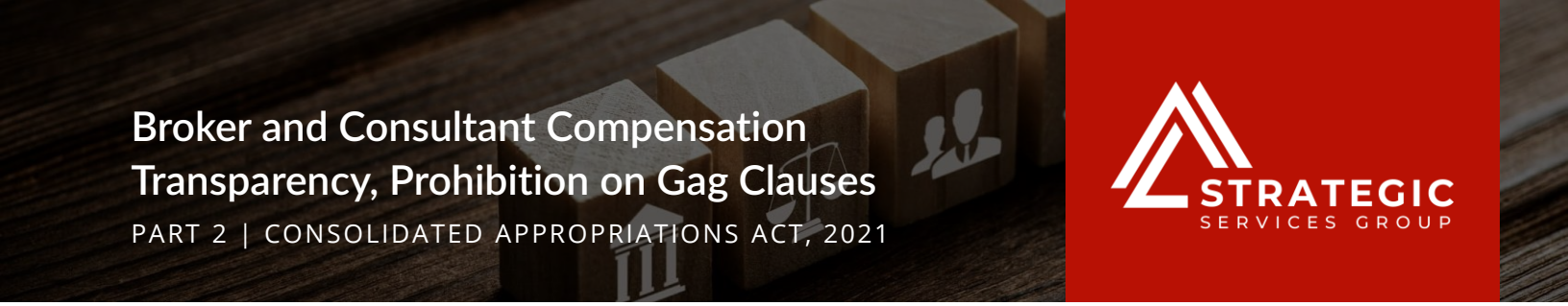

# Broker and Consultant Compensation Transparency, Prohibition on Gag Clauses

PART 2 | CONSOLIDATED APPROPRIATIONS ACT, 2021

STRATEGIC SERVICES GROUP

## Broker and Consultant Compensation

ERISA imposes penalties on prohibited transactions between covered benefit plans and individuals who have a relationship with the plan to ensure that these "parties in interest" do not use their influence with the plan for their own benefit or in a manner that is not most beneficial to the plan. One of the prohibited transaction rules prohibits the furnishing of goods and services between a plan and party in interest.

However, an exception applies if the party in interest receives no more than "reasonable compensation" from the plan for the services rendered or supplies furnished. Further, the services provided to the plan must be based upon a reasonable contract or arrangement. The Appropriations Act amends ERISA to provide that, in order to satisfy the "reasonableness" requirement, the service provider must provide several disclosures to the fiduciary responsible for the plan. Prior to the enactment of the Appropriations Act, ERISA also contained a compensation disclosure obligation. The new rules, however, have increased the required level of transparency in the disclosures.

*Disclosure Obligation*

A service provider must disclose, in writing, the following information to a responsible plan fiduciary in connection with contracts or arrangements for services between a plan and a service provider in the amount of $1,000 (indexed annually) or more:

- A description of the services to be provided to the plan pursuant to the contract or arrangement;
- If applicable, a statement that the service provider, an affiliate, or a subcontractor will provide, or reasonably expects to provide, services pursuant to the contract or arrangement directly to the plan as a fiduciary;
- A description of all direct compensation, either in the aggregate or by service, that the service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the services;
- A description of all indirect compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the services described (including compensation from a vendor to a brokerage firm based on the structure of incentives not solely related to the contract with the plan including: i) a description of the arrangement between the payer and the covered service provider, an affiliate, or a subcontractor, as applicable, pursuant to which such indirect compensation is paid; ii) identification of the services for which the indirect compensation will be received, if applicable; and iii) identification of the payer of the indirect compensation;
- A description of any compensation that will be paid among the covered service provider, an affiliate, or a subcontractor, in connection with the services described if such compensation is set on a transaction basis (such as commissions, finder's fees, or other similar incentive compensation based on the business placed or retained); and
- A description of any compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination.

A service provider must also disclose, in writing, to the responsible plan fiduciary, a description of the manner in which the compensation will be received.

*Types of Services*

Examples of the types of services subject to the disclosure obligation include: brokerage and consulting services by a service provider, an affiliate, or a subcontractor, related to plan design; insurance product selection; recordkeeping; medical management vendors; benefits administration; stop-loss insurance; pharmacy benefit management; wellness; transparency tools and vendors; group purchasing organization preferred vendor panels; compliance services; employee assistance programs; or third-party administration services.

*Timing of Disclosure*

Upon the written request of the responsible plan fiduciary or plan administrator, a service provider must furnish any other information relating to the compensation received in connection with the contract or arrangement that is required for the plan's timely compliance with the reporting and disclosure requirements under ERISA. The information disclosure is required to be made upon the occurrence of the following events.

## 1. Contract Execution

The information required above must be disclosed to the responsible plan fiduciary not later than a date that is reasonably in advance of the date on which the contract or agreement is entered into, and extended or renewed. Accordingly, the plan fiduciary must have this information to enter into the contract with the service provider. Failure of the fiduciary to obtain the required information prior to contract execution could be a breach of fiduciary duty. The service provider must disclose a description of the services to be provided, reasonably in advance of the date on which the responsible plan fiduciary or plan administrator states that it is required to comply with the applicable reporting or disclosure requirement, unless the disclosure is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information must be disclosed as soon as practicable.

## 2. Contract Changes

A service provider must disclose any change to the information required above as soon as practicable, but not later than 60 days from the date on which the service provider is informed of such change, unless such disclosure is precluded due to extraordinary circumstances beyond the service provider's control, in which case the information must be disclosed as soon as practicable.

*Relief for Errors*

A contract or arrangement will not fail to be reasonable solely because the service provider, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the above information or to change such information as required, if the service provider discloses the correct information to the responsible fiduciary as soon as practicable, but not later than 30 days from the date the service provider knows of the error or omission.

*Fiduciary Relief*

A responsible plan fiduciary will not be held responsible for the failures of service providers to disclose the required information provided that the responsible plan fiduciary:

- Did not know that the service provider failed or would fail to make the required disclosures and reasonably believed the service provider disclosed the required information; or
- Requests in writing that the covered service provider furnish such information upon discovering the service provider's failure. If the service provider fails to comply with the written request, the responsible plan fiduciary must notify the Department of Health and Human Services (HHS) of the service provider's failure not later than 30 days following the earlier of: 1) the service provider's refusal to furnish information; or 2) 90 days after the written request is made. If the requested information relates to future services and is not disclosed after the end of the 90-day period, the responsible plan fiduciary must terminate the contract or arrangement consistent with the ERISA duty of prudence.

The provisions regarding disclosure of compensation will apply beginning December 27, 2021, which is one year after the enactment of the Appropriations Act.

**Prohibition on Gag Clauses**

The Appropriations Act also amends the Public Health Service Act (PHSA), ERISA, and the Internal Revenue Code (IRC) to prohibit a group health plan or health insurance issuer offering group health coverage from entering into an agreement with a health care provider, network or association of providers, third-party administrator, or other service provider offering access to a network of providers, that would directly or indirectly restrict the group health plan or health insurance issuer from:

- Providing provider-specific cost or quality of care information or data, through a consumer engagement tool or any other means, to referring providers, the plan sponsor, enrollees, or individuals eligible for coverage; and
- Electronically accessing or sharing de-identified claims and encountering information or data for each enrollee in the plan upon request, provided that the request complies with Health Insurance Portability and Accountability Act (HIPAA) and the Americans with Disabilities Act (ADA).

Each year, group health plans must submit HHS an attestation that the plan is in compliance with the above requirements.

12/29/2020