



Date: December 14, 2022

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

The Centers for Medicare & Medicaid Services (CMS) issued Frequently Asked Questions (FAQ) on Agent/Broker Compensation and Guaranteed Availability of Coverage on June 7, 2022 (<https://www.cms.gov/files/document/agent-broker-compensation-and-guaranteed-availability-coverage.pdf>). That guidance clarified that arrangements that pay reduced (or no) commissions and other forms of compensation¹ to agents and brokers who assist consumers with enrollment in individual market coverage during a Special Enrollment Period (SEP) and pay higher amounts for Open Enrollment Period (OEP) enrollments for the same benefit year violate the guaranteed availability provisions of the Affordable Care Act. This guidance supplements and does not supersede the FAQ published on June 7, 2022.

Since we issued the Agent/Broker Compensation and Guaranteed Availability of Coverage FAQ, we received a number of questions from stakeholders regarding how the FAQ relates to bonus arrangements and other incentives for agents and brokers to enroll consumers in individual market coverage that are introduced after the beginning of OEP. This document provides further clarifying guidance on the circumstances in which it may be acceptable under the guaranteed availability provisions of the Affordable Care Act^{2,3} for an issuer to introduce a bonus or other incentive for agents and brokers after the beginning of OEP.

Q1. Does a bonus or other incentive for an agent or broker that is introduced after the beginning of an Open Enrollment Period violate the guaranteed availability provisions of the Affordable Care Act?

Bonuses and other incentives introduced after the beginning of OEP (“post-OEP bonuses”) that do not limit the guaranteed availability of coverage may be permissible under section 2702 of the Public Health Service Act (PHS Act), subject to an analysis of all the relevant facts and circumstances of each case.

Below are some examples of situations in which the availability of a bonus introduced after the beginning of an OEP would not violate the guaranteed availability provisions of the Affordable

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 Section 2702 of the PHS Act, as implemented in regulations at 45 CFR 147.104.

³ Compliance with the guaranteed availability provisions of the Affordable Care Act is not determinative of compliance with any other provision of law.

Care Act, subject to the relevant facts and circumstances of each case. In these examples, the bonuses described would encourage an agent or broker to market to and enroll eligible consumers into coverage at the same or at a greater level than in the absence of the bonus, and would not discourage or limit enrollment opportunities:

1. A bonus to incent agents and brokers to pursue and reach all populations impacted by a national emergency, such as a FEMA-declared emergency.
2. A bonus to incent agents and brokers to enroll eligible consumers into Marketplace coverage after they are determined to no longer be eligible for Medicaid following the end of a public health emergency, such as the COVID-19 public health emergency.
3. A bonus to incent agents and brokers to follow applicants through the entire process of resolving a data matching issue (DMI) in a timely manner to ensure that the consumer remains enrolled in health coverage.

Q2. Does a post-OEP bonus or other incentive need to be applied retroactively to all enrollments occurring for the same plan year?

To the extent a post-OEP bonus or other incentive that meets all other requirements under applicable Federal or State law fosters rather than limits guaranteed availability, as compared to the absence of the bonus or other incentive, nothing in the guaranteed availability provision of the ACA would require the post-OEP bonus or other incentive to be applied retroactively to all enrollments for the same plan year, unless required by applicable State law.

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,⁴ contact CMS at marketconduct@cms.hhs.gov. 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 FFMProducerAssisterHelpDesk@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.

⁴ 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.