



## Broker Compensation Transparency Requirements

Signed into law in late 2020, the Consolidated Appropriations Act, 2021 (CAA) created new requirements for health insurance brokers and consultants to disclose any **direct or indirect compensation** they may receive for referral of services to ERISA-covered group health plan sponsors. Similar disclosure to enrollees in the individual market or enrollees purchasing short-term limited duration insurance is required for referral of coverage.

These new disclosure requirements began on Dec. 27, 2021, although the U.S. Department of Labor (DOL) has announced a **temporary enforcement policy**. According to the DOL, a person will not be treated as having failed to make required disclosures to a responsible plan fiduciary as long as the person made disclosures in accordance with a good faith, reasonable interpretation of the law.

This Compliance Overview provides a summary of the disclosure requirements, including applicable content and timing requirements, as well as a sample form which requires customization.

### LINKS AND RESOURCES

- [Legislative text](#) of the Consolidated Appropriations Act, 2021
- [Summary of Appropriations Provisions](#) by the House Appropriations Committee
- [DOL Field Assistance Bulletin No. 2021-03](#), announcing the temporary enforcement policy

### Broker Compensation Transparency Requirements

The Employee Retirement Income Security Act of 1974 (ERISA) requires plan fiduciaries to, among other things, ensure arrangements with their service providers are “reasonable” and only “reasonable” compensation is paid for services. To meet these obligations, plan fiduciaries must be able to obtain sufficient information to enable them to make informed decisions about the reasonableness of plan service provider arrangements, including the costs of the services.

A [2012 final rule](#) requires **covered service providers** (CSPs) to provide plan fiduciaries with the information they need to assess the reasonableness of total compensation, both direct and indirect, received by the CSP, its affiliates and/or its subcontractors. This 2012 rule only applies to ERISA-covered retirement plans and **does not apply** to group health plans; however, the DOL has stated that CSPs can look to the prior departmental guidance developed for retirement plans in attempting to comply with the new CAA disclosure requirements.

### New Disclosure Requirements

The CAA creates similar disclosure requirements for CSPs in order for a contract between an ERISA-covered group health plan and a CSP to be considered reasonable. For this purpose, the term “**covered service provider**” means one that enters into a contract with the plan and reasonably expects **\$1,000 or more** in compensation (direct or indirect) to be received in connection with providing one or more of the services listed below—regardless of whether the services will be performed or compensation will be received by the CSP, an affiliate or a subcontractor.

Specifically, disclosure is required for:

- Brokerage services provided to a covered plan with respect to the selection of insurance products, record-keeping services, medical management vendors, benefits administration, stop-loss insurance, pharmacy benefit management services, wellness services, transparency tools and vendors, group purchasing organization preferred vendor panels, disease management vendors and products, compliance services, employee assistance programs or third-party administration services; and
- Consulting services related to the development or implementation of plan design, insurance or insurance product selection, record-keeping, medical management, benefits administration selection, stop-loss insurance, pharmacy benefit management services, wellness design and management services, transparency tools, group purchasing organization

agreements and services, participation in and services from preferred vendor panels, disease management, compliance services, employee assistance programs or third-party administration services.

According to Field Assistance Bulletin No. 2021-03, the fact that a service provider does not call itself a “consultant” or charge a “consulting” fee does not determine whether the requirements apply. Providers who reasonably expect to receive indirect compensation from third parties should be prepared to explain how a conclusion that they are not covered service providers is a reasonable, good faith interpretation of the law.

## Content Requirements

A CSP must disclose the following to a plan fiduciary in writing:

- A description of the services to be provided to the plan pursuant to the contract;
- A statement that the CSP, an affiliate or a subcontractor will or expects to provide services pursuant to the contract directly to the plan as a fiduciary, if applicable;
- A description of all direct compensation, either in aggregate or by service, that the CSP, an affiliate or a subcontractor reasonably expects to receive in connection with the services;
- A description of indirect compensation that the CSP, an affiliate or a subcontractor reasonably expects to receive in connection with the services;
- A description of the arrangement between the payer and the CSP, an affiliate or a subcontractor (as applicable) pursuant to which such indirect compensation is paid;
- Identification of the services for which the indirect compensation will be received, if applicable;
- Identification of the payer of the indirect compensation;
- If compensation is set on a transaction basis (such as commissions, finder’s fees or other similar incentive compensation based on business placed or retained), a description of the services for which such compensation will be paid and identification of the payers and recipients;
- A description of any compensation the CSP, an affiliate or a subcontractor reasonably expects to receive in connection with the termination of the contract and how any prepaid amounts will be calculated and refunded upon termination; and
- A description of the manner in which the compensation will be received.

According to Field Assistance Bulletin No. 2021-03, the required description of compensation or cost **may be expressed as a monetary amount, formula or a per capita charge** for each enrollee. If the compensation or cost cannot reasonably be expressed in such terms, any other reasonable method may be used. This would include a disclosure that additional compensation may be earned but may not be calculated at the time of contract if such a disclosure includes a description of the circumstances under which the additional compensation may be earned, and a reasonable and good faith estimate that explains the methodology and assumptions used to prepare the estimate.

In addition, pending further guidance, the DOL takes the view that disclosure of compensation **in ranges** may be reasonable in circumstances when the occurrence of future events or other features of the service arrangement could result in the service provider’s compensation varying within a projected range. However, such ranges must be reasonable under the circumstances, and the DOL cautions that **more specific—rather than less specific—compensation information is preferred** whenever it can be furnished without undue burden.

## Timing Requirements

Disclosure must be made no later than the date that is **reasonably in advance of the date on which the contract is entered into, extended or renewed**. This may involve disclosures of estimates or formulas that would govern any anticipated compensation. If there is any change to the required information, the CSP must inform the plan fiduciary as soon as practicable, but generally no later than **60 days** from the date on which the CSP is informed of the change. Lastly, upon written request of the plan fiduciary, the CSP must disclose any other information relating to compensation received in connection with the contract.

## Plan Fiduciary Requirements

If the CSP fails to provide the required information above, the plan fiduciary may be required to notify the DOL and terminate the contract.

## Sample Broker Compensation Disclosure Form

For contracts entered into or renewed on or after Dec. 27, 2021, the Consolidated Appropriations Act requires insurance brokers to disclose to plan fiduciaries any direct and indirect compensation they receive.

Wits Financial strives for transparency in all its business relationships, and is providing this form in full compliance with the law. This form details our compensation for [insert year].

Prepared by: Agent name: [Insert agent name] Broker: Wits Financial

Prepared for: [insert client name]

Rendered Service and Description	Compensation Form (e.g., cash)	Amount	Compensation Source

**BROKER**

I certify that the information above is accurate to the best of my knowledge and represents all direct and indirect compensation anticipated by Wits Financial for services related to our client, [insert client name], during the [insert year] period.

\_\_\_\_\_ Agent Signature Date

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