

On Friday, September 10th the Departments of Health & Human Services, Labor and the Treasury jointly released proposed rules to implement several elements of the Surprise Billing Act.¹ Most importantly, these proposed rules include the HHS proposed rules to effectuate insurer requirements to disclose agent/broker compensation in the individual and short-term, limited duration health plan markets. The proposed rules also include air ambulance reporting requirements that are necessary to effectuate the overall Surprise Billing regime with respect to such services and new enforcement rules. The proposed rules are scheduled to be published in the Federal Register on September 16th and comments are due within 30 days of that publication.

Agent/Broker Compensation Disclosure. The proposed rules with respect to agent/broker compensation are relatively short and straight forward. They require insurers to provide disclosures of both –

- “Direct compensation” that is defined to be any compensation paid by the insurer to the agent or broker that is directly related to the sale.² The proposed regulations require the insurer to provide a chart that shows all such compensation the agent/broker is entitled to receive with respect to all plans sold by that insurer for which the customer is eligible.³ The regulations expect these disclosures to be made in chart form.
- “Indirect compensation” – defined as any/all other compensation for which the agent/broker may be eligible to receive – including “service fees, consulting fees, finders’ fees, profitability and persistence bonuses, awards, prizes, volume-based incentives, and non-monetary forms of compensation.”⁴

For new placements, the disclosures must be made prior to the policyholder’s making of a final enrollment decision; for renewals, the disclosures must be included in the renewal notice.⁵ If there is no renewal notice, then the disclosures must be included in the first invoice after the renewal date.⁶

The compensation information must specify –

- the commissions paid by the issuer to an agent or broker for the applicable plans for which the producer has an appointment
- distinguish between new enrollment and renewal commissions and
- explain the qualifying thresholds for the payment of any indirect compensation.⁷

Any information that is not captured on the commission schedule must be included in a supplemental disclosure.⁸

¹ https://public-inspection.federalregister.gov/2021-19797.pdf?utm_source=federalregister.gov&utm_medium=email&utm_campaign=pi+subscription+mailing+list (the “Proposed Rule”).

² See § 148.410(b)(3).

³ *Id.* at (b)(2) (defining commission schedule).

⁴ *Id.* at (b)(4).

⁵ *Id.* at (c)(2) & (3).

⁶ *Id.* at (c)(4).

⁷ *Id.* at (c)(5).

⁸ *Ibid.*

Three other elements of the proposed rules are noteworthy. First, issuers will be required to submit reports to HHS detailing the direct and indirect payment arrangements they have in place.⁹

Second, those reports also must include the compensation arrangements both with the placing producer as well as any compensation arrangements for managing general agents or other intermediaries between the retail producer and the insurer.¹⁰

Third, the new transparency requirements apply with respect to contracts executed on or after December 27, 2021 between an agent/broker and a health insurance issuer and any “addenda or revisions to the material terms of a pre-existing contract” will be deemed the execution of a new contract.¹¹

Other Provisions Included In the Proposed Rules

The proposed rules include an extensive set of new reporting requirements for group health plans, health insurance issuers and providers of air ambulance services that will provide the requisite baseline for effectuating the Surprise Billing Act payment dispute resolution procedures for air ambulance services.¹² For group health plans, the requisite information that must be submitted relates to each claim related to air ambulance services providing details of the claim and how it was resolved.¹³ The health plan may delegate this reporting obligation to an insurer or other third party by contract.¹⁴

The new enforcement provisions generally are limited to health insurance issuers and health providers and facilities.¹⁵

⁹ *Id.* at (d)(1).

¹⁰ *Id.* at (d)(2)

¹¹ *Id.* at (e).

¹² *Id.* at §§ 149.230 (group health plans and insurers) and 149.260 (providers of air ambulance services).

¹³ § 149.230(b).

¹⁴ *Id.* at (c).

¹⁵ *See* §§ 150.101 and 150.201-455 (issuers) and 150.501-525 (providers and facilities).