



BREAKING NEWS: Individual Market Broker Compensation Transparency Proposed Rules Filed

HHS has filed a [proposed rule](#), "Requirements Related to Air Ambulance Services, Agent and Broker Disclosures, and Provider Enforcement," which is scheduled to be published later this week. The proposed rule provides further information on how HHS will implement the upcoming [broker compensation transparency requirements for individual and short-term limited duration plans](#) as well as information regarding [surprise billing of air ambulances](#). This message will focus on the broker compensation transparency proposals; we will provide more information on the air ambulance provisions in Friday's Washington Update.

Earlier this year, NAHU submitted a [letter](#) to HHS and DOL regarding our concerns about the implementation of both individual and group health plan broker compensation transparency required by the CAA. In this proposed rule, HHS has responded to some of our concerns and provided further guidance on how this will work for individual and short-term, limited duration plans. The DOL has yet to provide guidance for broker compensation transparency in the group market. In the proposed rule, HHS focuses the obligations of disclosure for health insurance issuers to disclose to policyholders and report to HHS on an annual basis all direct and indirect compensation provided by the issuer to an agent or broker associated with enrolling individuals in such coverage.

NAHU requested clarification on what would be considered "direct" and "indirect" compensation, and HHS provided further definitions. Direct compensation is defined as monetary amounts, including sales and base commissions, paid by an issuer that are attributable directly to the policy, certificate or contract of insurance and that are paid to an agent or broker for the sale, placement or renewal of individual health insurance coverage or short-term, limited-duration insurance. Indirect compensation is defined as payments by an issuer attributable indirectly to a policy, certificate, or contract of insurance to agents, brokers and other persons for items other than sales and base commission. Examples of indirect compensation include service fees, consulting fees, finders' fees, profitability and persistency bonuses, awards, prizes, volume-based incentives and non-monetary forms of compensation. In addition, a commission schedule is defined as an itemized list or table that provides the commission levels that are paid by an issuer for the sale, placement or renewal of individual health insurance coverage or short-term, limited-duration insurance.

Under the proposed rule, to ensure transparency of agent and broker compensation when purchasing individual health insurance coverage or short-term limited-duration insurance, issuers must disclose to a potential or existing policyholder the amount of direct and indirect compensation provided to an agent or broker associated with enrolling the policyholder in individual health insurance coverage or short-term, limited-duration insurance. This disclosure would be required to include the commission schedule used to determine the compensation owed to an agent or broker as part of the appointment contract between the agent or broker and the health insurance issuer as well as the structure for compensation not captured on the commission schedule.

For new, initial enrollments, this disclosure would be required to be made prior to when potential policyholders finalize plan selection and also to be included on any documentation confirming the initial enrollment, including enrollment documentation required in applicable state or federal law or an initial enrollment package. Health insurance issuers offering individual health insurance coverage or short-term, limited-duration insurance are required to include the disclosure on any documentation confirming the individual's enrollment. HHS recognizes that the term "any documentation" could be read broadly to refer to any documentation that a health insurance issuer provides during a plan year that serves as confirmation that the individual is enrolled in the coverage.

However, HHS is of the view that requiring such a broad reading of the statutory requirement would be burdensome to issuers, without producing a commensurate benefit to individuals who receive the disclosure. Therefore, HHS proposes to interpret the statutory language more narrowly. Specifically, with respect to initial

enrollments, HHS proposes to require disclosure on any documentation confirming initial enrollment, including enrollment documentation required in applicable state or federal law or an initial enrollment package.

For renewals of enrollment in a plan, an issuer must provide the required disclosure to the policyholder with the renewal notice, if applicable. HHS proposes this because plan renewals in the individual market generally do not have a moment when a consumer finalizes plan selection, as many of these renewals occur automatically, and because these renewal notices can also be considered to confirm enrollment in the plan for the upcoming plan year. Therefore, issuers would be required to provide the required disclosure as part of an initial enrollment package or renewal notice but would not be required to provide the required disclosure on other documents that could be considered to confirm enrollment, such as explanations of benefits.

The proposed rules do not provide a specific format for issuers' commission schedules or other documents that detail the applicable direct or indirect compensation. Instead, HHS is proposing minimum standards for the information that must be disclosed and permitting issuers to determine what documentation may contain that information and be used to satisfy the disclosure requirement, whether the issuer calls it a commission schedule or refers to it by another term.

HHS proposes that issuers would be required to make the necessary disclosures prior to the potential policyholder finalizing plan selection and that the disclosure be included on any documentation confirming the individual's enrollment. This requirement would ensure that the person who is choosing the coverage and agreeing to be financially responsible for premiums and other payments due under the insurance contract (who HHS proposes to define as the "policyholder") can evaluate whether and to what extent the advice they received from an agent or broker may have been influenced by the agent's or broker's compensation arrangement with an issuer prior to finalizing the plan selection.

In addition to disclosing compensation to policyholders, health insurance issuers offering individual health insurance coverage or short-term, limited-duration insurance must annually report to HHS prior to the beginning of open enrollment any direct or indirect compensation provided to an agent or broker associated with enrolling individuals in such coverage. HHS intends to collect data similar to the data collected by DOL on compensation of insurance producers for group health plans subject to the Form 5500 reporting requirement. Issuers would be expected to submit the reporting data to HHS through an online system. HHS is proposing to require issuers provide, for each payment recipient and intermediary organization in a specific month of the reporting year, a single row of data in comma-separated values (CSV) format containing the following fields/columns:

1. Payor Federal Tax ID Number (FTIN)
2. recipient identifier type ("NPN" for writing agents or "FTIN" for payments made to intermediaries)
3. recipient identifier value (the actual number)
4. the date on which the payment was made to the payment recipient
5. direct compensation, expressed as a dollar amount (the commission)
6. indirect compensation, expressed as a dollar amount, if any (if indirect compensation payment amount was made in that month -- for example, a bonus was paid out; bonuses for annual performance are accounted for in December of the reporting year rather than disaggregated into 12 parts for each month)
7. the basis for indirect compensation -- a text field allowing entry of what the grounds for the indirect compensation were (bonus, incentive, etc.)
8. other information specified by the secretary, which may include, for example, distinguishing between individual health insurance coverage and short-term, limited-duration insurance, listing the appointment arrangement duration, and providing the number of plans the agent sold.

NAHU is pleased that the proposed rule reflects the CAA's provisions to place the responsibility of broker compensation disclosure in the individual market on the health insurance issuer. NAHU will be providing comments in response to this proposed rule and, when finalized, will provide resources through our Compliance Corner to assist members in complying with the final regulation.

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