



An Overview of the Medicare Marketing Rule

PRESENTED BY:

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QUESTIONS?

You may ask your question in the questions box at any time.

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Today's Presenters

- Marcy M. Buckner, J.D., is the senior vice president of government affairs at NAHU. In this role, Marcy manages the association's government affairs team, including the monitoring of activities of all state legislatures, insurance departments, and intergovernmental organizations. She serves as the association's liaison to federal agencies such as HHS and CMS.
- Mike Smith is the president of The Brokerage, an insurance marketing organization licensed in all 50 states. The Brokerage specializes in life, health, financial, senior insurance products and marketing services. Mike Smith is also chair of NAHU's Medicare Advisory Group and FMO Council.



Why are we here?

- Increase in Medicare misleading marketing claims from 15,500 in 2020 to more than 39,000 in 2021



Final Rules Overseeing Recordings

- Medicare Marketing Rule:
 - <https://www.govinfo.gov/content/pkg/FR-2022-05-09/pdf/2022-09375.pdf>
- Medicare Managed Care Manual
 - 40.1.3 Enrollment via Telephone (p. 59)
 - [CY2021 MA Enrollment and Disenrollment Guidance \(cms.gov\)](https://www.cms.gov/medicare/managed-care-manuals/40-1-3-enrollment-via-telephone)

Implications of Medicare Marketing Final Rule

- A recently-enacted final rule requires agents to record telephonic marketing conversations with beneficiaries beginning October 1.
 - The wording of the rule references “marketing” calls, but NAHU confirmed that CMS interprets “enrollment” as “marketing.”
- The recording requirement applies to all agents who enroll beneficiaries into new plans, whether they are current or new clients.
- Online applications that agents walk through with their clients are also subject to recording. SHIPS are exempt from the rule.
- New disclaimer must be posted on website and read within first 60 seconds of marketing call.

Definition of TPMO

Third Party Marketing Organizations are defined as “organizations and individuals, *including independent agents and brokers*, who are compensated to perform lead generation, marketing, sales, and enrollment related functions as a part of the chain of enrollment (the steps taken by a beneficiary from becoming aware of an MA plan or plans to making an enrollment decision). TPMOs may be a first tier, downstream or related entity (FDRs), as defined under [§ 422.2](#), but may also be entities that are not FDRs but provide services to an MA plan or an MA plan's FDR.”

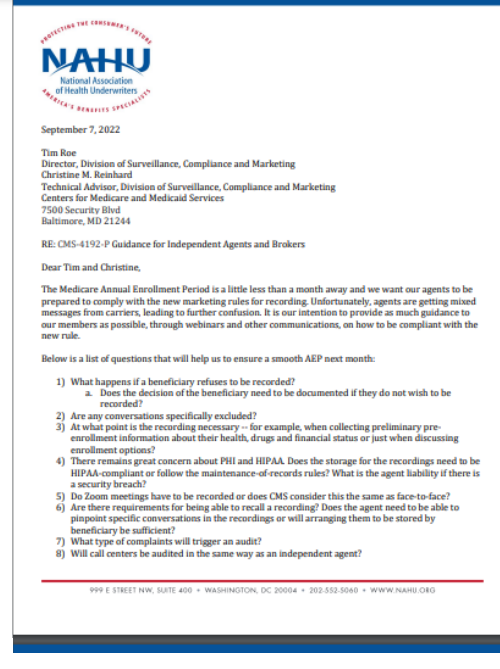
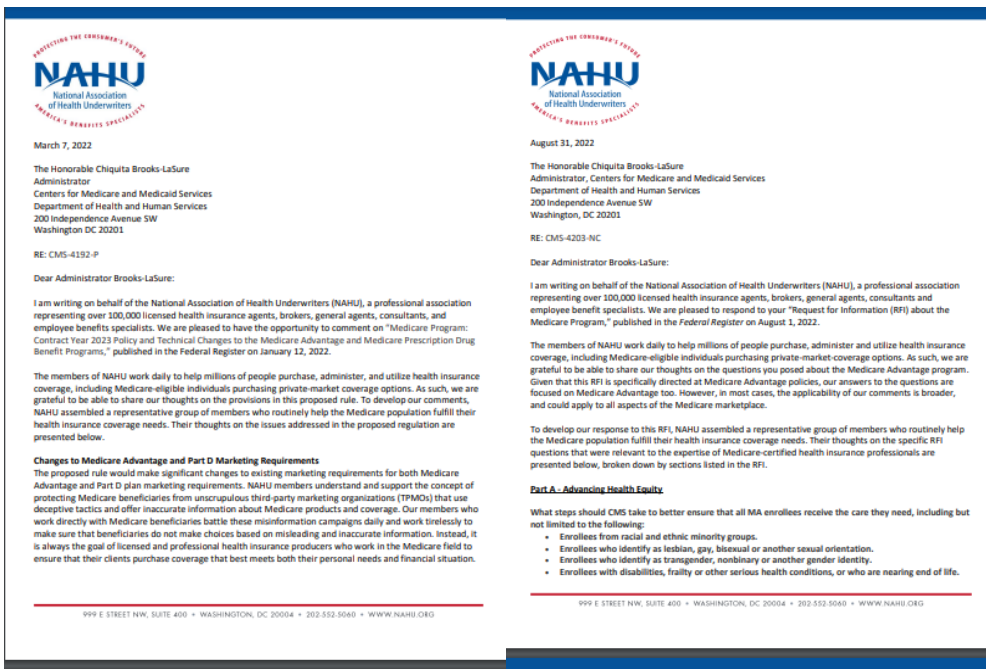
Disclaimer

CMS is requiring all TPMOs (including agents and brokers) to disclose on their website and in the first 60 seconds of each phone call:

“We do not offer every plan available in your area. Any information we provide is limited to those plans we do offer in your area. Please contact Medicare.gov or 1-800-MEDICARE to get information on all of your options.”

NAHU Concerns

- NAHU has sent a total of 5 letters (one under the Agency Alliance) to CMS with our concerns over these requirements.



NAHU Concerns

- NAHU noted that the scope and structure of the proposed definition of TPMOs would inadvertently affect independent agents who perform legitimate marketing of their services.
- Such a broad definition would apply the new requirements and restrictions to virtually all professionals who assist Medicare beneficiaries with their coverage and enrollment needs.

NAHU Suggestions

- Instead of moving forward with less-than-adequate proposed changes right away, NAHU requested that CMS delay its proposed marketing changes for the 2023 plan year.
- Instead, we suggested that CMS take the balance of 2022, including the 2023 AEP, to meet with all stakeholders and observe market conduct and gather feedback.
- Using this feedback, we believe CMS can craft a comprehensive and quality proposal that protects all Medicare beneficiaries in a truly meaningful fashion.

NAHU Supports...

- Changes designed to improve beneficiary-communication materials, including:
 - ✓ reinstatement of a prior requirement mandating the inclusion of a multi-language insert in specified materials to inform beneficiaries of the availability of free language and translation services,
 - ✓ mandatory enrollee ID card standards, requiring plans to provide a disclaimer when access to preferred pharmacies is limited, and
 - ✓ requiring plans to include instructions on their websites for beneficiaries explaining enrollment processes

FAQs for Compliance

- What if a beneficiary refuses to be recorded?
 - The call must end.
 - We have seen differing guidance from carriers on this question, CMS specifically stated the call must end if the beneficiary does not want to be recorded.
- *What should you say to end the call?*
 - *Unfortunately, I am required to record our enrollment calls by the federal government. I understand you are not comfortable with that. When is a good time for us to meet in person to discuss your enrollment without being recorded?*

FAQs for Compliance

- Are any calls excluded? At what point is the recording necessary -- for example, when collecting preliminary pre-enrollment information about their health, drugs and financial status or just when discussing enrollment options?
 - All calls need to be recorded. However, all calls to beneficiaries who enroll into a plan need to be retained. Therefore, preliminary pre-enrollment information, as described above, will need to be recorded and retained for those beneficiaries who enroll in the plan.
- *Confused? We are too!*
 - *CMS is saying that all calls should be recorded, but only calls that lead to enrollment should be “retained”. So, calls that don’t lead to an enrollment don’t have to be saved.*

FAQs for Compliance

- *All calls incoming and outgoing? Even if I'm on the road between clients?*
 - *Yes, all calls. If you get a call on your cell phone and are driving between clients without the ability to record you will need to arrange to follow up with the beneficiary in a manner that can be recorded if the subject of the call could lead to an enrollment.*
- *Really, all calls?!*
 - *Yes, all calls that could lead to an enrollment. If an enrollment has been made and the beneficiary is calling with follow up questions about providers in network, drug coverage, or needs a new plan card those "service" calls do not need to be recorded.*
- *Even my current clients?*
 - *Yes, even your current clients if leading to an enrollment.*

FAQs for Compliance

- Does the storage for the recordings need to be HIPAA-compliant or follow the maintenance-of-records rules?
 - Calls need to be meet all privacy and HIPAA rules. It is up to the plan/agent to determine the best way to meet those requirements.
- *Recordings and storage must be HIPAA compliant.*
 - *If the plan you work with offers recording assistance, ask if it is HIPAA compliant.*
 - *If you are putting a recording system in place, check with the vendor to be sure the system is HIPAA compliant and can retain recordings for 10 years.*

FAQs for Compliance

- Do Zoom meetings have to be recorded?
 - Yes, they are considered telephonic
- *NAHU has seen differing guidance on this from carriers. We specifically asked CMS this question because of that. They do not consider Zoom meetings face to face, they are considered telephonic and must be recorded and retained if the conversation leads to an enrollment.*

FAQs for Compliance

- Does the Disclaimer have to read at the beginning of every call?
 - The Disclaimer only needs to be said once, but at the beginning of an enrollment call, not a call setting up an appointment.
- *The Disclaimer doesn't need to be read on every call, but does need to be read on the first call with a client that begins the enrollment process. We know this can last over several phone calls so it only needs to be read at the beginning of the call.*
- *You are also able to explain the Disclaimer after you read it. We know many NAHU members are concerned because they do actually work with all plans in the area. You are able to explain that this is a requirement of the federal government, and which plans you work with.*

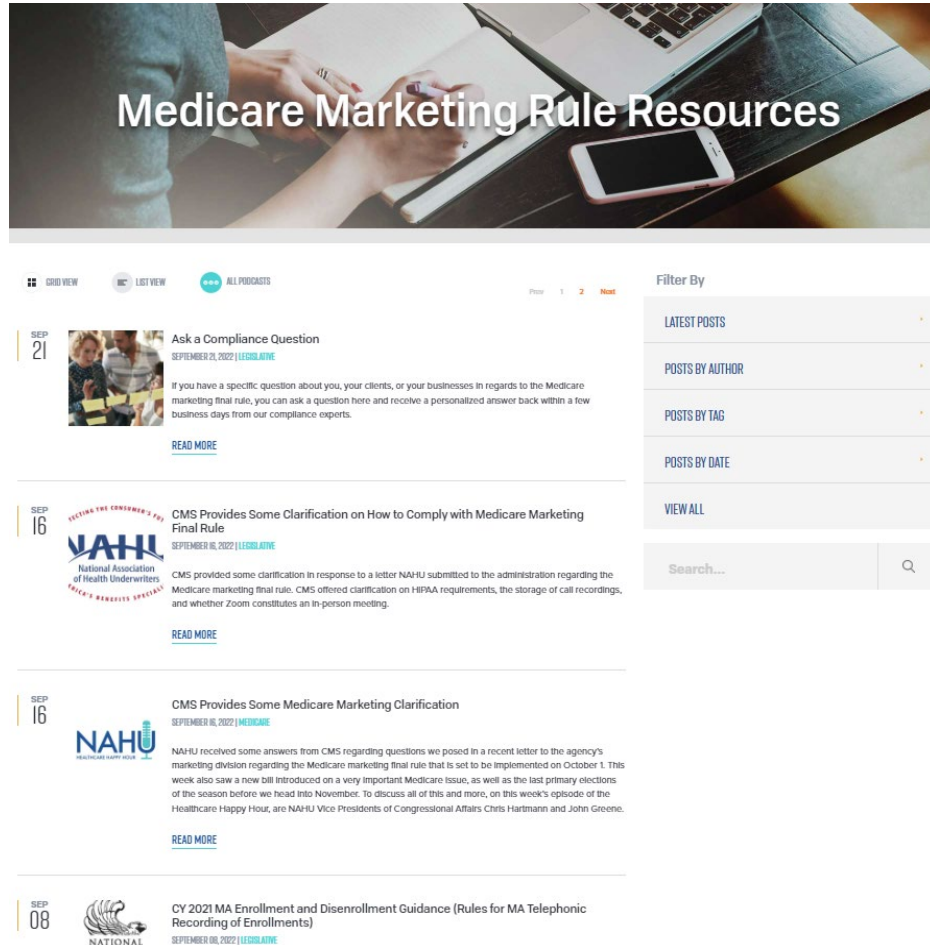
FAQs for Compliance

- If I am a captive agent and only work for one plan do the recording and disclaimer requirements apply to me?
 - Yes, they apply to all TPMOs, included independent agents and brokers, regardless of how many plans you work with.

FAQs for Compliance

- How will enforcement work?
 - Breaches of security will be overseen by the Office of Civil Rights
 - CMS will randomly audit complaints and take action with state insurance departments regarding licensure of the agent depending on the severity of the violation

FAQs for Compliance



- NAHU has a page under our “Medicare Portal” with links to:
 - All of NAHU’s comment letters
 - The final rule itself
 - CMS guidance and clarification
 - Relevant podcast episodes with detailed discussion
 - This webinar (after it ends)
 - “Ask a Question” feature to ask specific compliance questions
- <http://nahu.org/membership-resources/medicare-portal/medicare-marketing-rule-resources>

Letters from the Hill

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United States Senate
WASHINGTON, DC 20540-5000

SEPTEMBER 19, 2022

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare and Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Dear Administrator Brooks-LaSure:

The Centers for Medicare and Medicaid Services (CMS) released a final rule in May that will revise the Medicare Advantage program and Medicare Prescription Drug Benefit program regulations to implement changes related to marketing and communications requirements. While I appreciate that CMS is taking steps to help ensure that Medicare enrollees are receiving accurate and accessible information about Medicare coverage, CMS should provide more guidance about how to comply with the revised regulations.

The final rule states that, among other requirements, third-party marketing organizations will be required to record sales calls with beneficiaries in their entirety.¹ Furthermore, the final rule defines, for the first time, third-party marketing organizations as being "organizations that are compensated to perform lead generation, marketing, sales, and enrollment related functions as a part of the chain of enrollment."² This means that independent insurance agents and brokers, many of whom were previously not subject to CMS's marketing and communications regulations, will now have to comply with the revised regulations, including the call recording requirement.

I have heard from a number of constituents who own or work for independent insurance agencies who have struggled to understand how they can comply with these new requirements and what the financial impact to their business may be. CMS has provided no guidance on the call recording requirement, including whether the recorded calls will be subject to Health Insurance Portability and Accountability Act (HIPAA) requirements, how long the recordings must be retained, how the recordings will be used for compliance efforts, and which, if any, calls would be exempted from the requirement. Guidance in this area is important not just to assure independent agencies that they are in compliance with the provisions of the final rule, but also to assure potential enrollees that they can trust that the personal information they are sharing over the phone will be recorded and stored in a responsible and secure way.

I support the overall goal of ensuring that bad actors do not confuse or potentially mislead Medicare enrollees during the enrollment process; however, the final rule has led to

¹ <https://www.federalregister.gov/2022-09-15/p-1294>
² <https://www.federalregister.gov/2022-09-15/p-1292>

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confusion and apprehension among many independent insurance agencies about the implications of the new requirements. It is imperative that CMS issue clear guidance to stakeholders clarifying their obligations under the final rule so that independent agents and brokers can continue to help the thousands of enrollees they serve find a Medicare plan that best meets their needs.

Sincerely,

Susan M. Collins
Susan M. Collins
United States Senator

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Medicare Marketing Rule Operation Shout



COBRA as Creditable Coverage

- The intersection between employer coverage and Medicare is fraught with landmines.
 - Seniors who are enrolled in COBRA coverage but are eligible for Medicare face financial penalties for not enrolling within the mandated time-frame.
 - People take COBRA for a variety of reasons but pulling along a younger spouse is common.
- On Monday **H.R. 8791**, bipartisan legislation was introduced by Representatives Kurt Schrader (D-OR), Gus Bilirakis (R-FL), Mike Thompson (D-CA), Lloyd Smucker (R-PA), Mikie Sherrill (D-NJ), and Tim Walberg (R-MI) to treat COBRA as creditable coverage for Medicare, the same way that similar employer-sponsored insurance is already treated as creditable.
- The issue is ripe for again for bipartisan action to remove the penalty and provide a special enrollment period to enroll in Part B.

COBRA Operation Shout



Questions?