



LOUISIANA DEPARTMENT OF INSURANCE

JAMES J. DONELON
COMMISSIONER

ADVISORY LETTER NO. 2014-01

TO: ALL HEALTH INSURANCE ISSUERS, HEALTH MAINTENANCE ORGANIZATIONS, AND HEALTH AND ACCIDENT PRODUCERS

FROM: JAMES J. DONELON, COMMISSIONER OF INSURANCE

RE: EFFECT OF ACT 283 OF THE 2013 REGULAR SESSION OF THE LOUISIANA LEGISLATURE RELATIVE TO HEALTH INSURANCE ISSUER COMMISSION SCHEDULES AND PRODUCER COMPENSATION

DATE: MAY 2, 2014

Please be advised that Act 283 of the 2013 Regular Session of the Louisiana Legislature (Act 283) amended La. R.S. 22:855(H) with respect to health and accident policies and enacted La. R.S. 22:1568 relative to health insurance issuer (issuers) commission schedules and related matters. The purpose of Advisory Letter 2014-01 is to advise all issuers and health insurance producers regarding the enforcement of Act 283 by the Louisiana Department of Insurance (LDI) and the effect of Act 283 on prior guidance issued by the LDI concerning producer compensation agreements between issuers, producers and policyholders.

Applicability of Act 283

The provisions of La. R.S. 22:1568(A) are applicable to all major medical products sold in both the individual and group markets, but do not apply to any employee welfare benefit plans exclusively regulated by the United States Department of Labor. The provisions of La. R.S. 22:1568(B) are applicable to all issuers of group health insurance policies and to all health insurance producers (producers) engaged in the solicitation, negotiation, and sale of group health insurance products. The provisions of Act 283 do not apply to limited benefit or excepted benefit products, or political subdivisions meeting the criteria set forth in La. R.S. 22:1568(C).

Commission Schedules

La. R.S. 22:1568(A) requires issuers to establish one or more schedules of commission for the sale of each health insurance product. The schedules of commission must be uniformly applied to all producers within the same schedule for the particular health insurance product and shall be payable to all producers licensed and appointed to sell the health insurance products of the issuer. La. R.S. 22:1568(A) does not prohibit an issuer from using a tiered or graduated commission scale within an

established schedule. For example, if an issuer calculates a producer's commission as a percentage of paid premium, the commission schedule may include different tiers or be graduated whereby the amount of commission is adjusted as the amount of paid premium increases (e.g. 4% on the first 500k, 2% on the next 500k, etc.) or commissions paid as a dollar amount per enrolled subscriber per month may be adjusted by the number of enrolled subscribers (e.g. 4-15 enrolled subscribers - \$34.00, 16-25 enrolled subscribers - \$27.00, etc.) as long as such calculations are applied uniformly to all producers that fall within a particular tier of the commission schedule.

La. R.S. 22:1568(A) does not prohibit a producer from receiving additional compensation from an issuer in the form of incentive compensation, including awards and bonuses based on factors that typically include the total sales volume, growth, profitability, and the retention of business placed by the producer. However, any incentive payment made to a producer shall not affect the premium (inclusive of the scheduled commission as established by the issuer pursuant to 22:1568(A)) paid by the insured for the insurance. Incentive compensation shall be paid only to a producer if the performance criteria established in the producer-issuer agreement is actually met by the producer or the business entity with which the producer is affiliated.

Fees Charged in Addition to a Health Insurance Producer's Commission

La. R.S. 22:1568(B) authorizes a health insurance producer to negotiate a charge, fee or any other form of compensation directly with a plan sponsor or employer group. Historically, these negotiated fees and fee agreements in the sale of insurance contracts have been closely scrutinized by the LDI and are generally prohibited by the Louisiana Insurance Code (Code) unless specifically permitted by statute because they can create legal and regulatory issues including but not limited to undisclosed premium, rebating, and unfair discrimination in the rate and premium charged to the insured.

As detailed in prior LDI guidance¹, the Code broadly defines "premium" to mean "all sums charged, received, or deposited as consideration for the purchase or continuance of insurance for a definitely stated term...." This comprehensive definition is an integral factor in the LDI's determination whether a fee charged by a producer or the related fee agreement violates any provisions of the Code including but not limited to provisions regarding rebating, non-disclosure of premium or unfair discrimination in the rate or amount of premium charged to the insured. Further, the Code prohibits a producer from charging or receiving any fee, compensation, or consideration charged for insurance or the procurement thereof, that is not included in the premium quoted to the insured and the premium specified in the policy delivered to the insured unless expressly permitted by statute.

¹ Advisory Letter 2010-01; Advisory Letter 2012-03.

La. R.S. 22:855(B)(2)(a) provides one such exception by authorizing a producer to charge a reasonable agency fee directly related to the services provided by the producer. Prior to Act 283, health and accident policies were exempt from the provisions of La. R.S. 22:855, and a producer was prohibited from charging an agency fee on such policies. By Act 283's amendment of La. R.S. 22:855(B)(2)(a) and the enactment of La. R.S. 22:1568(B) a health insurance producer may negotiate a charge, fee, or any other form of compensation directly with a plan sponsor or employer group for major medical coverage. By enacting La. R.S. 22:1568(B) and amending La. R.S. 22:855, it is evident that a primary objective of Act 283 was to authorize a health insurance producer to negotiate an agency fee directly with the plan sponsor or employer group to compensate the producer for rendering services related to a group health insurance contract. Therefore, in addition to any compensation a producer is entitled to receive based on the commission schedules established pursuant La. R.S. 22:1568(A) or any incentive compensation that does not affect the premium paid by the insured, a health insurance producer may directly negotiate and charge a reasonable agency fee with a plan sponsor or employer group without the agency fee constituting premium.

Invoicing Fees Negotiated Pursuant to R.S. 22:1568(B)

A question has arisen regarding the proper invoicing and collection of agency fees negotiated between a producer and a plan sponsor or employer group, specifically, whether an issuer may directly invoice and collect the producer's negotiated agency fee from the plan sponsor or employer group and subsequently remit the agency fee to the producer. Under such an arrangement, the issuer would essentially provide a billing and collection service for the producer with respect to the separately negotiated agency fee. In pertinent part, La. R.S. 22:855(B) which governs the authorization to charge an agency fee and its means of disclosure provides that:

B. (1) No insurer or...producer...shall charge or receive any fee...which is not included in the premium quoted to the insured and the premium specified in the policy delivered to the insured...except for reimbursement for expenses due the producer, and except for an agency fee, if any, as authorized hereunder.

(2)(a) The producer may receive reimbursement from the insured for expenses incurred by the producer directly related to the insurance coverage for the insured. In addition, the producer may charge a reasonable agency fee related to the services provided by the producer. Any reimbursement or agency fee shall be itemized separately on an invoice statement. A single invoice may be used to make known all charges. Each such charge must be prominently disclosed and itemized separately on the invoice.

The purpose of La. R.S. 22:855(B) is clear. Since the agency fee is charged in excess of the premium and retained solely for the producer's benefit either to defray costs or compensate the producer for services related to the policy, it should not be disclosed or collected in a manner that incorporates the agency fee into the premium or otherwise obscures the producer's agency fee. An issuer that elects to invoice and collect an agency fee on behalf of a producer shall do so only pursuant to a written agreement with the producer which demonstrates that the plan sponsor or employer group has agreed to the payment of the agency fee, the producer has authorized the issuer to collect the agency fee, and the agreement specifies the amount to be collected.

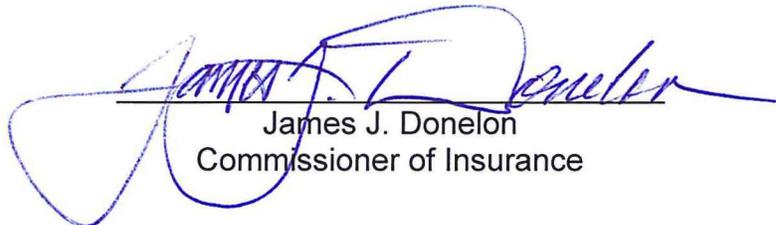
Additionally, while the collection of an agency fee by the issuer is not prohibited, it could create some legal and regulatory compliance issues. A potential issue presented by this billing and collection method is an issuer's right to cancel a health insurance policy for nonpayment of premium. Since an agency fee is "not considered premium for any purpose," the issuer is prohibited from using the insured's failure to remit any portion of the invoice constituting the agency fee as a basis to cancel the policy for nonpayment of premium.

Net of Commissions Quotes

Nothing provided for in Act 283 supersedes or amends prior statutory law or LDI guidance regarding the prohibition on "net of commission" quotes except for the specific exemption given to political subdivisions meeting certain criteria pursuant to La. R.S. 22:1568(C).

Questions regarding Advisory Letter No. 2014-01 should be directed to Barry Ward, Esq., Deputy Commissioner, Office of Licensing and Compliance, at (225) 342-0814.

Baton Rouge, Louisiana, this 2nd day of May 2014.



James J. Donelon
Commissioner of Insurance