DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201

Date: June 7, 2022

Subject: Frequently Asked Questions on Agent/Broker Compensation and Guaranteed Availability of Coverage

The Centers for Medicare & Medicaid Services (CMS) has become aware that some health insurance issuers offering individual market health insurance coverage, including issuers of qualified health plans offered through the Marketplaces, have reduced or eliminated commissions and other forms of compensation for agents and brokers who assist consumers with enrollments in individual market coverage during a special enrollment period (SEP).

Is it permissible for an issuer to differentially compensate agents or brokers who assist consumers with enrollments in individual market coverage in the same benefit year based on whether the enrollment is completed during an SEP or during the applicable benefit year's Open Enrollment period (OEP)?

No. Arrangements that pay reduced (or no) commissions and other forms of compensation[1] to agents and brokers who assist consumers with enrollment in individual market coverage during an SEP and pay higher amounts for OEP enrollments for the same benefit year violate the guaranteed availability provisions of the Affordable Care Act.

The guaranteed availability provisions in section 2702 of the Public Health Service Act (PHS Act), as added by the Affordable Care Act, generally require issuers to accept "every employer and individual in the State that applies for such coverage." This requirement applies to issuers offering non-grandfathered health insurance coverage in the group or individual markets, through or outside of the Marketplaces. As implemented in the individual market, issuers are required to guarantee issue such coverage during the annual OEP to all individuals, as well as during an SEP to an eligible individual.[2]

Issuers' normal conduits for receiving applications and offering coverage must also be open to individual market consumers for OEP and SEP enrollments, as applicable.[3] Issuers commonly use agents and brokers as an important part of their marketing and sales distribution channels. The way an issuer structures its compensation to agents and brokers influences the marketing to, as well as enrollment and retention of, individual market consumers. An arrangement that reduces or eliminates the commission or other

[1] Compensation includes commissions, fees, or other incentives (for example, rewards or bonuses) as established in the relevant contract between an issuer and the agent or broker.
[2] See 45 CFR 147.104(b).
[3] See HCFA Insurance Standards Bulletin Series No. 98-01, Agent Commissions and Application Processing Delays (March 1998), available at: https://www.cms.gov/CCIIO/Resources/Files/Downloads/hipaa_98_01_508.pdf. See also 77 FR 70584 at 70598-70599 (Nov. 26, 2012).

compensation an agent or broker receives for SEP enrollments compared to the commission or other compensation received for OEP enrollments in the same benefit year discourages agents and brokers from marketing to and enrolling individuals eligible for an SEP. These practices therefore violate the guaranteed issue protections afforded to these individuals under the statute. Exceptions may be made for cases in which state regulators make specific recommendations for issuers to address solvency concerns or financial capacity limitations.[4]

In a 2016 FAQ[5], CMS previously stated that payment of agent/broker commissions or other forms of compensation is a marketing practice covered under 45 CFR 147.104(e) and 156.225(b). Specifically, the 2016 FAQ explained that compensation arrangements structured to discourage agents and brokers from marketing to and enrolling consumers with significant health needs constituted a discriminatory marketing practice prohibited under §§ 147.104(e) and 156.225(b). Consistent with this previous guidance, to the extent arrangements which pay reduced or no compensation for SEP enrollments discourage agents and brokers from marketing to and enrolling consumers with significant health needs, the arrangements would also constitute a discriminatory marketing practice prohibited under 45 CFR 147.104(e) and 156.225(b).

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 applicable Federal or State law, contact the applicable State authority or, in States not enforcing the applicable Affordable Care Act market reform provisions, contact CMS at marketconduct@cms.hhs.gov.[6] If you are an agent or broker facilitating enrollments in coverage through a Federally-facilitated Marketplace, you may also contact the 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 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.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way, unless specifically incorporated into a contract. This document is intended only to provide clarity to the public regarding existing requirements under the law.

[4] See section 2702(c) and (d) of the PHS Act and 45 CFR 147.104(c) and (d).

[5] Frequently Asked Questions on Agent/Broker Compensation and Discriminatory Marketing Practices (Dec. 16, 2016), available at https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/Agent-Broker-Compensation-and-Discriminatory-Marketing-Practices.pdf.

[6] As of publication of this document, the following States are considered by CMS to not be enforcing the applicable Affordable Care Act market reform provisions: Missouri, Oklahoma, Texas, and Wyoming.