

**Health Insurance Compensation Disclosures for Agents, Brokers
and Other Service Providers to ERISA-Covered Health Plans:
FAQ and Sample Disclosure Form**

Updated January 2022

Applies to New or Renewed Contracts or Arrangements

**IMPORTANT DISCLAIMER: THIS INFORMATION MUST
BE READ BEFORE REVIEWING THE FAQ & SAMPLE.**

This FAQ and sample compensation disclosure form (“Sample”) has been prepared with outside counsel at Faegre Drinker Biddle & Reath LLP for IIABA member agencies for general information purposes only. The FAQ and Sample may be helpful to agents and brokers subject to the disclosure requirements for compensation relating to ERISA-covered group health plans that took effect on December 27, 2021. This Sample, by its nature, is not exhaustive and cannot address every type of compensation that may require disclosure. **The broad statutory requirements reflected in the FAQ and Sample may be materially affected by further guidance subsequently issued by the U.S. Department of Labor, and these materials may not yet be updated to reflect these changes.**

By providing this Sample to member agencies, neither IIABA nor its outside counsel intend to provide, and are not providing, a legal opinion or legal advice, and it should not be acted upon or relied upon as such. The states where members conduct business and the carriers with which members transact business may have legal, regulatory, contractual, or other requirements that provide for additional or different disclosures. Moreover, this Sample includes only general information and comments, and is not intended to provide specific advice about individual legal, financial, or other questions. If specific legal or other expert advice is required or desired, the services of an appropriate, competent professional, such as an attorney, should be sought.

The bottom line of the new disclosure requirement is relatively straightforward—agents and brokers must provide a written description of their compensation and services to ERISA-covered health plans before they are hired. It is based on a similar requirement for service providers to ERISA-covered retirement plans that has been in effect since 2012. Extended to health plans by Congress, the rationale is that plan fiduciaries need to understand your total compensation to ensure the arrangement and its costs are “reasonable.” An arrangement is not “reasonable” and becomes a “prohibited transaction” under ERISA if the agent or broker fails to comply with the disclosure requirements. Although the law provides flexibility in how compensation can be described and the manner in which compliance is achieved, the challenge is that the disclosure requirement includes new legal jargon and can be complex for certain compensation arrangements.

Federal law requires that health insurance agents, brokers, and consultants entering into, or renewing, a contract or arrangement to provide brokerage or consulting services to an ERISA-covered group health plan must make certain disclosures reasonably in advance of entering into or renewing the contract. Specifically, the agent or broker must disclose the services to be provided and the “direct” and “indirect” compensation they will receive in connection with the arrangement.

Below are some frequently asked questions regarding the requirements that may help you understand their practical impact. We also created a sample form that illustrates how you might summarize some of this information.

- **Does this Apply to Us?** It likely does if you are signing, extending, or renewing a contract or arrangement to provide brokerage or consulting services to an ERISA-covered group health plan of any size (including dental, vision, and “excepted benefit” plans) and you expect to receive at least \$1,000 in total compensation.
- **What Do We Disclose?** You have to disclose the services you are going to provide and the direct and indirect compensation that you reasonably expect to receive. If you will be acting in a capacity as an ERISA fiduciary when providing any services, you must identify those specifically and state that you are a fiduciary.
- **What is Direct and Indirect Compensation?** Direct compensation is money paid to you by the plan itself. Indirect compensation is money paid to you or things of monetary value provided to you by someone other than the plan or the plan sponsor in connection with the contract or arrangement. Indirect compensation typically includes commissions paid by carriers, incentive payments, finder’s fees, etc.
- **How Do We Disclose Compensation?** Compensation can be disclosed as an amount, formula, or a per capita charge. When describing your indirect compensation, you must also disclose who is paying the compensation to you, for which services, and how much it is. The Department of Labor (DOL) states that a significant goal of the new law is to enhance fee transparency “especially” for indirect compensation. This will likely be the primary focus of their enforcement efforts.
- **How Do We Disclose Compensation Amounts That Cannot Be Known in Advance?** If the compensation cannot be expressed as an amount, formula, or per capita charge, or is not yet known because it depends on future events or other factors, you can use any reasonable method to describe and estimate the compensation. In such instances, DOL states that disclosure of compensation in projected ranges is permissible if the range provided is reasonable under the circumstances. You should explain the method you use to describe your compensation and any assumptions used, and you should also use more specific, rather than less specific, information when possible.
- **What Does “Reasonably in Advance” Mean?** There is no specified minimum time period, but the statute suggests the information has to have been provided before the plan signs the contract or agreement. In instances in which a “broker of record” agreement is used, DOL has indicated that the contract or arrangement generally will be considered entered into at the earlier of (1) the date the “broker of record” agreement is submitted to the carrier or (2) the date on which the group application for coverage for the following plan year is signed.
- **Is there a Required Form or Format?** No. DOL has not developed a mandatory or model form, and has instead adopted a temporary enforcement policy that focuses on whether agents and brokers are attempting to comply with the law reasonably and in good faith. Parts of the required information can be provided in different documents, as long as it is in writing. For example, your service agreement or contract likely provides much of the required information about services, and disclosure forms required by some States may also serve to meet some of the new federal requirements. Nevertheless, some agents and brokers may find that compiling

a summary document helps the client review the material and helps document compliance. We have attached a sample of such a summary document below.

- **Do I Need a Client Signature for the Disclosure?** No, the law does not require a client signature acknowledging receipt of the disclosure. Nevertheless, some agents and brokers may find that having the client sign such an acknowledgment helps document compliance and may wish to include language to that effect (e.g., that “The responsible Plan fiduciary acknowledges it has timely received and reviewed the disclosures required by ERISA Sec. 408(b)(2).”).
- **What if We Make a Mistake or Things Change?** If you make a good faith error, you have 30 days to correct from when you know about the error. If the information changes, you have 60 days to inform the plan.
- **What Else Has DOL Said About Compliance Measures?** DOL issued [guidance](#) shortly after the ERISA disclosure requirements took effect outlining the manner in which it will interpret and apply the new law. The Department indicated that agents and brokers have “considerable flexibility” in how they describe and disclose their compensation and will be considered to be in compliance if they take “good faith” and “reasonable” actions to satisfy the requirements.

There is more complexity to these disclosures than we can cover in this FAQ and Sample, such as specific issues relating to transaction-based compensation among affiliates and subcontractors. While this summary can help you get started, it cannot answer all your questions or substitute for professional compliance assistance.

[Please see the next pages for the sample form and a hypothetical example based on it.]

[AGENCY LETTERHEAD]

Compensation Disclosure Form

[Agency/Broker Name] is very pleased to have the opportunity to work with you to provide brokerage [and/or consulting] services in connection with your group health benefit plan (“you” or the “Plan”). We are required by law to provide you with certain disclosures about our services and compensation, and this form and other information or documents you may receive from us are provided for that purpose.

Services to be Provided:

[Option 1—Reference Contract] The services we will provide are identified in our service agreement or contract.

[Option 2—List Services Below] We will provide the following services to the Plan:

[INSERT LIST OF SERVICES TO BE PROVIDED (e.g. health insurance plan selection and related brokerage and consulting services).]

[REQUIRED IF APPLICABLE] [We are a fiduciary within the meaning of ERISA Sec. 3(21) with respect to the following services: INSERT LIST OF SERVICES TO BE PROVIDED AS A FIDUCIARY (IF ANY).]

Direct Compensation (Compensation We Receive From You):

We anticipate receiving the following compensation directly from the Plan:

[Provide amount, formula, or per capita charge. If not possible, estimate with explanation of reasonable method and assumptions.]

Examples:

We will receive \$X per year from the Plan.

or

We will receive \$X per participant per month from the Plan.]

Indirect Compensation (Compensation We Receive From Insurance Companies and Others):

We anticipate receiving the following compensation from sources other than the Plan or Plan Sponsor:

Source:	Services:	Description of Arrangement:	Description of Compensation:
Example: ABC Insurance Company	Insurance brokerage	We are an agent authorized to sell the insurer’s policies. They pay us a commission.	Examples: We receive a commission of ___% of premium. It is included in the premium that you pay. <i>Or</i>

			<i>[Describe the manner in which the insurer compensates you on a per contract or per participant per month basis.]</i>
--	--	--	---

Other/Additional Indirect Compensation

We may also receive additional compensation from the sources listed above that cannot be calculated at this time and that is contingent on future factors that may or may not be directly related to the Plan. For example, compensation from a listed source may increase based on our overall business relationship with that source, taking into account factors including, but not limited to, the overall profitability, volume, growth, and retention of all business between us and the source. We may also receive non-monetary compensation or benefits with a value that cannot be estimated in advance, such as training and educational resources, business and marketing support, or sponsorships.

These additional indirect compensation amounts are typically a small percentage of our overall compensation. Based on our past experience, we estimate that the portion of such compensation related to the Plan could range from **[INSERT PERCENT OF PREMIUM RANGE OR DOLLAR AMOUNT RANGE]**.

If you have any questions relating to the compensation we receive or this disclosure, please contact **[INSERT APPROPRIATE CONTACT NAME]** at **[EMAIL/PHONE]**.



**IMPORTANT DISCLAIMER: THIS INFORMATION MUST
BE READ BEFORE REVIEWING THE EXAMPLE BELOW.**

The hypothetical example of a completed disclosure notice found below is premised on the guidance provided in the FAQ and Sample above and is likewise provided for general information purposes only. This example is not intended to provide legal advice or to represent what constitutes compliance with the ERISA disclosure requirements. Individual IIABA member agencies should not rely on this example and should instead ensure that their ERISA disclosure notices accurately reflect and describe their own circumstances and business practices as required by federal law.

It should be noted that this example might describe a narrow and particular hypothetical situation in which an agency is providing health insurance plan selection and providing related brokerage and consulting services, is not providing any of those services in a fiduciary capacity, and is compensated only by the insurer (not the plan) in the form of commissions and potentially other forms of compensation. Of course, the blank and bracketed areas would include the appropriate information in a completed form.

**HYPOTHETICAL EXAMPLE
OF COMPLETED COMPENSATION DISCLOSURE FORM**

The XYZ Agency is very pleased to have the opportunity to work with you, and we appreciate your business. We will be assisting you and your employees with health insurance plan selection and providing related brokerage and consulting services, and we look forward to doing so.

We are required by law to provide you with certain disclosures about our services and compensation. For the services we will be providing to you, we will be compensated by the ABC Insurance Company. Specifically, we will receive a commission of ___%, which is included in the premium that you pay.

We may also receive additional compensation from the ABC Insurance Company that cannot be calculated at this time and that is contingent on factors that may or may not be directly related to our work with you. The compensation we receive may increase based on our overall business relationship with the ABC Insurance Company, taking into account factors including, but not limited to, the overall profitability, volume, growth, and retention of our business with ABC Insurance Company. We may also receive non-monetary compensation or benefits with a value that cannot be estimated in advance, such as training and educational resources, business and marketing support, or sponsorships. This additional compensation is typically a small percentage of the overall amount we receive, and based on our past experience, we estimate that the portion of such compensation related to your plan could range from ___ - ___% of the premium paid.

If you have any questions related to the compensation we receive or this disclosure, please contact [CONTACT NAME] at [EMAIL] or [PHONE].