

HEALTH LAW ALERT

March 11, 2011

HHS Proposes Notice for Rate Increase Transparency Most Information Used to Justify Rates will be Public

This week, the Department of Health and Human Services (“HHS”) published a proposed “consumer disclosure notice” that would inform the public of rate increases that HHS (or a State) might determine to be unreasonable under proposed Affordable Care Act rules published in December (the “Proposed Rate Increase Rule”). The seven-page notices, along with most information health insurers use to describe and justify the rate increases, would be made available to the public on an HHS website. HHS would post these “consumer disclosure notices” for every rate increase subject to review under the Proposed Rate Increase Rule. Rate increases subject to review would include every increase of 10% or more in the small group and individual markets, with respect to rate increases effective on or after July 1.* ([Click here](#) for my 12/23/2010 Health Law Alert on the *Proposed Rule for Review of Unreasonable Rate Increases* (or go to the “Resources” page of tbixbylaw.com); see the link under “Health Law Alerts”).

Comments on the proposed notice may be submitted on or before May 2, 2011. HHS’s formal notice concerning the format of the consumer disclosure notice is published at 76 *Federal Register* 11248 (Mar. 1, 2011). [Click here](#) for the HHS packet of information on the notice, including a template consumer disclosure notice.

Under the Proposed Rate Increase Rule, prior to implementing a rate increase of 10% or more in the small group or individual market, insurers would be required to electronically submit a “preliminary justification” of the rate increase. The submission would include three parts:

- I. **The rate increase summary**, including historical and projected claims experience, trend projections, claims assumptions related to benefit changes, allocation of the rate increase to claims and other costs, current and projected loss ratios, history of rate increases, and executive compensation data;
- II. **A written description justifying the rate increase**, including explanations of the rating methodology, significant factors causing the rate increase, and overall experience with the policy (*e.g.*, historic expenses, projected expenses, and loss ratio); and

* The 10% threshold may change for rate increases effective in 2012 and later.

- III. **Documentation to justify the rate filing**, which would be required only if the rate increase was subject to review by HHS (rather than a State’s “effective rate review program”). HHS would require rate filing documentation sufficiently detailed “to permit HHS to conduct a review to determine whether the rate increase is an unreasonable rate increase,” including average annual premium for the policy, past experience, “any other alternative or additional data used,” and a general description of and source of “each assumption used” in calculating the rate increase.

The information in Part I of the preliminary justification would be used to “auto-populate” the consumer disclosure notice. HHS would post the first two parts of the preliminary justification on its website along with the consumer disclosure notice. In addition, all information in Part III would be posted to the HHS website, unless the insurer claims—and HHS agrees—that the information is confidential under HHS’s Freedom of Information Act (“FOIA”) Rule.

Consumer Disclosure Notice Content

HHS would post the consumer disclosure notice for all rate increases, including those to be reviewed by a State. The seven-page notice would describe the rate increase by providing a dollar value of the average rate increase and by comparing the new average rate to the pre-increase average rate (see box on right). The notice would also describe the rate increase in percentage terms, providing an average percentage increase as well as a range of percentage increases, from lowest to highest.

In addition, the notice will explain how much of the increase is attributable to (1) the increased cost of medical services (broken down into six categories, *e.g.*, hospital inpatient, professional services, prescription drugs, etc.), (2) administrative expenses, and (3) profit or retained earnings. Finally, the notice will provide pie charts showing the percentage of total premium attributable to medical services, administrative costs, and profit or retained earnings (based on the assumption that the rate increase goes into effect).

Hypothetical Notice

The template consumer disclosure notice published by HHS describes a rate increase proposed by “ABC Health Insurance Company” affecting its “Green Earth” products in the State of Indiana. The notice provides the following initial description of the rate increase:

How large is the proposed rate increase?

- *If* this proposed rate increase goes into effect, the *average* new rate for The ABC Health Insurance Company’s Green Earth products [*link*] sold in Indiana will be **\$235.05** a month. This is up **\$24.82** from last year’s *average* rate of \$210.23 a month.
- Expressed as a percentage, this proposed increase is an **11.8%** increase *on average*.

How will this rate increase affect the premiums people pay?

- A “rate” is a base price for health benefits—a “premium” is the specific amount charged to a policyholder. The actual premium a policyholder pays may be higher or lower than the \$235.05, based on factors like their age and where they live.

HHS FOIA Rule

Information an insurer provides HHS as documentation of its rate filing (Part III of the preliminary disclosure) would be published on the HHS website, unless the insurer designates the information—and HHS agrees with the designation—as being subject to the HHS FOIA exemption for privileged or confidential “commercial or financial” information.

HHS “broadly” defines the commercial or financial information that may be exempt from public disclosure to include information that “relates to businesses, commerce, trade, employment, profits, or finances.” But, such information is only exempt from public disclosure if it is “privileged or confidential.” To be “privileged,” the information must be subject to the attorney-client privilege or some other “recognized evidentiary privilege.” To prevent data used to justify a rate increase from being subject to public scrutiny because of its “confidentiality,” an insurer would have to show that disclosure of the data would “substantially harm” the insurer’s “competitive position.”[†]

Given that HHS’s goal in the Proposed Rate Increase Rule and the proposed consumer disclosure notices is to “provide an unprecedented level of transparency in the health insurance market [so as to] promot[e] competition,” convincing HHS that data used to justify a rate increase should remain confidential may be a difficult hurdle for insurers to get over.

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[†] Information may also be determined to be “confidential” under the HHS FOIA Rule if disclosure might “impair the government’s ability to obtain necessary information in the future” or “impair other government interests, such as program effectiveness or compliance.”