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# A Field Guide to the Compensation Disclosure Requirements Under Section 202 of the Consolidated Appropriations Act

## HIGHLIGHTS

1. Covered service providers must disclose, in writing, any and all direct and indirect compensation in excess of $1,000.00 they receive for providing services to the plan.
2. Covered service providers include brokers and consultants which provide services ranging from third party administration, pharmacy benefits management, plan design, to recordkeeping services.
3. Responsible plan fiduciaries must review Section 202 disclosures for reasonableness.
4. Section 202 disclosures are applicable to all contracts, renewals, and/or extensions with covered service providers entered into on or after December 27, 2021.

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### Introduction

If you sponsor a group health plan, do you know how your broker will be compensated if you follow their recommendation for a new program for your members? If you are a consultant for a group health plan, do you know what information about your compensation you must disclose to your client? Although these types of disclosures are commonplace for pension and retirement plans, these questions were largely unanswerable in the healthcare benefits industry until this year.

The Consolidated Appropriations Act, 2021 (CAA), enacted by Congress in December 2020, defines a compendium of transparency, disclosure, and reporting requirements that group health plans and plan sponsors must navigate to fulfill their fiduciary responsibilities to plan beneficiaries. Prior to the enactment of the CAA, group health plans were often limited by healthcare industry practices preventing the disclosure of claims and pricing data necessary to effectively design and administer health plans. Congress's enactment of the CAA seeks to improve the market by placing the onus on group health plans and plan sponsors to avoid contracting with entities and health benefits issuers whose business practices prevent plan sponsors from making prudent decisions in the administration of health plans.

This Field Guide addresses one area of these new transparency requirements. Section 202 of the CAA,[1] applicable to group health plans governed under the Employee Retirement Income Security Act of 1974, as amended, (ERISA), prohibits covered plans[2] from entering into a contract, renewal, or extension of services for the plan with "covered service providers" without first requiring the covered service provider to disclose, in writing, any and all direct and indirect compensation in excess of $1,000.00 they receive for providing services to the plan. Section 202's disclosure requirements apply to all contracts, renewals, or extensions provided by a covered service provider on or after December 27, 2021. A covered plan's failure to obtain the

1 It should be noted that Section 202 of DIVISION BB—PRIVATE HEALTH INSURANCE AND PUBLIC HEALTH PROVISIONS is also applicable to health issuers of individual market plans; however, this Field Guide only addresses Section 202's applicability to ERISA plans.
2 A covered plan means a group health plan as defined under section 733(a) of ERISA.

required disclosures from a covered service provider under Section 202 is considered a prohibited transaction under ERISA and the Department of Labor can assess fees in accordance therewith. The following is a brief overview of the applicability and required disclosures of Section 202.

**Who Is a "Covered Service Provider"?**

A "covered service provider" is defined by the CAA as a service provider (including affiliates and subcontractors of the service provider) who reasonably expects to receive $1,000.00 or more in direct or indirect compensation[3] to provide brokerage or consulting services to a covered plan. The CAA defines direct compensation as payment for services received directly by the covered plan. Indirect compensation is any compensation received from any source other than the plan, the plan sponsor, the covered service provider, or an affiliate of the covered service provider. Examples of indirect compensation include, but are not limited to, commissions, finder's fees, and incentive payments, received by a covered service provider by an entity other than the plan, plan sponsor, or an affiliate of the covered service provider. Indirect compensation from a subcontractor of a covered service provider must be disclosed unless it is received in connection with services performed under a contract or arrangement with the subcontractor.

The CAA defines brokerage and consulting services ***broadly*** to include the following:

- Selection of insurance products (including dental and vision);
- Development or implementation of plan design;
- Recordkeeping services;
- Medical management vendors;
- Benefits administration (including dental and vision);
- Stop-loss insurance;
- Pharmacy benefit management services;
- 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; and/or
- Third-party administration services.

**What Must Be Disclosed and to Whom?**

Covered service providers must disclose, in writing, the following, to a responsible plan fiduciary[4] in reasonable advance of the date the contract or agreement is expected to be executed, extended, or renewed:

- A description of the services to be provided;
- A statement that the covered service provider, an affiliate, or a subcontractor will provide the services pursuant to the contract or arrangement directly as a fiduciary under Section 3(2) of ERISA, if applicable;
- A description of all direct compensation either in the aggregate or by service;
- A description of all indirect compensation that the covered service provider, an affiliate, or a subcontractor expects to receive in connection with the services, including compensation from a vendor to a brokerage firm based on a structure of incentives not solely related to the contract with the covered entity;[5]
- A description of the arrangement between the payer and the covered service provider, an affiliate, or a subcontractor, as applicable, pursuant to which the indirect compensation is paid;
- Identification of the services for which indirect compensation is received;
- Identification of the payer of the indirect compensation;

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3 Compensation includes in-kind consideration valued over $250.00.
4 Section 202 defines a "responsible plan fiduciary" as a fiduciary with authority to cause the covered plan to enter into, extend, or renew, the contract or arrangement.
5 This does not include salary, bonuses, commission, etc. received by an employee from an employer for work performed by an employee.

- A description of any compensation paid among the covered service provider, an affiliate, or a subcontractor if such compensation is set on a transaction basis, i.e. commissions; and
- A description of any compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with termination of a contract or arrangement including calculation of refunds for prepaid amounts.

**Repercussions for Failing to Provide Section 202 Disclosures**

Generally, ERISA prohibits plans from entering into transactions with parties-in-interest, which include service providers such as brokers and consultants. An exception to this general rule is that a plan may enter into contracts for various services as long as those contracts are reasonable. The disclosures listed above, specifically the disclosures regarding indirect compensation, are designed to aid responsible plan fiduciaries in determining the reasonableness of the agreements with consultants and brokers.

Covered service providers must notify the responsible plan fiduciary in writing of any changes in the disclosures no later than 60 days from the date the covered service provider is informed of the change. Additionally, while covered service providers are required to provide responsible plan fiduciaries with the disclosures on their own accord, the CAA also empowers plan fiduciaries to request Section 202 disclosures from covered service providers. The failure of a covered service provider to make the required disclosures within 90 days of a written request obligates the plan fiduciary to notify the Department of Labor within 30 days of the covered service provider's failure to respond. Additionally, a responsible plan fiduciary should avoid contracting with brokers or consultants who fail to provide Section 202 disclosures as to do so may subject the plan to penalties.

If you have any questions about Section 202 disclosures or CAA compliance generally, please contact Jenn Malik at 412.525.6755 or jmalik@babstcalland.com or Robert Max Junker at 412.773.8722 or rjunker@babstcalland.com.

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