NAIFA

National Association of Insurance and Financial Advisors

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February 24, 2014

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS–4159–P
P.O. Box 8013
Baltimore, MD 21244–8013.

Re: Proposed Regulation CMS-4159-P

Dear Ladies and Gentlemen:

On behalf of the National Association of Insurance and Financial Advisors (NAIFA), this letter provides our comments on proposed regulations ("Proposed Regulations") (RIN 0938-AR37, CMS-4159-P) relating to Medicare Advantage and the Medicare Prescription Drug Program.

Founded in 1890 as The National Association of Life Underwriters, NAIFA is one of the nation's oldest and largest associations representing the interests of insurance professionals from every Congressional district in the United States. NAIFA members assist consumers by focusing their practices on one or more of the following: life insurance and annuities, health insurance and employee benefits, multiline, and financial advising and investments. NAIFA's mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members.

Overview

On February 18, 2014, approximately 200 companies and organizations, including those representing multiple healthcare sectors, employers and patients, wrote to CMS Administrator Marilyn Tavenner that they "are deeply concerned that the proposed rule is inconsistent with the spirit and purpose of Medicare Part D, represents unnecessary changes to programs that are already extraordinarily effective in containing costs and, most importantly, will severely impede beneficiaries' access to affordable health plans and medicines." NAIFA shares their concerns and agrees with these stakeholders that the Proposed Regulations should be withdrawn.

NAIFA will focus its detailed comments on Section 13 of the Proposed Regulations that would make changes to the rules for agent/broker compensation. NAIFA believes the proposed compensation changes are unwarranted. The Proposed Regulations assert that the current compensation system is too complicated and provides an incentive for agents and brokers to encourage beneficiaries to switch plans. NAIFA believes these assertions are incorrect.

The existing system is not particularly complicated and the proposed changes are not demonstrably less complicated for plan sponsors to administer. As discussed below, NAIFA believes the existing compensation system provides no meaningful incentive for agents and brokers to encourage plan switches in order to generate increased compensation. Moreover, by reducing permissible compensation for second and subsequent years, the proposed changes will diminish the incentives for agents and brokers to stay involved in advising their clients on the critical Medicare Advantage and Medicare Part D plan choices they must make every year.

NAIFA believes the regulatory impact analysis for this portion of the Proposed Regulations is inadequate. NAIFA also believes that the comment period on the Proposed Regulations is insufficient for affected stakeholders to respond, and that the comment period should be extended for at least an additional 90 days.

Proposed Changes to Agent/Broker Compensation

Under current regulations, Medicare Advantage and Medicare Part D prescription drug plan sponsors are permitted to pay agent/broker compensation, up to a “fair market value” (FMV) amount determined by CMS, in the initial year of a beneficiary’s enrollment in a plan. During the next five years, the regulations provide that the plan sponsor may pay compensation up to 50 percent of FMV (as determined in the original coverage year). The CMS “Announcement of Calendar Year (CY) 2014 Medicare Advantage Capitation Rates and Medicare Advantage and Part D Payment Policies and Final Call Letter” (Call Letter) released on April 1, 2013, advised plans that they could continue to pay renewal levels of compensation in the seventh and succeeding years. However, the Call Letter noted the concern that there was an incentive for brokers and agents to encourage beneficiaries to leave plans after year 6 in order to begin a new compensation cycle. Accordingly, the Call Letter indicated that future regulations applicable to the 2015 year would provide that plan sponsors could pay no more than the renewal amount in years seven and beyond.

The Proposed Regulations would alter the agent/broker compensation structure by providing that first year compensation could be up to the FMV, but that renewal compensation (for year 2 and all subsequent years) could be no more than 35 percent of the FMV (determined in the year for which payment is made).

NAIFA Concerns Over Proposed Changes

The current compensation system is not complicated. Agents and brokers can be paid in the first year an amount no greater than the FMV for that year. In subsequent years (including years 7 and beyond), they can be paid an amount no higher than 50 percent of the first year FMV. Plan sponsors, who all have modern computer systems, need simply keep track of the applicable first year FMV (which is the same for all beneficiaries first covered in the same year) and whether the payment is for a first year or a renewal year (i.e., whether the maximum compensation is 100% of FMV or 50% of FMV). Because the applicable FMV does not change for renewal years, the existing compensation system is simple; all subsequent year payments with respect to a particular beneficiary’s coverage will be identical. While the Proposed Regulations state that they are intended to simplify administration for plan sponsors, we are not aware of any volume of plan sponsor complaints that the current system is too complicated.

The proposed changes do not represent any particular simplification. Under the proposed changes, a plan sponsor would still need to know whether the compensation is for a first year or a renewal year. And, because the applicable FMV would change each year, the compensation paid with respect to a particular beneficiary's coverage would vary each year. Moreover, even though the applicable FMV limitation would be the same for every compensation payment in a particular year, this does not mean that every first year or renewal compensation payment will be uniform. The existing and Proposed Regulations make it clear that there is nothing requiring plan sponsors to pay the maximum allowable amount or even the same amount for every agent or broker. And obviously the proposed change of the renewal percentage from 50% to 35% of FMV is not a simplification.

The Proposed Regulations express the belief that because commissions from an initial plan are based on the FMV in the year of sale but commissions from a replacement plan can be based on FMV in the year of replacement, there is an incentive for agents/brokers to encourage clients to switch plans. This belief is completely unrealistic and is not based on any meaningful real-world experience.

The existing regulations, with their maximum levels of renewal compensation, already remove any "incentive" for agents/brokers to move enrollees from plan to plan. Moreover because CMS does not require plan sponsors to pay the maximum allowable amount, the Proposed Regulations would not remove this supposed incentive – i.e., an agent might get increased compensation from a replacement plan sponsor that pays a higher percentage of FMV than the original sponsor.

The initial and renewal commission values used as examples in section 13 or the Proposed Regulations are not reflective of the actual Medicare Advantage FMVs for the years referenced. While we fully support taking all necessary steps to enforce enrollee protection, the premise of this proposed compensation change appears to be solely based on the assumption that an agent/broker would financially benefit from moving his/her own clients to a new plan every Annual Enrollment Period (AEP). Using the national FMV for CY 2012 to CY 2014 an agent/broker would have seen a net benefit of $6 per enrollee (2012-2013) and $6 per enrollee (2013-2014) if they moved their enrollees each AEP.

The examples use the maximum commission levels for Medicare Advantage plans to attempt to demonstrate that there could be an agent/broker compensation advantage for switching an enrollee to a new plan. The 2014 national FMV compensation limit for Medicare Advantage is $425 ($213 for renewals). However, for Medicare Part D prescription drug plans which would also be affected by the new rule, the 2014 FMV limit is only $56 ($28 for renewals). So an agent/broker might find an increase of compensation of maybe $1 from switching a Part D prescription drug plan enrollee to a new plan.

It takes over an hour, at a minimum, for an agent/broker to educate a beneficiary and give a compliant sales presentation using all CMS/carrier approved marketing material. This proposed compensation change supposes that agents/brokers are enticed by an amount that is below the current federal minimum hourly wage. Further, agents are mindful of their duty to serve the best interests of the client. From a purely financial perspective, it benefits agents/brokers to enroll one of the more than 70,000 people becoming eligible for Medicare on a weekly basis as opposed to moving an existing client during each AEP.

The AEP is a 54-day period and is the only time during the year when agents/brokers would have the opportunity to move an enrollee of theirs without due cause. It is inaccurate to suggest that agents/brokers are financially incentivized to move their own enrollees to a new plan for the potential of an incremental compensation increase. The plan changes that do occur during an AEP are far more likely due to plan withdrawals, service area reductions, doctors and hospitals entering and exiting networks, formulary updates, premium increases and/or other changes to the plan benefit packages from year to year.

The incentive to move an enrollee from their current plan after year 6 has also been greatly diminished with the Call Letter allowing MA organizations and Part D sponsors, at their discretion, to pay agents/brokers renewal amounts for year 7 and beyond. We support changes providing that payments for year 7 and beyond should be treated as renewal payments, even if with respect to a new plan. However, we urge CMS to require all MA organizations and Part D sponsors to pay renewals beyond the 6-year cycle and that agents/brokers remain contracted, certified and appointed. This will have a far greater impact in reducing or eliminating any incentive for agents/brokers to move enrollees to a new plan after year 6 and would also increase consumer servicing from agents and brokers.

Even taking into account that the renewal compensation amounts will be based on the each year's current (and presumably higher) FMV, the compensation structure in the Proposed Regulations represents a significant reduction in compensation over the agent/broker compensation levels allowable currently. Because inflation is relatively low, the FMV level will not vary enough, even over a period of several years, to offset the impact of reducing the renewal compensation level from 50% of original FMV to 35% of current FMV. For example using a simplified Medicare Advantage example that starts with FMV in Year 1 of $400 and inflating the FMV by 3% each year, the aggregate nominal compensation under the Proposed Regulations during the first five renewal years would be $765 compared to $1,000 under the current rules. The annual 35% of current FMV compensation during a renewal year would not equal the 50% of first year FMV compensation under the current system until Year 13, and the aggregate nominal compensation would not catch up until several years later. Of course, on a present value basis, the proposed changes represent an even more significant reduction in compensation, no matter how one calculates it.

We raise the concern about the reduced renewal compensation levels because it is the renewal compensation that gives agents and brokers the financial incentive to continue to work with their clients, advising them on the various plan options they have each year and helping them determine which plan will best suit their needs for the coming year. If that renewal compensation is reduced, agents and brokers will spend proportionally more of their time seeking new enrollees (or selling other forms of insurance) and less of their time advising past enrollees. While CMS may not intend that to occur, it is an inescapable consequence of reducing renewal compensation.

Regulatory Impact Analysis

As CMS notes in the Proposed Regulations, various laws and Executive Orders require that a proposed rule be accompanied by a detailed and comprehensive regulatory impact analysis. NAIFA believes the "regulatory impact analysis" in the Proposed Regulations relating to the agent/broker compensation changes is demonstrably inadequate. It consists only of the following brief statement:

> We do not believe that any of these revisions will add additional burden or have financial impact. We are simply revising the existing compensation structure under which MA

> organizations may pay independent agents and believe that the total compensation amounts will generally remain unaffected. Furthermore, we believe these proposed changes would actually lessen the burden and impact on MA organizations by simplifying the compensation structure for independent agent brokers.

This so-called "regulatory impact analysis" simply assumes away the impact of the proposed changes on agents and brokers and on the Medicare beneficiaries they serve.

<u>Comment Period</u>

The Proposed Regulations were released in early January with comments due 60 days later (i.e., by March 7). This comment period is inadequate for stakeholders to digest and analyze a complicated 700-page proposed rule, including the impact of the proposed compensation changes. While we are urging CMS to withdraw the Proposed Regulations, we would also urge it to extend the comment period for at least 90 additional days.

<u>Conclusion</u>

NAIFA urges CMS to reconsider the proposed changes to agent/broker compensation in light of the above. The existing compensation structure (as supplemented by the Call Letter) has worked well. We are concerned that the proposed agent/broker compensation changes will have the unintended consequence of harming Medicare beneficiaries by reducing their access to plan selection advice.

Thank you for your consideration of our view. Please contact Diane Boyle, NAIFA Vice President, Federal Government Relations at dboyle@naifa.org or 703-770-8252 if you have any questions.

Sincerely,

John F. Nichols, MSM, CLU
NAIFA President