

JANUARY 04, 2022

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DOL Announces Good Faith Enforcement Standard, Provides Guidance on Compensation Disclosures

The Consolidated Appropriations Act, 2021 (CAA) amended Section 408(b)(2) of the Employee Retirement Income Security Act (ERISA) to require service providers (including brokers) to disclose direct and indirect compensation to group health plan fiduciaries. [Field Assistance Bulletin No. 2021-03](#) (FAB) states that the U.S. Department of Labor (DOL) has set a temporary enforcement policy under which it will use a good faith standard to determine compensation disclosure compliance until further notice. This announcement is welcome news to brokers who have been awaiting further detailed guidance as to their disclosure obligations.

Background

The CAA requires brokers and consultants who reasonably expect to receive at least \$1,000 in direct or indirect compensation to disclose the compensation to ERISA group health plans reasonably in advance of entering a contract or agreement to provide covered services. The CAA provided that the disclosures should give plan fiduciaries enough detail to determine that the compensation is reasonable as well as to identify any potential impermissible conflicts with compensation sources beyond the plan or its sponsor.

The CAA's mandatory compensation disclosures parallel the DOL's rules that long have applied to retirement plan service providers. However, there are enough differences and nuances in the CAA language that interested parties had anticipated that the DOL would provide regulatory guidance ahead of the December 27, 2021, effective date but the FAB provides that the DOL will not be issuing regulations any time soon.

FAB Guidance

The FAB notes that the new disclosure rules aim to enhance transparency and that there are many ways to achieve that end. The FAB states that the DOL recognizes that group health plan service provider arrangements and compensation structures are not uniform, often complicated, and frequently structured to reflect state law. Thus, the DOL states that it expects brokers and other service providers to adopt an array of solutions to make required compensation disclosures that comply with ERISA.

The DOL's posture does not give affected parties direct guidance on how to comply with the new rules, but it does importantly include an assurance that the DOL will not treat a broker as having failed to make required disclosures to a responsible plan fiduciary under ERISA if the person made disclosures in accordance with a good faith, reasonable interpretation of the law.

The DOL further notes that brokers and others may pattern their compliance efforts from previous detailed guidance regarding compensation disclosures to retirement plan fiduciaries. While the DOL appreciates that the CAA rules do not exactly mirror the retirement disclosure rules, it states that it believes that there are enough similarities that brokers and others can use the retirement disclosure regulations as a guide – and that doing so will demonstrate good faith effort. The FAB also contains several helpful FAQs to address issues that brokers and other service providers have raised concerning the CAA rules.

Covered Plans

The FAQs confirm that the new rules apply to fully insured and self-funded plans, including excepted benefits (e.g., stand-alone dental or vision plans), and apply to small and large plans alike. Qualified small employer health reimbursement arrangements (QSEHRAs) are the only plans excepted from the disclosure rules.

Covered Service Providers

The FAQs further state that the new disclosure requirements apply to service providers even if they are not specifically licensed or marketed as brokers or consultants. The DOL states that it understands that service providers have broad leeway to describe and market their services and label their fees. Thus, for example, just because a service provider does not call itself a consultant or charge a consulting fee does not mean the provider is not consulting for purposes of ERISA. Additionally, the nature of compensation that a service provider receives will not define broker or consultant services.

Pending further guidance, the DOL's announced enforcement policy will apply to parties who reasonably and in good faith determine their status as a covered service provider. Specifically, service providers include any entity that reasonably expects to receive direct or indirect compensation from third parties in connection with advice, recommendations, or referrals for:

- Services provided to a covered plan with respect to selection of insurance products (including vision and dental), recordkeeping services, medical management vendor, benefits administration (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness services, transparency tools and vendors, group purchasing organization preferred vendor panels, disease management vendors and products, compliance services, employee assistance programs, or third party administration services; or
- Consulting related to the development or implementation of plan design, insurance or insurance product selection (including vision and dental), recordkeeping, medical management, benefits administration selection (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness design and management services, transparency tools, group purchasing organization agreements and services, participation in and services from preferred vendor panels, disease management, compliance services, employee assistance programs, or third-party administration services.

An entity that concludes that it is not a service provider regarding any of the above-listed services must be prepared under a DOL audit to explain how its conclusion is consistent with a reasonable, good-faith interpretation of the law.

Covered Compensation

Covered service providers must disclose direct and indirect compensation to responsible plan fiduciaries reasonably in advance of the date they enter into a contract or arrangement for covered services. The DOL recognizes that covered service providers may be unable to state precisely certain compensation they expect to receive for services because it will depend on factors that are not known before, or even at the time, the parties execute the contract or arrangement. The DOL provides that service providers can express this compensation as an estimate or using a formula that would govern any anticipated compensation.

Given the diverse service and compensation structures in the group health plan market, the DOL notes that it will not provide a model form or specific directions on how to disclose all components of every service provider's potential compensation. The FAQ states that service providers may express compensation as a monetary amount, formula, or a per capita charge for each enrollee. If the compensation cannot reasonably be expressed in such terms,

a service provider may use any other reasonable method, including a disclosure that additional compensation may be earned but may not be calculated at the time of contract if such a disclosure includes a description of the circumstances under which the additional compensation may be earned. The description must also include a reasonable and good faith estimate of the compensation including the method and assumptions used to estimate the compensation.

Pending further guidance, the DOL also states that disclosing compensation in ranges may be reasonable in circumstances when the occurrence of future events or other features of the service arrangement could result in the service provider's compensation varying within a projected range. Any ranges must be reasonable under the circumstances surrounding the applicable service and compensation arrangement at issue.

No matter how a covered service provider discloses compensation, the DOL will judge the adequacy of a disclosure by whether it gives a responsible plan fiduciary enough information to allow the fiduciary to assess the reasonableness of the compensation and the severity of any associated conflicts of interest. What counts as adequate disclosure will depend on the facts and circumstances of each service contract or arrangement.

Covered Contracts or Agreements

The new rules apply only to contracts or arrangements for covered services entered, extended, or renewed on or after December 27, 2021. The FAB clarifies that the date on which a contract or arrangement is entered into between an agent or broker and a plan fiduciary is the date the parties execute the contract or arrangement. For example, if a plan fiduciary enters into a new service contract with an agent on December 15, 2021, for the plan year beginning on January 1, 2022, the service contract will be treated as having been executed on December 15, 2021, which is prior to December 27, 2021, so that the contract will not be subject to the new compensation disclosure requirements, but the disclosure requirements would apply if the contract is renewed or extended, or a new contract is executed, on or after December 27, 2021.

Also, subject to further guidance, in the case of an agent or broker that enters into a contract or arrangement with a plan fiduciary through a broker of record (BOR) agreement, the date the contract or arrangement will be considered entered into is the earlier of the date on which the BOR agreement is submitted to the insurance carrier or the date on which a group application is signed for insurance coverage for the following plan year provided that the submission or signature is not done specifically to avoid the CAA's disclosure obligations.

Conclusion

Service providers and plan sponsors now can address their compensation disclosures by following longstanding retirement plan guidance. More importantly, if they take measured steps to interpret the CAA rules in good faith, they can take some solace in the DOL's announced good faith enforcement policy. Brokers and plan sponsors should keep in mind that the DOL has announced that it intends to monitor stakeholder feedback and its own enforcement efforts to assess what, if any, additional guidance may be needed to assist covered service providers and responsible plan fiduciaries in complying with the new disclosure requirements. We also will monitor developments in this area and provide updated guidance as necessary.

1/4/2022

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