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A T T O R N E Y S A T L A W  
A LIMITED LIABILITY PARTNERSHIP

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February 5, 2008

Office of Regulations and Interpretations,  
Employee Benefits Security Administration  
Attn: 408(b)(2) Amendment  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Re: Proposed Regulations: Reasonable Contract or Arrangement under Section 408(b)(2) –  
Fee Disclosure

Dear Sir or Madam:

We represent a number of employers who sponsor self-insured health benefit plans. Our comments and requests for clarification on the proposed regulations relate specifically to the application of the rules of these plans.

1. Please clarify whether the proposed regulations will apply to contributory welfare plans which are entitled to rely on the relief from the trust and reporting requirements provided under Technical Release 92-01. These plans were specifically exempted from the Schedule C requirements under the recently released revisions to Form 5500.

In this regard, please note that it can be exceptionally difficult for a plan sponsor to obtain from prospective service providers much of the fee disclosure information required by the proposed regulations. If the final regulations do not clearly state whether these plans are subject to the requirements, it may be impossible for a plan sponsor to force the disclosure. Also, please note that these fees make up a significant part of overall plan costs, and are typically reflected in COBRA premiums and the employee's share of premiums. Plan sponsors would be in a much better position to negotiate a reduction in fees if prospective service providers were required to be more transparent.

2. Please clarify whether the following types of revenue would be considered subject to the fee disclosure rules:

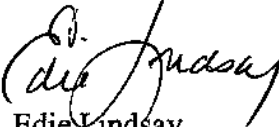
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- A Prescription Benefits Manager (PBM) receives a rebate from the manufacturer with respect to drugs purchased by a health plan. The amount of the rebate is determined by the manufacturer on the basis of the PBM's entire book of business, not the purchases of a particular health plan. If this is fee income subject to disclosure, may the PBM calculate the plan's allocable portion on some reasonable basis, and must PBM disclose the allocation method?
- A PBM receives an administrative fee from a drug manufacturer on the basis of physician education programs sponsored by the PBM. Physicians are identified as being a good target for the various educational programs on the basis of drug purchasing information from the plan. Again, if this is fee income, may the PBM allocate on a reasonable basis, and must it disclose its allocation methods to the plan sponsor?
- The PBM charges the plan for drugs on the basis of a formula set out in the plan (e.g. a 20 percent reduction off average wholesale price). The price charged to the plan is more than the PBM pays to the pharmacy that fills the prescription. The PBM retains the "spread". Is this compensation that must be disclosed?
- PBM owns a mail order pharmacy. It charges the plan for drugs at a price higher than the PBM's costs. Is the "spread" compensation that must be disclosed? Or is it a profit margin similar to that of any service provider who charges a plan more than it costs the service provider to provide its services? Does the degree of PBM's ownership of the mail order pharmacy affect the answer?

Please note that all of the scenarios described above have similar counterparts in the operation of third party medical claims administrators who contract with or own interests in preferred network providers. As a result, these types of arrangements make up a significant portion of health care costs. It would be very helpful to know which of these arrangements result in fees or compensation, the amount of which must be disclosed, and those which represent merely a material financial or other arrangement, the fact of which – but not the amount – must be disclosed.

Thank you in advance for your attention to these questions.

Very truly yours,  
  
Edie Lindsay