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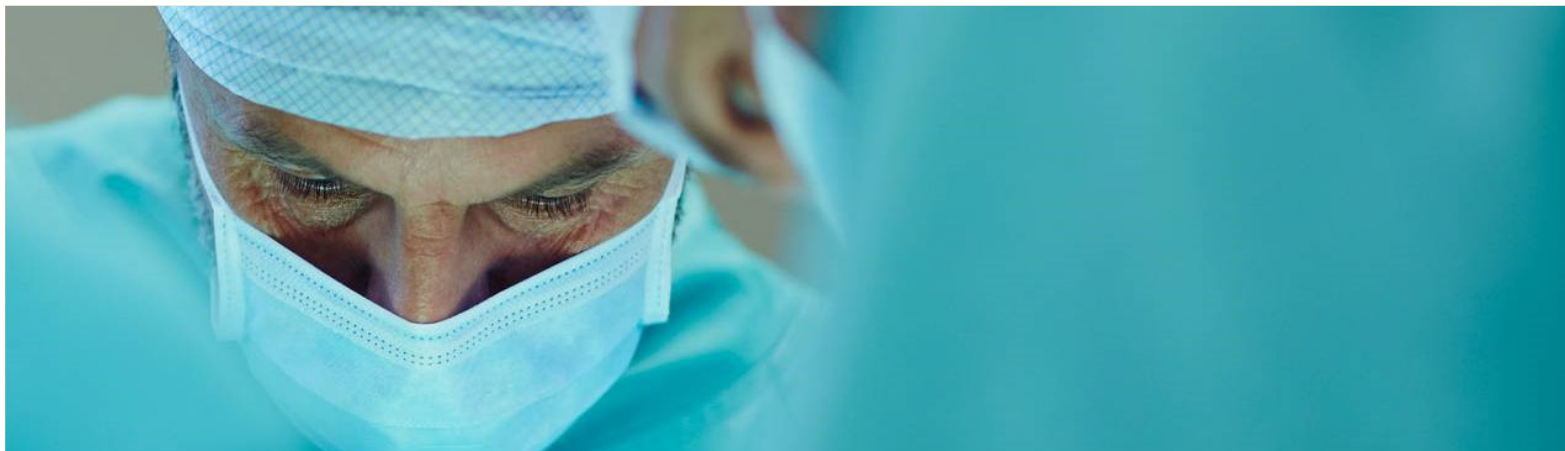
# ALMIA

## THE ALLIANCE OF LICENSED MEDICARE INSURANCE AGENCIES

OFFICE OF MANAGEMENT AND BUDGET MEETING

MONDAY, MARCH 25, 2024





## WHO WE ARE

ALMIA represents the most significant companies committed to assisting Medicare beneficiaries with understanding their health insurance coverage options and selecting the coverage that best suits their individual needs.

Collectively, ALMIA members have assisted millions of beneficiaries with enrollment into Medicare Advantage (“MA”) and Medicare Prescription Drug Plans (“PDP Plans”) in the past two years alone.

# FALSE AND DECEPTIVE *MARKETING* PRACTICES IN MA

ALMIA ***fully supports*** initiatives to combat false and deceptive marketing practices.

However, 4205-P contains proposals to combat false and deceptive marketing practices by *scapegoating* an entire industry of *independent agents and brokers*, which will ultimately harm beneficiaries, and undercut the President's policies and priorities.







## MAINTAINING INDEPENDENCE IN ENROLLMENT IS CRITICAL

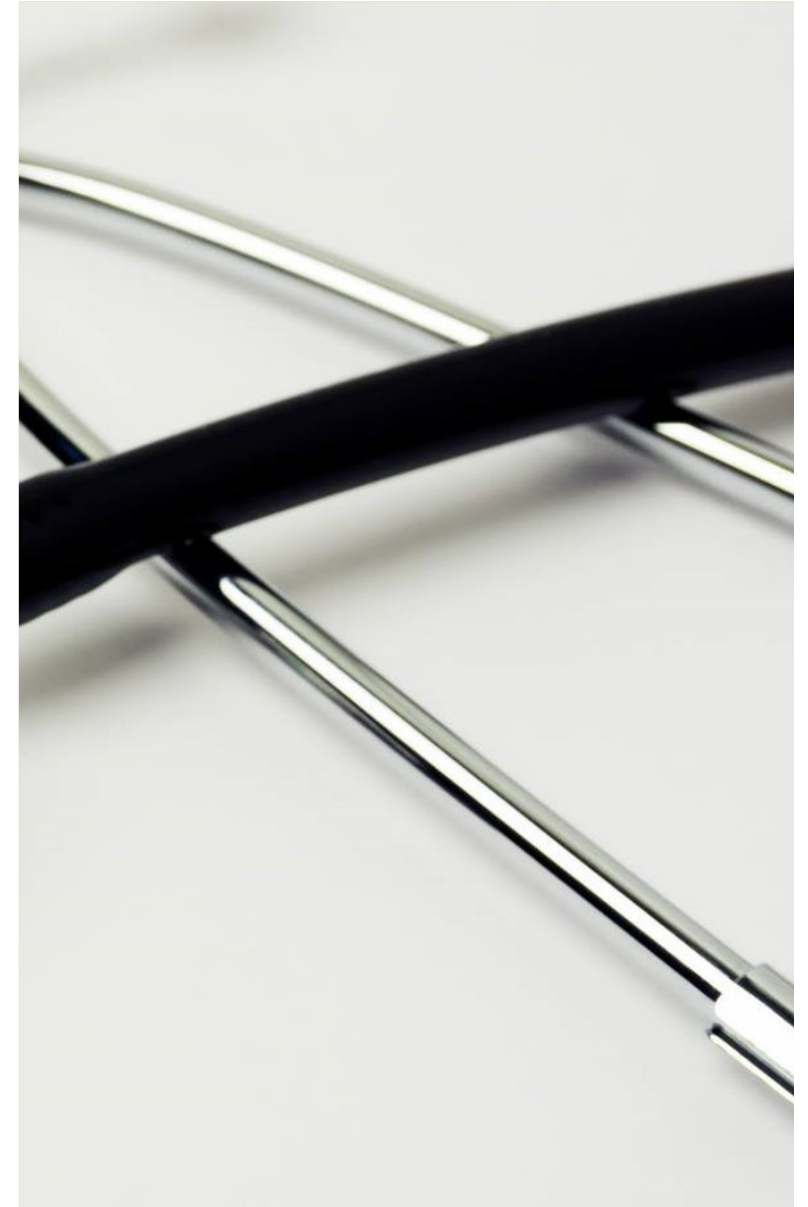
- One-third of MA beneficiaries are enrolled through an agent or broker.
  - <https://www.commonwealthfund.org/publications/issue-briefs/2022/oct/traditional-medicare-or-advantage-how-older-americans-choose>
- But agents and brokers are not a monolith.
  - Agents and brokers may be *employed* by carriers (“captive”)
  - Agents and brokers may be *independent* from carriers.
- Independent, *unbiased* agents and brokers are the most surefire way to “ensure” that consumers are enrolled “in the MA plan that is intended to best meet their health care needs.” 42 U.S.C. § 1851(j)(2)(D).

# AGENDA

The proposals in 4205-P targeting independent agents and brokers do not withstand scrutiny under the APA.

The proposals in 4205-P also amount to regulatory action that:

1. Creates serious inconsistencies in the law and interferes with other state and federal agencies;
2. Materially alters the budgetary impact of entitlements for Medicare beneficiaries; and
3. Raises legal and policy issues that are inconsistent with the priorities and principles of Executive Orders 14070 and 14036.
4. Lacks Quantifiable Data





## I. 4205-P CREATES SERIOUS INCONSISTENCIES IN THE LAW

By federal regulation, administrative payments are not “compensation,” and neither administrative payments or compensation address *marketing* complaints.

- The proposals in 4205-P to combat marketing complaints are not solved by targeting independent agent and broker compensation.
- The proposals to modify compensation amounts are not solved by applying regulations that are expressly “payments other than compensation.”
- Eliminating “payments other than compensation” are therefore legally (and logically) inconsistent with proposals to combat marketing complaints.

## I. 4205-P INTERFERES WITH OTHER **FEDERAL** AGENCIES

The Proposed Rule lacks mention of other federal agencies and/or statutes that regulate “marketing” activities—including health insurance marketing—that takes place in-person, on the television, by telephone, or online.

- Federal Communications Commission (FCC)
  - Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227
- Federal Trade Commission (FTC)
  - Federal Trade Commission Act, 15 U.S.C. §§ 53b, 57b
  - Telemarketing and Consumer Fraud and Abuse Act (“Telemarketing Act”), 15 U.S.C. §§ 6101-6108
  - Telemarketing Sales Rule (TSR), 16 C.F.R. Part 310
  - Restore Online Shoppers’ Confidence Act (“ROSCA”), 15 U.S.C. § 8404.
  - Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act (INFORM Consumers Act), 15 U.S.C. § 45f.
  - CAN-SPAM Act, 15 U.S.C. § 7701-7713, 16 C.F.R. Part 316

1. A failure to acknowledge or even mention the scope of authority that the FCC possesses with respect to health insurance marketing activities will interfere with the FCC and its Congressional authority.

2. A failure to acknowledge or even mention the scope of authority that the FTC possess with respect to health insurance marketing activities will interfere with the FCC and its Congressional authority.

## I. 4205-P INTERFERES WITH OTHER **STATE** AGENCIES

The Proposed Rule fails to mention other *state* agencies and/or statutes that regulate “marketing” activities within the state—including health insurance marketing.

For example:

- Minn.Admin. Rules Ch. 2790 Part 2790.0500
- Code of D.C., Ch. 22A § 31-2231.02-2231.04
- California Code, INS § 10192.19
- Texas Ann. Code, Title 28, Ch. 21, Subchapter B
- New York Codes, Title 11, Part 215

1. A failure to acknowledge or even mention the *scope of authority* that state agencies possess with respect to health insurance marketing activities will interfere with those state agencies.

2. A failure to acknowledge or even mention the scope of authority these agencies possess will interfere with health insurance marketing activities taking place *inside each state*.



## 2. 4205-P MATERIALLY ALTERS THE BUDGETARY IMPACT OF ENTITLEMENTS FOR MEDICARE BENEFICIARIES

If CMS 4205-P is finalized as proposed, the MA independent agent and broker industry will collapse, causing:

- An immediate drop in MA enrollment; a spike in FFS Medicare;
- Market consolidation and decreased competition;
- Decreased number of plans for beneficiaries to choose from and increased out of pocket costs;
- An overwhelmed 1-800-Medicare call center.

### 3. 4205-P RAISES LEGAL AND POLICY ISSUES THAT ARE **INCONSISTENT WITH THE PRIORITIES AND PRINCIPLES** OF EXECUTIVE ORDERS 14070 AND 14036

- 4205-P generally invokes authority under EO 14070: Executive Order on Continuing to Strengthen Americans' Access to Affordable, Quality Health Coverage (April 8, 2022).
- The proposals to *eliminate administrative payments to independent agents and brokers* invoke authority under EO 14036: Promoting Competition in the American Economy (July 9, 2021).

Eliminating independent agents and brokers from the MA chain of enrollment **undercuts the priorities and principles of both EOs.**

### 3. 4205-P RAISES LEGAL AND POLICY ISSUES THAT WILL NOT STRENGTHEN AMERICANS' ACCESS TO AFFORDABLE, QUALITY HEALTH COVERAGE (EO 14070)

The absence of independent agents and brokers in the MA chain of enrollment will compromise, weaken, or worsen:

- Consumers' ability to *enroll in and retain coverage, understand their coverage options, and select appropriate coverage*
  - Captive agents alone cannot credibly perform this role.
- Consumers' ability to *access plans that best provide the healthcare providers, benefits, and drug benefits that best meet their health care needs*
  - Captive agents alone cannot credibly perform this role.
- Consumers' ability to *access lower-cost coverage in the ACA Marketplaces, Medicaid, Medicare, and other programs*
  - Many independent agents and brokers serving the MA industry also serve participants on ACA exchanges.
- *Linkages between the healthcare system and other stakeholders to address health-related needs*
  - Independent agents and brokers advance the interests of health equity by facilitating unparalleled access for rural and underserved, mobility-impaired, limited English-proficient, otherwise vulnerable beneficiaries and communities.
- *The burden of medical debt on households*
  - Without access to plans that best meet their healthcare needs, beneficiaries risk poor coverage options (with potentially higher cost sharing) and therefore dramatically increase their risk of medical debt.

### 3. 4205-P RAISES LEGAL AND POLICY ISSUES THAT WILL DECREASE COMPETITION IN THE AMERICAN ECONOMY (EO 14036)

The absence of independent agents and brokers in the MA chain of enrollment will compromise, weaken, or worsen:

- CMS's ability to improve consumer choice and enhance a beneficiary's ability to compare plan offerings
  - The disintermediation of agents and brokers diminishes choice.
  - Star ratings were in flux during COVID and have become more variable post-COVID; agents and brokers support beneficiaries navigating a post-COVID marketplace for MA plans
  - Captive agents and brokers will steer beneficiaries to the plans that employ the agent/broker.
- CMS's ability to address the scale of a massively expanding cohort of "Baby Boomers (4.1 million individuals will turn 65 in each of the next four years)"
  - 12,500 SHIP team members, half of whom are volunteers, cannot replace an indispensable industry compromised of more than 150,000 agents/brokers.<sup>1</sup>
  - *Re-enrollments* over the course of the *entire cohort's* lifetimes.
- CMS's ability to improve competition
  - Shopping is in part a function of benefit stability
  - Intermediaries like agents and brokers ensure that competition remains fair and transparent.

## 4. “ENSURING” THE PRESIDENT’S PRIORITIES AND PRINCIPLES IN EO 14036 REQUIRES QUANTIFIABLE DATA

CMS cannot “ensure” the President’s principles and priorities if CMS:

- Lacks data;
- Fails to publish data it relies upon;
- Fails to utilize existing data; and
- Relies solely upon unsupported “expectations.”



## 4. “ENSURING” THE PRESIDENT’S PRIORITIES AND PRINCIPLES IN EO 14036 REQUIRES QUANTIFIABLE DATA

If CMS **lacks data**, CMS cannot “ensure” any of the President’s priorities or principles in EO 14036 because:

- CMS has explicitly *stated* that it “lacks data to quantify” the “potential economic effects on agents/brokers, plans, and Medicare beneficiaries” resulting from “the proposed changes to the MA and Part D agent broker compensation regulations.”
- CMS explicitly solicits data related to the “economic cost and benefits of this Proposed Rule,” which indicates that CMS knows that data is obtainable. 88 Fed. Reg. 78,476, 78,610-11.
- CMS lacks data to show that administrative payments comprise any portion of agent and broker “compensation”—they do not.

## 4. “ENSURING” THE PRESIDENT’S PRIORITIES AND PRINCIPLES IN EO 14036 REQUIRES QUANTIFIABLE DATA

If CMS **lacks data**, CMS should issue a request for information (RFI), not an unsubstantiated Proposed Rule.

- CMS can distinguish between an RFI and a proposed rule subject to notice-and-comment rulemaking. See, e.g., 89 Fed. Reg. 5907 (Jan. 30, 2024) (“2024 MA RFI) (“Recommendations regarding MA data included calls for CMS to collect and release more MA data on key areas of concern, such as ... MA marketing activity, especially predatory behavior.”)
- Oct. 31, 2023, E&C and Ways and Means Committees explained that CMS should restore its data collection efforts that took place prior to 2018, where CMS required data from MA/PDP plans on direct sales, salaries, benefits, and agents and brokers fees in the annual [MLR] data collection.

## 4. “ENSURING” THE PRESIDENT’S PRIORITIES AND PRINCIPLES IN EO 14036 REQUIRES QUANTIFIABLE DATA

If CMS **fails to publish data it relies upon**, CMS cannot “ensure” any of the President’s priorities or principles in EO 14036 because:

- CMS will lack accountability to stakeholders, the public, beneficiaries themselves, and other branches of government.
- CMS will lack transparency to stakeholders, the public, beneficiaries themselves, and other branches of government.

## 4. “ENSURING” THE PRESIDENT’S PRIORITIES AND PRINCIPLES IN EO 14036 REQUIRES QUANTIFIABLE DATA

If CMS **fails to utilize existing data**, CMS cannot “ensure” any of the President’s priorities or principles in EO 14036 because regulatory reforms will lack quantifiable support.

- CMS could utilize its own budget requests for FY 2024, which would, at a minimum, provide a cost “floor” for industry writ large (recognizing the CMS costs would be significantly less than any private business).
- CMS could utilize on its own robust dataset housed on its own website detailing “Agent-Broker Compensation Data” for the entire nation, by cost year, which MA plans are annually required to report to CMS.

## 4. “ENSURING” THE PRESIDENT’S PRIORITIES AND PRINCIPLES IN EO 14036 REQUIRES QUANTIFIABLE DATA

If CMS lacks quantifiable data, it cannot support “**expectations**” that “ensure” any of the President’s priorities or principles in EO 14036

- “Overall, we do not *expect* a decrease in enrollment because of the agent and broker compensation provisions since *plans* meticulously monitor enrollment trends and possess a variety of vehicles to counteract any significant changes.”
  - This statement is a tell.



## 4. “ENSURING” THE PRESIDENT’S PRIORITIES AND PRINCIPLES IN EO 14036 REQUIRES QUANTIFIABLE DATA

A lack of quantifiable data requires CMS to simply **guess**.

- CMS should **avoid guesswork**—where a federal agency publicly states that it lacks data to quantify potential economic effects, solicits such data in a proposed rule, then nevertheless resorts to “discuss them qualitatively,” a finalized version of a proposal “ensures” little.
  - Federal courts demand more than agency guesswork.
  - “Ensuring” the President’s priorities or principles in EOs 14070 and/or 14036 demands more than agency guesswork.

# CONCLUSION

CMS's proposals to eliminate agent and broker administrative fees create serious inconsistencies in the law, interfere with other state and federal agencies, materially alter the budgetary impact of entitlements for Medicare beneficiaries, and raise legal and policy issues that are inconsistent with the priorities and principles of Executive Order 14036.

In addition, CMS lacks quantifiable data to support these proposals.

Accordingly, OMB should reject these proposals in 4205-P.

