AMWINS CONNECT

No Surprises Act, section 202(c)

Broker Compensation Disclosures

Updated December 7, 2021

On December 27, 2020, the Consolidated Appropriations Act, 2021 (CAA) became law and contains several provisions related to business transparency. The No Surprises Act Section 202(c) of the CAA is focused on enhancing the compensation disclosure rules for group health plans, individual brokers, and consultants. These new disclosure requirements bring group health plans more in-line with the disclosure rules under Section 408(b)(2) of ERISA issued in 2012 that apply to retirement plans (e.g.401(k) plans). This includes all forms of compensation, including standard ongoing compensation, bonuses, finder's fees, prepaid (advanced) commissions, payments made by third parties, incentive programs not solely related to the plan, etc.

The new ERISA disclosure requirements apply to any covered services provider that reasonably expects to receive $1,000 or more in direct or indirect compensation for brokerage or consulting services provided to an ERISA-covered group health plan.

What Types of Brokerage and/or Consulting Services Apply

There is a lack of clarity in terms of the scope of services and what plan service providers are subject to these requirements, particularly with respect to the consulting category. We hope that further regulations should hopefully provide additional guidance or confirmation of the "consulting" category.

- selection of health insurance products (including vision and dental)
- enrollment or implementation of plan design
- recordkeeping services
- medical management vendor
- benefits administration (including vision and dental)
- stop-loss insurance
- pharmacy benefit management services
- wellness services
- transparency tools and vendors
- group purchasing organization preferred vendor panels
- disease management vendors and products
- compliance services (regulatory updates, guidance on plan design, preparating Form 5500s, etc)
- employee assistance programs
- value added services (wellness resources, HR services, etc.)
- third party administration services

This applies to both fully insured and self-funded, which included level-funded plans. Non-ERISA plans are not subject to the requirement.

Brokers and consultants (and their subcontractors) for health plans, which include excepted benefits like stand-alone dental and vision, health FSAs, EAPs and HRAs, must disclose, in writing, the amounts on fee disclosure for the plan. The disclosure is required regardless of whether such services will be performed, or such compensation received, by the covered service provider, an affiliate, or a subcontractor. Values can be expressed in the aggregate or by service as a dollar amount, formula, per capita charge for each member, or any other reasonable method with a good faith estimate.

What the disclosures must include

- A description of the services to be provided to the plan pursuant to the consulting or brokerage services agreement;
- If applicable, a statement that the broker or consultant (or its affiliate or subcontractor) expects to provide services to the plan as a fiduciary;
- A description of all direct compensation the broker or consultant (or its affiliate or subcontractor) reasonably expects to receive in connection with its anticipated services;
- A description of all indirect compensation the broker or consultant (or its affiliate or subcontractor) reasonably expects to receive in connection with its anticipated services. This includes incentive compensation paid to the broker or consultant based on a “structure of incentives not solely related to the contract with the [group health] plan;”
- If applicable, a description of how compensation is shared among the broker/consultant and its affiliates or subcontractors;
- If the broker’s or consultant’s compensation is received on a transaction basis (e.g., incentive compensation based on business placed or retained, such as commissions and finder’s fees), the information must identify the relevant services and who is paying and receiving such commissions and fees; and
- A description of termination-related fees, including (if applicable) a description of how pre-paid amounts will be calculated and refunded.

The disclosure descriptions must be sufficient for the client to evaluate ‘reasonableness’. These changes are important for plan sponsors, because any compensation that is deemed ‘unreasonable’ under these new disclosure obligations would likely be a prohibited transaction under ERISA. Prohibited transactions give rise to potential excise taxes and other fiduciary enforcement action.

Timing of Disclosures

These new fee-disclosure requirements are set to go into effect on December 27, 2021 and were not changed in the most recent FAQs regarding the CAA issued by the Department of Labor, Health and Human Services, and the Treasury on August 20, 2021. On and after December 27, 2021, in order to be considered compliant, a detailed fee disclosure will be required prior to the date the contract or arrangement is entered into, extended or renewed. An updated notice will also be required within 30 days following the discovery of any inadvertent errors or omissions, within 60 days of a compensation change, and within 90 days of a client request.

Broker Takeaways

Brokers and consultants should be considering how these provisions may affect their broker services agreements. Brokers should evaluate a procedure for what information or documents are needed to communicate compensation. There may be a need to establish a formalized broker agreement, if one does not exist.

Brokers and consultants should educate their clients on the new disclosure requirements and use this opportunity to establish greater transparency and trust with their clients. The new compensation transparency disclosures will allow employers to understand how much brokers are being paid for their services. It also allows brokers to showcase how they bring results to help their clients sponsor and manage healthcare solutions and truly go beyond just delivering rate renewals.

Next Steps For Brokers

- Inform your clients! Use this as an opportunity to bring awareness to your client on the breadth of services you provide, the value you bring that allows them to strategize and manage costs for their business and let them know that you will be sharing with them what the compensation is related to your services. Contact your Amwins Connect team for a presentation template to help you communicate the Broker Compensation Disclosure changes.
- Leverage carrier provided compensation schedules. Some carriers publish a compensation guide that encompasses commissions as well as contingent compensation calculations. You can summarize this info on your disclosure or make the carrier guide as a part of your disclosure.
- Utilize the NAHU CAA Broker Compensation Disclosure Form as a starting point to build your disclosure.
- Track your disclosures! Keep a record of the disclosures you have provided to your clients – what, when and to whom. If you are going to require a signature on the disclosures, don't forget to collect them after you've provided the document to your client and store them appropriately.

About Broker Service Agreements or Contracts

Brokers and consultants should be considering whether they want to enter into a contract with their clients, or whether they want to provide disclosures. The statute does not require a broker and consultant to enter into a formal contract. That statute does require certain written disclosures to applicable clients. Each broker and consultant should evaluate whether to provide a disclosure or enter into a formal contract.

There are numerous considerations that a broker and consultant should evaluate if they desire to enter into a formal contract. A formal contract may help to clarify and define the roles and responsibilities of each party. A broker or consultant should seek qualified legal counsel to develop a contract that is appropriate for their specific needs.