THE DEEP DIVE
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CAA DEEP DIVE SERIES: COMPENSATION DISCLOSURE REQUIREMENTS

The Consolidated Appropriations Act of 2020 (CAA) was signed into law by President Trump on December 27, 2020. One of the more surprising parts of the almost 6,000-page measure (at least to the employee benefits community) was Section 202. It creates significant compensation disclosure requirements for health insurance brokers and other benefit plan service providers, effective for contracts issued after December 27, 2021.

Applicability

The compensation disclosure requirements apply to any health insurance broker or other consultant that either has a contract with or enters into an "arrangement" with a group health benefit plan and expects to yield $1000 or more in direct or indirect compensation as a result. The law extends the disclosure requirements to individual market carriers and directs the development of regulations to carry that extension out.

The definition of who qualifies as a "consultant" is expansive. Besides health insurance brokers, it also requires any of the following types of entities that provide these services to a group health benefit plan at the $1000 or more compensation level to engage in compensation disclosure:

- Development or implementation of plan design
- Any involvement in insurance or insurance product selection (including vision and dental)
- Recordkeeping
- Medical management
- Benefits administration selection (including vision and dental)
- Stop-loss insurance
- Pharmacy benefit management services
- Wellness design and management services
- Transparency tools
- Group purchasing organization agreements and services
- Participation in and services from preferred vendor panels

- Disease management, compliance services
- Employee assistance programs
- Third-party administration services

Information To Disclose

When it comes to the actual disclosure, it's not just as simple as telling each group and individual client how much you make. Instead, every broker and consulting entity needs to give the group plan sponsor a written statement that describes all of the services they provide. They must note if they assume any fiduciary status for the group and outline all indirect and direct compensation, including how payment works and how it is split with others if it comes on a transactional basis.

Direct compensation, such as commission or a finder's fee, is relatively easy to identify and measure. Indirect payment is less clear, but the law defines it as compensation based on a structure not solely related to the contract with the covered plan. Brokers and covered service providers need to provide a reasonable estimate of any indirect compensation they or any affiliates or subcontractors reasonably expect to receive. They also need to describe what services generate this remuneration, identify the payer, and outline their arrangement with the paying entity. Indirect compensation does not include any compensation a covered employer might pay to its employees.

Brokers and consultants do have some flexibility when it comes to preparing the actual compensation descriptions. Compensation may be expressed as a monetary amount, a formula, or a per capita charge for each enrollee, such as $1.00 PEPM. If none of those methods make sense, then the service provider can use any other reasonable description, including a statement that "additional compensation may be earned but may not be calculated at the time of the contract." The broker or consultant needs to ensure that their disclosure statement includes a description of how they might earn other payments, a reasonable and good faith estimate of the potential revenue, and an explanation of how they came up with their forecast.

Disclosure Methodology

Many brokers and benefit industry consultants may wonder why this new type of compensation disclosure is necessary, given that most of these payments are recorded on a group's Form 5500 filing. However, there are several critical distinctions between the CAA's compensation disclosure requirements and Form 5500. The new requirement applies to contracts or arrangements with group health plans of all sizes. There will also be regulations coming that explain how health insurance

issuers will need to disclose compensation to individuals. Plus, the new requirement asks for much more information than what goes on the Form 5500.

Another difference is unlike Form 5500, this new disclosure isn't public-facing. Instead, the broker or other service provider needs to directly give their written compensation report to the group health plan fiduciary. The law notes that service providers need to provide each fiduciary with a comprehensive disclosure "reasonably in advance of the date on which the contract or arrangement is entered into, extended, or renewed." Then, if their contract or the agreement with the group later changes (e.g., the addition of new services, a change in the payment stream, etc.), the service provider or broker has to update their disclosure as soon as they can. In most cases, that means no longer than 60 days from the date on which the covered service provider is informed of the change.

Compliance Consequences

While it might seem like this is just another health insurance-related notice that will ultimately end up in someone's circular file, there are significant and unique consequences for non-compliance. The law requires brokers and consultants to provide their disclosure notice to their group health plan clients. It also places the responsibility for enforcing the requirement on the group plan fiduciary.

If the covered service provider does not meet its obligation to disclose, then the plan fiduciary needs to ask for the information in writing. Suppose the broker or consultant doesn't follow up with the information within 90 days or refuses to provide it. In that case, the plan fiduciary must notify the Department of Labor (DOL) within 30 days. When the group plan informs the DOL, they need to provide particular information, including:

- The name of the covered plan;
- The plan number used for annual reporting on the covered plan;
- The plan sponsor's name, address, and EIN;
- The name, address, and telephone number of the responsible plan fiduciary;
- The name, address, phone number, and, if known, EIN of the covered service provider;
- A description of the services provided to the covered plan;
- A description of the information that the covered service provider failed to disclose;
- The date of their request to the covered service provider; and
- A statement noting if the covered service provider continues to provide services to the plan.

The group plan also needs to consider if they can terminate the contract or arrangement and when that could happen (considering the impact terminating an in-force contract could have on plan participants). If the agreement still needs to be executed, then the law states the plan fiduciary should end the relationship as expeditiously as possible, consistent with the duty of prudence.

If a group plan fiduciary doesn't follow through with all of these obligations, they are guilty of prohibited transactions under ERISA. The penalties involved are steep. The DOL could enforce civil monetary penalties under ERISA Section 502(i) of up to 5% of the involved compensation. There is the potential for triggering a 15% excise tax under Internal Revenue Code Section 4975 too, which could become 100% if the plan fiduciary does not correct their actions on a timely basis. The good news is that the law does give plan fiduciaries a bit of a break if they can demonstrate that they did not know that a covered service provider failed to make a disclosure or did so incorrectly and reasonably believed that the covered service provider disclosed the right information. If a plan sponsor discovers a service provider made a mistake with their compensation report or forgot to disclose a type of compensation, the employer plan sponsor needs to attempt to get a correction within 30 days.

Rationale

Now that this compensation requirement is the law, many brokers and other employee benefits professionals wonder why? The idea is that this level of disclosure is necessary to elevate the importance of ERISA fiduciary duty for the plan administrator. The requirement is designed to help plan sponsors confirm that all paid compensation to their consultants is reasonable.

What's Next

The law only requires the Department of Labor to develop regulations to implement the section addressing individual coverage. However, our understanding is that the Biden Administration intends to propose implementing regulations this summer that may provide more details about how service providers and plan fiduciaries should proceed. Still, brokers and those involved in the benefits industry should begin to consider how they will meet their new obligations.

Given that brokers and covered consultants need to provide their disclosures to clients in advance of any new contracts and arrangements starting on or after December 27, 2021, plan renewals beginning January 1, 2022, will likely be the first time most covered entities need to comply. Before then, any business that could potentially need to make disclosures to group clients should:

- Evaluate all revenue streams;
- Determine what reporting will be needed;
- Compile applicable contracts for revision/use in developing disclosures;
- Determine date disclosure required for each group;
- Identify any partners to assist in the disclosure process;
- Determine how to describe each form of compensation;
- Compile necessary compensation data;
- Prepare draft disclosures;
- Review disclosures for accuracy; and
- Provide disclosures to plan fiduciaries

On the group health plan fiduciary side of the equation, plan sponsors should be aware that they should begin getting disclosure documentation from their broker and any related service providers starting as early as the Fall of 2021. Group plan fiduciaries should consider:

- Which service providers likely need to provide disclosure;
- When they should expect disclosure documentation;
- How they will keep track of notifications received;
- How they handle written requests for disclosures from service providers if needed;
- Documentation of any written requests;
- A method for calculating how long each provider has to provide a requested disclosure; and
- A method for notifying the DOL should a service provider fail to comply.

MZQ Consulting will continue to monitor implementation developments regarding the compensation disclosure requirements. As soon as more guidance or proposed rules are available, we will ensure all of our partners are informed.

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