

Broker Compensation Disclosure Compliance Continues

February 1, 2023

Quick Facts

- As part of the Consolidated Appropriations Act of 2021, (CAA) certain arrangements with those Employee Retirement Income Security Act (ERISA) health plans that are entered into, extended, or renewed on or after December 27, 2021, must include specific disclosures about compensation.
- The requirements are modeled after similar disclosures for retirement plans.
- The requirements are ongoing. Brokers and consultants who are covered service providers (CSPs) should review agreements with covered plans to ensure compliance.

Background

As part of the CAA signed into law by President Trump in December 2020, contracts or arrangements for services between a “covered plan” and CSP entered into, extended, or renewed on or after December 27, 2021, must include specific disclosures for broker and consultant compensation. On December 30, 2021, the Department of Labor (DOL) released a [Field Assistance Bulletin](#) providing some clarifying guidance on the requirements.

Covered Service Providers

The requirements apply to both large and small, fully insured and self-funded group health plans as defined by ERISA who reasonably expect to receive at least \$1,000 in compensation, whether direct or indirect, for brokerage and consulting services. The requirements do not apply to non-ERISA plans. The term “broker and consulting” is vague and includes services such as:

- Selection of third-party administrators (TPAs) and other service providers for benefits administration
- Recordkeeping
- Medical management
- Pharmacy benefit management (PBM)
- Wellness
- Employee Assistance Programs (EAPs)
- Compliance services
- Stop-loss
- Transparency tools
- Disease management products
- Development and/or implementation of plan design
- Group purchasing organization agreements and services
- Participation in and/or services from preferred vendor panels

The December 2021 clarifying guidance stated that, when determining who is a CSP, to take into consideration that the terms “broker” and “consultant” are not defined by ERISA, and the determination on who is a CSP will be a facts-and-circumstances determination. The guidance states: “The fact that a service provider does not call itself a ‘consultant’ or charge a ‘consulting’ fee is not dispositive, for example, as to whether the provider is ‘consulting’ for purposes of section 408(b)(2)(B).”

Disclosure Format

The statute has specific requirements on what must be included in the compensation disclosure and when the disclosure should be provided. The disclosure must include:

- Description of the services that will be provided
- If applicable, a statement stating that the CSP (or its affiliate or subcontractor) is a fiduciary
- Description of all direct and indirect compensation that the CSP (or its affiliate or subcontractor) expects to receive for services provided
- Description of the arrangement between the payer and the CSP (or its affiliate or a subcontractor) to which indirect compensation is paid, including a description of services for which indirect compensation is received and identification of the payer of the indirect compensation
- Description of any compensation that will be paid among the CSP (or its affiliate or subcontractor) paid on a transactional basis, including identification of the services for which such compensation will be paid and identification of the payers and recipients of such compensation even if said compensation is disclosed in another provision
- Description of any compensation that the CSP (or its affiliate, or subcontractor) reasonably expects to receive in connection with termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination

Compensation

The requirements provide that CSPs must disclose specific compensation arrangements including direct, indirect, supplemental, and contingent compensation. Compensation is defined as anything of monetary value and non-monetary compensation in excess of \$250. The disclosure must provide a description of the compensation provided with sufficient information to allow the plan fiduciary to determine the reasonableness of the compensation as it relates to the CSP’s services.

Direct Compensation

Direct compensation is compensation received directly from the ERISA plan such as flat fees, per contract or per service fees, and/or a percentage of premium.

Indirect Compensation

Indirect compensation is compensation received from any other party other than the ERISA plan, the plan sponsor, or the plan sponsor’s affiliate. Examples include commissions, referral fees, payments from admin fees, referral fees and non-monetary compensation in excess of \$250.

Contingent or supplemental compensation could be either direct or indirect depending on how the CSP receives it. Supplemental compensation is most often received in the form of bonuses to the CSP.

In the December 2021 clarifying guidance, the DOL states that when indirect compensation is unknown at the time of the disclosure, compensation may be disclosed by an amount, formula, or per capita charge for each enrollee. If the compensation cannot be expressed by any of those methods,

then by other methods such as reasonable estimates of additional compensation that may be earned. Further, the DOL states that providing compensation ranges may be considered reasonable in circumstances where an arrangement could result in the covered service provider's compensation varying within a projected range.

Timing

As of December 27, 2021, the covered service provider must provide the compensation disclosure to the plan "not later than the date that is reasonably in advance of the date on which the contract or arrangement is entered into, and extended or renewed."

This means that disclosures should be made in advance of plan renewal and contract renewal dates, but do not need to be provided before agreements that are entered into, extended, or renewed before December 27, 2021. For example, a new client contract or arrangement that was entered into on December 26, 2021, did not require the disclosure at the inception of the agreement, but the disclosure should have been provided in advance of the 2022 renewal.

Amendments

Updates to the disclosure may be required throughout the course of the year. CSPs should provide an updated disclosure within 60 days of knowledge of a plan-related compensation change. Additionally, disclosure of good faith errors or omissions must be reported within 30 days of discovery.

Enforcement

Compliance with the broker compensation disclosure requirements is ongoing. The DOL has said that they will not exercise enforcement action if, when complying with these rules, brokers and consultants use a "good faith, reasonable interpretation of ERISA." The DOL refers to similar guidance for [retirement and pension plans](#), and stated that group health plans that follow that guidance would likely be taking a good faith reasonable interpretation of the requirements. The DOL states, "Although group health plan compensation arrangements may differ from pension plan compensation, much of the terminology and many of the requirements in section 408(b)(2)(B) as added by the CAA and the Department's regulation on pension plan disclosure are identical, such that the Department's explanations of such terminology and requirements may be useful when analyzing the new provisions in ERISA section 408(b)(2)(B)."

Next Steps for Plan Fiduciaries

Plan fiduciaries should review compensation disclosures sent by CSPs. The intent of the new requirement is to provide plan fiduciaries with information in advance of entering into or renewing a contract or agreement to make an informed decision about next steps. After reviewing, plan sponsors should keep all compensation disclosures sent from covered service providers on file. Compliance with this requirement is ongoing, and as more information becomes available disclosures may change.

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