



# Broker Compensation Disclosure Requirements under the CAA, 2021 - Group Health Plans

*November 2021*



MARATHAS BARROW  
WEATHERHEAD LENT LLP

# Table of Contents

- 1** Executive Summary
- 2** Background
- 3** Effective Date
- 3** Covered Plans
- 4** Covered Service Providers
- 5** Covered Services
- 6** Content of the Disclosures
- 9** Penalties
- 10** Sample Form

# Executive Summary

---

**Effective for contracts executed on or after 12/27/2021**

- Applicable to contracts or arrangements between plan sponsors (employers) and brokers or consultants involving a group health plan.
  - For example, brokers receiving commission on fully insured groups or consultants receiving fees from a TPA or other service providers for self-insured groups.
- Brokers and consultants receiving at least \$1,000 in fees or commission (directly or indirectly) for performing certain services for group health plans must disclose their compensation to clients.
- Does not apply to exclusively fee-based work subject to a fee agreement where the payment is made directly from the employer. This is because the written fee agreement serves as a disclosure.

# Background

---

ERISA prohibits plan fiduciaries from entering into in certain transactions with “parties in interest,” which include plan fiduciaries, such as the sponsoring employer, and any service providers to the plan, such as insurers, TPAs, attorneys, brokers, consultants and other vendors. Such action is considered a **“prohibited transaction.”**

**Any Exceptions?** Plans may contract with service providers even though they are parties in interest provided that the contract is reasonable, the services are necessary for the establishment or operation of the plan, and the compensation paid for the services is reasonable.

In 2012, the Department of Labor (DOL) issued regulations under that section, but those regulations only applied to retirement plans, not health plans.

The Consolidated Appropriations Act, 2021 now amends the section 408(b)(2) statutory exemption to impose compensation disclosure requirements on health plan service providers that are similar to the requirements applicable to retirement plan service providers.

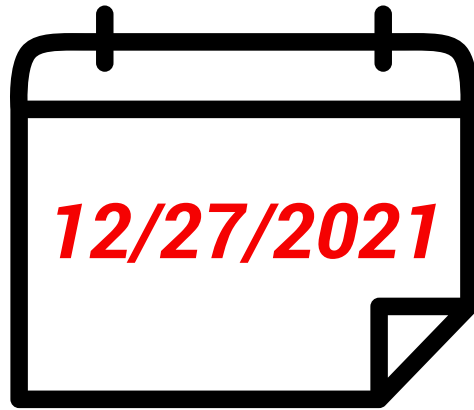
The Omnibus Package’s important changes for insurance agents and brokers are found in a section titled “Title II – Transparency, Section 202, Disclosure of direct and indirect compensation for brokers and consultants to employer-sponsored health plans and enrollees in plans on the individual market”.<sup>1</sup>

<sup>1</sup> Consolidated Appropriations Act, 2021, H.R. 133, 110th Cong. § 202 (2020).

# Effective Date

---

The CAA's disclosure requirements apply to any contract executed, extended or renewed on or after **December 27, 2021**



Contracts executed prior to **December 27, 2021**, are not subject to the disclosure requirements until renewal. "Evergreen" contracts will still require reasonable re-disclosure of compensation, even if they last beyond the employers plan year.

## Covered Plans

---

A "covered plan" includes employee welfare benefit plans to the extent the plan provides medical care to employees or their dependents directly or through insurance, reimbursement, or otherwise.

Basically, the disclosure requirement applies to group health plans (other than QSEHRAs). This Includes self-insured and fully insured group health plans, including dental and vision.

# Covered Service Providers

---

A “covered service provider” is one who contracts with a “covered plan” and who reasonably expects to receive \$1,000 or more in direct or indirect compensation for providing brokerage or consulting services, whether such services will be performed by the service provider or an affiliate or subcontractor.

An entity is not a “covered service provider” solely due to providing services as an affiliate or a subcontractor.

The party entering into the contract with the covered plan is the covered service provider responsible for making the required disclosures, even if work is performed by an affiliate.

When a service provider expects to receive \$1,000 or more in direct compensation from the covered plan or indirect compensation from a source other than the covered plan, plan sponsor, covered service provider, or an affiliate, it must provide plan fiduciaries a written disclosure of certain, specified information no later than a date “reasonably in advance of” when the contract is entered, extended, or renewed.

Because direct compensation is defined as coming from the covered plan and indirect compensation is defined as coming from a source other than the covered plan, plan sponsor, the covered service provider, or an affiliate, then if a plan sponsor pays the covered service provider directly from its general assets, no disclosure of direct or indirect compensation is required.

# Covered Services

---

## **Brokerage and consulting services include:**

- Selection of insurance products (including dental and vision);
- Recordkeeping services;
- Selection of medical management vendors;
- Benefits administration (including dental and vision);

## **Selection, placement, enrollment, and servicing of all products and services related to the health plan including:**

- Stop-loss insurance;
- Pharmacy benefit management services;
- Wellness services including wellness design and management services;
- Transparency tools and vendors;
- Group purchasing organization preferred vendor panels;
- Disease management vendors and products;
- Compliance services;
- Employee assistance programs;
- Third party administration services;
- And development of plan design



# Content of Disclosure

---

## Disclosures are required to include:

1. A description of the services to be provided to the covered plan pursuant to the contract or arrangement.
2. Where applicable, a statement that the covered service provider (or their affiliate or subcontractor) will provide or reasonably expects to provide services directly to the covered plan as a fiduciary.
3. A description of all direct compensation, either in the aggregate or by service, the covered service provider (or their affiliate or subcontractor) reasonably expects to receive in connection with services provided under the contract. Compensation includes standard commissions, contingent commissions, supplemental commissions.
4. A description of all indirect compensation, including compensation from a vendor to a brokerage firm based on a structure of incentives not solely related to the contract with the covered plan, but excluding any compensation received by an employee from an employer, the covered service provider (or their affiliate or subcontractor) reasonably expects to receive in connection with services provided under the contract.
5. Where compensation is based on a formula, such as bonuses related to a block of business, retention, or other contingencies, a description of the formula is required.

### **In addition, for any indirect compensation, the disclosure must also include:**

- A description of the arrangement between the payer and covered service provider (or their affiliate or subcontractor) pursuant to which indirect compensation is paid;
- Identification of the services for which the indirect compensation will be received, if applicable; and
- Identification of the payer of indirect compensation



# Content of Disclosure

---

6. A description of any compensation provided on a transaction basis (such as commissions, finder's fees, or other similar incentive compensation based on business placed or retained) that will be paid among the covered service provider (or their affiliate or subcontractor) in connection with the services provided under the contract.

This should include an identification of the services for which such compensation will be paid and identification of the payers and recipients of such compensation as well as the status of a payer or recipient as an affiliate or a subcontractor, regardless of whether such compensation also is disclosed pursuant to any other provision.

7. A description of any compensation that the covered service provider (or their 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.

# Content of Disclosure

---

## When describing compensation or cost, the disclosure may:

- Express it as a monetary amount, formula, or a per capita charge per enrollee;  
**or**
- If the compensation or cost cannot reasonably be expressed in such terms, by any other reasonable method, including a disclosure that additional compensation may be earned but may not be calculated at the time of contract.
  - In this case, the disclosure must describe the circumstances under which the additional compensation may be earned, provide a reasonable and good faith estimate if the covered service provider cannot otherwise readily describe compensation or cost, and explain the methodology and assumptions used to prepare such estimate.
- Any such description must contain sufficient information to permit evaluation of the reasonableness of the compensation or cost.

## Other Disclosure Requirements?

- A covered service provider must update its disclosures:
  - Within 60 days of being informed of the change.
  - To correct any inadvertent errors within 30 days of discovering the error.
- Covered service providers must provide their disclosure within 90 days of a written request.

# Penalties

---

- Under ERISA, plan fiduciaries may be liable for any losses to the plan that result from a prohibited transaction.
- Service providers who participate in a prohibited transaction can also face potential liability under ERISA.
- DOL assesses an additional **20% penalty** on judgments or settlements involving a prohibited transaction.

## NAHU Contacts

### **Janet Trautwein**

*Chief Executive Officer, NAHU*

[jtrautwein@nahu.org](mailto:jtrautwein@nahu.org)

### **Marcy M. Buckner**

*Senior Vice President of Government Affairs, NAHU*

[mbuckner@nahu.org](mailto:mbuckner@nahu.org)

# Sample Form

## **Broker Compensation Disclosure Requirements**

Section 202 of the Consolidated Appropriations Act, 2021 (“CAA”), requires entities providing brokerage and consulting services (referred to collectively as “covered service providers”), including their affiliates and subcontractors, who expect to receive \$1,000 or more in direct or indirect compensation, to provide plan fiduciaries with a written disclosure “reasonably in advance of” when the contract is entered, extended, or renewed. The effective date of the requirement is December 27, 2021 and applies to contracts executed on or after December 27, 2021.

Disclosures are required to include:

- A description of the services to be provided to the covered plan pursuant to the contract.
- Where applicable, a statement that the covered service provider (or their affiliate or subcontractor) will provide or reasonably expects to provide services directly to the covered plan as a fiduciary.
- A description of all direct compensation, either in the aggregate or by service, the covered service provider (or their affiliate or subcontractor) reasonably expects to receive from the covered plan in connection with services provided under the contract.
- A description of all indirect compensation, including compensation from a vendor to a brokerage firm based on a structure of incentives not solely related to the contract with the covered plan that the covered service provider reasonably expects to receive in connection with services provided under the contract. Indirect compensation excludes any compensation received by an employee from an employer. Further compensation from the covered service provider (or their affiliate), the covered plan, or the plan sponsor is not indirect compensation.

In addition to the above, for any indirect compensation, the disclosure must also include:

- A description of the arrangement between the payer and covered service provider (or their affiliate or subcontractor) pursuant to which indirect compensation is paid;
  - Identification of the services for which the indirect compensation will be received, if applicable; and
  - Identification of the payer of indirect compensation.
- A description of any compensation provided on a transaction basis (such as commissions, finder’s fees, or other similar incentive compensation based on business placed or retained) that will be paid among the covered service provider (or their affiliate or subcontractor) in connection with the services provided under the contract. This should include an identification of the services for which such compensation will be paid and identification of the payers and recipients of such compensation as well as the status of a payer or recipient as an affiliate or a subcontractor, regardless of whether such compensation also is disclosed pursuant to any other provision.
- A description of any compensation that the covered service provider (or their 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.
- A description of the manner in which such direct or indirect compensation will be received.

{00035440 2}

# Sample Form

---

Compensation may be expressed in a monetary amount, formula, or per capita charge based on enrollment counts, or another reasonable method if it cannot reasonably be expressed in one of the other manners. If additional compensation can be earned, but it is not calculable at the time of the contract, then the disclosure must include a description of the circumstances under which the additional compensation may be earned and a reasonable, good faith estimate if the covered service provider cannot readily describe compensation or cost and explains the methodology or assumptions used to prepare their estimate.

In addition to the above, the covered service provider must update its disclosures:

- Within 60 days of being informed of a change to the information already disclosed (or as soon as practicable if disclosure is precluded due to circumstances beyond the covered service provider's control)
- To correct any inadvertent errors or omissions within 30 days of discovering the error or omission

Further, covered service providers must provide its disclosure within 90 days of a written request by the plan fiduciary.

# Sample Form

[AGENCY LOGO]

**BROKER COMPENSATION DISCLOSURE FORM**

The following constitutes AGENCY NAME’s (the “Company”) disclosure of direct and indirect compensation the Company will receive or reasonably expects to receive for the period of \_\_\_\_\_, 2022 through \_\_\_\_\_ 2022 in connection with the below referenced services it provides to CLIENT’S NAME (the “Client” or “you”):

- [Insert a description of the services you provide to your clients. This should align with any services agreement you may have with the client]

The Company [does not provide] [provides] the above-referenced services to Client in the capacity of a plan fiduciary.

The Company reasonably expects to receive direct compensation for the placement of the below lines of coverage in the form of either a per employee per month (“PEPM”) fee or a commission paid by the carrier or vendor, in the amount indicated below:

Coverage Line	Carrier/Vendor/Fee Agreement	PEPM, Standard Commission, Commission Schedule, or Compensation Calculation
		PEPM: \$____ Commission: \$____ Fee: \$____
		PEPM: \$____ Commission: \$____ Fee: \$____
		PEPM: \$____ Commission: \$____ Fee: \$____
		PEPM: \$____ Commission: \$____ Fee: \$____
		PEPM: \$____ Commission: \$____ Fee: \$____

# Sample Form

**Indirect Compensation**

In addition to the above, the Company reasonably expects to receive the following indirect compensation:

Description of Indirect Compensation	Amount of, or Description of Calculation for, Indirect Compensation	Services for Which Indirect Compensation Will be Received	Payer of Indirect Compensation
	\$		
	\$		
	\$		
	\$		
	\$		
	\$		

**Attach detailed explanation of formula for indirect compensation here if applicable:**

**Other Compensation**

The Company may earn additional compensation from any of the above referenced insurers, vendors, or other third parties that cannot be calculated as of the time this disclosure is made to you, or prior to the date the Company’s executed, extended, or renewed contract with you is effective. For example, the Company may receive additional compensation contingent upon certain conditions being met, including, but not limited to, profitability, growth, churn/retention, or the volume of services provided. Compensation may be in the form of additional commissions, bonuses or benefits (“compensation”). Furthermore, we may receive corporate sponsorships for webinars, training or other programming we provide for you and other clients, or for our own internal trainings. Whether we receive any of the above referenced compensation, or how much that compensation may be, cannot be discerned at this time.

{00035440 2}



# Sample Form

Should you have any questions about any of the above information or require additional information, please don't hesitate to contact [designate an agency contact person – this could be the producer or account manager or another member of the agency] at [email and phone].

The above information is accurate to the best of my knowledge as of the date this disclosure is executed above.

[Agency Representative Name]

Date: \_\_\_\_\_, 202\_

I acknowledge that I received the above referenced Broker Disclosure form from AGENCY NAME, and that I have read and understand the disclosures made. I understand that I can ask questions regarding the information included in this disclosure form at any time. Further, I understand that if I do not sign this acknowledgement within 15 business days from receipt, it will be deemed to be acknowledged and accepted by me.

\_\_\_\_\_

Date: \_\_\_\_\_, 202\_

Name

Title

[Client Name]