

IIASD/NAIFA-SD  
ERISA Compensation Disclosure Guidance

In the interest of encouraging compliance with Federal Department of Labor requirements, IIASD and NAIFA-SD are providing guidance to members to the best of our understanding of these requirements. We recommend members consult their own experts to ensure compliance.

- **To whom does this apply?** 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, these requirements apply.

- **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. Compensation provided from an agency to an agent would likely not be considered part of these calculations.

- **How Do We Disclose Compensation?** Compensation can be disclosed as an amount, formula (percentage), 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.

Below is a recommended example form:

(Agency Letterhead)

### Compensation Disclosure Form

[Agency/Broker Name] “the company” 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”) for the term of \_\_\_\_\_, 2022 through \_\_\_\_\_, 2022.

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).]

The company (does not provide)/(provides) the above-referenced services to “you”/”Plan” in the capacity of a plan fiduciary.

The company reasonably expects to receive direct and/or indirect compensation for the placement of the below lines of coverage in the form of either a per employee per month (“PEPM”) fee or a commission paid by the carrier/vendor in the amount indicated below:

Coverage	Carrier/Vendor	Compensation
_____ <b>Health</b>	_____	Direct _____ Indirect _____
_____ <b>Dental</b>	_____	Direct _____ Indirect _____
_____ <b>Vision</b>	_____	Direct _____ Indirect _____
_____ <b>Other</b>	_____	Direct _____ Indirect _____

#### Other Compensation

The Company may earn additional compensation from any of the above referenced insurers, vendors, or other third parties that cannot be calculated as of the time this disclosure is made to you, or prior to the date the Company’s executed, extended, or renewed contract with you is effective. For example, the Company may receive additional compensation contingent upon certain conditions being met, including, but not limited to, profitability, growth, churn/retention, or the volume of services provided. Compensation may be in the form of additional commissions, bonuses or benefits (“compensation”). Furthermore, we may receive corporate sponsorships for webinars, training or other programming we provide for you and other clients, or for our own internal trainings. Whether we receive any of the above referenced compensation, or how much that compensation may be, cannot be discerned at this time.

Should you have any questions about any of the above information or require additional information, please don't hesitate to contact [**designate an agency contact person – this could be the producer or account manager or another member of the agency**] at [**email and phone**].

The above information is accurate to the best of my knowledge as of the date this disclosure is executed above.

Date: \_\_\_\_\_, 202\_

[**Agency Representative Name**]

I acknowledge that I received the above referenced Broker Disclosure form from (**AGENCY NAME**), and that I have read and understand the disclosures made. I understand that I can ask questions regarding the information included in this disclosure form at any time. Further, I understand that if I do not sign this acknowledgement within 15 business days from receipt, it will be deemed to be acknowledged and accepted by me.

\_\_\_\_\_ Date: \_\_\_\_\_, 202\_

Name \_\_\_\_\_

Title \_\_\_\_\_