Consolidated Appropriations Act Compliance
Broker/Consultant Compensation Disclosure Rules

Presenters:
Darren Fogarty, Executive Director, Committee for Fee-Only Benefits Advisors
James Gelfand, President, The ERISA Industry Committee (ERIC)

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Executive Summary

Employers and other stakeholders attended BHCG's sixth Delivering Value Series symposium of 2022 (via webinar) to gain extensive insights into the new Consolidated Appropriations Act (CAA) of 2021's broker and consultant compensation rules. This new obligation gives employers more information about what payments their brokers and consultants receive.

Those in attendance learned about plan sponsor fiduciary obligations, how the new rule changes ERISA requirements, why Congress enacted the rule and why it's a positive development for employers, how to determine if information employers receive is sufficient, an employer's liability if they do not obtain the required information and how to re-evaluate broker/consultant contracts.

Introduction – Jeff Kluever, BHCG

- **Enthused about the opportunity to tap into expertise regarding the CAA to help employers ensure they are meeting fiduciary responsibilities**
  - Thanks to the presenters and attendees
- **Presenters**
  - Darren Fogarty
    - Executive Director of Committee for Fee-Only Benefits Advisor

        - Organization championing transparency and direct fee compensation in consultant/client relationships
    - Former director at nonprofit in DC – Institute for Fiduciary Standard
        - Focuses on advocating for fiduciary and financial service issues
        - Not employee benefits but parallel industry governed by ERISA
    - Also works for fee-based and fee-only benefits consulting firm
        - Wide view of related issues
    - Founded committee advocating the importance of direct fee compensation and transparency for brokers/consultants
- James Gelfand
    - ERISA attorney
    - Government relations professional (20 years of experience)
    - Worked on Capitol Hill on regulatory issues
    - Many years working with employers as trade association professional – The ERISA Industry Committee (ERIC)
        - Represents about 100 of very largest employers across many industries/regions providing comprehensive employee benefits
        - Advocates on federal, state and local levels for policies that make the regulatory environment better for employers

James Gelfand, The ERISA Industry Committee (ERIC)

- **CAA enactment**
    - Omnibus piece of legislation passed in late December 2020
        - Funded agencies/contained host of other policies
        - Contained "no surprises" act dealing with medical billing and other transparency policies for brokers/consultants and other vendors to deal with conflicts of interest (Lower Health Care Costs Act) – put into CAA
    - Active right now (any contract executed on or after 12/27/21)
    - Meant to improve health care market through transparency for better decision-making and fulfillment of fiduciary responsibilities
- **New requirements**
    - Disclosure of compensation by brokers and consultants for a broad range of services they recommend
    - TPAs have been involved in recommending services and are included in CAA
        - Some exceptions are allowed – low payment compensation (< $1,000) and life insurance/disability
        - If services are subcontracted, the duty is still on contracted entity
    - What must be disclosed?
        - Is broker/consultant/entity serving as a fiduciary? What is it they will be doing?
        - Indirect compensation with subcontractors (who will pay?)
        - Includes commissions, finder's fees, retention fees, sales bonuses and override fees

        - Direct compensation (contracted): commissions, fees (incl. per claim/per visit fees)
        - Termination compensation
        - Conditional compensation – includes non-cash items (meals, entertainment, gifts, trips)
    - Covered entities required to make information available reasonably in advance of contract entered, renewed or extended
        - Changes need to be conveyed generally within 60 days
- **Fiduciary obligations**
    - Group health plan/employer is responsible for ensuring disclosures happen and evaluating them, considering alternatives
        - Should go through contracts to ensure adequate disclosure – if not, payments made could be deemed prohibitive transaction
        - Exception – if information is in error and a correction is made to plan sponsor within 30 days; no knowledge of lack of disclosure; formal request in writing is required
        - Employer needs to notify DOL if entity fails to comply
        - Employer may have penalty – pay back payments with a 20% penalty
    - Plan sponsors need to have process in place to justify they sought to ensure compliance
        - Need to ask tough questions about disclosed relationships and indirect compensation
        - Include in all RFIs and contracts
- **Questions?**
    - **Q: Is there a difference in rules for self-funded vs. fully insured plan sponsors?**
    - **A:** A difference in how to comply and some commonalities

Darren Fogarty, Committee for Fee-Only Benefits Advisors

- **What employers should demand in a benefits professional**
    - Compensation disclosure is the minimum threshold for compliance
    - CAA gives employers an opportunity to scrutinize advisors' business practices for transparency in other ways
        - Demonstrates prudence and process (prepare against DOL audits)
    - Competency is important but doesn't mean they are transparent; the opposite is true as well
        - Need advisors who are skilled and ethical
- **What employers should expect in a disclosure**
    - Should be brief and simple (2-3 pages)
    - Should not be vague or noncommittal (e.g., "may or may not") – ask pointed questions
    - Compensation should be stated clearly – ideally in dollars/cents
        - If a range is given, ask for some scenarios/examples
        - Ask for last year's compensation to compare
- **Follow-up questions employers should ask**
    - Use the opportunity to have a frank discussion about your business relationship

- Examples of questions:
  - How do you help me to meet my fiduciary obligation to plan members to pay only fair and reasonable expenses?
  - Are you financially rewarded/penalized when our health plan's net expenses decrease? Why? (One of the main conflicts of interest, e.g., percentage of premium)
  - What experience do you have in reducing (not just managing) health care costs while expanding/improving benefits?
  - How do you ensure you and all our vendors fully disclose compensation so I may comply with the CAA?
  - What does transparency in this business relationship look like to you? Choice of words is important
  - Can you give me an example when you recognized/corrected a client conflict of interest (everyone has conflicts – to what degree is important)?

- **Questions?**
  - **Q: Can you explain the term "overrides" that are paid by insurance companies to regional and national brokers/consultants? For disclosure purposes, are they included on Form 5500?**
  - **A:** Form 5500 information is captured for insurance purposes – but some, not all the bonuses are reported
    - Terminology is murky – if it's not insurance-related, bonuses do not need to be reported on the 5500
    - Overrides and bonuses are pretty much the same; overrides are contingent on retention/production, number of lives or a certain amount of premium
    - Up to this point, bonuses have not been disclosed – now they need to; employers should ask; need to remember these monies are coming from the clients (higher fees, etc.); the CAA was intended to foster realignment
  - **Q: Can you comment on how indirect compensation is impacting competition?**
  - **A:** It's been "news" to some employers about how this works
    - Have long-standing relationships with brokers/consultants recommending vendors and are finding out how vendors really get on recommendation lists ("pay to play") – shaking the core of relationships
    - Most wellness programs are not as effective as they purport; a lot exist because they pay consultants to sell the programs
  - **Q: Can you comment on the Osceola FL School District lawsuit (reflective of what you discussed)?**
  - **A:** School District suing consultant for receiving $2 million over 10 years and not disclosing it (contract placed cap on compensation)
    - School district claims consultant was acting in a fiduciary capacity – will have implications on employer/consultant relationships
    - Most consultants avoid acting in a fiduciary capacity because of compensation prohibition
  - **Q: When you look at override based on total book of business, how much information can an employer receive?**

- **A:** Most brokerages will not disclose it; but the plan sponsor should ask what percentage is my account of your total book of business?
  - Pre-CAA, brokers could say this does not relate to your business; post-CAA, employer has a right to the information in some form
- **Q: A lot of brokers/consultants have created product solutions they sell to employers (effectively taking a portion of the overall cost as a management fee); does that need to be disclosed?**
- **A:** Employers deserve to know (part of the fiduciary process); intent of the law would be that it is disclosed, but difficult to figure out who's involved sometimes

Presentation slides and a video recording of the symposium are available for review.