THE COUNCIL
The Council of Insurance Agents & Brokers

NAIFA National Association of Insurance and Financial Advisors

BIG i Independent Insurance Agents & Brokers of America.

July 26, 2021

VIA ELECTRONIC MAIL

The Honorable Ali Khawar
Acting Assistant Secretary
Tim Hauser
Deputy Assistant Secretary
Joe Canary
Director, Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Section 202 of the No Surprises Act – Request For An Initial Non-Enforcement Period To Enable Insurance Agencies/Brokerage Firms To Implement The Requirements of the Law

Dear Messrs. Khawar, Hauser and Canary:

The Council of Insurance Agents & Brokers ("The Council"), the National Association of Insurance and Financial Advisors ("NAIFA"), and the Independent Insurance Agents & Brokers of America ("IIABA") appreciated the opportunity to speak with you and your staff on July 1, 2021 about Section 202 of the No Surprises Act, as incorporated into the Consolidated Appropriations Act of 2021 ("Section 202" or the "Act").

As we discussed at our meeting, and as outlined in more detail below, since the Act's enactment on December 20, 2020, each of our trade groups have been working closely with our members to fully understand the law, field both legal and definitional questions, discuss operational difficulties, understand the limitations of the carriers that pay a significant amount of the compensation, and consult with risk, compliance and IT staff to develop protocols to satisfy the new compensation disclosure rules for health plan brokers and consultants.

Section 202 requires our members to describe their direct and indirect compensation to ERISA-covered plan clients, and the overwhelming majority of a broker's compensation can easily be described at the time a contract is entered into or a plan is renewed. A notable compliance challenge for agents and brokers is how to appropriately describe any contingent compensation – a small portion of indirect compensation (typically amounting to less than 1% of premiums) that is not client-specific – they may receive in connection with brokerage or consulting services provided. Further complicating matters is that we have come to realize that – at least with respect to some of the disclosures more proprietary to carriers – development and implementation of the necessary comprehensive disclosure framework (and of the corresponding internal processes and procedures) will be a complex and burdensome undertaking for our members and is unlikely to be ready by the effective date.

For these reasons and for the reasons outlined in more detail below, we therefore urge the Department to consider a staged enforcement policy, so that readily available information be provided by the effective date, along with a description of any additional compensation that is expected to be received in connection with the services being provided to the plan. Given the current compensation structures and the inaccessibility of certain data with respect to these complicated compensation arrangements, a staged enforcement policy will allow our members the opportunity to implement the systems and frameworks necessary to comply with the statutory disclosure requirements. We estimate that for the 12 to 18 months that it may take to create the systems necessary to completely comply with the Act, our members would disclose both the direct and indirect compensation information that is currently accessible and available (e.g., fees/commissions per plan participant) and generally describe the other sources of compensation to the extent possible.

INTRODUCTION

The Council represents the largest and most successful employee benefits and property/casualty agencies and brokerage firms. Council member firms annually place more than $300 billion in commercial insurance business in the United States and abroad. In fact, they place 90 percent of all U.S. insurance products and services, and they administer billions of dollars in employee benefits. Council members conduct business in some 30,000 locations and employ upward of 350,000 people worldwide, specializing in a wide range of insurance products and risk management services for business, industry, government, and the public.

Founded in 1890 as The National Association of Life Underwriters (NALU), NAIFA is the oldest, largest and most prestigious association representing the interests of insurance professionals from every Congressional district in the United States. Our mission – to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members – is the reason NAIFA has consistently and resoundingly stood up for agents and called upon members to grow their knowledge while following the highest ethical standards in the industry.

IIABA is one of the nation's oldest and largest national associations of independent insurance agents and brokers, representing more than 25,000 agency locations united under the Trusted Choice brand. Trusted Choice independent agents offer consumers all types of insurance—property, casualty, life, health, employee benefit plans and retirement products—from a wide variety of insurance companies.

Collectively, our trade associations represent the entire spectrum of insurance agents and agency/brokerage firms (collectively "producers") that work with employer plans large and small as well as in the individual health marketplace setting up and selling health insurance plans. Our organizations (and our members) have been working tirelessly to implement a consistent and transparent compensation disclosure process, and to be able to ensure that it is appropriately delivered in a manner that assures accuracy and completeness.

Each organization has established a working group dedicated to this issue, and those groups have been meeting almost weekly since the Act was passed. Our members, both individually and through their participation in these groups, have collectively spent tens of thousands of hours evaluating the new compliance obligations, gathering the required information, and working on methods to ensure effective delivery of the disclosures. As outlined below, however, specific barriers—including the complexity of narrow elements of the insurance industry's compensation systems; the lack of notice and comment period that might have flushed out compensation complexities; the competing regulatory frameworks to which the carriers are subject to, which necessarily impacts their ability to help us meet these requirements; and a constantly-evolving marketplace—dictate that more time is needed both to create the requisite disclosure processes and to evolve the underlying compensation systems to ensure effective disclosure. Most insurance brokers are small and medium-sized businesses that lack access to the legal and other resources of larger enterprises, and these entities will face unique compliance challenges and would especially benefit from a temporary nonenforcement period.

DISCUSSION

1. The Complex Nature of The Insurance Industry's Compensation Practices Makes Development of a Standardized Compliance Framework Difficult

Other than compensation that comes directly from a plan, and is relatively straightforward to report, compensation in the health plan area is generally paid by insurance carriers. As we know you appreciate, health insurance is a very state-based and locally-managed business. This is in part a function of the state-based orientation of the insurance regulatory system and in part a function of the health insurance markets, which also are primarily state-based. This effectively means that firms with multiple offices in multiple states usually have separate carrier contracts and thus multiple compensation arrangements with each individual carrier that vary by state, by market and by product.

For example, most states have rules governing when a producer can receive both a "fee" directly from a client and a "commission" for the sale of an insurance product from the insurer. Those rules differ in terms of the services for which such a fee can be received. In addition, states have differing regimes related to the scope of the requisite disclosures of those fees.

It also is common in the industry to have contingent compensation arrangements under which a producer might receive year-end compensation from a carrier that is based on the firm's overall book of business with that carrier, including other types of insurance and arrangements not subject to ERISA. The nuances and subtleties of individual formulas vary widely but generally are based on the overall book of business a firm has with the carrier in the specified markets, the scope of administrative services the firm is providing to the carrier, and plan retention rates. These arrangements can be specific to a state or even a particular office for a producer with multiple offices. The specific formula details used by a carrier with respect to the compensation being paid to the producer can and do vary widely from contract to contract. One Council member, for instance, reports that it has <u>65 different</u> contingent compensation arrangements in one state alone.

Given that each ERISA-covered plan client may be subject to a unique compensation framework that can vary by state (and sometimes within states), the number of different potential payment arrangements for a national broker is often in the thousands. Simply cataloguing the applicable compensation methodologies, systematizing how the formulas relate to each plan client, and creating a framework for describing such compensation is, at this point, almost unachievable. And of course, the more manual the process, the less confidence our members have in accurate and timely delivery of this information to plans.

2. Compensation Practices in The Insurance Marketplace May Evolve to Simplify Some of The Compensation Formulas.

In the retirement plan space, the analog for the Section 202 health plan requirements are the requirements in the regulations issued under ERISA Section 408(b)(2). Not surprisingly, those regulations took almost five years to finalize, with several hearings, proposals, and comment periods to fully explain the complexity of the compensation rules. Over that period, mutual fund and insurance company fees became more aligned and easier to report and, over time, with much interpretative guidance from the Department, the disclosure became quite manageable and routine. We expect the same thing to evolve here – that the carriers will evolve their compensation formulas to enable more impactful upfront disclosures. As you know, the amount of contingent compensation that is allocated to any specific plan already is disclosed after the plan year by the carriers through the Form 5500 process for plans of employers that have more than 100 employees.

While we expect that carriers will work to streamline the compensation formulas to facilitate simpler and more straight forward disclosures for health plans (and, ultimately, ease the burden associated with the disclosure), we are sure you appreciate that developing these new, simplified formulas will not happen overnight. This is particularly true given that many carriers are focused on building systems to comply with several other new regulatory transparency requirements including the Section 202 Centers for Medicare and Medicaid Services ("CMS") individual market compensation disclosure rules and the CMS transparency in coverage and hospital price transparency rules.

3. Any Standardized Framework Must Be Coordinated With The Forthcoming Individual Market Compensation Disclosure Rules From CMS.

One concern that we are facing is inconsistency between the CMS regulations on compensation disclosure in the individual market that are required by Section 202(c) of the Act and the Section 202(a) disclosure rules for the group market which are essentially self-effectuating. Most carriers and brokers hope to be able to leverage one set of disclosure systems to meet both regulatory regimes, and thus, they are reluctant to create a system for the group market which will be inconsistent with those required for the individual market. Since the disclosure rules in the individual market is on the *carriers,* and not on the producers, and since the most complicated compensation structures are within the control of the carriers, we have little hope that carriers will move forward on simplification, or reporting systems until the CMS regulations are finalized. Those rules likely will impact how the carriers describe their compensation arrangements in both the individual and group markets as well as how those arrangements may evolve to more easily satisfy both sets of disclosure obligations. Until those CMS rules are finalized – which is statutorily due by January 1, 2022 – movement on the evolution of those compensation arrangements likely will be put on hold.

4. Compensation-Related Information is Often Not Readily Available, Particularly to Client-Facing Producers, For Disclosure Purposes.

Adding to the complexity of describing complex compensation methodologies that vary by market and by a number of other factors depending on the carrier, many firms have policies that bar their client-facing producers from having any access to the details of the compensation arrangements from carriers. The reason for this lack of transparency can be explained by our members' efforts to remove any assertions that clients are being "steered" based on those arrangements. This practice became much more prevalent in the wake of several New York Attorney General lawsuits that highlighted the steering concerns and is an approach often welcomed and appreciated by clients. To avoid steering charges, brokers have tried hard to separate the details of the arrangements, and especially the "book of business" or other incentive compensation, from client-facing producers.

Given that the new compensation disclosure requirements may expose the client-facing individual producers to compensation data to which they have not been privy in many firms, our members are actively considering what additional internal policies and procedures can be used to address the potential issues raised by giving the individual producers access to this data.

CONCLUSION

Given the ongoing work by our industry and our members, the ongoing and competing regulatory processes underway, the potential for fundamental changes to the market, and the complexity of certain compensation arrangements, we appreciate the Department's consideration of our proposal to implement a nonenforcement policy for the specific and detailed descriptions of the more cumbersome, formula-based compensation arrangements with carriers until 12 to 18 months after the effective date.

In the meantime, and while we develop and implement compliant disclosure frameworks, our members would disclose any direct compensation received from the plans themselves as well as all aspects of their indirect compensation that is readily available (e.g. the standard commissions paid by insurance companies). This information would address the overwhelming majority of compensation that producers receive for the brokerage and consulting services they provide to plans. Our members also would generally describe any other sources of compensation they are receiving in connection with the services they are providing to the plan to the extent possible.

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We sincerely appreciate the Department's willingness to consider our recommendations. Thank you for your consideration of these important issues.

Respectfully submitted,

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