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Bradford P. Campbell
Assistant Secretary of Labor
U.S. Department of Labor
Employee Benefits Security Administration
200 Constitution Avenue, NW, Suite S-2524
Washington, DC 20210

Re: **Application of Proposed 408(b)(2) Regulation to Health and Welfare Plans**

Dear Mr. Campbell:

I am troubled by the reported comments and presentations to the DOL concerning the applicability of the Proposed Sec. 408(b)(2) Regulations to ERISA Health and Welfare Plans. The consistent themes of the vendors who would be affected are:

1. There are no "transparency" problems in the Health and Welfare Industry.
2. Requiring disclosure of "proprietary compensation arrangements" will result in higher service fees.
3. As the FTC has repeatedly found, a high degree of competition already exists which results in transparency in the provision of services.

In addition to the obvious inconsistencies in these arguments, they miss the point and are untrue. Furthermore, the argument made that PTCE 84-24 and Schedule C of the Form 5500 are a "sufficient tandem structure of disclosure" is deficient.

I am writing as a 30 year practitioner in the ERISA Health and Welfare area to make sure the DOL is presented with several viewpoints on this important question.

The Point

The Preamble to the Proposed 408(b)(2) Regulation correctly points out that both ERISA 404(a)(1) and 406(a)(1)(C) impose duties on ERISA Plan fiduciaries that cannot be properly discharged without information "sufficient to enable the fiduciary to make informed decisions about the services, the costs and the service provider". The Proposed Regulation (and the Proposed Class Exemption) recognizes the market place reality that most Plan Fiduciaries are not sophisticated enough to independently obtain all the necessary information. Furthermore, even if a high level of sophistication is present, the bottom line is that all necessary information is not accessible by Plan Fiduciaries. They must rely on the service providers to fully inform them of all of the relevant information.

This problem is not limited to the Pension Plan investment area. It is equally, if not more, true for Health and Welfare Plan service providers. Competition and even lower fees are not the issue. The issue is whether fiduciaries can make informed decisions based on the information service providers supply them.

When fiduciaries have the necessary information, we can then ask whether they are making good decisions. Until then, the fiduciary based regulatory scheme is badly flawed.

Untrue

One need only review the industry literature over the last year to see that transparency in the Health and Welfare area is sorely lacking. I enclose but a few examples for your consideration.

1. Excerpts from 2007 10-Ks for three large PBMs listing all of the "material" lawsuits in which they are currently involved, many of which involve allegations of undisclosed fees and conflicts of interest.
2. Court Certifies Damages Class Action Suit Against Firms Involved in Drug Price Hike (March 2008).
3. Insurers, Brokers are Not ERISA Fiduciaries (January 2008).
4. Merck to pay more than $650M to Settle Lawsuit Claims that PBMs Violate Their Fiduciary Duties to Clients, Members Insurers (December 2007).
5. Blue Cross Wasn't an ERISA Fiduciary in Negotiating Hospital Rates (November 2007).
6. DOL Fee Initiatives Have Implications For Health and Welfare Plans (October 2007).
7. Court Says Employers Can Sue Agent For Taking Excessive Commissions From Plan (September 2007).
8. Participants Have Standing to Sue Blue Cross For Breaching Fiduciary Duties (September 2007).
9. Official Says Federal Court Certifies RICO Class Action Charging Two Firms With Hiking Drug Prices (August 2007).
10. Court Rules Merits of Curbs on PBMs (August 2007).
11. Data Mining Debated at State Lawmakers Meeting (August 2007).
12. Court Finds TPA, Owner Violated ERISA By Receiving Millions in Fees, Commissions (June 2007).
13. Commissions Labor Unions Can Sue PBM for Breach But Not for Other State Law Violations (June 2007).
14. PBM Not ERISA Fiduciary in Negotiating Retailer Drug Prices, Manufacturer Rebates (April 2007).
15. Recent decision of the 6th Circuit Court of Appeals dealing with the claim that a Blues organization was liable for retaining undisclosed network access and other fees (January 2007).

PTCE 84-24 Not Enough

Based upon my knowledge of the industry, PTCE 84-24 is often misinterpreted and improperly utilized. PTCE 84-24 provides a limited conditional exemption to ERISA's prohibited transaction rules for plan purchases of insurance and annuity contracts and shares of mutual funds, and for the receipt of sales

commissions by insurance agents, pension consultants and mutual fund principal underwriters in connection with these transactions. In February 2006 this exemption was broadened slightly to include purchase transactions involving insurance agents, pension consultants and principal underwriters whose affiliates exercise investment discretion over plan assets that are not involved in the transaction.

PTCE 84-24 does not exempt other multiple compensation arrangements that are common in the Health and Welfare Plan Industry. Nonetheless, many vendors try to shoehorn disclosure of other compensation arrangements into their PTCE 84-24 Disclosure Notice. PBM's sharing of drug rebates; PPO referral fees; subrogation recoveries and provider network access fees are common examples. While these disclosures are laudable, they do not technically provide the protection that the vendors believe they are getting.

The Proposed Regulation under 408(b)(2) would largely eliminate the shortcomings of PTCE 84-24.

Schedule C (of Form 5500) Disclosure Has No Enforcement Mechanism

Unlike Schedule A of the Form 5500 (Annual Return/Report), no statutory duty is imposed on service providers to disclose the compensation information required to be reported on Schedule C. As a result, plan administrators must rely on the vendors to voluntarily supply "direct and indirect" compensation information.

This is the same problem that the Proposed Regulation is trying to solve in the prohibited transaction context by putting the burden of disclosure on the vendors who control such information. If service providers have to disclose their direct and indirect compensation arrangements before their service contracts are renewed, they are much more likely also accurately report their incomes 12 months later when the plan administer is preparing the Schedule C.

Your consideration of this "alternative" view is appreciated. If you have any comments or questions regarding the above statements, please feel free to contact me.

Very truly yours,

John H. Eggertsen

Enclosures