NEW YORK STATE
DEPARTMENT of
FINANCIAL SERVICES

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Supplement No. 1 to
Insurance Circular Letter No. 20 (2017)
May 3, 2018

TO: All Insurers Authorized to Write Accident and Health Insurance in New York State, Article 43 Corporations, and Health Maintenance Organizations (collectively, "issuers") and All Insurance Agents and Brokers Licensed to Sell Accident and Health Insurance in New York State.

RE: Insurance Producer Compensation for Accident and Health Insurance Policies and Contracts

STATUTORY AND REGULATORY REFERENCES: N.Y. Insurance Law § 2119(c); 11 NYCRR 20 (Insurance Regulations 9, 18 and 29)

I. Purpose

The purpose of this Supplement to Insurance Circular Letter No. 20 (2017) is to provide additional guidance and clarification to issuers and insurance agents and brokers of requirements regarding commissions, fees, or other allowances (collectively, "compensation") paid to insurance agents and brokers by issuers or to insurance brokers by group policyholders or prospective group policyholders (collectively "policyholders"), including when and how an issuer may collect fees on behalf of insurance brokers, and the sources of compensation that may be included in an issuer's premium rate.

DFS has received rate filings for group and blanket accident and health insurance that include flexibility in the payment of compensation to insurance agents and brokers without correlation to the services provided by the agent or broker. Issuers have indicated that the compensation ranges in these filings accommodate arrangements where broker compensation is agreed upon by the broker and a group and the issuer is asked to adjust the premium accordingly. An issuer may not consider these arrangements or any associated payments to a broker from a policyholder in determining broker compensation paid by that issuer. Therefore, such arrangements are not in compliance with New York's insurance laws and regulations. Circular Letter No. 20 (2017) and this supplement clarify the rules governing how and when an agent or broker may be compensated either from premium according to an issuer's rate filings or according to an agreement that provides for payment from a policyholder.

II. Discussion

Although Insurance Circular Letter No. 20 (2017) primarily addresses the requirements for comprehensive medical policies and contracts, Section II.A of Insurance Circular Letter No. 20 describes rate filings requirements (including with respect to compensation paid to an

insurance agent or broker by an issuer) for all types of accident and health insurance policies and contracts.

The premium charged to insureds of the same class must be based on the issuer's approved premium rate filing and must be applied uniformly to all similarly situated insureds. An insurance agent or broker may receive different compensation from an issuer in connection with the sale of an accident and health insurance policy only if such differences are attributable to specific factors articulated in the issuer's approved premium rate filing for that policy. For example, an insurance agent or broker may provide differing levels of services on behalf of the issuer in connection with the sale of a policy and therefore may receive different compensation. See OGC Opinion No. 08-05-05 (May 13, 2008).

Insurance Law § 2119(c)(1) permits an insurance broker to receive compensation from a policyholder in connection with an accident and health insurance policy. An insurance broker may not receive:

> any compensation, other than commissions deductible from premiums on insurance policies or contracts, from any insured or prospective insured for or on account of the sale, solicitation or negotiation of, or other services in connection with, any contract of insurance made or negotiated in this state or for any other services on account of such insurance policies or contracts, including adjustment of claims arising therefrom, unless such compensation is based upon a written memorandum, signed by the party to be charged, and specifying or clearly defining the amount or extent of such compensation.

Accordingly, an insurance broker may not receive compensation from a policyholder unless the broker obtains a written memorandum signed by the party to be charged. Section 20.6 of 11 NYCRR 20 (Insurance Regulations 9, 18 and 29) provides additional requirements with respect to the written memorandum. Insurance agents, including managing general agents or similar intermediaries acting as agents on behalf of the issuer, may not charge policyholders any fee or receive any compensation on account of the sale, solicitation or negotiation of, or other services in connection with any insurance policy. If any portion of the compensation pursuant to such an agreement is paid by an insured member of the group, the insured member must be a party to the agreement.

While a service fee agreement pursuant to Insurance Law § 2119(c) need not necessarily be a separate form, it should not confuse or mislead the policyholder as to the nature of the charges or whether a particular charge is compensation or otherwise. See Insurance Circular Letter No. 9 (2006). Forms that include both service fees and other expenses to the policyholder but that do not clearly indicate which of the amounts listed are broker service fees are impermissible. See id. A service fee agreement must clearly identify the amount of compensation paid, indicate that the compensation is paid to the insurance broker by the policyholder, include the express written consent of the party to be charged, and include the broker as a party. See id. Compensation may be expressed as a percentage of the premium provided the agreement clearly explains whether changes in coverage, cancellation of the policy, audits or other factors will result in changes in compensation. See id. Fees should be reasonable and different policyholders should not be charged different amounts for the same services. See id.

It is not the function of an issuer to act as a collection service for insurance brokers. However, if the issuer seeks to collect service fees on behalf of insurance brokers, then it must do so for all brokers in a fair and non-discriminatory manner. In no event may the failure to pay fees associated with the service agreement constitute a failure to pay premium or otherwise trigger a cancellation notice or other action by the issuer.

If the issuer chooses to collect fees associated with a service fee agreement, then the issuer should confirm the existence of the agreement and secure a copy of the agreement. The issuer also should: (1) on any premium statement or bill, clearly identify which amounts are the broker's fee and distinguish any fees associated with the service agreement from the insurance premium; (2) advise the policyholder that it is collecting the service fee only as an accommodation for the broker; (3) advise the policyholder that payment of the service fee is between the policyholder and the broker and the issuer will not intervene; and (4) apply any funds received by the issuer first to the insurance premium.

Compensation paid by a policyholder to a broker is not part of the insurance premium. An issuer may not adjust the premium rate pursuant to a service fee agreement. While it is permissible for an insurance broker to receive compensation from both a policyholder and an issuer, it is not permissible for an issuer to consider any arrangement that a broker may have with a policyholder when setting a broker's compensation.

III. Conclusion

Issuers should adhere to the guidance in this Supplement. Please direct any questions regarding this Supplement to Frank Horn, Assistant Chief Actuary, Health Bureau, at New York State Department of Financial Services, One Commerce Plaza Albany, NY 12257 or by e-mail at Frank.Horn@dfs.ny.gov.

Very truly yours,

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Bureau Chief, Health Bureau