Department of Health & Human Services
Centers for Medicare & Medicaid Services
Center for Drug and Health Plan Choice
7500 Security Boulevard, Mail Stop C4-22-04
Baltimore, Maryland 21244-1850

MEDICARE DRUG AND HEALTH PLAN CONTRACT ADMINISTRATION GROUP (MCAG)

Memorandum

Date: February 24, 2009

To: Medicare Advantage Organizations
Medicare Advantage-Prescription Drug Organizations
Prescription Drug Plan Sponsors
Cost-Based Contractors

From: Louis Polise **/s/**
Acting Director, Medicare Drug and Health Plan Contract Administration Group

Subject: Payment of Referral Fees

The Centers for Medicare & Medicaid Services (CMS) has received reports of activities in the marketplace that have been designed to bypass our new agent/broker compensation regulations (CMS-4138-IFC2). Specifically, plans are paying extravagant fees to agents for making a referral. We discovered that these fees are in addition to the compensation paid to the selling agent. While historically referral fees have been of a nominal amount, such as $25-$100, in some cases we are finding that these fees exceed the total compensation that could be paid to the writing agent (the national fair market value cut-off amount released in the January 16, 2009, HPMS memo). Organizations must cease this practice immediately as it is not compliant with our regulation and guidance. The total compensation amount paid to agents for an enrollment, including referral fees, may not exceed the fair market value identified by CMS. For example, if a plan pays $400 for the initial enrollment, payment to the referring agent must be deducted from the initial compensation amount paid to the selling agent.

There seems to be an erroneous belief that referrals are not governed by the January 16th guidance. However, § 422.2274 and § 423.2274 of CMS-4138-IFC2 specify that compensation includes pecuniary and non-pecuniary remuneration of any kind relating to the sale or renewal of a policy including, but not limited to, commissions, bonuses, gifts, prizes, awards and finder's fees. Referral fees are equivalent to finder's fees and, therefore, governed by CMS regulations.

CMS has taken many actions over the past few years to strengthen marketing requirements and oversight, particularly of agent and broker conduct. It appears that our efforts to ensure the protection of Medicare beneficiaries and preserve the integrity of the Medicare Managed Care program are often thwarted by some of our contractors and related third-party entities who find ways to circumvent our rules and guidelines. CMS will not tolerate the continued attempts of the industry to avoid complying with marketing requirements and practice. CMS will take very strong action against any entity attempting to skirt CMS' rules.

Additionally, we would like to clarify our policy regarding the payment of agents. As stated in the preamble of the regulation, "for enrollments with effective dates in 2009, the MA or PDP plan initially pays the renewal compensation amount to the broker or agent enrolling an individual. Several times in 2009, we will run a report identifying those beneficiaries enrolled in an MA plan or PDP who were newly entitled or enrolled from Original Medicare. Organizations can use the report to identify the agents or brokers who are entitled to an initial compensation amount" and adjust their payment accordingly. To be very clear, CMS is not requiring plans to wait to pay agents until the report is released. Rather, we think that it would be prudent to pay agents the renewal rate and then adjust the payment once the report is released.

If you have any further questions regarding this memo, please contact your Regional Office Account Manager.