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Title: Insurance Standards Bulletin Series—INFORMATION

Subject: CCIIO Technical Guidance (CCIIO 2015—0001): Questions and Answers Regarding the Medical Loss Ratio (MLR) Reporting and Rebate Requirements

I. Purpose

The purpose of this bulletin is to provide guidance regarding: the limited circumstances in which a health insurance issuer may, for MLR reporting purposes, exclude agent and broker fees or commissions from earned premium under 45 CFR §158.130; and, to whom a health insurance issuer must provide MLR rebates payable under section 2718 of the Public Health Service Act (PHS Act), as added by the Patient Protection and Affordable Care Act (Affordable Care Act), and the implementing regulation at 45 CFR §158.240, when a portion or all of the premium is paid with advance payments of the premium tax credit.

This Bulletin provides MLR guidance on the following topics:

- Earned premium and agent and broker fees and commissions
- Recipients of MLR rebates

II. Questions and Answers

EARNED PREMIUM (45 CFR §158.130)

Question #64:

May an issuer, for MLR reporting purposes, exclude from earned premium agent and broker fees or commissions paid in connection with a health insurance policy?

Answer #64:

No, unless all of the conditions stated in this guidance exist. 45 C.F.R. §158.130 requires health insurance issuers to report earned premium for each MLR reporting year. The regulation states that earned premium “means all monies paid by a policyholder or subscriber as a condition of receiving coverage from the issuer, including any fees or other contributions associated with the health plan.” 45 C.F.R. §158.160(b)(2)(iv) requires issuers to report “Agents and brokers fees and commissions” as a non-claims cost (i.e., part of an issuer’s administrative costs) because

such fees and commissions are generally a condition of receiving coverage and an expense of the issuer and not a separate cost incurred by the policyholder.

CMS has become aware that some issuers have been seeking ways to exclude agent and broker fees and commissions from premium in order to increase their MLRs and reduce or eliminate rebates. Specifically, some issuers have been trying to assert that payment of agent or broker fees or commissions is not a condition of coverage, and that the policyholder owes these amounts directly to the agent or broker, while issuers merely pass these amounts through. In some cases, issuers have required policyholders, as a condition of coverage, to sign a statement that the policyholder retained the agent or broker and negotiated the fee independently of the issuer, even where it appears that such statement was not factually accurate.

In recognition of the fact that there may be instances where the policyholder does in fact retain the agent or broker and negotiate and pay the agent or broker's fee or commission, CMS is issuing this guidance to clarify when it may be acceptable for an issuer to exclude agent or broker fees and commissions from premium for MLR reporting purposes. Accordingly, if all of the following seven conditions are met, an issuer may exclude these agent or broker fees and commissions from premium in the applicable state/market for MLR reporting purposes:

1. The law of the state in which the policy is situated does not deem the agent or broker to be a representative of the issuer;
2. The policyholder is not required to utilize an agent or broker to purchase insurance and may purchase a policy directly from the issuer;
3. The policyholder selects, retains, and contracts with the agent or broker on his or her own accord;
4. The policyholder negotiates and is responsible for the fee or commission separate and apart from premium;
5. The issuer does not include these agent or broker commissions and fees in rate filings submitted to the applicable regulatory agency;
6. The policyholder voluntarily chooses to pass the fee or commission through the issuer and is not required to do so, or the policyholder pays the fees or commission directly to the agent or broker; and,
7. The policyholder issues the 1099 to the agent or broker, if a 1099 is required.

If any condition in the above list is not met, then the issuer must include the agent or broker fees and commissions in earned premium for MLR reporting purposes.

Question #65:

How will CMS enforce the above guidance on earned premiums and the treatment of agent and broker fees and commissions?

Answer #65:

The Affordable Care Act and implementing regulations at 45 C.F.R. Part 158 require health insurance issuers to submit data on the proportion of premium revenues spent on clinical services and quality improvement, also known as the Medical Loss Ratio (MLR), in accordance with

CMS guidance and instructions. Issuers are also required to issue rebates to enrollees if this percentage does not meet minimum standards.

CMS will review issuer compliance with this guidance as part of its ongoing MLR monitoring efforts, including examination as part of an audit pursuant to 45 C.F.R. 158.402. If CMS determines that an issuer has incorrectly calculated rebates or has incorrectly reported MLR data, it may require issuers to take appropriate corrective actions, such as paying any difference in rebates owed (with interest) to enrollees, and reporting the corrected amounts to CMS.

REBATING PREMIUM IF THE APPLICABLE MEDICAL LOSS RATIO STANDARD IS NOT MET (45 CFR §158.240)

Question #66:

If an issuer is required to provide a rebate because the MLR standard was not met for a given reporting year, and a portion or all of that policyholder's health insurance premium obligation was paid with advance payments of the premium tax credit, to whom must the issuer provide the rebate?

Answer #66:

The Affordable Care Act established a refundable health insurance premium tax credit to help eligible individuals and families afford health insurance coverage. An eligible enrollee may choose to pay his or her health insurance premiums to the issuer during the year, and claim the full amount of the premium tax credit when he or she files an income tax return for that year. Alternatively, the eligible enrollee may choose to have some or all of the estimated premium tax credit paid in advance, directly to the insurance issuer, if he or she enrolls in coverage through the Marketplaces. If an enrollee chooses this latter option, he or she must reconcile the advance payments of the estimated premium tax credit with the actual premium tax credit that the enrollee is eligible to claim when his or her income tax return is filed.

For purposes of the MLR rebate, there is no distinction between an enrollee who chooses to pay the entire amount of premium to the issuer and claim the full amount of the premium tax credit when he or she files an income tax return for that year, and an enrollee who chooses to apply the premium tax credit against the premium obligation to the issuer in advance of filing an income tax return. Therefore, when a policyholder is owed an MLR rebate, and a portion or all of that policyholder's health insurance premium obligation was paid with a premium tax credit, the issuer must provide the rebate to the policyholder.