



Broker Compensation Disclosure Requirements under the CAA, 2021

National Association of Health Underwriters

November 10, 2021

Stacy Barrow

sbarrow@marbarlaw.com

(617) 830-5457

Agenda



Broker Compensation Disclosure Requirements under the CAA, 2021

- Executive Summary / Background
- Effective Date
- Covered Plans
- Covered Services
- Covered Service Providers
- Content of the Disclosure
- Penalties

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 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

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 a “prohibited transaction”
- **Exception**: 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

Background



- The Consolidated Appropriations Act, 2021 (CAA) amended ERISA to provide that no contract or arrangement for services between a “covered plan” and a “covered service provider,” and no extension or renewal of such a contract or arrangement, is reasonable unless certain disclosure requirements are met
 - Prior DOL regulations only required disclosure for qualified retirement plans

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

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)
 - Includes self-insured and fully insured group health plans

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

Covered Service Providers



- 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), 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 the 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

Content of the Disclosure



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
 - 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 the Disclosure



5. 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

Content of the Disclosure



6. 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 described in 1 – 6 will be received

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



Questions?

Stacy Barrow

sbarrow@marbarlaw.com

(617) 830-5457

The information provided in this slide presentation is not, is not intended to be, and shall not be construed to be, either the provision of legal advice or an offer to provide legal services, nor does it necessarily reflect the opinions of the firm, our lawyers or our clients. No client-lawyer relationship between you and the firm is or may be created by your access to or use of this presentation or any information contained on them. Rather, the content is intended as a general overview of the subject matter covered. Marathas Barrow Weatherhead Lent LLP is not obligated to provide updates on the information presented herein. Those viewing this presentation are encouraged to seek direct counsel on legal questions. © Marathas Barrow Weatherhead Lent LLP. All Rights Reserved.