



The Leapfrog Consolidated Appropriations Act  
Compliance Webinar Series

*Session 4: Employers & Purchasers: It's Time to Refresh Your  
Contracts with Consultants and Brokers in Light of CAA*

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- II. Employee Benefits Broker, Consultant, or Advisor Checklist for Employers

# The Great Re-Evaluation

## Broker/Consultant Compensation

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Tuesday, June 21<sup>st</sup>, 2022 at 12:00pm | CAA Compliance Series  
Darren Fogarty | Executive Director

# Agenda

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- Setting the Stage
- The Fiduciary Obligation of Plan Sponsors
- How the CAA Modifies ERISA Requirements
- What You - The Plan Sponsor - Must Do Now
- Re-Evaluating Your Broker/Consultant Contract
- What Employers Should Demand in a Benefits Professional

# 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



# The Fiduciary Obligation of Plan Sponsors

- Managing **commingled assets** originates and necessitates fiduciary liability.
- The DOL enforces this liability through **ERISA**.

## Requirements

- Act **solely** and **exclusively** in the best interest of benefit plan participants.
- Pay *only* **reasonable** plan expenses.
- Abide closely by **plan documents**.
- Carry out one's duties **prudently**, which means with expertise and a thoroughly-documented process.

**Note:** Selecting the lowest cost option is decidedly not a fiduciary's duty.

\* The DOL provides a more detailed overview of plan sponsor fiduciary responsibilities in its [own booklet](#), "Understanding Your Fiduciary Responsibilities Under a Group Health Plan."

# How the CAA Modifies ERISA Requirements

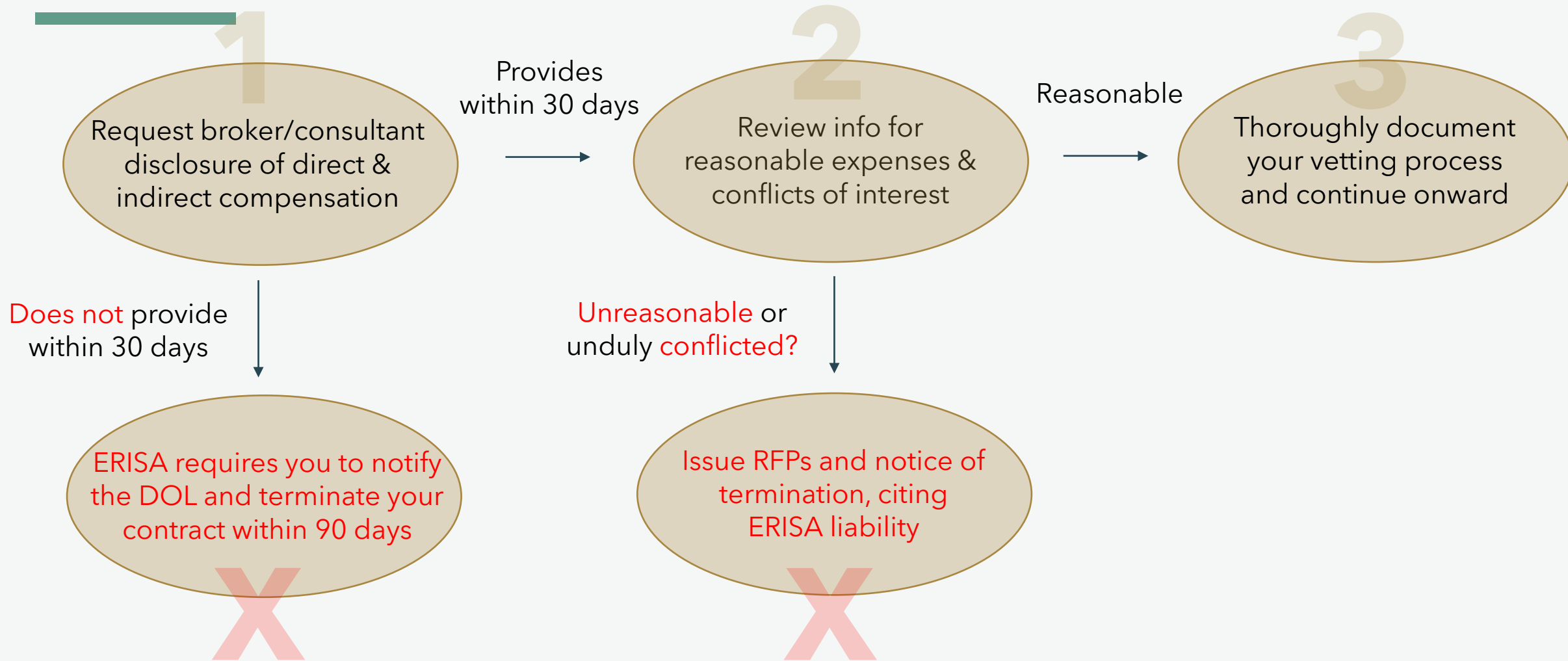
- CAA's Goals

- To inject **compensation transparency** into an historically opaque space
  - To assist plan sponsors in evaluating and verifying **reasonable** plan expenses
- §202 of the CAA amends ERISA at 408(b)(2)(B)

“ [Effective December 27, 2021,] the new disclosure requirements ... apply to persons who provide “brokerage services” or “consulting” to ERISA-covered group health plans who reasonably expect to receive \$1,000 or more in direct or indirect compensation in connection with providing those services.

\* Quote excerpted from [Field Assistance Bulletin](#) No. 2021-03. Actual CAA amendments are granular modifications to pre-existing ERISA statutory language, which is hard to quote.

# What You – The Plan Sponsor – Must Do Now



# Re-Evaluating Your Broker/Consultant Contract

- Brokers/consultants must disclose to your health plan **in writing** descriptions of:
  1. The **services** to be provided to your health plan,
  2. Compensation that will be **paid by the health plan** for the services it receives,
  3. All **direct and indirect compensation** the broker/consultant reasonably expects to receive in association with your account in excess of \$1,000,
  4. Identifying information about the **nature and the payer** of those services, and
  5. Any compensation that the broker/consultant expects to receive **upon contract termination**, and how any prepaid amounts will be calculated and refunded.
- Ask for the compensation disclosure in terms of **actual dollars & cents**. Although this is not currently required,\* it is a best practice and allows you to make meaningful comparisons.

\* Per the Department of Labor's December 30, 2021 [Field Assistance Bulletin](#), No. 2021-03. See **Q5** on page 5.



# Re-Evaluating Your Broker/Consultant Contract

As a reminder, here are the sources of compensation the CAA specifically outlines:

1. Development or implementation of health plan design, insurance, or insurance product selection (including vision and dental benefits)
2. Recordkeeping
3. Medical management
4. Benefits administration selection (including vision and dental benefits)
5. Stop-loss insurance
6. Pharmacy benefit management (PBM) services
7. Wellness design and management services
8. Transparency tools
9. Group purchasing organization (GPO) agreements and services
10. Participation in and services from preferred vendor panels
11. Disease management
12. Compliance services
13. Employee assistance programs (EAPs)
14. Third party administration (TPA) services

\* [CAA Final Text](#) (H.R. 133), at §202(a)(2)(B)(ii)(I)(bb)(AA) and (BB) on page 1714. (Search text for “Brokerage Services” or “Consulting”)

# Re-Evaluating Your Broker/Consultant Contract

DOL issued guidance on December 30, 2021:

“ *The Department will not treat [covered service providers] as having failed to make required disclosures to a responsible plan fiduciary . . . as long as the [CSP] made disclosures in accordance with a good faith, reasonable interpretation. Further, ERISA provides conditional relief for responsible plan fiduciaries in connection with disclosure failures by [CSPs].*

However, this safe harbor is not guaranteed to last, and the CAA has *still* heightened employer’s fiduciary liability.



\* December 30, 2021, [Field Assistance Bulletin](#), No. 2021-03. See [Temporary Enforcement Policy](#) on page 2.

# We Are Moving Into the “Less Formal” Guidance Section

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COMMITTEE FOR FEE-ONLY  
**BENEFITS ADVISORS**

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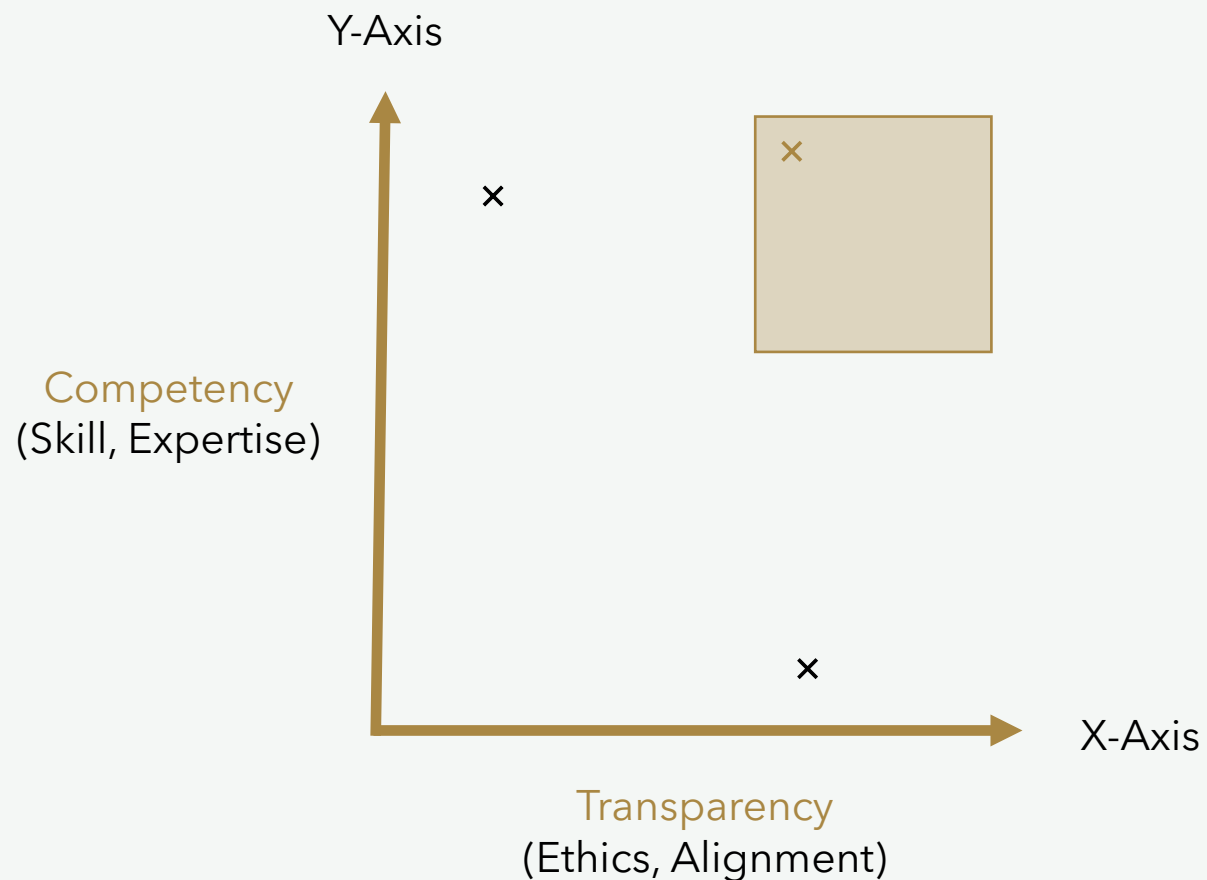


# What Employers Should Demand in a Benefits Professional

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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 Demand in a Benefits Professional

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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.

\* For more information or to have further discussion on these issues, or others, reach out to Darren Fogarty at [Darren@TheFiduciaryInstitute.org](mailto:Darren@TheFiduciaryInstitute.org) or on [LinkedIn](#).

## Employee Benefits Broker, Consultant, or Advisor Checklist for Employers

### Background

Employers who provide group health insurance to their employees owe those employees and dependents (collectively “members”) a fiduciary obligation of loyalty, care, and prudence. This is because, much like employer sponsored 401(k) retirement and pension plans, health plans involve “commingled” funds. This means employee dollars are mixed with employer dollars, which in turn creates a trust.\* Thus, the employer - and particularly the designated “plan sponsor” at the company (typically an HR executive or the CFO) - are “plan fiduciaries” and must act as such whenever they exercise discretion over health plan dollars.

How is an employer with relatively little expertise in managing healthcare dollars supposed to be a prudent fiduciary to health plan members? Traditionally, employers have relied on an employee benefits broker, consultant, or advisor to assist them in fulfilling these fiduciary obligations. When employers select a benefits professional, here is a list of questions they can use to help determine if the professional is competent, ethical and can therefore truly help the employer meet its fiduciary obligations.

### Questions

- 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?
- Are you and your firm financially rewarded or penalized when our company’s health plan’s net expenses decrease? Why is that?
- What specific experience does your firm have in reducing (not just “managing”) healthcare costs while expanding or improving benefit offerings?
- 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?
- What does “transparency” in this business relationship look like to you?
- Can you give me a past example where you or your firm recognized and mitigated/eliminated a client conflict of interest?

The answers you receive to these questions will be your best guide in determining whether a benefits broker, consultant, or advisor will be a good partner for your business. Your chosen benefits professional will guide you through the important decisions you make for your company health plan. You want to work with someone who is competent, ethical, and whose incentives are aligned with your plan’s success.

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The Committee for Fee-Only Benefits Advisors is a voluntary effort to make transparent, fee-only compensation the benefits industry gold-standard. It aims to advance this mission through research and education to practitioners, policymakers, and the healthcare industry overall. For more information, please contact Darren Fogarty at [Darren@TheFiduciaryInstitute.org](mailto:Darren@TheFiduciaryInstitute.org).

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\* AICPA (February, 2017) “Master Trusts in Employee Benefit Plans,” *Employee Benefit Plan Audit Quality Center*, at p. 1 [\[Link\]](#)