# TESTIMONY OF SCOTT A. SINDER, ON BEHALF OF THE COUNCIL OF INSURANCE AGENTS & BROKERS, BEFORE THE DEPARTMENT OF LABOR'S EMPLOYEE BENEFITS SECURITY ADMINISTRATION REGARDING THE NEED FOR 408(b)(2) DISCLOSURE REGULATIONS FOR WELFARE BENEFIT PLANS

## I. Introduction to The Council and Its Mission (1 minute)

My name is Scott Sinder. I am a partner with the law firm Steptoe & Johnson LLP and serve as General Counsel to the Council of Insurance Agents and Brokers. My testimony will describe the views and concerns of the agent/broker community with regard to the Department's intention to develop fee disclosure regulations for welfare benefit plans under ERISA Section 408(b)(2), parallel to regulations it adopted this summer governing pension plans.

The Council is a trade association representing the nation's leading insurance agencies and brokerage firms, which specialize in a wide range of insurance products and risk management services for business, industry, government, and the public. Operating both nationally and internationally, Council members conduct business in more than 3,000 locations, employ more than 120,000 people, and annually place more than 80 percent – well over $200

billion – of all U.S. insurance products and services protecting business, industry, government and the public at-large. Council members also place the majority of U.S. employee benefit insurance products and provide a range of insurance-related consulting and administrative services.

The Council has long been an avid supporter of transparency and disclosure in our industry. We adopted a formal policy in favor of greater transparency in 1998. In 2004, we again publicly took steps to enhance transparency and disclosure, working with the National Association of Insurance Commissioners ("NAIC") and National Conference of Insurance Legislators ("NCOIL") to develop model state laws on transparency. As I will discuss, Council members are committed to disclosure of their compensation and routinely disclose information on how they are compensated, both directly and when more detail is requested by their client-insureds.

Although we strongly support efforts to promote transparency and disclosure in our industry, we do not believe it appropriate to develop a new federally mandated disclosure framework for welfare benefit plans. Our concerns arise from our belief that robust, effective disclosure requirements

already are in place for our industry, and an additional overlay of a new and burdensome federal regime is not warranted.

## II. Insurance Brokerage Industry in the Context of Welfare Benefit Plans (4 minutes)

### A. Description of Industry

Council members assist employers in designing their welfare plans and in effectuating the plan, including most importantly the placement of insurance products with those plans. Those products include, among others, group medical, dental, vision, life, health, short and long-term disability and long term care insurance. A single multi-state employer's plan easily can include 15 to 20 separate insurance products. In connection with the insurance products they place, Council members also may provide a variety of administrative services to the purchaser, including assisting plan sponsors with plan design, applications for coverage, claim forms, claims resolution, and COBRA administration.

### B. Description of Relationship Between Agents/Brokers and Plans

The relationship among a purchaser of insurance products, the broker or agent placing the insurance, and the carrier issuing that product, is governed principally by the contractual relationship entered into between the purchaser

and the broker or agent, and then of course with the carrier by the insurance policies themselves. A well-developed body of state agency law and, in most states, statutory insurance law, provide that the legal relationships between the employer on behalf of the plans that purchase insurance products and administrative services, the agent or broker that places the coverage, and the carriers that provide coverage, are contractual matters. Thus, for example, whether a broker is providing services to the plan instead of the carrier, or vice-versa, is determined by the relevant contracts.

### C. Description of Compensation Arrangements Between Brokers and Plans

Council members receive compensation in a variety of forms, including commissions from the carrier, fees from the plan or employer plan sponsor, contingent payments from the carrier when business originated by the broker passes certain thresholds (e.g., relating to premium income levels and client retention), and discretionary travel or other non-cash compensation from the carrier.

As mentioned, state insurance laws govern whether and to what extent brokers or agents must disclose the types and amounts of compensation they

receive. Under the laws of most states, brokers and agents are required to disclose in advance the *types* of compensation they receive. However, brokers and agents generally are not required to disclose in advance the *amount* of compensation they expect to receive, in part because the actual amount of compensation often cannot be known until after placement of the insurance. This is the case because commission rates and forms of compensation vary by carrier as well as by program.

With respect to commissions, for example, welfare plan benefits programs vary in terms of carriers, products, price and usage. A single welfare plan could offer its participants multiple products from multiple insurers in several categories of coverage (medical, dental, life, long term care, etc.). The commission earned by the broker will vary with the carrier and the premium paid on each particular policy. The premium, in turn, will vary with the take-up rates by plan participants (*i.e.*, the extent to which participants choose a particular option on the insurance menu). Because brokers cannot determine in advance how these factors will play out, they cannot provide, upon placement, more than general disclosure about the commissions they may receive.

As previously noted, some brokers and agents accept contingent compensation, such as contingent commissions, overrides, and bonuses. The level of such compensation explicitly is contingent on factors such as volume, profitability, client retention, and premium income levels. The extent to which these factors will affect the actual level of compensation is not knowable at the outset of an engagement for a particular client. Additionally, some contingent compensation may be based on a broker's overall book of business with the carrier, not the premiums earned with respect to any particular plan. Thus, it is not possible for the broker to determine with precision the extent to which its contingent compensation arises from insurance placed for any particular plan.

### D. Existing Disclosure Regime

Insurance agents and brokers already are subject to extensive regulation, including disclosure requirements, which sets them apart from other service providers. First, state law heavily regulates the placement activities of insurance agents and brokers as a general matter, and most states require compensation disclosures when a broker is providing both placement and non-placement services. Over 40 States, for example, require a broker to have a

written agreement in place with the client in order to collect fees from that client while at the same time receiving any insurer provided compensation. The fee disclosure requirements are quickly becoming even more relevant in the wake of the passage of the Patient Protection and Affordable Care Act in all market segments. The MLR carrier cost regime created under that statute is creating significant pressure on carrier commissions and some segments of the market are already migrating to a fee model. Aetna recently announced, for example, that it is going to sell all of its group insurance products on a net of commission basis and it has instituted plans to help smaller agencies implement and use client paid fees for their compensation.

In addition, under Schedule A to the Department's Form 5500 and related opinion letters (DOL Adv. Opin 86-17A, DOL Adv. Opin. 2005-02), the Department requires comprehensive and robust disclosure regarding commissions, fees any non-cash incentives earned by insurance agents and brokers in particular (in contrast to other service providers).

Finally, where agents or brokers or their affiliates act as fiduciaries and need the relief provided under Prohibited Transaction Class Exemption 84-24,

they must comply with that exemption's comprehensive fee and conflict-of-interest disclosure requirements.

## III. Proposed Regulations Are Unnecessary for/Inconsistent with Insurance Brokerage Industry ( 4 minutes)

In the rule adopted to govern pension plans, the Department cited concerns about the adequacy of information plans have regarding service providers' compensation and potential conflicts-of-interest. The rule reflects particular concern with undisclosed, indirect compensation paid in connection with the investment of the assets of participant-directed defined contribution plans. The Council understands the Department's concerns and certainly did not oppose the Department's desire to enhance transparency in connection with those plans.

We disagree, however, with the suggestion that the placement of insurance products with welfare plans raises the same concerns as those related to 401(k) plan investment services. The two products are completely different, both in character and with regard to the existence of comprehensive state regulation. They have different purchasers, beneficiary concerns, and regulatory schemes. Service providers for defined contribution plans often

manage assets for plan beneficiaries, whereas insurance agents and brokers do not. Further, in the 401(k) context, services are performed on a daily basis; in contrast, insurance brokers act only at the plan level by, for example, simply selling products on an annual basis.

And significantly, as previously explained, under existing state laws, disclosure concerning relationships and fees already is required under existing state regulatory regimes. Imposition of the Department's rules for pension plans, which require disclosure of the compensation to be received by the service provider, would thus be a duplicative burden for welfare plans at a cost the Department acknowledges to be "economically significant" for welfare plan service providers.

## IV. Conclusion/Questions and Answers ( 1 minute)

For all of the above reasons, we respectfully suggest that – if the Department determines to adopt new disclosure rules covering insurance services provided to employee welfare benefit plans – any such rule should provide that it will be satisfied by an insurance agent's or broker's compliance with the disclosure requirements imposed by state law and existing federal law.

Alternatively, if the Department seeks to impose a new federal disclosure mandate in this context, we ask that it be the sole disclosure standard and that it be deemed preemptive of the current state-imposed disclosure regimes under which we currently operate.

On behalf of the Council, I again thank you for affording me the opportunity to speak to you today. If you have any questions, would be pleased to address them now.