APRIL 2022

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New compensation disclosure rules impact brokers, consultants and group health plan fiduciaries.

Alston & Bird LLP and Aflac

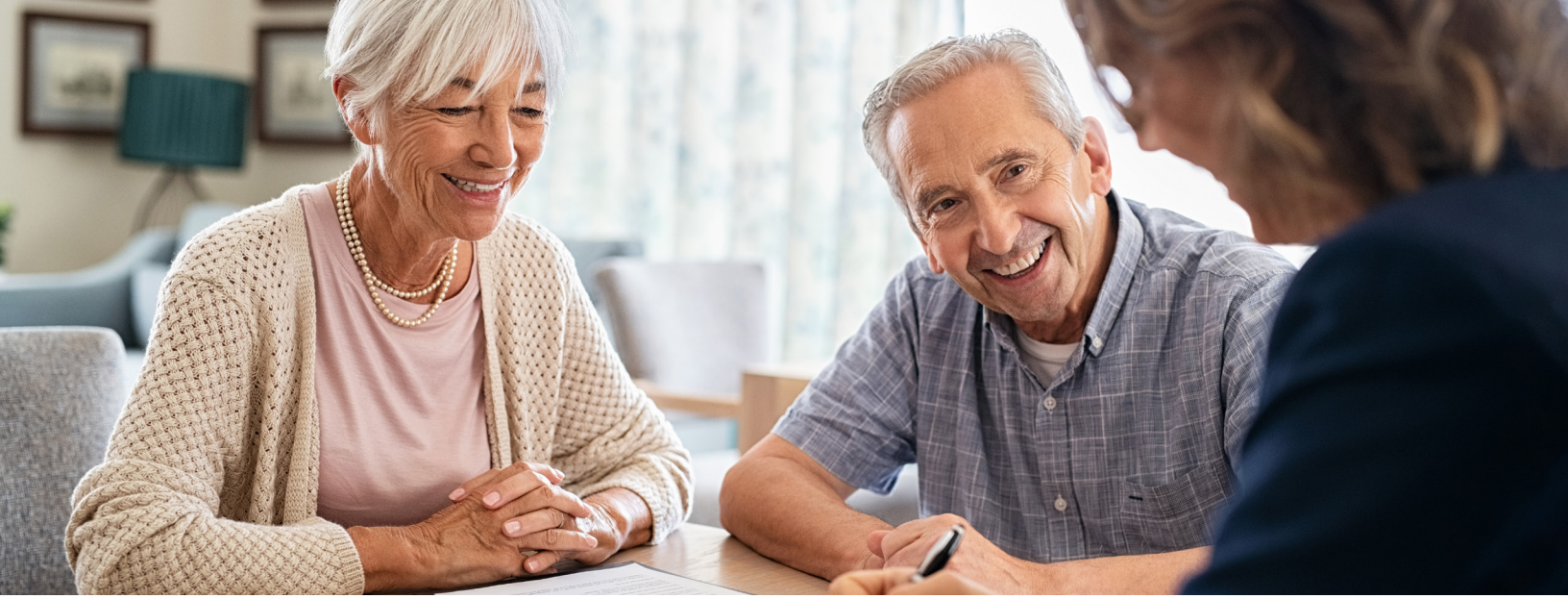
The Consolidated Appropriations Act, 2021 (CAA) imposes new compensation disclosure requirements for group health plans subject to the Employee Retirement Income Security Act of 1974 (ERISA). The new rules are effective for contracts entered into or renewed on or after Dec. 27, 2021.

Brokers, consultants and fiduciaries of ERISA-covered health plans can face significant consequences for failure to comply with the new compensation disclosure requirements.

The new requirements:

- Provide group health plan fiduciaries with the information needed to meet their obligations under ERISA.
- Determine whether the compensation for services is reasonable.
- Assess potential conflicts of interest that may exist due to the receipt of indirect compensation from persons other than the plan or plan sponsor.

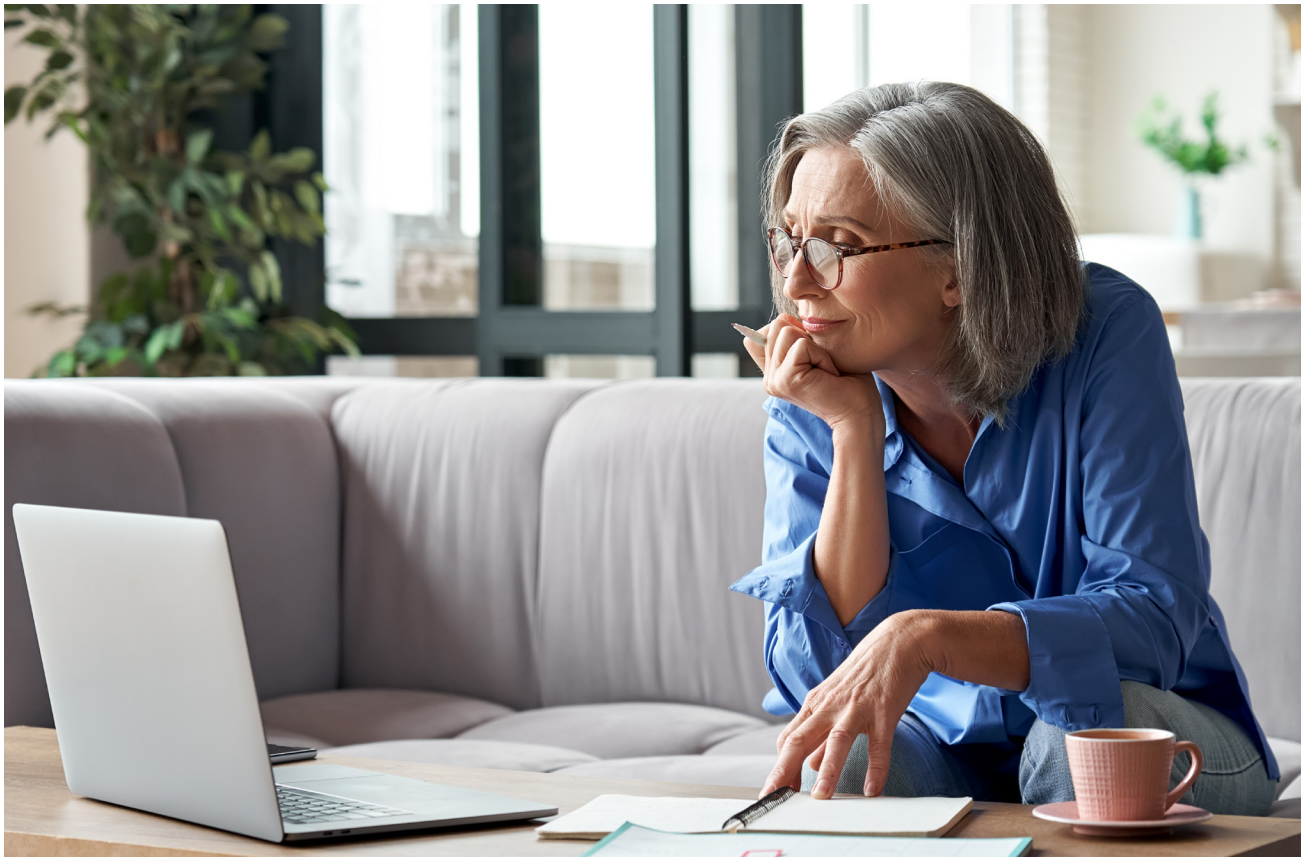
The CAA also imposes compensation disclosure rules on health insurance issuers with respect to individual market insurance (other than excepted benefits) and short-term limited duration insurance (STLDI). The rules for such coverage are different than those that apply to ERISA-covered group health plans and will be addressed in a **separate article**.



At a glance

Who must disclose?	Persons providing brokerage or consulting services who expect to receive $1,000 or more in total annual direct and indirect compensation from a group health plan covered by ERISA. Persons subject to the disclosure requirement are called "covered service providers."
What types of plans does it apply to?	Applies with respect to **any ERISA-covered group health plan**, including: ■ Self-funded and fully insured. ■ Large and small group. ■ Retiree only. ■ Excepted benefits (e.g., dental and vision coverage, specified disease coverage) if offered under a group health plan. The rules do not apply to church plans and governmental plans that are not subject to ERISA. **The following plans are exempt (because they are not group health plans):** ■ Plans that meet the voluntary plan safe harbor exemption from ERISA coverage. ■ Qualified small employer health reimbursement arrangements (QSEHRAs). ■ Life insurance. ■ Accident or disability coverage. ■ Health savings accounts that are not also an ERISA group health plan.

Disclosure is made to	Group health plan fiduciaries.
Enforcement	Department of Labor (DOL).
Effective date	The disclosure requirement is effective for contracts entered into, extended or renewed on or after **Dec. 27, 2021**. **Note:** *A contract is considered entered into on the date it was executed, not when it is effective. For example, a contract executed Dec. 15, 2021, that takes effect on Jan. 1, 2022, is not subject to the new rules. The date of execution of a Broker of Record (BOR) agreement is generally the earlier of (a) the date the BOR agreement is submitted to the insurer or (b) the date a group application is signed for insurance coverage for the following plan year. For many group health plan service providers and sponsors of calendar year plans, the effective date timing was fortuitous, with disclosure generally not required for 2022 as long as the contract was executed or renewed prior to Dec. 27, 2021. But for new business and the next cycle of renewals, the challenges will be much more complicated.*



Overview of compensation disclosure requirements for group health plans

Key elements of disclosure requirements are summarized in the following table.

What must be disclosed?	Both direct and indirect compensation must be disclosed.
Definitions	■ **Direct compensation** is compensation from the plan itself, that is, compensation paid from plan assets. Amounts paid by the employer or other plan sponsor are not considered plan assets, but participant contributions are always plan assets. ■ **Indirect compensation** is generally any amount received from anyone other than the plan or the employer/plan sponsor. Compensation is not limited to cash but includes anything of monetary value. **Note:** There is a de minimis exception for non-monetary compensation of $250 or less, in the aggregate, during the term of the contract. The DOL may increase the $250 amount for inflation.

Who must submit the disclosure?

The reporting requirement applies to those who provide "brokerage services" or "consulting," neither of which is defined by ERISA. Instead, the terms are described in the statute by reference to a list of subservices that relate to the brokerage services or consulting. Brokerage services and consulting generally include services provided by affiliates and subcontractors.

Note: *The fact that a service provider does not call itself a consultant or charge a consulting fee is not determinative of whether someone is engaged in consulting. Licensure is also not determinative. Bundled fees may trigger reporting where consulting is provided even if there is no specific fee for the consulting service. The nature of the compensation, e.g., commissions vs. fee for service, is also not a basis for distinguishing between brokerage services and consulting.*

Service providers who determine they are not subject to the reporting rules should be prepared to provide reasons for their conclusion. If the DOL audits compliance, service providers who receive indirect compensation from third parties in connection with advice, recommendations or referrals regarding any of the listed subservices should be prepared to explain how they are not a covered service provider based on a reasonable and good faith interpretation of the statute. Plan fiduciaries may also be interested in such information.

Subservices included in brokerage and consulting:

The following are the subservices included in brokerage and consulting. There are many similarities between the two lists:

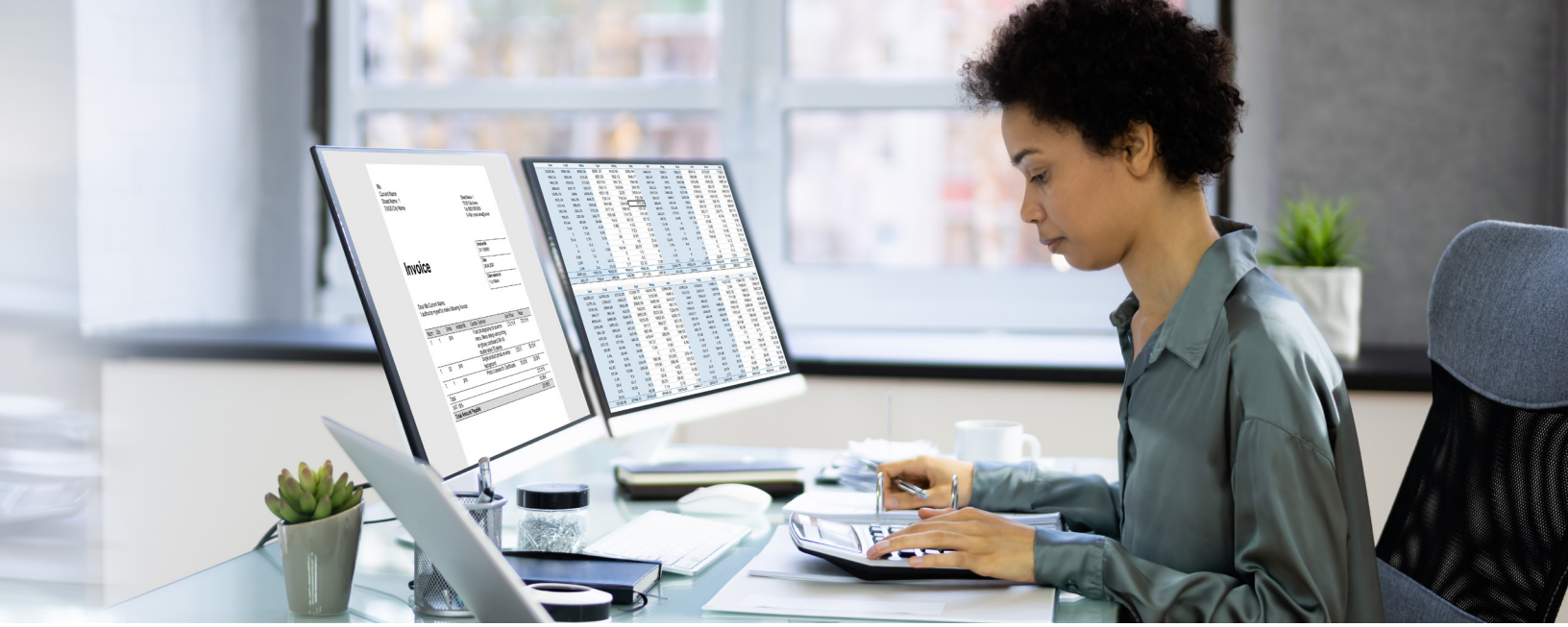
Brokerage subservices:

- Selection of insurance products.
- Recordkeeping.
- Medical management vendor.
- 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.
- Third-party administration services.

Consulting subservices:

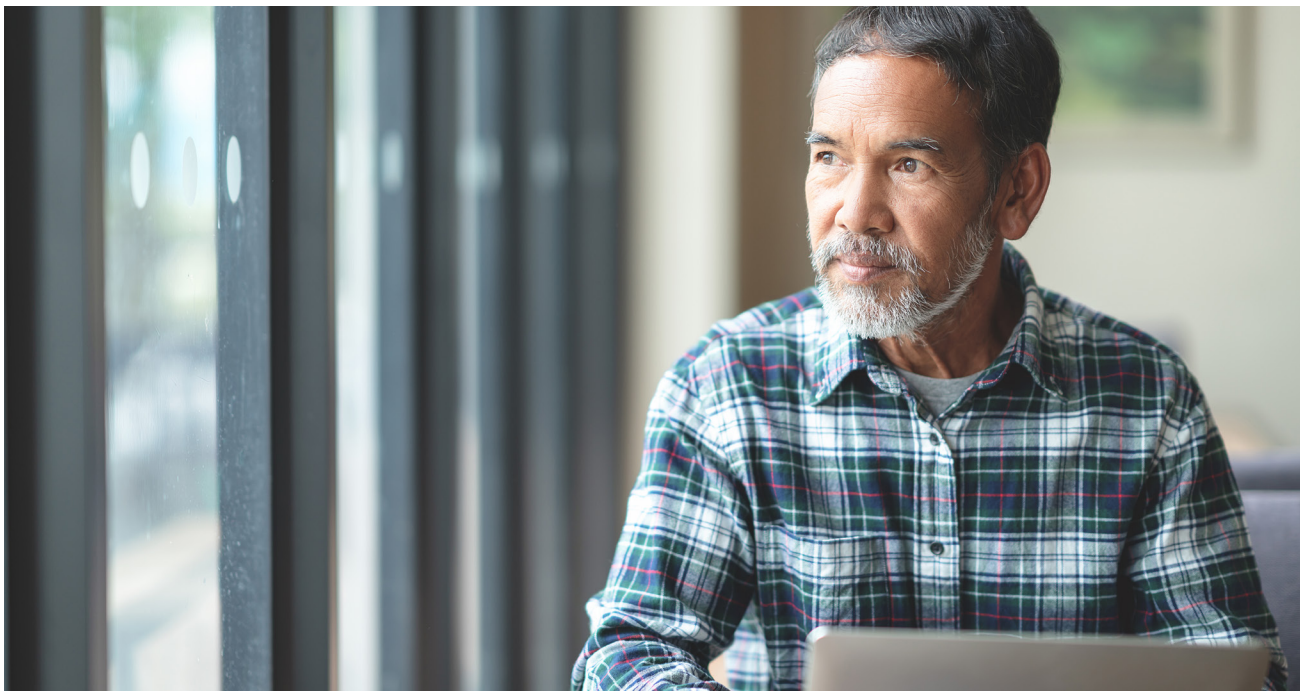
- Services related to the development or implementation of plan design.
- Insurance or insurance product selection.
- Recordkeeping.
- Medical management.
- Benefits administration selection.
- Stop-loss insurance.
- Pharmacy benefit management services.
- Wellness design and management services.
- Transparency tools.
- Group purchasing organization agreements and services.
- Participation in and services from preferred vendor panels.
- Disease management.
- Compliance services.
- Employee assistance programs.
- Third-party administration services.

What must be disclosed?	The disclosure must include the following nine types of information: **1** A description of the services to be provided. **2** If applicable, a statement that the services will be provided directly to the plan as a plan fiduciary. **3** A description of all direct compensation, either in the aggregate or by service. **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 plan, but excluding compensation received by an employee from an employer on account of work performed by the employee. **5** A description of the arrangement between the payer and the service provider pursuant to which the compensation is paid. **6** Identification of the services for which indirect compensation will be received. **7** Identification of the payer of indirect compensation. **8** Information regarding transactional compensation (e.g., commissions, finder's fees or similar incentive compensation based on business placed or retained), who pays the compensation, and who receives the compensation. **9** Compensation expected to be received in connection with termination of the contract.
Timing of disclosures	The required disclosure must be provided by the covered service provider: ■ "Reasonably in advance" of the date of entering into a contract for services with the plan. ■ With respect to any changes, as soon as practicable but no later than 60 days after the change, with a special rule for extraordinary circumstances outside the service provider's control. ■ Upon written request of the plan fiduciary.



How must the disclosure be made?	Service providers have flexibility regarding how to disclose compensation. Compensation may be expressed as a dollar amount, formula or a per capita charge for each enrollee. If the compensation cannot reasonably be expressed in such terms, the DOL has stated that any other reasonable method may be used. A disclosure that additional compensation may be earned but may not be calculated at the time of contract may be used if the disclosure includes: ■ A description of the circumstances under which the additional compensation may be earned; ■ A reasonable and good faith estimate if the covered service provider cannot otherwise readily describe compensation; and ■ An explanation of the methodology and assumptions used to prepare such estimate. Disclosure of compensation in ranges may be reasonable based on the facts and circumstances. While more specific information is preferred, disclosure must be sufficient to allow the plan fiduciary to evaluate the reasonableness of the compensation and the severity of any conflicts of interest.
Enforcement and consequences of nondisclosure	The DOL issued limited guidance on the disclosure requirement and doesn't believe implementing regulations are necessary at this time. Temporary guidance and enforcement policies are included in the December 2021 Field Assistance Bulletin 2021-03, and the DOL has stated that covered service providers can look to the pension plan disclosure regulations finalized in 2012 for guidance. The DOL will assess whether additional guidance should be issued. Under the temporary enforcement policy, covered service providers and plan fiduciaries are expected to implement the requirements using a good faith, reasonable interpretation of the statute.

Consequences of nondisclosure	Failure to properly disclose would mean that the contract does not meet the requirements under ERISA and would be a prohibited transaction. A prohibited transaction has implications both for the broker or consultant and the responsible plan fiduciary. For example, engaging in a prohibited transaction is a violation of fiduciary duty, which can subject the fiduciary to personal liability to the plan for any losses due to the transaction. A service provider that knowingly engages in a prohibited transaction may also be liable under ERISA for equitable relief. A service provider may be subject to civil penalties under ERISA for engaging in a prohibited transaction. **Note:** The CAA provides some limited relief from the consequences of engaging in a prohibited transaction, such as in the following cases: ■ A prohibited transaction does not occur merely because the service provider, acting in good faith and with reasonable diligence, makes an error or omission in the disclosure. The error must be corrected as soon as practicable, but no later than 30 days after the date on which the service provider becomes aware of the error or omission. ■ The plan fiduciary (but not the service provider) is relieved of liability for a prohibited transaction if the fiduciary, upon discovering an error, requests in writing that the service provider furnishes the information. If the service provider fails to comply with the request, the plan fiduciary must notify the DOL and make a determination on whether to retain the covered service provider based on ERISA's fiduciary prudence standards. If the failure relates to future services, then the responsible fiduciary must terminate the contract or arrangement as expeditiously as possible and consistent with those prudent standards.



Action items for plan fiduciaries and service providers

There are a number of actions that plan fiduciaries and service providers need to take to be in compliance. As the provisions have been in effect for some contracts since Dec. 27, 2021, many fiduciaries and service providers will have already taken some of these steps. This list is a reminder of ongoing actions that need to be taken.

Action items for plan fiduciaries and service providers:

- Identify all consultants and brokers with respect to any group health plan.
- Determine whether any service provider receives any direct compensation and the amount of that compensation.
- If known, determine whether the service provider receives any indirect compensation and the amount of that compensation. This information often needs to come from the service provider.
- Make a demand to any covered service provider who has not provided adequate disclosure.
- Establish and document that a responsible fiduciary actually reviews the disclosures and determines that the compensation is reasonable and evaluates the impact of any potential conflicts of interest.

Action items for brokers and consultants:

- Identify all group health plans where brokerage or consulting services are provided.
- Determine all sources of direct and indirect compensation.
- Determine whether direct and indirect compensation meets the $1,000 threshold.
- Design and format (and presumably automate) the disclosures to include the required information for timely delivery.
- Update disclosure if there are any changes or an error is discovered.
- Respond promptly to requests from plan fiduciaries.

Conclusion

The disclosure requirement imposes significant new obligations on group health plan fiduciaries and service providers, and the DOL is expected to audit for compliance with the new rules. Many details remain unclear, but for now the DOL is looking for good faith compliance based on the statute and the other limited guidance available. Fiduciaries and service providers should consult with their own advisors as to what specific actions they need to take and check for any new developments.

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