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DELIVERING **VALUE** SERIES

## Consolidated Appropriations Act Compliance Broker/Consultant Compensation Disclosure Rules

*Employer Session - September 21, 2022*



# Welcome

## Jeffrey Kluever

Executive Director

Business Health Care Group

# Today's Presenters

## **James Gelfand**

*President, The ERISA Industry Committee (ERIC)*

## **Darren Fogarty**

*Executive Director, Committee for Fee-Only Benefits Advisors*



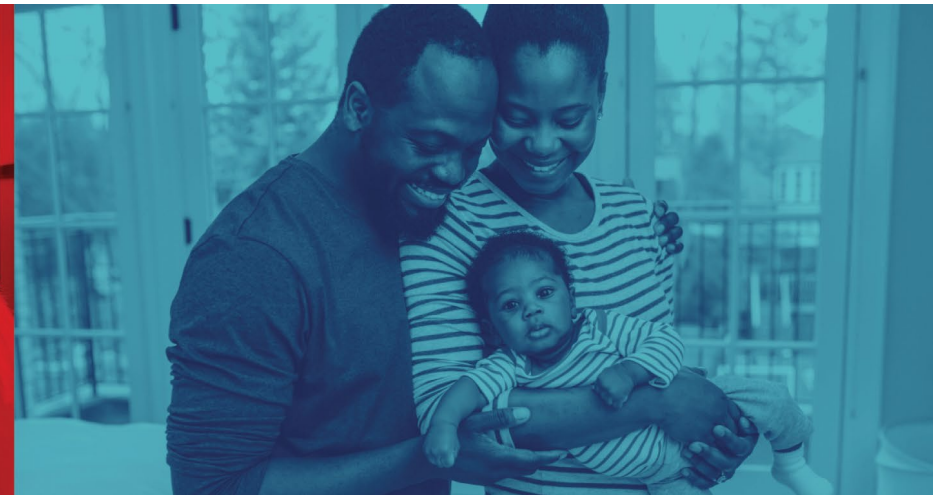
*Shaping benefit policies  
before they shape you.*

September 21, 2022



***BHCG Symposium: Consolidated Appropriations  
Act Compliance  
Broker/Consultant Compensation Disclosure Rules***

*James Gelfand, President, ERIC*



# Introduction to The ERISA Industry Committee

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ERIC is the only national association advocating exclusively for large employer plan sponsors that provide health, retirement, paid leave, and other benefits to their nationwide workforces. With member companies that are leaders in every economic sector, ERIC advocates on the federal, state, and local levels for policies that promote flexibility and uniformity in administering their employee benefit plans against a patchwork of conflicting and burdensome rules.

You are likely to engage with ERIC member companies when you:

- Drive a car or fill it with gas
- Dine out or at home
- Use a cellphone
- Use a computer
- Visit a bank or hotel
- Fly on an airplane
- Watch T.V.
- Benefit from our national defense
- Receive or send a package
- Go shopping
- Use cosmetics
- Enjoy a beverage



# Introduction to The ERISA Industry Committee

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## EXPERTISE

Our policy staff has deep knowledge of health, retirement, and compensation policies. We leverage this expertise into action on the federal, state, and local levels to protect your interests.



## VOICE

ERIC is your voice on Capitol Hill for the issues you care about. We put our name and reputation on the line to represent large employers.



## MEMBER DRIVEN

Being an ERIC member helps you engage with peer companies, set priorities, and shape policy together. We listen to you before acting—and act when you ask.



## LARGE-EMPLOYER FOCUS

Our members are dynamic, visionary large employers who provide comprehensive benefits to employees across the country.



## COMMUNITY OF PEERS

You can share information, benchmark, and build relationships in a trusted network of those who share your interests.



## ADVOCACY BEYOND INFORMATION


ERIC shapes policy before it shapes you. Our legislative experts work side-by-side with members to identify employer needs and deliver policy wins.



# Agenda

- CAA and its Enactment
- Fiduciary Obligations
- Sufficient Information
- Employer Liability
- Re-evaluating Contracts
- Conclusion



A photograph of a male doctor with a stethoscope around his neck and a female patient. They are both smiling and looking down at a clipboard held by the patient. The image has a blue tint and a thin white border.

# *CONSOLIDATED APPROPRIATIONS ACT*



## ORIGIN

- [Insurance Brokers Get Paid More To Sell More, Fueling High Health Care Costs : Shots - Health News : NPR](#)
- *“Health Net of California's pitch is not subtle: A smiling woman in a business suit rides a giant \$100 bill like it's a surfboard. "Sell more, enroll more, get paid more!" In some cases, its ad says, a broker can "power up" the bonus to \$150,000 per employer group”*



## ORIGIN (CONT.)

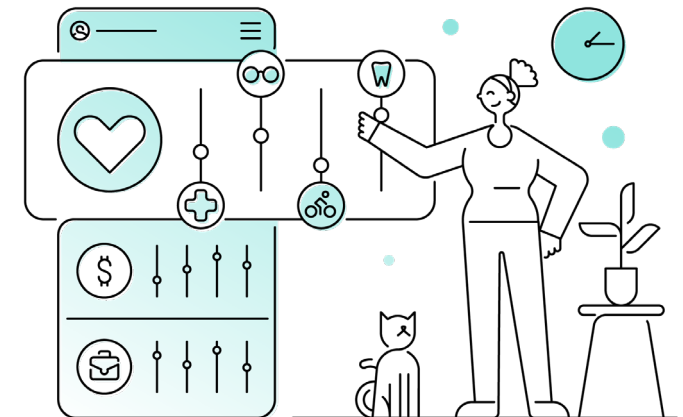
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- Congress drafted the Lower Health Care Costs Act to address a series of abuses they saw in the health care system – not just the brokers and consultants, but also employer ownership of data, state APCD demands, PBM opacity, abusive hospital contracts, surprise medical billing, etc.
- Some of these provisions were included in the Consolidated Appropriations Act



## WHY WAS CAA ENACTED?

- Transparency!
- Improve the health care market for health plans and plan sponsors
- Better fulfill fiduciary responsibilities



## WHAT CHANGED?

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- CAA included new requirements for disclosure of compensation by brokers and consultants

### Brokers

This includes for services such as:

- Medical insurance
- Vision
- Dental
- Plan management
- Health specialty vendor administrative support and recordkeeping
- Stop-loss insurance
- Pharmacy & PBM
- Wellness, EAPs, etc

### Consultants

This includes help developing, implementing, or assessing:

- Plan design
- Insurance or insurance selection
- Plan management
- Specialty vendors
- GPOs
- Stop-loss
- Pharmacy + PBM
- Wellness, disease management, medical management, etc.

## WHAT CHANGED? (CONT.)

- Remember, this includes your TPAs, vendors helping with compliance assistance, any transparency or data vendors, and anyone helping with plan design or strategy. And remember that an HRA and FSA are considered group health plans
- Exception: Only applies if the covered entity expects \$1,000 or more in direct/indirect compensation in connection with the plan. And the new rule does not apply to life insurance, disability insurance, etc.
- Clarification: If services are subcontracted, the duty is on the contracted entity
- This aligns health plan vendor requirements, with those already applied generally to retirement plan vendors

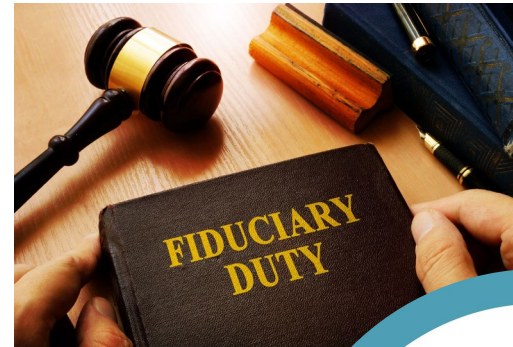




## WHAT MUST BE DISCLOSED?

### Description of the Services

Clarify when the entity will serve as a fiduciary



**SERVICE  
DESCRIPTIONS**





## WHAT MUST BE DISCLOSED? (CONT.)

### Indirect Compensation

Describe arrangements with affiliates or subcontractors, identify what might give rise to indirect compensation and how it will be calculated – including who will pay it, and any other arrangement between the covered entity and the entity paying the indirect compensation

This includes transaction-based compensation like commissions or “finder’s fees”, retention fees, sales bonuses, or fees associated with overrides

## WHAT MUST BE DISCLOSED?

### Direct Compensation

Commission, fees, etc.,  
including “per claim” or “per  
visit” fees



## WHAT MUST BE DISCLOSED?

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### Any “Termination Compensation”

What will have to be paid to the covered entity if the contract is terminated, including how any amount paid in advance will be charged and refunded



## WHAT MUST BE DISCLOSED? (CONT.)

### Conditional Compensation

- What would trigger this compensation and how would it be calculated?
- Note that some types of compensation might be hard to quantify, in which case the vendor should provide a range and/or formula (example: “persistency bonuses”)

### The manner in which compensation will be collected or received

Remember –  
this includes non-cash compensation  
such as meals,  
entertainment, gifts,  
or reward trips!





## WHEN ARE DISCLOSURES REQUIRED?

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- For any contract that is executed on or after December 27, 2021
- Covered entities are required to make this information available “reasonably in advance” of a contract being entered, extended, or renewed
- Any changes in the disclosures need to be conveyed as soon as practicable (generally within 60 days)

## WHAT MUST A GROUP HEALTH PLAN DO?

***YOU are the fiduciary,  
so  
YOU are responsible  
for ensuring that these  
disclosures happen,***



***and then for evaluating  
them and considering  
potential alternatives***

## WHAT MUST A GROUP HEALTH PLAN DO? (CONT.)

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- To enforce the provision, contracts entered into without adequate disclosure will be deemed prohibited transactions
- There are limited exceptions



## WHAT MUST A GROUP HEALTH PLAN DO? (CONT.)

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Exceptions that will not be deemed prohibited transactions:

- If the information shared with plan sponsor was in error, and the covered entity was acting in good faith, and if they send a correction to plan sponsor within 30 days of discovering the error or omission

## WHAT MUST A GROUP HEALTH PLAN DO? (CONT.)

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Exceptions that will not be deemed prohibited transactions:

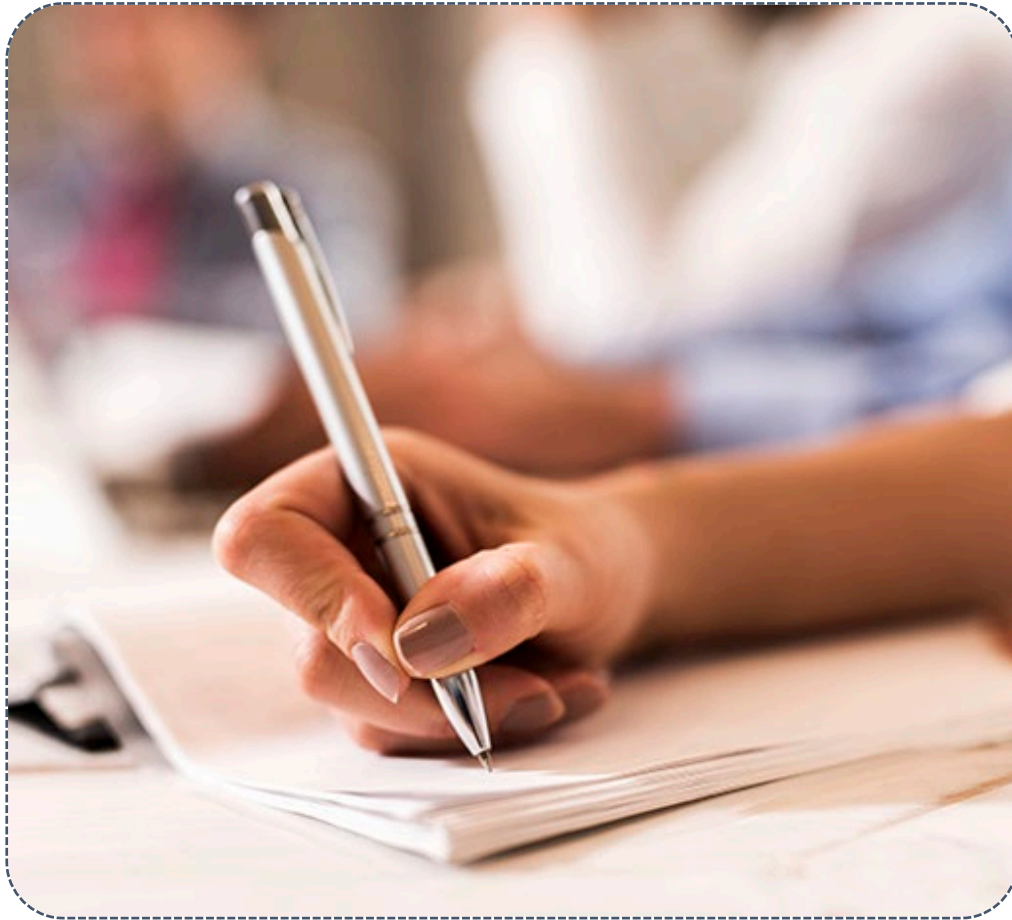
- If the plan sponsor did not know that the covered service provider would fail to make the disclosures, and **reasonably believed** that the required information was disclosed





## WHAT MUST A GROUP HEALTH PLAN DO? (CONT.)

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Exceptions that will not be deemed prohibited transactions:

- If the plan sponsor, when the failure to disclose was discovered, **requests in writing** that the covered entity furnish the required information

## WHAT MUST A GROUP HEALTH PLAN DO? (CONT.)

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Exceptions that will not be deemed prohibited transactions:

- If the covered entity fails to comply with a written request, and within 90 days, the plan sponsor notifies the Secretary of Labor of this failure



## WHAT MUST A GROUP HEALTH PLAN DO? (CONT.)

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- Consequences for a prohibited transaction
  - The plan's fiduciaries are held responsible, and will be on the hook for a 20 percent penalty (applied to whatever amount is eventually recovered associated with the prohibited transaction)
  - The covered entity can also be charged with ERISA civil enforcement provisions, and the Secretary of Labor can also seek to impose civil monetary penalties against them

## CONCLUSION

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Plan sponsors need to have a process in place, so they can later justify that they sought to ensure compliance, as responsible fiduciaries



Further, plan sponsors need to carefully consider the disclosures. Ask tough questions about the disclosed relationships and indirect compensation. Some interactions might be in the best interest of the vendors, but are they in the best interest of the plan beneficiaries?



Include this in all RFIs and contracts!

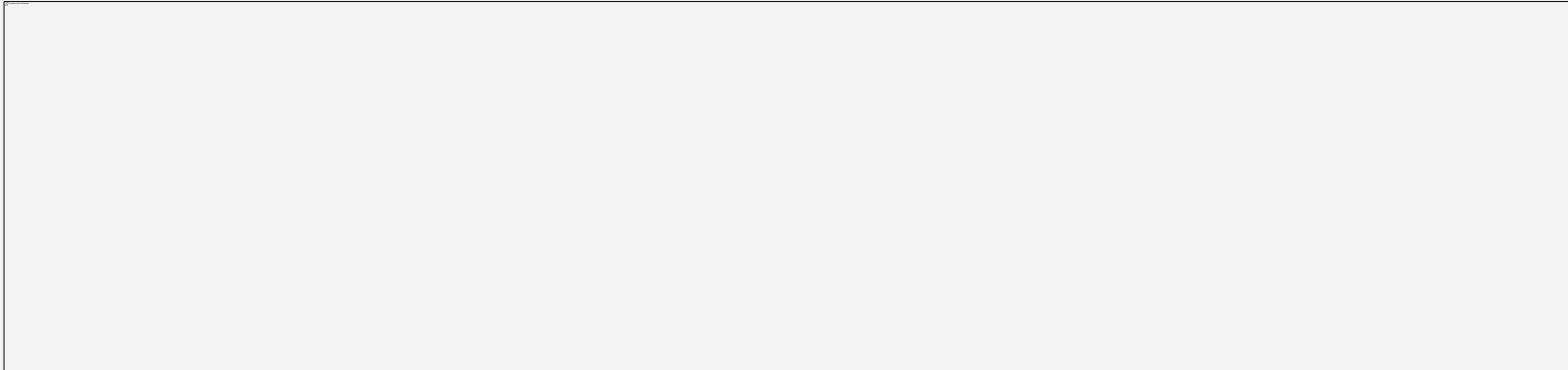


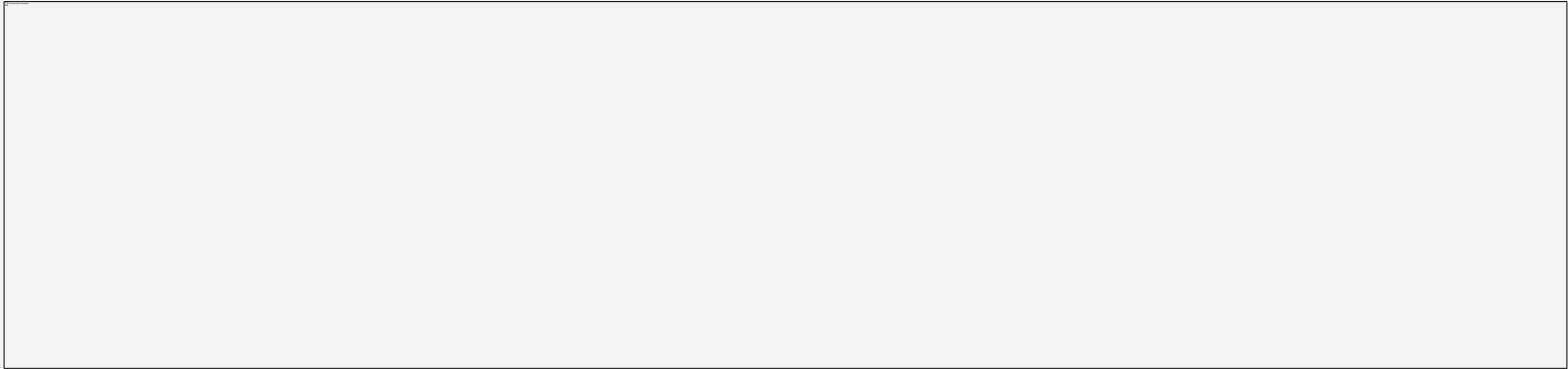
*Questions?*



For the latest on  
employee benefits  
legislation & regulations  
visit  
***ERIC.org***

James Gelfand  
President  
[jgelfand@eric.org](mailto:jgelfand@eric.org)





# CAA Compliance

## Broker/Consultant Compensation

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Wednesday, September 21<sup>st</sup>, 2022 | BHCG Symposium  
Darren Fogarty | Executive Director

# Agenda

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- Setting the Stage
- What Employers Should Demand in a Benefits Professional
- What Employers Should Expect in a Disclosure
- Follow-up Questions a Prudent Employer Should Ask
- Q/A

# Setting the Stage

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- Upfront disclosure
- 7 years at a non-profit DC thinktank analyzing & advocating fiduciary issues in financial services
- 4 years at fee-based & fee-**only** employee benefits consulting firms
- Culminated in founding a Committee advocating the importance of direct fee compensation and transparency in the broker/consultant relationship



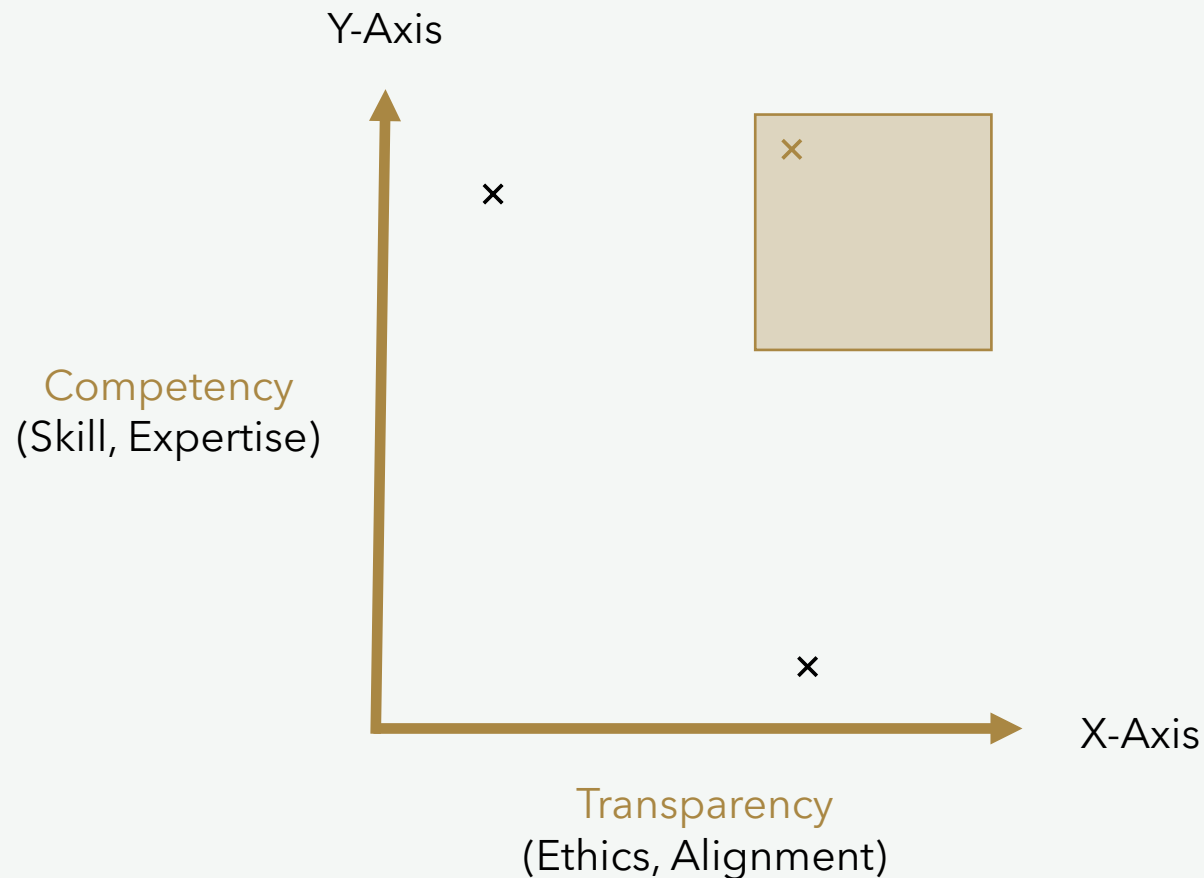


# What Employers Should Demand in a Benefits Professional

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- Compensation disclosure is the bar that must now be met, but it should be understood as the **minimum threshold** for compliance.
- The CAA presents a **unique opportunity** for plan sponsors to scrutinize broker/consultant business practices for transparency in other ways, too.
- Doing so not only demonstrates **prudence and process**, thereby inoculating one's company against future DOL audits; it is also consistent with the spirit of ERISA's new CAA amendments.

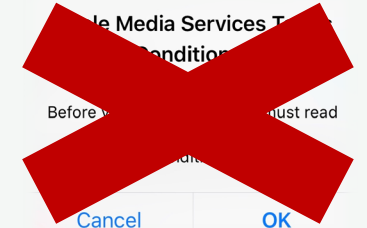
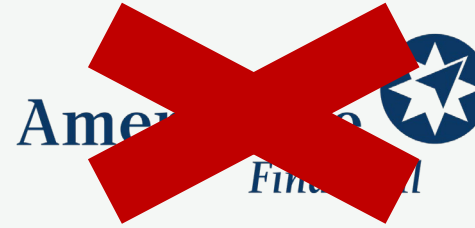
# What Employers Should Demand in a Benefits Professional



- Transparency, by itself, is no guarantee a broker/consultant will be adept at helping you ensure reasonable health plan expenses from other vendors.
- Plan sponsors need someone who is skilled *and* ethical. The "Gold Box" is not too much to ask for – or to aim at.
- **Who are you currently working with?**

# What Employers Should Expect in a Disclosure

- Should be brief. **2-3 pages max.**
- Should not contain vague legalese or **noncommittal language.**
- Should state the compensation clearly. Ideally, in **dollars and cents.\***
- Is an opportunity to **"press pause"** and discuss the business relationship.



\* Even though brokers/consultants are not required to by law, per the Department of Labor's December 30, 2021 [Field Assistance Bulletin](#), No. 2021-03. See Q5 on page 5.

# Follow-up Questions a Prudent Employer Should Ask

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Here are open-ended questions to ascertain broker/consultant competency & transparency:

1. How do you assist me in meeting my **fiduciary obligation** to my health plan members to pay only fair and reasonable expenses – to you, to our insurance carrier, and to all our third-party vendors?
2. Are you and your firm financially **rewarded or penalized** when our company's health plan's net expenses decrease? Why is that?
3. What specific experience does your firm have in **reducing** (not just “managing”) healthcare costs while expanding or improving benefit offerings.
4. How do you ensure that you – and all our third-party vendors – **fully and meaningfully** disclose compensation to my company, so that I may comply with the Consolidated Appropriations Act?
5. What does “**transparency**” in this business relationship look like to you?
6. Can you give me a past example where you or your firm recognized and **mitigated/eliminated** a client conflict of interest?

# Let's Open the Discussion Up

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CAA has cracked wide open the discussion on broker/consultant compensation.

Employers – especially self-funded ones – have the **responsibility** & **opportunity** to re-evaluate how their service providers are bringing them value, and at what cost.

This is consistent with the greater **healthcare price transparency** movement.

We can't let this opportunity go to waste. Let's get these **conversations** started.



Questions?

# Thank You

**For more information about BHCG programs  
and membership, please contact:**

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[jkluever@bhcgwi.org](mailto:jkluever@bhcgwi.org)**