

# Frequently Asked Questions

## Broker Compensation Disclosures

Updated December 7, 2021

### Who must disclose and to whom?

- a. The “covered service provider” (broker, agent or consultant) must disclose to the employer group or client; they are not required to report to the Department of Labor. However, if the broker fails or refuses to disclose, the client could be liable for a DOL penalty unless they report the failure in writing to the DOL within 30 days.
- b. The broker is liable under Section 502(i), which allows the DOL to assess penalties against service providers whose arrangements result in prohibited transactions. Brokers’ E&O policies will not likely cover the financial liability associated with these failures to disclose penalties.

### What plans are subject to the disclosure?

- a. Group health (fully-insured and self-funded), dental, vision plans of all sizes as well as health reimbursement arrangements (HRAs), health flexible spending accounts (health FSAs), most employee assistance programs (EAPs), certain wellness programs, and most other plans providing health benefits (these requirements do not explicitly carve out “excepted benefits” as some other health care reform rules do).
- b. Individual Plans also require compensation disclosures however, the insurance carrier will be responsible for providing this information to the member.

### What must be included in the disclosure?

- a. Any insurance agent, broker, consultant, or other covered service provider subject to the requirements must disclose the following to a responsible plan fiduciary:
  - A description of the services to be provided to the group health plan;
  - A description, either in the aggregate or by service, of all direct compensation (i.e. compensation received from the client directly) the service provider or its affiliates or subcontractors reasonably expect to receive;
  - A description of all indirect compensation (i.e. compensation received from any source other than the client or its plan sponsor) the service provider or its affiliates or subcontractors reasonably expects to receive;
  - The identity of any entity paying indirect compensation and description of the arrangement that exists between that entity and the service provider and the services for which the indirect compensation will be received;

- A description of any compensation that will be paid among the service provider, an affiliate, or a subcontractor in certain instances if the compensation is determined on a transaction basis (e.g. commissions); and
- A description of the manner in which any such compensation will be received.

## **When must disclosures be made? There are various timing requirements.**

- a. Brokers must disclose the required information no later than the date that is reasonably in advance of the date on which the contract or arrangement is entered into, extended, or renewed.
- b. Brokers must disclose compensation changes within 60 days of being informed of the change.
- c. Brokers must correct inadvertent errors and omissions within 30 days of discovery.
- d. Brokers must respond to any written request made by the client within 90 days.
- e. If the broker fails or refuses to disclose, the employer must request disclosure in writing. If the broker fails or refuses to respond to the written request, the client must submit a formal notice to the DOL within 30 days.

## **What does the December 27, 2021 deadline refer to?**

- a. Applies to “contracts or arrangements” with the broker/consultant entered into on or after December 27, 2021. Focus is on the contract or arrangement between broker/consultant and group, and not the plan year.

*For example: Disclosure is not required if a group contracts with a broker/consultant on December 15, 2021, for a fully insured medical policy with an effective date of January 1, 2021. Conversely, disclosure is required if a group contracts with a broker/consultant on December 28, 2021, for January 1, 2021, coverage.*

## **If broker has a formal contract/agreement with the client already in place prior to December 27, 2021, does a disclosure still need to be provided?**

- a. Unknown. There is an argument that evergreen formal contracts/agreements would be grandfathered under the rules, and that those arrangements would not require disclosure, regardless of the renewal date. However, it is unlikely that a new contract (even if prior to December 27, 2021) would be grandfathered.
- b. The safest course of action would be to disclose compensation even if an existing agreement is in place.
- c. A formal contract/agreement with the client would include either a commission agreement, or a contract that includes the commission agreement and standard terms governing the relationship between the group and the broker/consultant.

## Is there a difference between a Broker Contract/Agreement and a Compensation Disclosure?

- a. A Contract is a legally binding arrangement where each party is required by law to provide certain obligations to the other party. A party may enforce the terms of the contract against the other party.
- b. A Disclosure is a notification (written or oral), from one party to another party. On its own, a disclosure is not legally enforceable. However, where a statute or law requires a disclosure (i.e. Broker Transparency), a party may enforce an inadequate disclosure under that statute or law.

## How does expected compensation have to be disclosed?

- a. Descriptions must permit overall compensation reasonableness
- b. Any descriptions of compensation may be expressed as a dollar amount, formula, or a per capita charge per enrollee

## What about compensation that is incalculable at the time the disclosure is made?

- a. Broker should make a good faith estimate and provide any supporting explanations, methodologies, and assumptions.
- b. The below text provides some examples of how compensation that may be incalculable at the time the disclosure is made, such as forms of incentive compensation, might possibly be described.

**Contingent Based Example:** *“We also may be paid additional commissions by the carriers normally calculated at the calendar year end that are contingent on a number of factors including the overall number of employer plans and/or employee participants in plans for which we have placed the insurance, plan retention rates, and premium growth. Historically, these contingent commissions have ranged between 0-3 percent of the premiums we have placed on behalf of the carrier.”*

**Noncash Compensation Example:** *[FIRM] and [FIRM associated persons] may receive compensation from Plan vendors and service providers that is not in connection with any particular customer. This compensation includes such items as gifts valued at less than \$100 annually, an occasional dinner or ticket to a sporting event or other entertainment, or reimbursement in connection with educational meetings, client workshops or events, or marketing or advertising initiatives, including services for identifying prospective clients. Plan vendors and service providers may also pay for, or reimburse [FIRM] for the costs associated with, education or training events that may be attended by [FIRM associated persons] and for [FIRM]-sponsored conferences and events.*

## How does broker estimate compensation at a client level if compensation is based on book of business?

- a. The broker/consultant must make a good faith attempt to accurately disclose the amount of compensation. See the example above in terms of possible language that might capture this type of compensation.

## How is this disclosure different from Form 5500?

- a. This disclosure requirement is separate from annual Form 5500 reporting. It is forward-looking, broad, and addressed to the employer. Form 5500 is retrospective, narrower, filed with the DOL, and a matter of public record. Form 5500 will continue to apply, just like it has for retirement plans in the years since the 2012 regulations.

## Is the \$1,000 of 'direct' and/or 'indirect' compensation based on a specific timeframe?

- a. The calculation includes all forms of compensation (direct, indirect, contingent) that is both monetary and non-monetary (if it exceeds \$250). The applicable timeframe is the period for which a specific policy is in force (i.e. plan year).
- b. If a broker/consultant takes over a client group for a period shorter than the entire policy year, only the compensation reasonably expected by that broker/consultant is counted toward the \$1,000 threshold.
- c. If a broker/consultant splits the compensation with another broker/consultant, each broker/consultant who receives \$1,000 or more of compensation will be required to make a disclosure. Each broker/consultant is responsible for their own compensation disclosures only.

## Do you have to make a disclosure every year?

- a. Yes. Unless otherwise grandfathered, a broker/consultant must update their disclosures upon each renewal. This is true even where the client group retains the same carrier, or even the same plan.
- b. Mid-term changes (BOR) – Disclosure should be in place before group would authorize BOR change.

## Is there a template that brokers can use for the disclosures?

- a. NAHU, in partnership with Marathas Barrow Weatherhead Lent LLP, has developed a CAA Broker Compensation Disclosure Form that may be of use to help brokers structure the disclosure content. Visit the Amwins Connect website for your copy.

## What happens if broker doesn't provide the disclosure?

- a. Technically, the responsibility to review is on the part of the employer group. However, failure to comply with these requirements can bring derivative liability, and a group could complain to the DOL regarding broker's lack of compliance.