements to plan sponsors acting on behalf of group health plans is subject to the disclosure rules. Transparency helps everyone.

Some advisors to plan sponsors may misinterpret the proposed rule as not applying to them since they view themselves as advisors to the plan sponsor and not the employee benefit plan. The wording in the proposed regulation applies the disclosure rules to contracts or arrangements for providing services to an employee benefit plan. Please clarify that the function of providing a recommendation to the plan sponsor concerning an employee benefit plan is considered to be providing services to the employee benefit plan and therefore subject to the disclosure rule.

Key Points that Need Clarification in the Final Rule

>> Advising a plan sponsor about an employee benefit plan is considered to be providing services to an employee benefit plan.

>> An individual or entity that advises a plan sponsor about whether to select a fully insured arrangement for a group health plan or another type of arrangement is considered a service provider subject to the disclosure requirements.

Gaping Hole in Proposed Regulation: Bonuses Not Required to Be Disclosed

The proposed rule requires service providers to disclose in writing "All services to be provided to the plan pursuant to the contract or arrangement and, with respect to each such service, the compensation or fees to be received by the service provider, and the manner of receipt of such compensation or fees."

In tying the disclosure of compensation or fees to specific services rendered to an individual employee benefit plan, the Department has overlooked a large part of the compensation that service providers receive and is keeping plan sponsors in the dark about the full scope of the actual payments being made to service providers. This unknown factor is often, by far, the largest influence on the broker's action.

Let me explain how health insurers award bonus payments to brokers for bringing them an employee benefit plan to insure. A broker typically receives an upfront fee from the insurer when the broker places an employee benefit plan with an insurer. Insurers also pay fees to brokers based on the entire book of business that a particular broker maintains with an insurer. A broker will receive a yearly bonus of X dollars per enrolled employee on the overall block of business that is placed with the insurer which is comprised of many different employee benefit plans, sponsored by many different plan sponsors. If the broker retains that level of business for a second year and increases the block of business by a certain percentage, the broker will often receive an additional bonus that is 150% of the original bonus.

The current proposed regulation does not require these bonuses to be disclosed to plan sponsors because it focuses on compensation and fees that are related to specific services rendered to individual employee benefit plans. These bonuses are based on an aggregate number of employee benefit plans and have a huge impact on the recommendations to and subsequent action of trustees of specific plans; so the money paid for all the aggregated participants in many plans also includes the participants of each individual plan.

The Department must broaden the scope of the proposed regulation to capture all compensation and fees related to the placement of employee benefit plan business with insurers.

In addition to the current wording in the proposed regulation, the Department should include a new section addressing indirect compensation and fees received by service providers.

This section should address bonuses and ANY type of payment received because of the employee benefit plan but not specifically related to one individual employee benefit plan.

The regulation should require the service provider to disclose the bonus in terms of the conditions that give rise to the bonus (such as the volume of business, or maintaining a block of business with an insurer), as well as the formula that the insurer uses to determine the bonus.

Without this change to the regulation under 408(b)(2), you will have failed to achieve your goal of providing comprehensive information to plan sponsors and enabling them to enter into service contracts with full knowledge of the potential undisclosed conflicts of interest. The present absence of transparency in the placement of insurance for employee benefit plans distorts the market and severely weakens the knowledge base of plan sponsors in discerning the best type of plan for plan participants. Regulatory guidance is needed to correct this distortion.

Bundle of Services

The proposal permits aggregate disclosure by the bundled service provider of the total compensation received directly or indirectly by the service providers, any affiliate or subcontractor of such service, or any other party in connection with the bundle of services when the services are priced as a package. It is our understanding that a TPA that offers plan sponsors numerous services (e.g. administration, disease management, PBM) provided by different service providers as a package would be permitted to disclose the aggregate compensation received, directly or indirectly by the service providers, and would not be required to show the allocation of the compensation to the various service providers.

We request a clarification when the services are priced on a service-by-service basis and not priced as a package. For example, a TPA offers numerous services (e.g., administration, disease management, PBM, PPO) provided by different service providers and each service is priced separately. The non-TPA service providers do not have any contact with the plan fiduciary, as the TPA is acting on their behalf. The TPA presents the services along with the accompanying prices for each respective service to the plan fiduciary. In this example, is the proposed rule requiring each service provider to comply with the disclosure requirements independently?

In the modern employee benefit market, services are offered by a collection of specialty firms. Sometimes TPA firms have sister firms who provide COBRA or other services, and there are apt to be several outside firms providing wellness, utilization review and other services. Most services are coordinated by the TPA firm (much like a building contractor arranges sub-contractors). The key as well as the intent is to have all of these services and

providers work as a seamless service to the plan and participants. Therefore, we recommend that it would be most accurate and also most easily understood and comparable by plan sponsors and trustees to provide the disclosure as one package.

Transaction Basis

The proposed regulation sets forth an exception to the general rule imposed on the bundled service provider when the service provider fees are “set on a transaction basis,” such as brokerage commissions. This exception needs to be more clearly explained and clarified with examples that apply to group health plans.

Let’s look at some examples to understand where the confusion lies and what we think the Department actually intends.

Broker Fees for Self-Funded Plans – Example 1: An individual (known as a broker in the self-funded industry) recommends a TPA to a plan fiduciary for the purpose of administering a group health plan. The broker is paid for this recommendation through the TPA administration fees. The broker asks the TPA to add X dollars per employee per month to the TPA’s administration fee that is charged to the plan. Does the proposed rule require the broker’s fee in this example to be disclosed separately from the TPA’s fee? We believe the Department intends that answer to be yes.

Plan fiduciaries are often unaware of the cost of the broker’s commission because it is hidden within the TPA administration fee, as the above example demonstrates. Separate disclosure of broker fees will assist the plan fiduciary in assessing the reasonableness of fees charged to the employee benefit plan for the value the broker’s services brought to the plan.

The final rule should clarify the definition of a fee that is “set on a transaction basis” with respect to a group health plan. In the above example we highlighted a broker commission that was based on the number of employees per month that the broker had brought to the TPA. We believe the Department intends for this type of arrangement to be subject to separate disclosure under the exception for fees “set on a transaction basis.” However, readers of the proposed rule may not interpret a commission based on the number of employees per month covered by a plan to be “set on a transaction basis.” Please address the prevalent industry practice of ongoing broker commissions that are based on a per employee per month basis in the final rule and require that these types of commissions be disclosed separately from the aggregate bundled service provider disclosure.

Example 2 - A TPA designates certain employees of the TPA firm to focus on bringing in new employee benefit plans to administer. These employees are paid based on a commission basis; their pay could be considered by the Department to be “set on a transaction basis” – the transaction being the attainment of a new employee benefit plan to administer.

Statements in the preamble to the rule suggest that the fees paid to employees of the TPA firm are not required to be disclosed separately from the overall TPA fees. According to the preamble, the Department does not intend this rule to result in any “double counting” of compensation. For example, an employee’s salary or a bonus that is paid to an employee from the general assets of his employer (i.e., the service provider) would not need to be separately disclosed, even if the employee is paid in connection with services to an employee benefit plan. Despite this comment in the preamble, we would like to see this further discussed in the final rule to give the regulated community a better comfort level.

We suggest that the final rule draw a distinction between independent brokers (i.e., brokers who are not employed by the bundled service provider or any service providers represented in the service bundle) and employees of the bundled service provider. In drawing this distinction and requiring separate disclosure of independent broker compensation, the plan sponsor will have knowledge of the entities, other than the bundled service provider, who are receiving commissions and the extent of those commissions. This information is necessary for a plan sponsor to exercise its fiduciary duty.

Finally, we believe that PTE 84-24, pertaining to Stop-Loss commissions, has worked well since the first version in 1977. We recommend that it remain unchanged.

Respectfully submitted,
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