Final Rule for Broker/Agent Compensation

A review of the proposed rules:

Centers for Medicare & Medicaid Services (CMS)
42 CFR Parts 409, 417, 422, 423, and 424

Medicare Program; Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs; Proposed Rule

A review of the final rules:


Medicare Program; Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs; Final Rule


Overview

This whitepaper is for Medicare Advantage health plans (MA) and those who are responsible for incentive compensation to external agent/brokers and internals sales reps.

MA plans are required to follow marketing guidelines that outline how plans can market to Medicare beneficiaries. In this paper we review common challenges we see MA plans having with MIPPA rules for agent/broker compensation. We examine common challenges from the current rules and new challenges from the proposed 2015 rules.

This EvolveSPM White Paper, Version FR2015A, is a follow to the original white paper, Version PR2015A. This white paper confirms the final rules for each of the proposed rules originally examined. The confirmation of each proposed rule is included using red font color.

Disclaimer: This document is for illustrative purposes only and should not be used as legal advice or for direction.
Introduction

From the 2014 Medicare Marketing Guidelines: “The Medicare Marketing Guidelines (MMG) implement the Centers for Medicare & Medicaid Services’ (CMS) marketing requirements and related provisions of the Medicare Advantage Organization (MA).”

See the Appendix A for where to download the 2014 MMG.

Included in the MMG are sections related to Agent/Broker Compensation. We’ll review wording in these sections and the common challenges plans have when implementing their Agent/Broker Compensation.

We’ll also examine the proposed rule changes to the MMG for 2015 that will affect Agent/Broker Compensation.

See Appendix A for where to download the proposed rules: “Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs; Proposed Rule”

Summary of our Review

This whitepaper has the following sections:

1. Common challenges interpreting and implementing the 2014 MMG Agent/Broker Compensation Rules
2. How the proposed 2015 changes may affect MA Agent/Broker Compensation
3. Appendix A on how to locate the documents referenced in this whitepaper.
Common challenges interpreting the current rules:

In the detailed review section, we examine two common challenges: 1) Paying by calendar year instead of anniversary year, and 2) the difference between “No Prior Plan”, “Like Plan Type” and “Cycle Year”.

While we still see plans having issues with many areas of the MMG Agent/Broker Compensation, the two challenges above are common. Both challenges come from differing interpretations of the current rules on how agents/brokers are paid for enrollments. Both challenges come from how plans must track the value each calendar month, for every enrollment. Below we provide examples of how each month should be valued.

The final ruling’s summary section states:

“Since we proposed to eliminate the 6-year cycle, our revised paragraph (b)(2) deletes the reference to the initial year and the 5 renewal years. ”

How the proposed 2015 changes may affect MA Agent/Broker compensation:

Paying by calendar year:

The proposed rules are clear that paying by calendar year will be enforced. Also, the proposed rules have new requirements that can’t be implemented by plans that don’t currently pay by calendar year. The proposed rules will apply to all new enrollments and to all renewals being paid, including renewals for historic enrollments from 2014 and earlier.

We’ve successfully switched plans from anniversary year to calendar year payments. Being familiar with the process, we anticipate the proposed rules will complicate conversions to calendar year payments.

The final ruling makes it clear that paying by calendar year will be enforced.

Renewals based on current fair market value:

The proposed rules for 2015 include a substantially change from the current payment requirements. The current requirements follow a 6 year payment cycle, where the value of all months in all 6 years is known at the time of the enrollment.

Conversely, the proposed 2015 rules require renewal payments to be paid at a percentage of the renewal year’s fair market value (FMV). This change requires plans to carefully value each month of a member’s enrollment, by calendar year, by regional FMV. Every enrolled month must be paid out or charged back at the correct value, even as FMV changes each year. The required payment for each month in a renewal’s calendar year won’t be known until CMS publishes the FMV each year.

The final ruling confirms that agents and brokers will be paid at a 50% of the renewal year’s fair market value. The proposed rules used a renewal amount of 35% of the renewal year’s fair market value. The final ruling states:

“We received numerous comments from agents, brokers, plans and trade associations overwhelmingly opposing the 35 percent renewal rate. Based on the comments received, we will finalize the amendment to the regulations with a cap of 50 percent of the current FMV for renewals.”
Detailed Review

1.1 Common Challenges Interpreting 2014 MMG Agent/Broker Compensation Rules

In the next two sections we review common issues we see plans have when interpreting the current MMG rules. The first challenge is related to “Calendar Year” versus “Anniversary Year.” The second challenge is differentiating “No Prior Plan” versus “Like Plan Type” versus “Cycle Year.”

1.1.1 Calendar Year versus Anniversary Year (Annual Cycle)

We interpret the MMG as plans being required to pay brokers for their enrollments by calendar year. Plans may pay brokers in advance no more than one calendar year at a time.

A common challenge we see plans have is paying brokers for each enrollment by anniversary year (annual cycle) instead of calendar year.

Since plans must distribute broker payments for each enrollment over multiple years, there’s a concept of calendar year versus anniversary year. Calendar year means a year of enrollment follows the calendar year, i.e. January through December, where each month in a calendar year has the same value. Conversely, anniversary year means a year of enrollment is a count of 12 months from the beneficiary’s first month of enrollment, where each month in a group of 12 has the same value.

For example, calendar based payments for an 8-2014 enrolment would have its first renewal payment start on 1-2015. For an anniversary based payment, that same enrollment would have its first renewal payments start on 8-2015.

The requirement to pay by calendar year is listed in the 2014 MMG: “CMS defines ‘year’ as a plan year, meaning January 1 through December 31.” The requirement to pay by calendar year was also listed in previous year’s MMGs.

Plans may not pay more than one calendar year at a time. This requirement is listed in the 2014 MMG: “Plan sponsors cannot pay agent/brokers for the entire 6-year compensation cycle upfront, but may pay them annually, quarterly, monthly, or more frequently.” The requirement to pay a maximum advance of one calendar year (annually) was also listed in previous year’s MMGs.

1.1.1.1 Our interpretation of a correct calendar based payment

We interpreted the calendar based payment to mean every month in a calendar year has the same value. The month’s value is derived from the fair market value reported by CMS and the beneficiary’s Cycle Year of enrollment as reported in the CMS data file called “Agent Broker Compensation Data File” (CMS Broker Comp File).

Furthermore, we interpret paying annually, or more frequently, to mean plans can pay in advance the 12 months that are in the enrollment date’s calendar year.

The final ruling states:

"Comment: One trade organization commented that many MA organizations and Part D sponsors currently operate on a "rolling year" basis, such that, if an enrollment is effective February 1, the compensation covers the period starting on February 1 and continuing through January 31 of the following year. The association said that these were well-established processes and a change could disrupt systems and require a significant redesign.”
Response: Our position has always been that organizations and sponsors were required under the existing rules to pay compensation on a calendar year basis, not a “rolling” year basis. When we encountered situations where organizations and sponsors have not implemented these requirements correctly, we have required the organization to adjust its processes to comply and they have done so in a timely manner.

Example enrollment and payment details:

Payment Definition: Pay maximum initial payment in advance, Pay maximum renewal payment in advance, Pay by calendar year

Enrollment Date: 8-1-2013, Application Received on 7-5-2013

CMS Data: Cycle Year=1, Prior Plan=MA

Estimated Fair Market Value/Year: Cycle Year 1=$400, Cycle Year 2 and greater $400*.5=$200

Payment in 2013: Payment date of 7-15-2013, 5/12*$400=$166.67 where 5/12 is for 8-2013 through 12-2013

Renewal Payment: Renewal payment date of 1-15-2014, 12/12*$200=$200 for 1-2014 through 12-2014

Disenrollment: Date of disenrollment 10-31-14, Date disenrollment is known 11-1-2014,
Charge back to broker on 11-15-2014, -2/12*$200=-$33.33 where -2/12 is for 11-2014 through 12-2014

Total payment: as of 11-15-2014: $166.67 + $200 - $33.33=$333.34

1.1.1.2 Our interpretation of an incorrect anniversary based payment

Example enrollment and payment details:

Payment Definition: Pay maximum initial payment in advance, Pay maximum renewal payment in advance, Pay by anniversary date

Enrollment Date: 8-1-2013, Application Received on 7-5-2013

CMS Data: Cycle Year=1, Prior Plan=MA

Estimated Fair Market Value/Year: Cycle Year 1=$400, Cycle Year 2 and greater $400*.5=$200

Payment in 2013: Payment date of 7-15-2013, 12/12*$400=$400 where 12/12 is for 8-2013 through 7-2014

Renewal Payment: Renewal payment date of 8-15-2014, 12/12*$200=$200 for 8-2014 through 7-2015

Disenrollment: Date of disenrollment 10-31-14, Date disenrollment is known 11-1-2014,
Charge back to broker on 11-15-2014, -9/12*$200=-$150.00, where -9/12 is for 11-2014 through 7-2015

Total payment: as of 11-15-2014: $400 + $200 - $150.00=$450.00

Issues with anniversary based payment:

1. In this example, the anniversary based payment overpays by $450.00 - $333.34=$116.66

2. On 8-2013, payment is made for 12 months when 5 are allowed prior to when disenrollment is the known
3. Months 1-2014 through 7-2014 are each valued at 1/12*$400=$33.33 but should be valued at 1/12*$200=$16.67

4. On 8-2014, renewal payment is made for 12 months when 5 are allowed prior to when the disenrollment is known

1.1.2 No Prior Plan versus Like Plan Type versus Cycle Year

1.1.2.1 Like Plan Type

Like Plan Type is used to describe a type of transfer a beneficiary can make when switching to a new plan. The transfer can be between plans in the same parent organization or between plans from two different parent organizations. When both plans have the same plan type as designated by CMS, the second plan into which the beneficiary transfers is referred to as having a Like Plan Type (or same Plan Type).

Like Plan Type is relevant to how CMS increments a beneficiary’s Cycle Year. The beneficiary’s Cycle Year will increment with each calendar year when that beneficiary stays in the same plan, or stays in the same Plan Type.

To determine if a beneficiary is in cycle year 1, some plans use the Prior Plan Type field in the CMS Broker Comp File. These plans use that field to see if the prior plan is a “Like Plan Type”. Plans then determine the cycle year to be 1 (one) if it’s not a Like Plan Type.

However, examining the Prior Plan Type field in the CMS Broker Comp file is not necessary to determine if beneficiary is in cycle year 1. The beneficiary’s cycle year is explicitly provided in that CMS Broker Comp File, in its own Cycle Year field.

We interpret the MMG to mean the beneficiary’s cycle year should be obtained from CMS Broker Comp File. This is listed in the 2014 MMG: “The monthly MARx agent/broker compensation report that is generated when an enrollment occurs will provide Plans/Part D Sponsors with the information necessary to determine whether they should make an initial or renewal payment.” The requirement to use the data file was also listed in previous year’s MMGs.

The final ruling is not clear which fields will be included in the CMS Broker Comp Data File. There is clarification of what is a “Like Plan” and a “Non-Like Plan”. The final rule states:

"Like plan type means one of the following:
(1) PDP replaced with another PDP.
(2) MA or MA–PD replaced with another MA or MA–PD.
(3) Cost plan replaced with another cost plan.

Unlike plan type means one of the following:
(1) PDP replaced with an MA–PD or an MA–PD replaced with a PDP.
(2) PDP replaced with a cost plan or a cost plan replaced with a PDP.
(3) MA–PD replaced with a cost plan or a cost plan replaced with an MA–PD."

Because there’s emphasis on how to determine Like Plan versus Unlike Plan, it could be assumed that the cycle year may be removed from the CMS Broker Comp Data File at some point in the future.

1.1.2.2 No Prior Plan

No Prior Plan is a special status a beneficiary may have at the time of enrollment. The general idea is that a beneficiary can be new to Medicare and therefore have no MA plan history.
Some plans confuse the concept of No Prior Plan with Like Plan Type and then with Cycle Year. These three concepts are related, but that relationship doesn't actually have to be considered. Both Prior Plan Type and Cycle Year are provided in the CMS Broker Comp File and those values can be used directly. Therefore, as is the case with Cycle Year, we interpret the MMG to mean the beneficiary’s No Prior Plan status should be obtained from the CMS Broker Comp File using the Prior Plan Type field.

1.1.2.3 What No Prior Plan Means

If a beneficiary has a status of No Prior Plan, plans have the option of paying a broker what the MMG refers to as the “full year initial compensation amount” - even if the beneficiary enrolls midyear.

This is listed in the 2014 MMG as: “When a beneficiary enrolls in a plan after January 1 and has no prior plan history (as indicated on the MARX agent/broker compensation report), Plans/Part D Sponsors may pay the full year initial compensation amount or a pro-rated amount based upon the number of months the beneficiary is enrolled.” This option was also listed in previous year’s MMG.

We interpret the “full year initial compensation amount” to mean the full calendar year (Jan through Dec) at the Cycle Year 1 amount. For a mid-year enrollment, this means the plan is compensating the enrolling broker for months in the calendar year that are actually prior to the beneficiary’s enrollment date.

The option to pay “full year initial compensation amount” seems to conflict with other sections of the MMG, including: “Plans/Part D Sponsors should pay only for the actual months the beneficiary is enrolled in the plan.” To reconcile the two sections, we interpret “full year initial compensation amount” to apply only when the beneficiary is enrolled for the full calendar year of their initial year where they have no prior plan history. So, in the case where a beneficiary disenrolls before the end of their initial year, we interpret “pay only for the actual months the beneficiary is enrolled in the plan” to mean the subsequent charge-back should be for all unenrolled months, including those months prior to the enrollment date.

In the final ruling, there’s no mention of a change to the “no prior plan” language from the 2014 MMG. However, the final ruling does state:

“(3) Compensation payment and payment recovery. (i) Compensation may only be paid for the enrollee’s months of enrollment during a plan year. “

This statement in the final ruling also seems to contradict the “no prior plan” statement from above.

1.1.2.4 Our interpretation of a No Prior Plan Payment with a disenrollment in the second calendar year

Note that confusion from a No Prior Plan payment typically comes from:

1. The calendar months for which the broker is compensated
2. How charge backs for same year versus subsequent year disenrollments are applied

Example enrollment and payment details for subsequent year disenrollment:

**Payment Definition:** Pay maximum initial payment in advance, Pay maximum renewal payment in advance

**Enrollment Date:** 8-1-2013, Application Received on 7-5-2013

**CMS Data:** Cycle Year=1, Prior Plan=NONE

**Estimated Fair Market Value/Year:** Cycle Year 1=$400, Cycle Year 2 and greater $400*.5=$200

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Disclaimer: This document is for illustrative purposes only and should not be used as legal advice.
Payment in 2013: Payment date of 7-15-2013, 7/12*$400=$233.33 + 5/12*$400=$166.67 for total of $400, where 7/12 is for 1-2013 through 7-2013 (prior to enrollment) and 5/12 is for 8-2013 through 12-2013 (months enrolled in 2013)

Renewal Payment: Renewal payment date of 1-15-2014, 12/12*$200=$200 for 1-2014 through 12-2014

Disenrollment: Date of disenrollment 11-30-13, Date disenrollment is known 12-1-2013, Charge back to broker on 12-15-2013, -7/12*$400=-$233.33 + -1/12*$400=-$33.33 for a total of -$266.66, where -7/12 is for 1-2013 through 7-2013 (prior to enrollment) and -1/12 is for 12-2013 (after the enrollment)

Total payment: as of 12-15-2013: $400 - $266.66=$133.34

Months Charged Back
The months charged back in this example are those which were paid in advance for 2013 that were months where the beneficiary was not enrolled. This includes months prior to the enrollment date and months after the disenrollment date.

1.1.2.5 Our interpretation of a No Prior Plan Payment with a disenrollment in the same calendar year

Payment Definition: Pay maximum initial payment in advance, Pay maximum renewal payment in advance

Enrollment Date: 8-1-2013, Application Received on 7-5-2013

CMS Data: Cycle Year=1, Prior Plan=NONE

Estimated Fair Market Value/Year: Cycle Year 1=$400, Cycle Year 2 and greater $400*.5=$200

Payment in 2013: Payment date of 7-15-2013, 7/12*$400=$233.33 + 5/12*$400=$166.67 for total of $400, where 7/12 is for 1-2013 through 7-2013 (prior to enrollment) and 5/12 is for 8-2013 through 12-2013 (months enrolled in 2013)

Disenrollment: Date of disenrollment 11-30-13, Date disenrollment is known 12-1-2013, Charge back to broker on 12-15-2013, -7/12*$400=-$233.33 + -1/12*$400=-$33.33 for a total of -$266.66, where -7/12 is for 1-2013 through 7-2013 (prior to enrollment) and -1/12 is for 12-2013 (after the enrollment)

Total payment: as of 12-15-2013: $400 - $266.66=$133.34

Months Charged Back
The months charged back in this example are those which were paid in advance for 2013 that were months where the beneficiary was not enrolled. This includes months prior to the enrollment date and months after the disenrollment date.

1.2 Overview of proposed 2015 changes to MMG Agent/Broker Compensation rules

There are proposed rule changes for 2015 that will substantially affect how plans pay their brokers, and possibly their internal sales teams, for enrollments and referrals.

In the following sections we’ll review verbiage that’s in the proposed rules and provide our interpretation of what the new rules mean and how they may affect a plan’s compensation for enrollments.

As described above, see Appendix A for how to download the proposed rules.

1.2.1 Paying by calendar year is being reinforced

We interpret from the proposed rules that the requirement to pay enrolling brokers by calendar year will be clarified and enforced. This is listed in the proposed rules: “The annual compensation amount covers January 1 through December 31 of each year.” and “we propose to revise the language at § 422.2274(a)(4) to clarify
that the payment made to an agent must be for January 1 through December 31 of the year and may not cross calendar years."

This means plans that are still paying by Anniversary year are subject to compliance issues. This is also listed in the proposed rules: "[CMS has] taken appropriate compliance actions in those instances where we have evidence that an MA organization or Part D sponsor is paying compensation incorrectly."

In addition, below we examine other changes to the rules that can’t be implemented correctly if a plan is still paying by anniversary year.

To understand how to pay by Calendar Year, see our examples in section 1.1.1 above.

As stated above, the final ruling clearly defines Plan Year as a Calendar Year. It states:

"Plan year means the year beginning January 1 and ending December 31.
Renewal year means all years following the initial enrollment year in a like plan type."

1.2.2 Fair Market Value for initial payments may remain unchanged

The proposed rules controlling broker compensation for initial year enrollments seem to follow the current rules. Initial payments are required to be no greater than “fair market value (FMV)."

This payment definition for initial enrollments can be derived from the proposed rules: "For new or unlike plan change enrollments, MA Organizations and PDP sponsors could make an initial payment that is no greater than the fair market value (FMV) amount for such services, set annually by CMS in guidance interpreting these regulations."

The final ruling confirms that the initial year payments will remain unchanged. The Final ruling states:

"(1) Compensation amounts. (i) For an initial year enrollment of a Medicare beneficiary into an MA plan, the compensation must be at or below the fair market value of such services, published annually as a cut-off amount by CMS."

However, it’s not clear if the proposed rules remove the current option to pay a full calendar year for midyear enrollments when the beneficiary has no prior plan. See section 1.1.2.3 above for what no prior plan means.

1.2.3 Fair Market Value for renewal payments is changing

The proposed rules imply that Cycle Year 1 through Cycle Year 6 and beyond will no longer play a major role in the compensation structure.

Instead, Cycle Years 2 and greater are referred to as “renewal” years.

The proposed rules require plans paying renewals for members in cycle year 2 or greater to use a common maximum payment rate that’s 35% of fair market value for the renewal year. Therefore, brokers get paid the same renewal amount, even if they try moving beneficiaries in their renewal years to a different plan.

The final ruling changed the percentage of fair market value from 35% to 50%. It states:

"(ii) For renewal years, compensation may be up to 50 percent of the current fair market value cut-off amounts published annually by CMS."
This payment definition can be derived from the proposed rules: “For renewals in Year 2 and subsequent years, the MA organization or sponsor could pay up to 35 percent of the FMV amount for that year.”

The term “renewal” used in the proposed rules can be confusing. We interpret “renewal” to be relative to Medicare, not the plan. So a renewal payment would apply to any beneficiary that’s in their cycle year 2 or greater, even if that beneficiary is in their first year with a different like plan.

The final ruling clarifies the term renewal. It states:

"Renewal year means all years following the initial enrollment year in a like plan type."

It’s not clear if Cycle Year will no longer be used in the final rules. It’s not clear if Cycle Year will be removed from the Broker Comp file. If Cycle Year is removed from the Broker Comp file, the Prior Plan field may have to be used to differentiate initial enrollments from renewal enrollments.

The purpose of the proposed rule follows the spirit of minimalizing a broker’s incentive to move beneficiaries from plan to plan for monetary gain. The method of minimizing that negative incentive, however, has changed.

The current MMG rules require plans to pay brokers for a 6 year cycle with two types of payments: one for a member’s initial year (cycle year 1) and another payment for a member’s renewal years (cycle years 2-6). The current rule, however, provides an unintended incentive for brokers to move beneficiaries in their cycle years 2 and greater to another plan. The proposed rules outline this unintended incentive and can be reviewed in the section starting with: “Beneficiary A is a new, initial enrollee in MA plan XYZ for CY2012.” The description explains how, with the current rules, brokers can receive an addition $15 for each beneficiary they move to another plan.

1.2.3.1 Our interpretation of fair market value renewal payments

Payment Definition: Pay maximum initial payment in advance, Pay maximum renewal payment in advance

Enrollment Date: 8-1-2013, Application Received on 7-5-2013

CMS Data: Cycle Year=1, Prior Plan=MA (Since it’s a 2013 enrollment, Cycle Year is considered for 2013 through 2014)

Estimated Fair Market Value/Year: for 2013 Cycle Year 1=$400, Cycle Year 2 and greater $400*.5=$200

For 2014, the fair market value is not applicable to renewals per 2014 MMG rules

For 2015, Initial year=$420, renewal year=$420*.35=$147

Based on the final ruling, the renewal year becomes=$420*.50=$210 (note the 50% of current fair market value)

Payment in 2013: Payment date of 7-15-2013, 5/12*$400=$166.67 where 5/12 is for 8-2013 through 12-2013

Renewal Payment 2014: Renewal payment date of 1-15-2014, 12/12*$200=$200 for 1-2014 through 12-2014


Based on the final rule, this becomes 12/12*210 for 1-2015 through 12-2015

Disenrollment: Date of disenrollment 10-31-14, Date disenrollment is known 2-1-2015

Charge back to broker on 2-15-2015, -12/12*$147=-$147 -12/12*$200=-$210 + -2/12*$200=-$33.33 for a total of -$180.33 -$243.33 where -12/12 is for 1-2015 through 12-2015 and -2/12 is for 11-2014 through 12-2014

Total payment: as of 2-15-2015: $166.67 + $200 + $147 + $210 - $147 - $210 - $33.33 = $333.34

Items to Note in this Example

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Disclaimer: This document is for illustrative purposes only and should not be used as legal advice.
In this example the months charged back may seem confusing due to the late date the disenrollment is known. This is a retro-active disenrollment that can occur for various reasons, like a late update to a plan’s enrollment system’s data. We use this example to show our interpretation of the current and proposed rules.

We interpret the current and proposed rules to require plans to place a value on each month of enrollment within a calendar year. In the charge back example, renewal months in 2015 are valued per the proposed rules, and must be charge back accordingly. Conversely, renewal months in 2014 are valued per the current MMG rules, and must be charged back accordingly.

The proposed rules will now require plans to track the value of every renewal month within a calendar year per CMS’s reported fair market value for that calendar year. It may be true the fair market value is further segmented beyond calendar year to include geographic regions. Plans will have to track the appropriate fair market value by calendar year, by region as determined by the beneficiary’s residence.

1.2.4 When a payment can be made during AEP is changing

We interpret the current MMG rules as allowing plans to advance payment to brokers prior the beneficiary’s enrollment date. This is listed in the 2014 MMG: “Plans may advance payments during the AEP for the coming plan year, but cannot otherwise make payments for more than one year at a time. Compensation may only be paid for a beneficiary’s months of enrollment.”

We interpret the proposed rules as removing this option of advance payment across the calendar year. In the proposed rules, this is listed as: “CMS proposes to change the timing of payments to require that payments may not be made until January 1 of the compensation year, and must be paid in full by December 31 of the compensation year.”

However, we also interpret the proposed rule as continuing to allow plans to pay for midyear enrollments prior to the actual enrollment date, provided the payment date is in the same calendar year as the enrollment date.

We also note the reinforcement of payment by calendar year instead of anniversary year. This is reinforced by: “…and [payment] must be paid in full by December 31 of the compensation year.”

The final ruling confirms the above, stating:

”(B) Compensation may not be paid until January 1 of the enrollment year and, if paid at all, must be paid in full by December 31 of the enrollment year. “

1.2.5 Rapid disenrollment charge back exceptions may be changing

The current 2014 MMG states that any disenrollment within 3 months of the enrollment is considered a rapid disenrollment and should result in a full charge-back to the broker: “Plans are required to recover compensation payments from agents under two circumstances: 1) when a beneficiary disenrolls from a plan within the first three months of enrollment (rapid disenrollment) and 2) any other time a beneficiary is not enrolled in a plan.”

The current 2014 MMG also states exceptions to rapid disenrollment full charge-backs. The exceptions are based on the concept some disenrollments are not the fault of the enrolling broker. Instances of some exceptions can be determined from enrollment/disenrollment dates, and available CMS data. However, not all of the exceptions listed can be automatically identified by plans.

The proposed rules clarify that in the case of rapid disenrollment exceptions, plans are to pay for enrolled months only: “In circumstances such as these, since the disenrollment decision could not be based on agent or broker behavior, we believe it to be appropriate for the agent to receive the compensation associated with the months that beneficiary was a member of the plan. While the plan would not recover the compensation for those months, it would recover any compensation paid for the months after the disenrollment.”
The proposed rules may still have ambiguity as to how plans can automate the identification of all instances when full charge backs aren’t required for rapid disenrollment: “We would provide more specific information in sub-regulatory guidance, and welcome comments regarding possible examples to include in that guidance” where “sub-regulatory guidance” refers to a list of exceptions when full charge-backs aren’t required.

The final ruling clarifies that rapid disenrollment exceptions will not change. In the summary section it states:

"We are not implementing the changes with respect to the recovery of compensation, but will finalize language to keep the existing situation, which requires full recoupment if a member disenrolls within the first 3 months of enrollment except in limited circumstances."

In the Amendment section it also states:

"(iii) When a beneficiary disenrolls from an MA plan, compensation paid to agents and brokers must be recovered for those months of the plan year for which the beneficiary is not enrolled. For disenrollments occurring within the first 3 months, the entire compensation must be recovered unless CMS determines that recoupment is not in the best interests of the Medicare program."

1.2.6 Restriction of referral fees to external brokers and internal sales

The proposed rules reinforce previous CMS memorandums and MMG rules regarding referral fees.

The current 2014 MMG include referral fees as part of the total fair market value compensation: “Referral/finder’s fees are part of total compensation. They are not subject to the six (6)-year compensation cycle.”

We interpret this as meaning a referral fee paid to an external agent or broker must be included in the allowable fair market value that can be paid in the first calendar year of enrollment. However, since the referral fees aren’t subject to the 6-year cycle, the entire fee can be paid at once. Further, we interpret this to mean the referral fee does not have to be prorated or charged back based on the number of enrolled months in the calendar year.

In both the proposed rules and previous CMS memorandums, a maximum referral fee is set. In the proposed rules this is listed as: “Therefore, we are proposing to limit the amount that can be paid as a referral fee to independent, captive, and employed agents and brokers, regardless of who completes the enrollment, to a reasonable amount specified by CMS, which is currently, for CY 2013, and CY 2014, $100.”

We interpret the proposed maximum to the referral fee as also applying to “employed agents” of the plan. However, this seems to contradict the current 2014 MMG: “These compensation rules do not apply to employed agents or employer group plans.”

The final ruling summary section clarifies that CMS will set reasonable finder fees. It states:

"CMS will set an annual threshold for finder fees based on a determination about amounts that would improperly incentivize agents and brokers to steer beneficiaries."

Disclaimer: This document is for illustrative purposes only and should not be used as legal advice.
In the Amendment section of the final ruling, it states:

"(h) Finder’s (referral) fees. Finder’s (referral) fees paid to all agents and brokers—
(1) May not exceed an amount that CMS determines could reasonably be expected to provide financial incentive for an agent or broker to recommend or enroll a beneficiary into a plan that is not the most appropriate to meet his or her needs; and
(2) Must be included in the total compensation not to exceed the fair market value for that calendar year."

1.2.7 Our interpretation of a referral fee payment

**Payment Definition:** Pay maximum referral fee, Pay maximum initial payment in advance, Pay maximum renewal payment in advance

**Enrollment Date:** 8-1-2015, Application Received on 7-5-2015

**CMS Data:** Cycle Year=1, Prior Plan=MA, (We’re assuming Cycle Year will still be in the Broker Comp file)

**Estimated Fair Market Value/Year:** For 2015, Initial year=$420, renewal year=$420*.35=$147

Based on the final ruling, renewal year becomes $420*.50=$210

For 2016, Initial year=$441, renewal year=$441*.35=$154.35

Based on the final ruling, renewal year becomes=$441*.50=$220.50

**Independent Referring Agent 2015:** Payment date of 7-15-2015, $100

**Broker 2015:** Payment date 7-15-2015, 5/12*($420-$100)=$133.33 where 5/12 is for 8-2015 through 12-2015

**Broker Renewal 2016:** Payment date of 1-15-2016, 12/12*$154.35=$154.35 for 1-2016 through 12-2016

Based on the final ruling, renewal payment becomes 12/12*$220.50=$220.50 for 1-2016 through 12-2016

**Disenrollment:** Date of disenrollment 10-31-16, Date disenrollment is known 11-1-2016

Charge back to broker on 11-15-2016, -2/12*$154.35=-$25.73, where -2/12 is for 11-2016 through 12-2016

Based on the final ruling, the charge back becomes -2/12*$220.50=-$36.75, where -2/12 is for 11-2016 through 12-2016

**Total payment:** as of 11-15-2016: $100 + $133.33 + $154.35 + $220.50 - $25.73 - $36.75 = $417.08

**Items to Note in this Example**

The fair market value for 2015 and 2016 are used to get the initial and renewal rates. These rates are used in the respective calendar years being paid. Each month within its respective calendar year is given the appropriate value.

Note that the referral fee to the independent referring agent is subtracted from the broker’s payment since the total allowable compensation must include both that referral fee and the broker payment.

Also note that the referral fee does not have to be paid out over multiple years and does not have to be prorated per the number of months enrolled.
Appendix A

1.3 How to Download CMS Medicare Marketing Guidelines (MMG)

The Centers for Medicare & Medicaid Services (CMS) publishes, each year, Medicare Marketing Guidelines (MMG). The current MMG can be downloaded from the CMS site.

As of 2-2014, the direct link is:

http://www.cms.gov/Medicare/Health-Plans/ManagedCareMarketing/FinalPartCMarketingGuidelines.html

To navigate to this link, follow:

1. CMS homepage: http://cms.gov/
2. Medicare form main menu
3. Managed Care Marketing from directory list
4. Medicare Marketing Guidelines from directory list

The sections of MMG related to agent/broker compensation reference section of Title 42 of the Code of Federal Regulations: 42 CFR 422.2274; 423.2274.


1.4 How to Download the Proposed Changes to MMG

Typically each year, proposed changes to MMG rules are published. This is released by CMS and is also published in the Federal Register (FR). The Federal Register is the official daily publication for rules, proposed rules, and notices of Federal agencies and organizations.

As of 2-2014, the direct link is:


To navigate to this link, follow:

2. Federal Register from the directory list
3. 2014 from the directory of years list
4. January from the directory of months list
5. Friday, January 10 from the directory of dates list
6. Health and Human Services Department from directory of departments list
7. Select the PDF link under the Proposed Rules section, under the document “Medicare Program; Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare”

If you don’t know the date of publication, then you can do an advanced search:

2. Federal Register from the directory list
3. Search Government Publications from the directly list
4. Advanced Search next to the search fields
5. Select Federal Register from the Available Collections
6. Search for “422.2274 proposed rules”
7. Sort results from Newest to Oldest, and find the proposed rules for Medicare Program
1.5 **How to Find the Source Documents Referenced in the Proposed Rules Changes**

Both the MMG and the proposed rules reference sections to of the CFR. Those references tell you how to find the original documents being referenced.

For example, the reference of: “42 CFR Parts 409, 417, 422, 423, and 424” means:

1. The document is in the Code of Federal Regulations (CFR)
2. In the CFR, it’s under title 42.
3. Under 42 we need part 422 and 423, which we know because within the proposed rules there are specific references to § 422.2274 and § 423.2274.
4. You need to know part 422 is actually under “Subpart V - Medicare Advantage Marketing Requirements” under title 42.

With the above information, you can then browse the CFR for the most recent documents by following:

2. Code of Federal Regulations from the directory list
3. Select the most recent year where you think the documents may be. In this case it turns out to be 2012
4. Expand Title 42 from list of agencies
5. Select Chapter IV - Centers For Medicare & Medicaid Services, Department Of Health And Human Services (Continued) (Parts 400 – 505)
6. Subchapter B, Medicare Programs (Parts 405 – 426)
7. Part 442 Medicare Advantage Program
8. Subpart V – Medicare Advantage Marketing Programs
9. The PDF under “Section 422.2274 - Broker and agent requirements”
10. Repeat for Part 443
11. Repeat if there are no links to follow under the year you’ve selected, until you get to the most recent year that has the document for which you’re looking.
Supporting Documents

- Contact: Chris Harrison 424-250-1835, chris.harrison@evolvespm.com

- White Paper on 2015 CMS Broker/Agent Compensation Final Rules (Downloaded by Over 400 Organizations/Individuals)
  Download: http://EvolveSPM.com/whitepaper

- EvolveSPM Webinar: “2015 AEP: CMS Compliant Sales Compensation”

- Website: http://EvolveSPM.com
Paying by Calendar Year is not Easy

- You can pay for months in one calendar year at a time
- All months in the calendar year have the same value per payee, per payment type, per type of enrollment
- There are cases where you can pay for months prior to the enrollment date - for “no prior plan” enrollments
- In the example on the right, the 8-2014 enrollment can result in payment for 1-2014 through 7-2014, since the member is new to Medicare
- Note the difference in how the pre-enrollment months are charged back, depending on the disenrollment date.
  - If the disenrollment is prior to the end of the year, all unenrolled months need to be charged back
- Consider what happens if new MARX data retroactively changes an enrollment’s Prior Plan from None to MA.
  - This means the value of months 1-2014 through 7-2014 reverts to $0.00 and must be charged back.
  - It also means the value of the enrolled months could change, if the cycle year were to change as well.

Pay for Months Prior to Enrollment for No Prior Plan Enrollees

8-1-2014 Enrollment, No Prior Plan

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Can pay out green and/or blue

11-30-14 Disenrollment

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Charge back pink and red

12-31-14 Disenrollment

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Example Calendar Year Payment 2013/2014

Payments as of 7-15-13, with 8-1-2013 Enrollment, No Prior Plan

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Can pay out green and/or blue

Payments as of 4-15-14, with renewals starting on 1-1-14

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Can pay out green and/or blue and purple

Payments as of 5-15-14, with retro-active disenrollment of 11-30-13

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Charge back pink, red, yellow

**Enrollment Date:** 8-1-2013, Application Received on 7-5-2013

**CMS Data:** Cycle Year=1, Prior Plan=None

**Estimated Fair Market Value/Year:** Cycle Year 1=$400, Cycle Year 2 and greater $400*.5=$200

**Payment in 2013:** Payment date of 7-15-2013, 12/12*$400=$400 where 12/12 = 7/12 + 5/12 = 12/12

Green: 7/12*$400 = $233.33, Blue: 5/12*$400 = $166.67

**Renewal Payments:** Payments as of 4-15-14, Purple: 4/12*$200=$66.67 for 1-2014 through 4-2014

**Disenrollment:** As of 5-15-14, retro-active disenrollment of 11-30-13, Charge back

Pink: -7/12*$200 = -$233.33 for 1-2013 through 7-2013

Red: -1/12*$200 = -$33.33 for 1-2014 through 4-2014

Yellow: -4/12*$200 = -$66.67 for 1-2014 through 4-2014

**Total payment:** as of 5-15-2014: $233.33 + $166.67 + $66.67 - $233.33 - $66.67 - $33.33 = $133.34 (Light Blue)
Switching Anniversary to CMS Calendar Year

• For existing MA enrollments, all renewals begin 1-1-2015. If you’re paying by anniversary now, on 1-1-2015 you should switch. The switch is quite complicated. Consider switching to Calendar payments 1-1-2015:
# Paying Renewals by Fair Market Value is Tricky

## Enrollment Date: 8-1-2013, Application Received on 7-5-2013

**CMS Data:** Cycle Year=1, Prior Plan=MA

**Estimated Fair Market Value/Year:**
- For 2013 Cycle Year: $400, Cycle Year 2 and greater $400*.5=$200
- For 2014, the fair market value is not applicable to renewals per 2014 MMG rules
- For 2015, Initial year=$420, renewal year=$420*.50=$210

**Renewal Advanced 2014:** Purple, renewal on 1-15-2014, 12/12*$200=$200 for 1-2014 through 12-2014

**Renewal Advanced 2015:** Green, renewal on 1-15-2015, 12/12*$210=$210 for 1-2015 through 12-2015

**Disenrollment:**
- As of 2-15-15, retro-active disenrollment of 10-31-14, Charge back

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### Payments as of 1-15-15

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### Payments as of 2-15-15, with retro-active disenrollment of 10-31-14

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**Total payment:**
- as of 2-15-2015: $166.67 (Blue) + $200 + $210 - $210 - $33.33 = $333.34 (Blue & Light Purple)
2015 CMS Regs Delay Payments to Brokers

• 2015 regs state you can’t pay the broker until the calendar months that’s in the same year of the effective date. (Can’t span calendar years)
• However, you can pay the FMO’s admin fee when the enrollment application is received.
• The FMO will likely expect payment ASAP. If you don’t pay on time, you don’t compete.