



Date: December 16, 2016

Subject: Frequently Asked Questions on Agent/Broker Compensation and Discriminatory Marketing Practices

Under 45 CFR 147.104(e) and 156.225(b), an issuer and its officials, employees, agents and representatives must comply with any applicable State laws and regulations regarding marketing by health insurance issuers and cannot employ marketing practices or benefit designs that will have the effect of discouraging the enrollment of individuals with significant health needs in health insurance coverage, including qualified health plans (QHPs). These prohibitions apply to issuers offering non-grandfathered health insurance coverage in the group or individual health insurance market, through or outside of the Marketplaces, as applicable.

We have become aware that some issuers are attempting to discourage the offering of insurance coverage to higher risk individuals by reducing or eliminating commissions and other forms of agent and broker compensation¹ for sales to such individuals.

Is the payment of agent/broker commissions a marketing practice under 45 CFR 147.104(e) and 156.225(b)?

Yes. Federal rules prohibit marketing practices that have the effect of discouraging the enrollment of individuals with significant health needs in health insurance coverage, both inside and outside of the Marketplaces. Issuers commonly use agents and brokers as an important part of their marketing and sales distribution channels, and the way an issuer structures its compensation to agents and brokers influences the enrollment and retention of consumers. Therefore, a commission arrangement or other agent/broker compensation that is structured to discourage agents and brokers from marketing to and enrolling consumers with significant health needs constitutes a discriminatory marketing practice prohibited under 45 CFR 147.104(e) and 156.225(b).² For example, if an issuer pays agents or brokers less through all forms of compensation for higher metal level plans (such as platinum and gold level plans), which are associated with higher utilization, than the issuer pays for lower metal level plans (such as

¹ Compensation includes commissions, fees, bonuses and other rewards or incentives as established in the relevant contract between an issuer and the agent or broker.

² See also HCFA Insurance Standards Bulletin Series, Agent Commissions and Application Processing Delays (March 1998), available at: https://www.cms.gov/CCIIO/Resources/Files/Downloads/hipaa_98_01_508.pdf.

bronze and silver level plans), this act constitutes a failure on the part of the issuer to comply with the applicable Federal guaranteed availability provisions and QHP marketing standards.³

Guidance Implementation

We recognize that agent/broker compensation is included among the costs used to establish the plan-adjusted index rate for an issuer's plans within the single risk pool and that some issuers may have to modify their rates based on the above guidance. Accordingly, CMS will not take enforcement action against an issuer for failing to comply with this guidance until the issuer's next opportunity to update rates consistent with applicable Federal and State law and regulations. For example, this guidance will not be enforced with respect to agent/broker compensation arrangements in connection with policy years beginning before January 1, 2018 in an individual or merged market, and plan years beginning before April 1, 2017 in a small group market in a State that permits quarterly rate updates. States, as the primary regulators of the guaranteed availability requirements, may exercise similar enforcement discretion and will not be considered by CMS to be failing to substantially enforce for this reason.

For non-grandfathered coverage offered with a plan or policy year beginning on or after such dates, issuer agent/broker compensation arrangements and accompanying marketing and distribution practices must comply with this guidance, regardless of whether such coverage is offered through or outside of the Marketplaces.⁴

Where to get more information:

If you have any questions about this guidance, please contact CCIIO at marketreform@cms.hhs.gov.

If you believe an issuer's compensation arrangement or other marketing practice violates the marketing standards or other provisions of applicable Federal or State law, contact the applicable State authority or, in States not enforcing the Affordable Care Act market reform provisions, contact CMS at marketconduct@cms.hhs.gov.⁵ If you are an agent or broker facilitating enrollments in coverage through a Federally-facilitated Marketplace, you may also contact the

³ We remind issuers that they may also have obligations under other applicable Federal laws prohibiting discrimination, and issuers are responsible for ensuring compliance with all applicable laws and regulations. This includes compliance with section 1557 of the Affordable Care Act, which prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities.

⁴ Under 45 CFR 156.200(f), a QHP issuer must pay the same agent or broker compensation for QHPs offered through a Federally-facilitated Marketplace that the QHP issuer pays for similar health plans offered in the State outside a Federally-facilitated Marketplace. For further guidance on agent and broker compensation in the Federally-facilitated Marketplaces, see Center for Consumer Information and Insurance Oversight (CCIIO), Centers for Medicare & Medicaid Services (CMS), "2017 Letter to Issuers in the Federally-facilitated Marketplaces," Section 4.v. (February 29, 2016), available at: <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Final-2017-Letter-to-Issuers-2-29-16.pdf>.

⁵ The following States are currently considered by CMS to not be enforcing the Affordable Care Act market reform provisions: Missouri, Oklahoma, Texas and Wyoming.

Federally-facilitated Marketplace agent and broker help desk at FFMProducer-AssisterHelpDesk@cms.hhs.gov. Documentation should be included that describes the compensation structure or other practice in question. If you are a consumer, you may submit complaints about discriminatory marketing practices by an issuer, agent, broker, or web-broker in a Federally-facilitated Marketplace to the Marketplace Call Center by calling 1-800-318-2596.