

Frequently Asked Questions: Agent, Broker, and Consultant Compensation Disclosure Requirements

Q1: How does the No Surprises Act affect agents, brokers, and consultants?

Effective December 27, 2021, the No Surprises Act requires agents, brokers, and consultants to provide fiduciaries of group health plans that are subject to the “Employee Retirement Income Security Act of 1974” (ERISA) information about their compensation.¹

Generally, the notice must be in writing and include information about the direct and indirect compensation if the agent, broker, or consultant expects to receive more than \$1,000 or more under the brokerage or consulting contract or arrangement for providing covered services to the group health plan.²

See the Answer to Question 7 as it specifies what information must be provided to satisfy the disclosure requirements.³

Q2: What constitutes “direct compensation?”

Direct compensation includes sales or base commissions paid by a health insurance issuer.⁴

Q3: What constitutes “indirect compensation?”

Indirect compensation includes payments by a health insurance issuer other than sales or base commissions, such as service fees, consulting fees, finder’s fees, bonuses, awards, and prizes.⁵

¹ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(iii); *see also* 86 Fed. Reg. 177, 51730 (Sept. 16, 2021).

² See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(ii)(I)(bb).

³ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(iii)(I)-(VI).

⁴ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(ii)(I)(dd)(BB).

⁵ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(ii)(I)(dd)(CC).

Q4: Am I acting as an ERISA fiduciary when providing various covered services to the group health plan?

The No Surprises Act and the Compensation Disclosure Form require that agents, brokers, and consultants must indicate whether or not they are acting in a fiduciary role while providing covered services to their clients.⁶ ERISA Section 3(21) provides that an individual acting as a fiduciary is generally someone who exercises any discretionary authority or control regarding the management of an employee benefit plan or the disposition of its assets.⁷

Generally, one who provides broker and general consultative services to an ERISA group health plan are not viewed as a fiduciary under ERISA.⁸ However, if an individual agent, broker, or consultant exercises discretionary control over plan assets and/or discretionary control over the administration of the plan as part of their services, then the agent, broker, or consultant could be said to be acting in a fiduciary capacity.⁹

See Q5 and Q6 for the definition of covered brokerage services and covered consultant services.¹⁰

Q5: What are covered brokerage services?

Brokerage covered services include: the selection of health insurance products (including dental and vision), recordkeeping services, medical management vendors, benefits administration, stop-loss insurance, pharmacy benefit management services, wellness services, transparency tools and vendors, group purchasing organization preferred vending panels, disease management vendors and products, compliance services, employee assistance programs, or third-party administrators.¹¹

Q6: What are covered consultant services?

Consultant covered services include services listed under Q5, plus the addition of services related to the development or implementation of plan design.¹²

⁶ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(ii)(I)(ee).

⁷ See 29 CFR § 2510.3-21(c)(1); *see also* 29 U.S.C.S. § 21(A).

⁸ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(ii)(I)(bb)(AA)-(BB).

⁹ See 29 CFR § 2510.3-21(d)(2).

¹⁰ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(ii)(I)(bb)(AA)-(BB).

¹¹ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(ii)(I)(bb)(AA).

¹² See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(ii)(I)(bb)(BB).

Q7: What information must agents, brokers, and consultants disclose to comply?

The following information must be disclosed:

- A description of the services to be provided to the plan pursuant to the contract or arrangement.
- If applicable, a statement that the agent, broker, or consultant (or affiliate or subcontractor) expects to provide services pursuant to the contract or arrangement to the plan as a fiduciary.
- A description of all direct compensation that the agent, broker, or consultant (or affiliate or subcontractor) reasonably expects to receive for the services provided.
- A description of all indirect compensation that the agent, broker, or consultant (or affiliate or subcontractor) reasonably expects to receive for the services provided.
- A description of the arrangement between the payer and the agent, broker, or consultant (or affiliate or subcontractor) pursuant to which such indirect compensation is paid.
- Identification of the services for which indirect compensation will be received, if applicable, and identification of the payer of indirect compensation, if applicable.
- A description, if applicable, of how compensation is shared among agents/brokers/consultants and affiliates or subcontractors.
- A description of any compensation that will be paid among agents, brokers, or consultants (or affiliates or subcontractors) in connection with services provided on a transaction basis (such as commissions or finder's fees).
- A description of any compensation that the agent, broker, or consultant (or affiliate or subcontractor) reasonably expects to receive in connection with the termination of the contract or arrangement.¹³

¹³ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(iii)(I)-(VI).

Q8: How must this information be disclosed to the health plan fiduciary?

The compensation disclosure information must be provided in writing.¹⁴ While the statutory disclosure requirements do not define “writing” at this time, ERISA disclosure provisions suggest that a “writing” may also consist of an electronic means.¹⁵

Absent further guidance, a position could be taken that the provision of the disclosure in an electronic format constitutes a “writing.” For example, an agent, broker, or consultant who emails a PDF version of the notice to their client would arguably satisfy the notice requirement.¹⁶

As a best practice, the agent, broker or consultant providing such notice should keep a log of outgoing notices and the method of delivery.¹⁷

Q9: What if I do not know the total compensation amount for disclosure purposes?

You can disclose the amount Per Employee Per Month (PEPM) or provide the formula that is used to calculate your compensation.¹⁸

Q10: At what point is it reasonable to disclose commissions or other compensation to “potential” clients? Would that disclosure occur prior to the sale, at the sale, or after the sale?

For new or potential clients, disclosure must occur prior to entering into the contract or arrangement.¹⁹

Q11: Do I have to provide compensation transparency for groups I have already renewed, but that officially renew after December 27, 2021?

Yes.²⁰

¹⁴ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(iii); see also 29 U.S.C. § 1108(g)(6).

¹⁵ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(iii).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(ii)(II).

¹⁹ See 86 Fed. Reg. 177, 51756 (Sept. 16, 2021).

²⁰ See 86 Fed. Reg. 177, 51771 (Sept. 16, 2021).

Q12: Do I have to provide compensation transparency for municipalities?

No. Although group health plans offered by municipalities are not governed by ERISA, disclosures can be, but are not required to be, made as a precautionary measure.²¹ That said, you should review the laws of the State or the municipality as they apply to your disclosure responsibilities.

Q13: Do I have to provide compensation transparency for work-site marketing products such as an American Family Life Assurance Company (AFLAC) plan?

No. AFLAC plans are not group plans.²²

Q14: Do I have to provide compensation transparency for Individual Coverage Health Reimbursement Arrangements (ICHRA)?

No. ICHRA are not group plans.²³

Q15: Does compensation disclosure apply to ancillary products like group life insurance, or accidental death and dismemberment (AD&D)?

No. Only disclose the compensation you will receive for the services as defined above under Q5-Q6.²⁴

Q16: Do I have to report commissions or other compensation paid to a third-party administrator (TPA)?

No. Only report commissions or other compensation that you will receive.²⁵

²¹ See 86 Fed. Reg. 177, 51749 (Sept. 16, 2021).

²² See 29 U.S.C. § 1191b(a)(1).

²³ See 86 Fed. Reg. 177, 51736 (Sept. 16, 2021).

²⁴ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(ii)(I)(bb)(AA)-(BB).

²⁵ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(ii)(I)(bb)(AA)-(BB).

Q17: Do I have to report commissions or other compensation paid to a general agent (GA)?

No. Only report commissions or other compensation that you will receive.²⁶

Q18: As a GA, do I have to report commissions or other compensation paid to subagent(s)?

As currently written and absent additional guidance, no, each party has a non-delegable responsibility to report their commissions.²⁷

Therefore, absent additional guidance, a GA may not report the commissions or other compensation of the brokers it represents in lieu of each broker reporting their own commissions or other compensation.²⁸

Q19: When are agents, brokers, and consultants required to disclose this information?

Agents, brokers, and consultants are required to disclose their compensation information to the health plan fiduciary on a date that is reasonably in advance of the date on which the contract or arrangement was entered (or reasonably in advance of the contract's extension or renewal date).²⁹

Q20: What does it mean to disclose “reasonably in advance?”

Generally, the agent, broker, or consultant should consider what a reasonable agent, broker, or consultant acting in good faith would do under the circumstances for the purposes of disclosing “reasonably in advance.”³⁰

If there are changes to the information that was disclosed reasonably in advance, then such changes must be disclosed as soon as practicable, but not later than sixty (60) days from the date on which the agent, broker, or consultant knows of such change.³¹

²⁶ See 86 Fed. Reg. 177, 51743 (Sept. 16, 2021).

²⁷ *Id.*

²⁸ *Id.*

²⁹ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(v)(I).

³⁰ See 86 Fed. Reg. 177, 51732 (Sept. 16, 2021).

³¹ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(v)(II).

If an agent, broker, or consultant acting in good faith and with reasonable diligence makes an error or omission with the disclosure, then the contract or arrangement may still be considered to be reasonable if the correct information is disclosed as soon as practicable, but not later than thirty (30) days from the date on which the agent, broker, or consultant knows of such error or omission.³²

Q21: Does compensation disclosure apply to group products only?

Yes.³³

Q22: Does compensation disclosure apply to stand alone dental plans?

Yes.³⁴

Q23: What are the consequences for noncompliance with disclosure requests?

Agents, brokers, or consultants must respond to any written request for disclosure information from the plan fiduciary within ninety (90) days.³⁵

If the agent, broker, or consultant fails to respond within ninety (90) days, the plan fiduciary must submit a formal notice to the DOL within thirty (30) days to avoid a prohibited transaction from occurring, and the plan fiduciary must decide whether to terminate the contract or arrangement with the agent, broker, or consultant, consistent with ERISA's fiduciary duty of prudence.³⁶

If the requested information relates to future services and is not disclosed within ninety (90) days, the plan fiduciary shall terminate the contract or arrangement with the agent, broker, or consultant as expeditiously as possible.³⁷

³² See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(vii).

³³ See 86 Fed. Reg. 177, 51747 n.31 (Sept. 16, 2021).

³⁴ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(ii)(I)(bb)(AA)-(BB).

³⁵ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(viii)(I)(cc).

³⁶ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(viii)(III).

³⁷ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 tit. II, § 202(a)(viii)(IV).