December 1, 2016

Andy Slavitt
Acting Administrator, Centers for Medicare and Medicaid Services
Department of Health and Human Services
200 Independence Ave SW
Washington, DC 20201

Submitted via email: FFEcomments@cms.hhs.gov

Re: Comment on the Draft 2018 Letter to Issuers on the Federally Facilitated Marketplace

Dear Mr. Slavitt:

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefit specialists nationally. We are pleased to have the opportunity to provide comments in response the "Draft 2018 Letter to Issuers on the Federally Facilitated Marketplace."

The members of NAHU work on a daily basis to help millions of individuals and employers purchase, administer and utilize health insurance coverage. Over the past two months, they have helped millions of their clients purchase marketplace-based coverage and will continue to support those clients throughout the remainder of the 2016 plan year as well as the 2017 coverage year that lies ahead. As such, we have a critical interest in the continued development of the federally facilitated marketplace (FFM) and feel that the decisions being made now that will impact its structure and functionality in the year ahead will be critical to its future success. We have grouped our comments on the proposed letter by topic, as requested, and appreciate your consideration of our point of view.

Certification Process for Qualified Health Plans (QHPs)

QHP Application and Certification Timeline
With regard to the timeframe proposed in this document, NAHU encourages CMS to be mindful of the impact the certification process timetable can have on the entire marketplace. Comments were solicited on whether the timetable should begin one week earlier so as to have the certification process finished sooner. NAHU believes that the sooner the plan options and prices are set for the 2018 open-enrollment period, the better, as it gives all involved more time to prepare. However, even if the current timetable remains unchanged, we appreciate that the proposed timeframe for QHP certification outlined in the draft letter indicates that issuers will have their finalized plan agreements and lists from CMS by September 22, 2017. This timeframe should, in theory, allow issuers the opportunity to release finalized QHP rates and plan designs to licensed and certified agents and brokers well in advance of the beginning of open enrollment. NAHU would further appreciate if the release of the plan designs and rates to certified agent and brokers and other applicable assisters be included in the official timetable, and that the timetable would allow for several weeks of review prior to the start of the 2018 open-enrollment season.

Giving brokers and other assisters adequate time to review rates ahead of time will better enable them to develop solid coverage recommendations for their clients right at the start of open enrollment. If agents and brokers do not have this lead time, then they are forced to spend valuable open-enrollment time learning about the costs and features of various plans and doing client-specific analyses. It would be far preferable if brokers could spend the whole of open enrollment directly reaching consumers and working through options with them. NAHU believes that giving the individuals who help consumers directly as much time as possible to familiarize themselves with plan choices and prices would be very beneficial to the marketplace and consumers alike. We would appreciate a CMS-required disclosure of plan information and rates to certified agents, brokers, navigators and other certified assisters by October 6, 2017, so that when the individual market opens for the year, they are fully prepared. If the plan and/or CMS makes corrections to the plan rates or other applicable changes during the limited correction period proposed for September 12-October 23, 2017, then certified brokers and assisters can be informed of any relevant changes by October 23, 2017, which would still give them a full week of time to review.

Suggested Alternative Enrollments for Enrollees Who Will Not Have Plans Offered by Their Current Issuers Available to Them through the Marketplace

In the draft letter, CMS indicates its plans to provide additional guidance to FFM states about the practice of the marketplaces, to the extent allowable by state law, selecting an alternate coverage plan for enrollees offered by a different issuer if no QHP plan is available to them for the 2018 plan year from their original issuer. NAHU has significant consumer-protection and privacy concerns with this practice. As such, we urge the public release of any state instructions or guidance as soon as possible, and request time for review and comment by stakeholders.

Qualified Health Plan and Stand-Alone Dental Plan Certification Standards

Network Adequacy

Health insurance agents and brokers nationwide are acutely aware of the need for health insurance consumers to have adequate information at the time of purchase about both health plan networks and formularies. Such information is critical if the consumer is to pick the health plan that best meets his or her needs and budget. However, our members know how important choice of health plan options is in the marketplace too.

Out-of-Network Cost Sharing for in-Network Settings

Beginning with the 2018 plan year, CMS will require QHP issuers to count cost-sharing payments made by enrollees for any essential health benefit (EHB) provided by an out-of-network provider in an in-network facility to the enrollee's in-network cost-sharing annual limitation in most circumstances. As an alternative, in this letter CMS has proposed a process by which an issuer could provide enrollees with written notice about the extra cost sharing they may occur by the longer of either 1) when the issuer would typically respond to a prior authorization request submitted on a timely basis or 2) 48 hours before the provision of the benefit. Given that normally consumers unknowingly incur charges by an out-of-network provider working with an in-network facility during the course of emergency treatment or an admission to an in-network facility, we do not think the advance notification option is practical. Further, we feel it would have little value to the consumers, as it would not give them the chance to seek other, more affordable care with reduced cost-sharing in most cases. As such, NAHU does not support the proposed alternative.

Network Transparency
NAHU supports the 2017 transparency pilot program approach outlined in this letter and previous rulemaking and guidance concerning providing more direct consumer information in the marketplace online display with regard to both hospitals and primary care providers. NAHU members who work with consumers on enrollment every day report that this is by far the most important information needed by consumers to help them make informed choices, particularly for those who may be very price-sensitive with regard to purchases. While NAHU does not have specific concerns about the proposed methodology that CMS is testing for 2017, we note that evaluating network breadth by county may be a more valuable tool for consumers in certain states than others given that counties nationally vary greatly by size and population. For example, Georgia has 159 counties but the states of Ohio and North Carolina, which both have comparable populations to Georgia, have far fewer, with 88 and 100 respectively. The Commonwealth of Pennsylvania, which has 2 million more residents than Georgia, has only 67 counties. A simpler and fairer way of measuring breadth might be by ZIP code.

CMS notes that it plans to collect data on the 2017 consumer experience from the pilot states where greater network transparency information will be displayed. NAHU supports this data-collection effort and hopes that the results will be released publicly within a reasonable time frame following the end of the 2017 open-enrollment season. Finally, as in previous years, we would like to note that further embracing the health insurance agent and broker community during open enrollment 2018 would address many consumer network and formulary concerns, as agents and brokers routinely assess how well each aspect of each plan choice will serve their clients' specific needs in these respects.

Specialty Access
In this draft letter, CMS notes that in addition to following network adequacy standards outlined in the rules, QHPs may not employ marketing strategies or benefit-design strategies that will discourage the enrollment of individuals with significant health needs. The letter lists various types of specialty providers that may not be adequately represented in plan networks and, as a result, could diminish patient access and discourage enrollment. CMS is considering monitoring access to a wide range of providers for this reason. NAHU suggests that in addition to providing adequate access to specialists, another important consideration for consumers with high-cost medical conditions is often the availability of specialty prescription drugs and other related therapies, and CMS may want to be mindful of access and cost issues on this front.

Discriminatory Benefit Design
CMS notes that it plans to communicate with the Departments of Health and Human Services, Labor and Treasury about issuing additional guidance about preventing discriminatory benefit design. NAHU believes that this additional guidance would be helpful to not only issuers of QHP coverage on the individual level but also to issuers of small-group and large-group employer-based coverage, including employers that offer self-funded benefits to employees, and we urge its release as soon as possible.

Consumer Support Tools and Public Information
Out-of-Pocket Cost-Comparison Tool
CMS has offered consumers an out-of-pocket cost-comparison tool to help enrollees evaluate different QHP options based on potential levels of total spending, including premiums and cost sharing. NAHU appreciates the inclusion of this and other consumer tools that have been built into the FFM. However, we note that while price is certainly

an important consideration in picking a health plan, insurance coverage is not a commodity and there are many other factors that consumers should consider when making a plan choice for the year. We encourage CMS to include clear verbiage in this section of the FFM about other key factors consumers should weigh beyond just price, including network adequacy, benefit design, claims processes, carrier stability and more. In addition, we encourage CMS to provide clear links within the FFM to various sources of direct consumer help, including certified agents and brokers. Certified brokers routinely consider how well each aspect of each plan choice will serve their clients' specific needs in these respects as part of their advisory role and consumers need to understand the benefit of this service.

Additional Consumer-Support Issue

Agents and brokers very much appreciate the creation of dedicated customer support for them to report client issues during the 2016-2017 open enrollment period. Brokers also need a means of tracking their clients' cases and ensuring follow-through and resolution. We recognize that the Health Insurance Casework System is intended for issuer and CMS use, but often brokers are the ones helping their clients through the consumer complaint process. We request that, moving forward, the FFM continue to develop a specific means for providing certified agents with more client support as well as a method for them to track problem cases and their resolution for their clients.

QHP Performance and Oversight

FFM Oversight of Agent and Brokers

NAHU believes it is critical that certified brokers be held accountable for their actions and we support efforts to enforce appropriate consumer-protection standards. However, as we have expressed in past communications, we continue to have concerns about how CMS may coordinate enforcement efforts with state regulators. While we recognize the responsibility of the FFM to investigate and take action against any cases of serious broker misconduct that might impact the exchange marketplace, given that state regulators are the primary regulators of broker conduct across all market spheres, we believe that state officials should be involved and alerted to suspected misconduct immediately so that they too can take appropriate action if needed. It is unclear if CMS always plans to notify and involve state regulators if serious broker misconduct is suspected. We also note that states have long-established processes for handling potential broker misconduct. NAHU believes that rather than the exchanges initiating separate investigations and processes with regard to potential misconduct, consumers, the exchanges, states, and agents and brokers will best served if exchanges would simply always work with state regulators within the existing enforcement framework at the state level.

Direct Enrollment

NAHU enthusiastically embraces the concept of a single streamlined application that would enable a consumer to complete the eligibility portion without leaving the web broker's or issuer's website. We also agree that any modifications designed to streamline the process must not come at the expense of overall program integrity, specifically consumer privacy and security. The HHS proposal to require brokers and issuers to strictly adhere to existing eligibility exchange language and scope of required information is a prudent safeguard. We support provisions for conspicuous notice to consumers to assure they are aware that they are applying for exchange coverage even though they will no longer be directed to the exchange website at any point in the application process. In addition, we encourage HHS to minimally require the submission of each web broker's and issuer's MARS-E Compliance Manual that details how they manage their compliance process, with particular attention to

the implementation and maintenance of a MARS-E compliance level. Web brokers and issuers that fail to materially meet MARS-E standards should not have access to the proposed streamlined application process until such time as they can demonstrate compliance.

With regard to downstream entities that may access a web broker's or issuer's technology to assist consumers, we note that licensed health insurance agents and brokers are already required to abide by extensive state and federal privacy requirements and that the federal marketplace already has the authority to suspend the activities of certified agents and brokers that do not meet their privacy responsibilities. We believe it is appropriate to require issuers and web brokers to refuse to imbed its enrollment technology in a downstream producer's website without the appropriate indemnification and HIPAA privacy agreements, and to take responsibility for stopping access to enrollment technology to individual producers in case of a downstream entity breach. However, individually licensed consumers are ultimately responsible for their own actions and the ability of a web broker or issuer to fully operate enhanced enrollment capabilities should not be compromised by the actions or mistakes of a downstream entity, provided that access to that entity is halted in the case of a breach.

Compensation

NAHU requests that CMS stipulate the final version of this letter that for plan year 2018 and all out-years for QHP certification and rate approval, if an issuer files a premium rate with the state that includes broker compensation and that premium rate and plan design is ultimately approved by the CMS QHP rate review and certification process, then as a condition of approval, the issuer may not alter the general compensation rate for brokers proposed and approved for the duration of the plan year. Such a requirement should not preclude an issuer from suspending broker compensation in the case of individual broker proved misconduct, but should prevent an issuer from altering a commission structure included in filed and approved rates for all brokers or a set grouping of brokers (such as appointed brokers) in the midst of the plan year.

Currently, issuers in multiple states implemented mid-year commission changes for the individual market that affected the special enrollment period (SEP) for 2016 even though rates filed for these products included commissions and the premiums for such policies are not being correspondingly reduced. NAHU believes this practice has a negative impact on consumers and that it is within CMS's authority to address with issuers under several fronts. While CMS has been very clear that it does not require or regulate broker compensation for marketplace products, CMS does stipulate that if an issuer provides broker compensation, then the issuer must provide the same level of compensation for all substantially similar QHP products, regardless if they are sold via the marketplace or in the off-exchange marketplace. The reasoning for this requirement is CMS's direct authority to both enforce the ACA's guaranteed-issue requirement and to ensure stability in the exchange marketplace. If the compensation environment is not kept level for substantially similar products both on- or off-exchange, then the guaranteed-issue provisions of the law are undermined as individuals might not have access to all products through their brokers and people may be unknowingly directed to one market or another, creating an unlevel market playing field and consumer harm. The same threats to the ACA's individual market guaranteed-issue requirements and the stability provisions apply to a mid-year commission policy change by an issuer. If an issuer provides one rate during open enrollment then reduces rates for the remainder of the plan year during the special enrollment period, an individual's access to coverage and exposure to all channels of consumer assistance will be diminished. This is especially true of a commission change that impacts the SEP, since consumers with SEP rights often need the most help taking advantage of their special status. Furthermore, by reducing their rate to a

noncompetitive level midway through the plan year, an issuer may be able to inappropriately shift risk to other issuers in the marketplace. If an issuer reduces its commission rate to zero during a plan year, a broker will likely be no longer able to help clients with that issuer's product options at all, since if the broker is not being paid for his or her services, no client relationship is established and then the broker's errors and omissions insurance coverage (which protects both the consumer and the broker) does not apply to the relationship and potential transaction.

NAHU also believes that CMS has the responsibility and authority under its rate review and QHP certification processes to ensure that issuers maintain the services that they promise via filed and approved rates throughout the plan year. Much like CMS stipulates that issuers may not change and reduce their initially specified service areas mid-plan-year, we believe it would be appropriate for you to stipulate that the services promised as part of approved rates, including access to the purchasing services and plan-year and renewal consumer support offered by a licensed health insurance agent or broker, not be eliminated part-way through a given plan year. Otherwise, consumer services that are promised as part of the approved rates of the policy may be reduced, and the consumer would see no corresponding premium reduction.

Oversight of Marketing Activities
NAHU has concerns about the proposed standards of conduct that would extend to businesses and agents that use the words "exchange" and "marketplace" in their names and websites. NAHU does not in any way support websites operated by brokers or any others that are intentionally misleading to consumers and attempt to confuse them relative to the federal marketplace. In addition, we support the required disclaimer to note that the entity or website is not the federal exchange and requirement to include a link to HealthCare.gov. However, we also note that the words "exchange" and "marketplace" are common and have been part of the names (and web addresses) of many long-standing insurance-related businesses established well before the federal marketplace was envisioned. For example, a NAHU member's company, The Insurance Exchange, has been operating as one of the largest general insurance agencies in Texas for decades. Businesses like this should be able to continue to operate and market online as they have for years without fear of federal reprisal. We request that the final issuer letter acknowledge that there are entities that have used these words in their name for years prior to the creation of the FFM, that these entities are in no way trying to confuse consumers by maintaining their longstanding corporate identities and that HHS does not expect these businesses to change names, websites, trademarks, etc. that have long been part of their business identity.

FF-SHOPs
The draft letter goes over proposed changes to SHOP enrollment procedures discussed in the proposed 2018 Notice of Benefit and Payment Parameters. NAHU appreciates the clarification in this draft letter that current FF-SHOP participation and enrollment processes remain in effect until further notice and that if any proposed changes are finalized, then implementation guidance will issued. NAHU continues to have significant concerns with the related proposal to limit variable-hour measurement periods for SHOP-participating employers to 10 months rather than the maximum of 12 allowable for all other employers. While right now most SHOP participating employers are not subject to the IRC §4980H employer responsibility requirements, given the possibility of SHOP expansion by states in 2017 and later, NAHU believes this new requirement would be a substantial barrier to entry and compliance issue for any large employer considering purchasing coverage through a SHOP exchange. Similarly, we oppose the proposed reductions and restrictions in the legal waiting periods for SHOP-participating employers. By creating both variable and more restrictive requirements on participating employers, the SHOP exchange is

only discouraging employer participation and inviting compliance errors. If SHOP would like to attract new employer entrants, its focus should be on making the coverage and compliance process simpler and more advantageous for employers and employees alike.

NAHU sincerely appreciates the opportunity to provide comments on this letter and we look forward to working with you in the year ahead. If you have any questions or need additional information, please do not hesitate to contact me at either (202) 595-0787 or jtrautwein@nahu.org.

Sincerely,

Janet Stokes Trautwein
Executive Vice President and CEO
National Association of Health Underwriters