

TRUE Special: Understanding the New Broker & Consultant Fee Disclosure Rules



Presented By
Matthew Cannova,
Maynard, Cooper & Gale, P.C.
April 2021



Disclosures Necessary to Avoid Prohibited Transaction

- ▼ The available prohibited transaction exemption is now conditioned upon these disclosures being made
- ▼ ERISA 406(a)(1)(C) – prohibits *furnishing of goods, services, or facilities between the plan and a party in interest*
 - ▼ **Party in interest** includes a *person providing services to plan*
- ▼ ERISA 408(b)(2) – provides an exception for *contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor*
- ▼ Failure to comply with the disclosure requirements means that the service arrangement is not reasonable and is therefore a prohibited transaction to which the statutory ERISA section 408(b)(2) exemption does not apply

Who is covered?

- ▼ *All group health plans*
- ▼ *Covered service providers (“CSP”)*
 - ▼ Defined by the types of services provided and compensation received
 - ▼ A CSP is a service provider that reasonably expects to receive \$1,000 or more in total direct or indirect compensation from the plan in connection with providing a “covered service” to an ERISA-covered group health plan

CSP Services

- ▼ **Brokerage services provided to a covered plan are those with respect to selection of insurance products (including vision and dental), recordkeeping services, medical management vendors, 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**
- ▼ **Consulting services are those 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**

Who is covered?

- ▼ Service providers that are paid entirely from the plan sponsor's (general) assets and no other sources would not be subject to the new disclosure requirements
- ▼ What is interesting here is that unless there is a trust or separate account for plan assets, we would almost always take the position that the plan expenses (and benefits) are paid from the plan sponsor's assets.
 - ▼ May provide an exception (similar to the exception to certain Form 5500 reporting requirements, including Schedule C)
 - ▼ Note, however, that this exception for the CSP disclosures would also require that the CSP receives no other compensation (i.e., indirect compensation)
- ▼ Triggers:
 - ▼ Covered Plans
 - ▼ Covered Service Providers
 - ▼ Compensation from Plan Assets OR Indirect Compensation

Content of the Disclosures

- ▼ Disclosure must contain a description of the services to be provided, a statement of the entity’s fiduciary status, and a description of direct or indirect “compensation” received by the CSP for services
 - ▼ “Compensation” includes anything of monetary value except for non-monetary compensation valued at \$250 or less throughout the term of the arrangement
- ▼ Effectively requires disclosure of all compensation as a monetary amount, formula, or a per capita charge for each enrollee or, if the compensation or cost cannot reasonably be expressed in such terms, by any other reasonable method
 - ▼ Including a description of the circumstances under which the additional compensation may be earned and a reasonable and good faith estimate
 - ▼ Including “shared compensation” among the CSP, its affiliates, and subcontractors
- ▼ In addition, the disclosure must describe any compensation expected to be received in connection with the termination of the contract or arrangement as well as the manner in which compensation will be received

Content of the Disclosures

- ▼ Direct compensation – Paid by plan
- ▼ Indirect compensation – Received from any source other than the covered plan, the plan sponsor, the covered service provider, or an affiliate
 - ▼ Disclosure must describe: the payer of the indirect compensation; the amount (or formula or estimate) of the indirect compensation; the services for which the indirect compensation will be paid; and the arrangement between the CSP (or its affiliate or subcontractor) who receives the fees and the payer of the indirect compensation
 - ▼ Importantly, indirect compensation is defined as including compensation paid by a vendor to a brokerage firm based on a structure of incentives not solely related to the contract with the covered plan

Content of the Disclosures

- ▼ The services CSPs are required to document include:
 - ▼ Recordkeeping services
 - ▼ Medical management
 - ▼ Benefits administration (including dental and vision)
 - ▼ Stop-loss insurance
 - ▼ Pharmacy benefit management
 - ▼ Wellness services
 - ▼ Group purchasing organization preferred vendor panels
 - ▼ Disease management vendors and products
 - ▼ Compliance services
 - ▼ Employee assistance programs
 - ▼ Third-party administration services

Reporting?

- ▼ Any required reporting associated with the broker disclosure requirements?
 - ▼ No affirmative reporting requirement at this time, but we would not be surprised if it is added to the Form 5500
- ▼ If the CSP fails to make the disclosures, then it is a prohibited transaction for the CSP to receive compensation
 - ▼ In effect, the requirement to correct prohibited transactions builds in a correction and possible requirement to self-report the failure
- ▼ DOL likely to request disclosures as part of plan/plan sponsor audits
 - ▼ Service Providers often issued subpoenas directly during these audits
- ▼ There is a procedure for a plan sponsor to insulate itself from the potential liability, which includes notifying the DOL of the disclosure failure and considering terminating the provider

Timing

- ▼ **Disclosure requirements take effect beginning on December 27, 2021**
 - ▼ Requires disclosures related to contracts for covered services executed (or extended/renewed) after effective date
 - ▼ Arrangements entered into prior to that date are not subject to the disclosures unless or until a renewal occurs.
- ▼ **Timing: Reasonably in advance of renewal of contract and within 60 days of any changes**
 - ▼ The disclosure must be made reasonably in advance of the date that the contract or arrangement for brokerage or consulting services is “entered into, extended or renewed”
 - ▼ Additionally, if the information contained in the disclosure changes over time, an update must be provided within 60 days unless extraordinary circumstances beyond the CSP’s control apply, in which case the disclosure must be provided as soon as reasonably practicable

Consequences of Disclosure Failures for Providers and Plan Sponsors

- ▼ Disclosure failures create potential liability for CSP and plan sponsor/fiduciary
- ▼ Prohibited Transactions
 - ▼ DOL 5-15% penalty
 - ▼ IRS 15% excise tax
- ▼ Fiduciary Liability
 - ▼ Fiduciaries may be held liable for any losses to the plan that result from the prohibited services arrangement
- ▼ ERISA's civil enforcement provisions
 - ▼ Allow for the imposition of equitable relief and civil penalties against a service provider for knowingly participating in a prohibited transaction or service providers whose arrangements result in a prohibited transaction
- ▼ 20% *Mandatory* Penalty on amounts recovered through either a settlement agreement or a court judgment

Closing Thoughts

- ▼ The law is directed at CSPs and plan sponsors
- ▼ Requires detailed descriptions of services and compensation
- ▼ Describing indirect compensation will be complicated
- ▼ Expecting more guidance
- ▼ Template or standardized reporting form
 - ▼ BUT this is our business, our livelihood, our relationships
 - ▼ Develop disclosure format that fits your business, your communication preferences, and your clients
 - ▼ Format
 - ▼ Confidentiality
 - ▼ Electronic disclosure, limited access
- ▼ CSPs and Plan Sponsors should implement recordkeeping process for reviewing and retaining the disclosures
- ▼ We will include statute for your review



MAYNARD
COOPER GALE

ALABAMA | CALIFORNIA | FLORIDA | NEW YORK | TENNESSEE | TEXAS | WASHINGTON DC

MAYNARDCOOPER.COM