

# Self-funded employers have a fiduciary responsibility to monitor health care prices



Fiduciaries have a responsibility to “act solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them.”

—Department of Labor



How can self-funded plans fulfill fiduciary obligations without knowing prices?

# Featured Speakers



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# The Consolidated Appropriations Act

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What Plan Sponsors and Employers Should Know



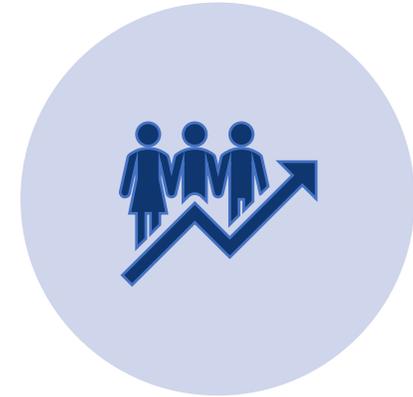
# Intent



ENSURE REGULATORY  
AWARENESS



MINIMIZE LIABILITY



IMPROVE PLAN FOR  
EMPLOYEES

# Impact on Outcomes – Retirement

## Before 408(b)(2)

- Choice overload in fund offering
- Commissioned education specialist on site = lots of ancillary products sold
- Average cost to employee 2.50% to 3.25% and termination fees
- Fees eating up returns
- Low participation
- Company liabilities

## Outcome

- Lawsuit
- Settlement of tens of millions

# Impact on Outcomes – Retirement

## After 408(b)(2)

- Prudent process established
- Appropriate fund line up
- Customized education and communication
- Average cost to employee less than 0.50%
- Transparent fees and services
- High participation, high deferrals
- Reduced company liabilities
- Better plan design

## Outcome

- Average account balances over \$100,000
- Employees able to retire on their terms

# Putting the big “F” in Fiduciary

Hospital Price  
Transparency

- Jan 1, 2021

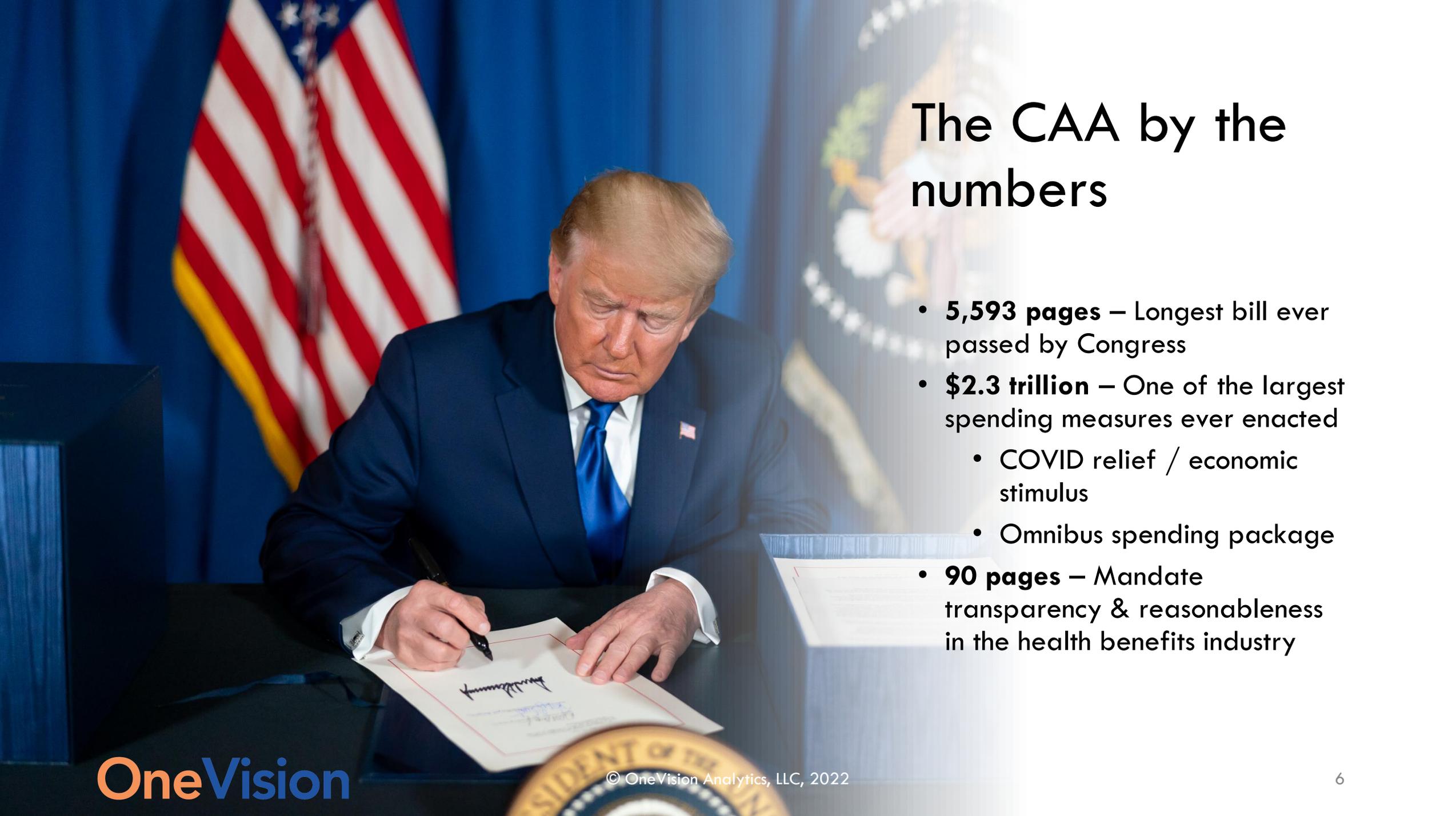
Transparency in  
Coverage (TICRA)

- Jan 1, 2022
- Jan 1, 2023
- Jan 1, 2024

Consolidated  
Appropriations Act of  
2021 (CAA)

- Jan 1, 2021

*Recent regulatory and legislative action has focused on controlling cost by mandating transparency.*



# The CAA by the numbers

- **5,593 pages** – Longest bill ever passed by Congress
- **\$2.3 trillion** – One of the largest spending measures ever enacted
  - COVID relief / economic stimulus
  - Omnibus spending package
- **90 pages** – Mandate transparency & reasonableness in the health benefits industry

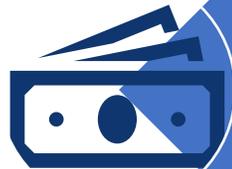
# The CAA Improves Transparency



Removal of Gag Clauses From  
Service Provider Contracts



Establish Reporting  
Requirements for Pharmacy &  
Prescription Drug Disclosures



Disclosure of Direct & Indirect  
Compensation from All Service  
Providers



Required Parity in Substance  
Abuse & Mental Health  
Benefits

# Requirements of the CAA:

## The Consolidated Appropriations Act of 2021

1 **“SEC. 9824. INCREASING TRANSPARENCY BY REMOVING**  
2 **GAG CLAUSES ON PRICE AND QUALITY IN-**  
3 **FORMATION.**  
4 **“(a) INCREASING PRICE AND QUALITY TRANS-**  
5 **PARENCY FOR PLAN SPONSORS AND CONSUMERS.—**

<https://www.congress.gov/bill/116th-congress/house-bill/133/text>

# Real “gag clause” language

- **Proprietary Materials specifically includes any data and information, including any data provided to Plan Sponsor in the form of a data extract or otherwise**, related to the *composition of the Carrier network of Participating Providers, the contracted (or “allowed” amounts) paid to Participating Providers, the terms of the agreement between Carrier and the Participating Providers, and the discounts to Carrier offered by Participating Providers.* Proprietary Materials also consist of any *analyses, compilations, studies or other documents* created on the basis of other Proprietary Materials.
- **All Proprietary Materials are the sole property of Carrier.** Carrier will have the right to protect the confidentiality of the Proprietary Materials and **will not be required to make such Proprietary Materials available to anyone.** Plan Sponsor agrees to maintain the confidentiality of any Proprietary Materials Carrier provides, and *Plan Sponsor will not provide any Proprietary Materials to any other person, including any data extracts or summary information,* except to the extent such Proprietary Materials have been made available to the public without fault of the Plan Sponsor.

# Real “gag clause” language

- **Plan Sponsor also specifically agrees that Carrier has the authority to disapprove of the vendor providing such audit, which authority shall not be unreasonably exercised, and to refuse access to membership and claims records by such vendor. Plan Sponsor, recognizing that patient specific information is confidential, agrees that it will take reasonable steps to restrict access to this information to those persons who need to know this information for determining compliance with this Agreement and for performing any necessary audit.**

# Requirements of the CAA:

## Compensation Disclosure Requirements

### Who is a “covered service provider”

- Any involvement in insurance or insurance product selection, recordkeeping, implementation and management (including vision and dental)

### What Information to Disclose?

- Direct compensation
  - Finder fees
  - Contracted fees
  - Commissions
- Indirect compensation
  - Compensation based on a structure not solely related to the contract with the covered plan
  - Reasonable estimate of any indirect compensation they or any affiliates or subcontractors reasonably expect to receive
- Transactional fees
  - A description of all transaction-based compensation.
  - A description of any compensation payable in connection with termination and, if applicable, how any prepaid amounts may be refunded and calculated.
- Written description of all the services they provide
- Fiduciary Status

# Compensation Disclosure Requirements

## How Compensation Information Needs to be Disclosed

- Monetary Amount
- A Formula
- Per Capita charge per enrollee (PEPM)

## When Information Needs to be Disclosed

- “reasonably in advance of the date on which the contract or arrangement is entered into, extended, or renewed.”
- No longer than 60 days from change

## Why?

- Determine “reasonableness” of fees
- ERISA section 408(b)(2) only permits plans to enter into reasonable plan service arrangements for reasonable compensation
- The CAA amends ERISA section 408(b)(2) requiring health plan vendors to provide written information about their fees and services to a “responsible plan fiduciary”
- The “responsible plan fiduciary” has authority to cause a plan to enter into, extend, or renew a contract or arrangement for plan services.

# Compensation Disclosure Requirements

## **Liability of Complacency**

- If the covered service provider does not meet its obligation to disclose, the plan fiduciary must ask for the information in writing
- Notify the DOL and consider termination of the contract
- Prohibited transactions
  - The DOL could enforce civil monetary penalties under ERISA Section 502(i)
  - The IRS could impose a 15% excise tax under IRC Section 4975 up to 100% of transaction value
- Class Action lawsuits

# Common Disclosure Language

## Declining Fiduciary Status & Liability

- We [broker] **do not accept any fiduciary or trust responsibilities** or related liability in connection with the performance of the services.
- [Broker] and its employees and agents are **not a trustee or fiduciary** of any Plan(s).

# Common Disclosure Language

## Requiring Additional Requests to Access Undisclosed Compensation

- **Upon request**, [broker] will provide you with **additional information about the compensation [broker] expects to receive** based in whole or in part on your purchase of insurance.
- [Broker] may be paid additional commissions by the carriers normally calculated at the calendar year end that are contingent on a number of factors... **On request**, we will always **disclose information about** our earned revenue, including the actual or our **potential contingent income earned**.

# Common Disclosure Language

## Pay to Play – Preferred Panel of Partners

- [Broker] may place your insurance or other business with members of a panel of insurers or other vendors... Commission or fee rates on panel placements may be higher than rates paid on business placed outside of the panel process... In some instances, insurers or vendors pay an administration or management fee to participate in the panel process.

# Requirements of the CAA:

## Reporting on Healthcare Spending

Total spending on health care services by such group health plan or health insurance coverage, broken down by the type of costs for the following.

1. Hospital costs
2. Health care provider and clinical service costs, for primary care and specialty care separately
- 3. Costs for prescription drugs**
4. Other medical costs, including wellness services

# Prescription Drug Disclosures

## The CAA requires Plan Sponsors to report certain information to HHS, DOL, and Treasury, including:

1. The beginning and end dates of the plan year
2. The number of plan participants and beneficiaries
3. Each state in which the plan is offered
4. The 50 brand prescription drugs most frequently dispensed (including number of paid claims for those drugs)
5. The 50 most costly prescription drugs by annual spend (including the annual spend amount for those drugs)
6. The 50 prescription drugs with the greatest increase in plan expenditures
7. Information about the total spending on health care services
8. The average monthly premium paid by employers and employees
9. The impact on premiums of rebates, coupons, other similar remuneration paid by drug manufacturers to the plan
10. Any reduction in premiums and out-of-pocket costs associated with rebates, fees or other remuneration described in #9

*Plan Sponsors will need an increased level of data from PBM's to meet reporting criteria. Currently, this information is not available.*

*Annual reporting requirements demonstrate that the Plan Sponsors actions serve the economic interest of the enrollee.*

### ACTION ITEM

- ✓ **Agreements with TPAs and PBMs** will need to be revised to allow full access to claim information, rebates, fees, and other forms of remuneration.

# Requirements of the CAA:

## **Mental Health & Substance Abuse Benefits Parity**

**The CAA requires plan sponsors to analyze non-quantitative treatment limitations on MH/SA benefits to show parity with medical and surgical care:**

- Quantitative treatment limitations include copay requirements or a restriction on the number of treatments
- Non-quantitative treatment limitations refer to network admission criteria, medical management programs, and coverage policies (i.e. access to substance abuse facilities)
- Guidance with respect to the required analysis is expected by July 2022



# Information Overload

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# What ERISA attorneys are saying

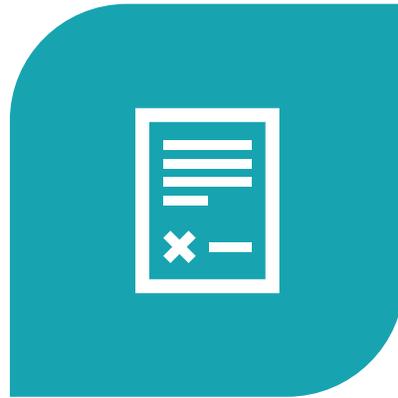
- We believe that **these rules will have a *significant impact*** on health plan coverage — ***more than anything else we have seen since the passing of the ACA.***
  - Mary E. Powell & Sarah Kanter, Trucker Huss
- ***Don't let your vendors lull you into complacency.*** Nothing is being complied with. None of these rules. ***Nobody's in compliance yet.*** And that's about to change because ***there's about to be a lot of litigation*** forcing compliance.
  - Julie Selesnick, Berger Montague

# What plan sponsors should do TODAY



## Establish & document a fiduciary process

- Fiduciary process
- Fiduciary committee
- Conflict free



## Remove “gag clauses”

- Review contracts
- Negotiate removal of prohibited language



## Gather broker compensation data

- Gather data
- Benchmark costs

# OneVision

*An Independent Fiduciary Company*

**Jamie Greenleaf**

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# DISCLAIMER

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## Pop Quiz

1. Who is responsible for collecting & maintaining all plan documents, reports and filings?
  - a. Broker of record
  - b. Health plan fiduciary committee
  - c. TPA
2. What amount of direct or indirect annual compensation identifies a plan vendor as a Covered Service Provider under the CAA?
  - a. Over \$100
  - b. Over \$500
  - c. Over \$1,000
  - d. Over \$5,000
3. What type of contract clause (now prohibited) restricted a plan sponsor's access to or use of plan data?
  - a. Execution limit clause
  - b. Entity sharing clause
  - c. Gag clause
  - d. No-use clause
4. What law extends ERISA compensation disclosure requirements to health plan service providers, in order to address "unreasonable" industry compensation practices?
  - a. Consolidated Appropriations Act, 2021
  - b. Transparency Amendment Act, 2021
  - c. Quality and Transparency Act, 2021
  - d. Consolidated Transparency Act, 2021



## Risk Self-Assessment – Health Plan

Question	Yes (0 points)	No (1 point)
<b>Fiduciary Process</b>		
1. Has your organization established a health plan fiduciary committee?		
2. Has your organization adopted a charter for the committee?		
3. Has your organization established a secure filing system to store plan documents for potential audit?		
4. Has your organization established a separate HIPAA compliant filing system to store claims data?		
<b>Covered Service Provider (CSP) Compensation &amp; Benchmarking</b>		
5. Have you gathered detailed disclosures from your CSP(s) regarding their direct and indirect compensation?		
6. Have you collected a list of all services your CSP(s) provide(s) in exchange for that compensation?		
7. Have you reviewed all CSP disclosures to ensure they are complete and compliant?		
8. In the last three years, have you benchmarked your CSP(s) compensation and services?		
9. Are you aware of potential conflicts of interest that may exist between your plan and a CSP?		
10. Have every CSP signed a conflict-of-interest disclosure?		
<b>Removal of Prohibited Language</b>		
11. Have you reviewed all plan contracts and removed all “gag” clauses?		
12. Are you prepared to attest to the fact that all “gag” clauses have been removed?		
<b>Fiduciary Status</b>		
13. Have you collected written declarations of fiduciary status from all plan service providers (broker, TPA, carrier, etc.)?		
14. Do you have an acknowledged co-fiduciary on the plan?		
<b>Reporting &amp; Analysis</b>		
15. Have you established which service provider(s) (carrier, TPA, PBM) will complete the CAA prescription drug reporting?		



Question	Yes (0 points)	No (1 point)
16. Have you established which service provider will complete your Mental Health Parity analysis if requested by the DOL?		
17. Have you benchmarked your plan design within the last three years?		
18. Have you benchmarked your prescription drug plan within the last three years?		
19. Have an impartial third party audited your paid claims for accuracy within the past year?		
<b>Total:</b>		



## Scoring your Risk Self-Assessment

If your total score is:

- < 5: You have taken a proactive approach to meeting the requirements of the new legislation. Your risk level is **low**.
- 5-10: You have started to implement a fiduciary process for your health plan, but still have some gaps in compliance. Your risk level is **medium**.
- > 10: You have a lot of work ahead of you to become compliant with the new legislation. Your risk is **high**

**Ready to start acting like a fiduciary?  
Get in Touch.**

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## Contract Language Exercise

Review each paragraph, and discuss why the language is either non-compliant, or creates a potential conflict of interest.

### Carrier Contract Language

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### Broker Contract Language

**On request**, we will always disclose information about our earned revenue, including the actual or our potential contingent income earned, or as a percentage or other reasonable method to describe such income.

In cases where compensation earned is based on commissions, we disclose that fact and we are pleased to disclose the amount of commission compensation, or otherwise describe that commission compensation arrangement **when our clients request it.**

**Upon request**, [Broker] will provide you with additional information about the compensation [Broker] expects to receive based in whole or in part on your purchase of insurance, and (if applicable) the compensation expected to be received based in whole or in part on any alternative quotes presented to you.

[Broker] may place your insurance or other business with members of a panel of insurers or other vendors. **[Broker] develops panels of insurers and vendors** in certain market segments. Participating insurers and vendors are reviewed on a variety of factors. **Commission or fee rates on panel placements may be higher** than rates paid on business placed outside of the panel process.... In some instances, **insurers or vendors pay an administration or management fee** to participate in the panel process or for additional reporting. In some instances, **[Broker] may earn a referral fee** for referring your business to certain vendors.



### TPA Contract Language

In cases where [TPA], itself or through an affiliate, provides direct negotiation services to reduce claim amounts to increase savings on behalf of the Plan, **[TPA] shall be entitled to retain a contingency fee up to 35% of the savings** resulting from such services.

**[TPA] shall determine which recoveries it will pursue**, and in no event will [TPA] pursue a recovery if it reasonably believes that the cost of the collection is likely to exceed the recovery or if the recovery is **prohibited by law or an agreement with a Provider**.

[TPA] will not be liable for any amounts it does not successfully recover. **[TPA] shall retain any recoveries it obtains as a result of its recovery services** or audits as the cost to administer the refund is likely to exceed the amount of the refund.