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**Date:** August 17, 2021

**From:** Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services (CMS)

**Title:** Web-broker Website Display Bulletin

**Subject:** Guidance Regarding Website Display for Web-brokers Assisting Consumers in States with Federally-facilitated Exchanges (FFE) and State-based Exchanges on the Federal Platform

## I. Background and Purpose<sup>1</sup>

In the 2022 Payment Notice final rule published May 5, 2021, CMS communicated its intent to limit its current use of enforcement discretion that permits web-broker websites to only display issuer marketing name, plan marketing name, plan type, and metal level for all available qualified health plans (QHPs).<sup>2</sup> Instead, CMS communicated that beginning at the start of the plan year (PY) 2022 open enrollment period (OEP), web-broker websites will be required to display all QHP comparative information provided by the Exchange or directly by QHP issuers for all available QHPs consistent with 45 C.F.R. § 155.205(b)(1) and (c),<sup>3</sup> with the exception of medical loss ratio (MLR) information and transparency of coverage measures under 45 C.F.R. § 155.205(b)(1)(vi) and (vii). As provided in the 2022 Payment Notice final rule, until CMS further clarifies these requirements in future rulemaking, it will exercise enforcement discretion and not deem a web-broker website out of compliance with 45 C.F.R. § 155.220(c)(3)(i)(A) and (D) with respect to the display of MLR information and transparency of coverage measures if the web-broker website displays the other required standardized QHP comparative information consistent with 45 C.F.R. § 155.205(b)(1) and (c).

This guidance shares information to help web-brokers comply with current regulatory requirements in light of this change in enforcement posture with respect to two web-broker website display issues:

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<sup>1</sup> Please note, the contents of this document do not have the force and effect of law and are not meant to bind the public in any way, unless specifically incorporated into a contract. This document is intended only to provide clarity to the public regarding existing requirements under the law. This guidance relies on authority from section 1312(e) of the Patient Protection and Affordable Care Act and from 45 C.F.R. §§ 155.205(b)(1) and (c) and 155.220(c)(3)(i)(A), (c)(3)(i)(B), (c)(3)(i)(D), (c)(3)(i)(L), and (j)(2)(i).

<sup>2</sup> See *Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2022 and Pharmacy Benefit Manager Standards*; Final Rule, 86 Fed. Reg. 24140 at 24208, May 5, 2021 available at: <https://www.federalregister.gov/documents/2021/05/05/2021-09102/patient-protection-and-affordable-care-act-hhs-notice-of-benefit-and-payment-parameters-for-2022-and>. Also see *Processes and Guidelines for Becoming a Web-broker in the Federally-facilitated Exchanges: An Overview for New and Existing Web-brokers*, slide 30, October 2017 available at: <https://www.cms.gov/files/document/processes-becoming-web-broker.pdf>.

<sup>3</sup> These regulatory requirements are applicable to web-broker websites through the cross reference in 45 C.F.R. § 155.220(c)(3)(i)(A).

use of the Plan Detail Disclaimer and use of filters to display QHPs.

For questions regarding this guidance, please contact: [directenrollment@cms.hhs.gov](mailto:directenrollment@cms.hhs.gov).

## II. Plan Detail Disclaimer

In accordance with 45 C.F.R. § 155.220(c)(3)(i)(A), if a web-broker's website does not display all of the information required under 45 C.F.R. § 155.205(b)(1) for a QHP, it must prominently display a standardized disclaimer provided by CMS (i.e., the Plan Detail Disclaimer) stating that information required under 45 C.F.R. § 155.205(b)(1) for the QHP is available on the Exchange website and provide a link to the Exchange website. The Plan Detail Disclaimer requirement, and CMS's historical use of enforcement discretion that allowed for limited QHP comparative information to be displayed for QHPs on web-broker websites, originated in the early years of operations of the FFEs when web-brokers may not have been able to obtain some of the required QHP comparative information from the FFEs or QHP issuers. Now that the required QHP comparative information is more readily accessible to web-brokers through the release of public use files and the Marketplace Application Programming Interface (MAPI), CMS is limiting its use of enforcement discretion as described in the 2022 Payment Notice final rule and above, and web-broker websites must display all QHP comparative information provided by the Exchange or directly by QHP issuers for all available QHPs consistent with 45 C.F.R. § 155.205(b)(1) and (c), with the exception of MLR information and transparency of coverage measures under 45 C.F.R. § 155.205(b)(1)(vi) and (vii), beginning with the PY 2022 OEP.

This approach makes continued use of the current Plan Detail Disclaimer unnecessary and confusing as it states more information about QHPs is available on [HealthCare.gov](https://www.healthcare.gov)<sup>4</sup> when in fact web-broker websites will be displaying the same QHP comparative information as HealthCare.gov. For these reasons, until the Plan Detail Disclaimer requirement under 45 C.F.R. § 155.220(c)(3)(i)(A) is addressed in future rulemaking, CMS clarifies that the current Plan Detail Disclaimer is not required to be displayed on web-broker websites that display all QHP comparative information provided by the Exchange or directly by QHP issuers for all available QHPs consistent with 45 C.F.R. § 155.205(b)(1) and (c), with the exception of MLR information and transparency of coverage measures.

To avoid marketing or conduct that is misleading or coercive,<sup>5</sup> web-broker websites that do not offer enrollment support for particular QHPs will need to display a visual cue for consumers to identify those QHPs for which enrollment support is not available through the web-broker's website. The QHPs for which web-broker websites do not support enrollment typically have aligned with the QHPs for which web-broker websites have displayed limited QHP comparative information and the Plan Detail Disclaimer. Therefore, historically the Plan Detail Disclaimer served as the mechanism and visual cue to convey to consumers where they may find additional information about particular QHPs and how they may enroll in those QHPs (i.e., using [HealthCare.gov](https://www.healthcare.gov)). In the absence of the Plan Detail Disclaimer, the secondary function of conveying those QHPs for which enrollment

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<sup>4</sup> The current Plan Detail Disclaimer states: “[Name of Company] isn’t able to display all required plan information about this Qualified Health Plan at this time. To get more information about this Qualified Health Plan, visit the Health Insurance Marketplace® website at HealthCare.gov.” See *Federally-Facilitated Exchanges (FFE) and Federally-Facilitated Small Business Health Options Program (FF-SHOP) Enrollment Manual*, section 5.3.2, September 2, 2020, available at: [https://www.regtap.info/uploads/library/ENR\\_FFEFFSHOPENrollmentManual2020\\_5CR\\_090220.pdf](https://www.regtap.info/uploads/library/ENR_FFEFFSHOPENrollmentManual2020_5CR_090220.pdf).

<sup>5</sup> See 45 C.F.R. § 155.220(j)(2)(i).

support is not available through the web-broker's website is lost.

After consideration of these issues, until CMS modifies the Plan Detail Disclaimer requirement in future rulemaking and in accordance with applicable Paperwork Reduction Act requirements, web-brokers must include appropriate visual cues on their websites to identify the specific QHPs for which they do not support enrollment to remain in compliance with 45 C.F.R. § 155.220(j)(2)(i). Consistent with section III of this guidance, web-broker websites may not adopt visual cues to distinguish between the QHPs for which they offer enrollment support and those for which they do not by adopting a website design such that QHPs offered by issuers from whom web-brokers receive commissions for enrollments are filtered favorably as compared to QHPs for which web-brokers do not receive commissions for enrollments. The visual cues described in this section of this guidance must have a neutral effect on the overall display of all available QHPs to avoid displaying or implicitly making QHP recommendations based on compensation the agent, broker, or web-broker receives from QHP issuers in violation of 45 C.F.R. § 155.220(c)(3)(i)(L).

In addition, consistent with 45 C.F.R. § 155.220(c)(3)(i)(F) and (G), web-broker websites must include information to convey to consumers how they may enroll in QHPs through the Exchange website, including in situations when enrollment support is not available through the web-broker's website for particular QHPs.<sup>6</sup> In addition to providing a link to HealthCare.gov, web-brokers should consider also providing consumers with the Marketplace Call Center phone number.

### **III. Filtering of QHPs on Web-broker Websites**

45 C.F.R. § 155.220(c)(3)(i)(B) requires web-broker websites to provide consumers the ability to view all QHPs offered through the Exchange. 45 C.F.R. § 155.220(c)(3)(i)(L) prohibits web-broker websites from displaying QHP recommendations based on compensation an agent, broker, or web-broker receives from QHP issuers.

All web-broker websites must adopt a default display of QHPs by virtue of providing consumers a list of available QHPs. Many web-broker websites also offer filters that consumers or agents/brokers may use to adjust the default display of QHPs using various tools (e.g., a sidebar of options on the website that may be selected to limit the display of or reorder the QHPs based on different criteria such as premium, deductible, metal level, network type, issuer, etc.). Historically, web-broker websites that displayed limited QHP comparative information<sup>7</sup> for some QHPs typically displayed those QHPs at the end of a list of all QHPs.

Beginning with the PY 2022 OEP, web-broker websites will be required to display all QHP comparative information provided by the Exchange or directly by QHP issuers, with the exception of MLR information and transparency in coverage measures, for all available QHPs. When web-

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<sup>6</sup> 45 CFR § 155.220(c)(3)(i)(G) requires the prominent display of a standardized disclaimer provided by HHS. For more information on this disclaimer requirement and the applicable standard for prominent display, see section 5.3.2 of the *Federally-Facilitated Exchanges (FfEs) and Federally-Facilitated Small Business Health Options Program (FF-SHOP) Enrollment Manual*, September 2, 2020, available at:

[https://www.regtap.info/uploads/library/ENR\\_FFEFFSHOPEnrollmentManual2020\\_5CR\\_090220.pdf](https://www.regtap.info/uploads/library/ENR_FFEFFSHOPEnrollmentManual2020_5CR_090220.pdf). 45 CFR § 155.220(c)(3)(i)(F) requires generally that web-broker websites provide consumers the ability to withdraw from the DE process and switch to using the Exchange website at any time.

<sup>7</sup> As described in the 2022 Payment Notice final rule and earlier in this guidance, this approach was permitted by CMS through use of enforcement discretion and will no longer be permissible beginning with the PY 2022 OEP.

broker websites begin to display additional QHP comparative information, they must continue to refrain from filtering the display of QHPs in a manner that favors QHPs for which the web-broker receives commissions or compensation from issuers for enrollments in such coverage, in order to remain in compliance with 45 C.F.R. §§ 155.220(c)(3)(i)(L).

For example, in the past, as a result of some web-broker websites displaying limited QHP comparative information for some QHPs, if one of those web-broker websites filtered the QHPs displayed from lowest to highest premium, and did not display premium information for those QHPs offered by issuers from whom the web-broker did not have an appointment, the web-broker website display implicitly favored QHPs offered by issuers from whom the web-broker received compensation. This was due to the absence of information (like premium) on their websites for some QHPs, which resulted in an otherwise neutral filter not providing a neutral result. However, beginning with the PY 2022 OEP, since all web-broker websites must display all of the required QHP comparative information, with the exception of MLR information and transparency in coverage measures, any filters offered on web-broker websites must result in a display based on the same comparative information for all QHPs, regardless of whether the web-broker has an appointment with and receives compensation from the QHP issuer.

This does not preclude web-broker websites from offering filtering capabilities that when applied neutrally happen to result in favorable display of QHPs offered by issuers from whom the web-broker receives commissions or other compensation for enrollments. For example, if a neutral filter orders all available QHPs from lowest to highest premium, includes all of the premium information provided by the Exchange or QHP issuers for all available QHPs, and the lowest premium QHPs happen to be ones for which the agent, broker, or web-broker receives compensation from QHP issuers, display of the lowest premium QHPs at the top of the list would not be considered out of compliance with 45 C.F.R. § 155.220(c)(3)(i)(L). Similarly, if an otherwise neutral filter is available for a consumer or agent/broker to select that, if selected, produces a list favoring a particular issuer's QHPs (e.g., a filter that limits the display of QHPs to those offered by specific issuers actively selected by the consumer or an agent/broker), making that filter available is not prohibited so long as the default listing of QHPs on the web-broker website includes all QHPs offered on the Exchange by all QHP issuers and is not limited to only those QHPs offered by an issuer (or issuers) from whom the agent, broker, or web-broker receives compensation, unless the consumer or agent/broker actively removes that default filter.