

# Guidance Issued on Broker Compensation Disclosure

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As reported earlier, beginning December 27, 2021, covered service providers (brokers and consultants) of ERISA-covered group health plans, regardless of size, must provide responsible plan fiduciaries information on direct and indirect compensation in writing.

On December 30, 2021, the DOL released Field Assistance Bulletin No. 2021-03, which provides guidance on this new broker transparency law. While many questions remain unanswered, there is some helpful relief and clarification. The following summarizes the key points.

## ■ Good Faith Relief

The DOL indicated that it expects that covered service providers will adopt various methods to make the required disclosure regarding their services and compensation in a way that complies. It will not treat them as having failed to make required disclosures to a responsible plan fiduciary as long as the person makes disclosures in accordance with a good faith, reasonable interpretation of the law. The DOL

further indicated that a good faith and reasonable step for a group health plan service provider would be to take into account the DOL's guidance on its regulation for pension plans, as applicable.

## ■ Covered Benefits

The covered group health plans include both insured and self-insured group health plans, including grandfathered health plans and stand-alone dental and vision benefits, but do not include qualified small employer health reimbursement arrangements. A covered group health plan also includes "excepted benefits" that are group health plans. While not expressly called out, this likely includes certain excepted benefits like EAPs and onsite clinics.

## ■ Effective Date

Only contracts or arrangements for services which are entered into, extended, or renewed on or after December 27, 2021 are required to comply with the disclosure requirements.

The date on which a contract or arrangement is entered into between a broker and a plan fiduciary is considered to be the date the contract or arrangement was “executed.” For example, if a plan fiduciary enters into a new service contract with a broker 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 is not subject to the new compensation disclosure requirements.

Also, pending further guidance, in the case of a broker that enters into a contract or arrangement with a plan fiduciary through use of 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 done in the ordinary course and not to avoid its disclosure obligations.

## ■ Unknown Compensation

ERISA Sec. 408(b)(2)(B) requires covered service providers to make the required disclosures to responsible plan fiduciaries reasonably in advance of the date they enter into a contract or arrangement with a covered group health plan. The DOL recognizes that covered service providers may be unable to state with precision the amount of compensation they expect to receive for services, because the methodology by which certain components of their compensation is determined will depend on decisions or variables that are not known before, or even at the time, the contract or arrangement is entered into and, in fact, may change over the term of the contract or arrangement. The DOL takes the view that disclosure of 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. The DOL indicates that the following language in the preamble to the DOL’s final regulation for covered service provider disclosures to pension plan fiduciaries is relevant:

*... such ranges must be reasonable under the circumstances surrounding the service and compensation arrangement at issue. To ensure that covered service providers communicate meaningful and understandable compensation information to responsible plan fiduciaries whenever possible, the DOL cautions that more specific, rather than less specific, compensation information is preferred whenever it can be furnished without undue burden.*

No matter the methodology used to disclose compensation, the adequacy of the disclosure should be measured against a principal objective of the statutory provision which is to provide the responsible plan fiduciary with sufficient information about the compensation to be received by covered service providers to allow the fiduciary to evaluate the reasonableness of the compensation, and the severity of any associated conflicts of interest. The duties of prudence and loyalty in ERISA Sec. 404 apply to a responsible plan fiduciary’s decisions to hire service providers and to monitor service provider arrangements. What constitutes adequate disclosure for a specific compensation arrangement will depend on the facts and circumstances of the service contract or arrangement.

## ■ Covered Service Providers

The bulletin confirms that the definition of a covered service provider is not limited to service providers who are licensed as or who market themselves as “brokers” or “consultants.” Pending further guidance, the DOL’s enforcement policy will apply to parties who reasonably and in good faith determine their status as a covered service provider. Whether a person acts reasonably and in good faith depends on the facts of the particular situation. Service providers who reasonably expect to receive indirect compensation from third parties in connection with advice, recommendations, or referrals regarding any of the listed services in footnotes 1 and 2 should be prepared, if the DOL is auditing their compliance, to be able to explain how a conclusion that they are not covered service providers is consistent with a reasonable good faith interpretation of the statute.

## Future Guidance

The DOL does not believe that comprehensive implementing regulations are needed. However, the department will monitor feedback from stakeholders to assess whether additional guidance may be necessary to assist covered service providers and plan fiduciaries in complying with the new disclosure requirements.

Beginning January 1, 2019, the New Jersey Health Insurance Market Preservation Act (the “NJ Act”) requires most New Jersey residents to maintain health insurance. Failure to do so, absent an exemption, will result in an individual penalty imposed by the state when a person files his or her 2020 New Jersey Income Tax return. This New Jersey individual insurance mandate essentially replaces the individual mandate imposed under ACA, which was effectively eliminated beginning January 1, 2019 under the Tax Cuts and Jobs Act.

As with the ACA, the NJ Act requires certain employers and insurance carriers to report to covered individuals and to the state affirming such individuals maintained health coverage during the calendar year.