

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)



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.



The Honorable Chiquita Brooks-LaSure Centers for Medicare and Medicaid Services artment of Health and Human Services 200 Independence Avenue SW Washington DC 20201

Dear Administrator Brooks-LaSure

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing over 100,000 licensed health insurance agents, brokers, general agents, consultants, and employee benefits specialists. We are pleased to have the opportunity to comment on "Medicare Program Contract Year 2023 Policy and Technical Changes to the Medicare Advantage and Medicare Prescription Drug Benefit Programs," published in the Federal Register on January 12, 2022.

The members of NAHU work daily to help millions of people purchase, administer, and utilize health insurance coverage, including Medicare-eligible individuals purchasing private-market coverage options. As such, we are grateful to be able to share our thoughts on the provisions in this proposed rule. To develop our comments, NAHU assembled a representative group of members who routinely help the Medicare population fulfill their health insurance coverage needs. Their thoughts on the issues addressed in the proposed regulation are

Changes to Medicare Advantage and Part D Marketing Requirements

The proposed rule would make significant changes to existing marketing requirements for both Medicare Advantage and Part D plan marketing requirements. NAHU members understand and support the concept of protecting Medicare beneficiaries from unscrupulous third-party marketing organizations (TPMOs) that use deceptive tactics and offer inaccurate information about Medicare products and coverage. Our members who work directly with Medicare beneficiaries battle these misinformation campaigns daily and work tirelessly to make sure that beneficiaries do not make choices based on misleading and inaccurate information. Instead, it is always the goal of licensed and professional health insurance producers who work in the Medicare field to ensure that their clients purchase coverage that best meets both their personal needs and financial situation.



August 31, 2022

The Honorable Chiquita Brooks-LaSure Administrator, Centers for Medicare and Medicaid Services Department of Health and Human Services 200 Independence Avenue SW Washington, DC 20201

RE: CMS-4203-NC

Dear Administrator Brooks-LaSure

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing over 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefit specialists. We are pleased to respond to your "Request for Information (RFI) about the Medicare Program," published in the Federal Register on August 1, 2022.

The members of NAHU work daily to help millions of people purchase, administer and utilize health insurance coverage, including Medicare-eligible individuals purchasing private-market-coverage options. As such, we are grateful to be able to share our thoughts on the questions you posed about the Medicare Advantage program. Given that this RFI is specifically directed at Medicare Advantage policies, our answers to the questions are focused on Medicare Advantage too. However, in most cases, the applicability of our comments is broader and could apply to all aspects of the Medicare marketplace.

To develop our response to this RFI, NAHU assembled a representative group of members who routinely help the Medicare population fulfill their health insurance coverage needs. Their thoughts on the specific RFI questions that were relevant to the expertise of Medicare-certified health insurance professionals are presented below, broken down by sections listed in the RFI

What steps should CMS take to better ensure that all MA enrollees receive the care they need, including but not limited to the following:

- Enrollees from racial and ethnic minority groups.
- · Enrollees who identify as lesbian, gay, bisexual or another sexual orientation
- Enrollees who identify as transgender, nonbinary or another gender identity.
- Enrollees with disabilities, frailty or other serious health conditions, or who are nearing end of life.

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Centers for Medicare & Medicald Services Washington DC 20201

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing over 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefits specialists. We will be formulating more detailed comments in response to the recent Request for tion (RFI) regarding Medicare Advantage plans published in the federal register on August 1, but would like to share our initial response expressing our concern with the threat to the success of the Medicare Advantage program in light of the rule "Medicare Program: Contract Year 2023 Policy and Technical Changes to the Medicare Advantage and Medicare Prescription Drug Benefit Programs," finalized in May of this year.

and drives towards a future where people with Medicare receive more equitable, high quality, and wholeson care that is affordable and sustainable." Nothing puts the person at the center of their care more than a licensed health insurance agent or broker that is able to guide the beneficiary to the plan that will truly wide the beneficiary with more equitable, high quality, and whole-person care that is affordable an sustainable for that specific beneficiary. The most immediate action CMS can take to protect Medicare Advantage beneficiaries is to delay the Medicare marketing rule and allow for engagement with the stakeholder community to develop a rule that reflects the actual business model of licensed independent agents and brokers and their client beneficiaries

The members of NAHU work daily to help millions of people purchase, administer and utilize health insurance coverage, including Medicare-eligible individuals purchasing private-market-coverage options. Earlier this year, we assembled a representative group of members who routinely help the Medicare population fulfill their health insurance coverage needs in order to submit comments on what was then the proposed Medicare marketing rule. Since then, the final rule has been released but many of our concerns were not addressed, and we believe this puts many Medicare beneficiaries in danger from not being able to receive advice from licensed, certified health











The Honorable Chiquita Brooks-LaSure, Administrator Centers for Medicare and Medicaid Service Department of Health and Human Services 200 Independence Avenue SW Washington DC 20201

RE: CMS-4192-P

The Agent Alliance, representing America's premier agent and broker trade associations whose members serve consumers and businesses with a canopy of insurance options, is writing in removes the "Medicare Programs. Contract Vear 2023 Policy and Technical Changes to the Medicare Avantage and Medicare Prescription Drug Benefit Programs," finalized in May of

The final rule made significant changes to existing marketing requirements for both Medicare Advantage and Part D plan-marketing requirements. We understand the importance of protecting Medicare beneficiaries from unscrupulous third-party marketing organizations (TPMOs), especially call centers that use deceptive tactics and offer inaccurate information about Medicare products and coverage.

We represent licensed and certified independent agents and brokers who work directly with Medicare beneficiaries to battle these misinformation campaigns daily and work tirelessly to make sure that beneficiaries do not make choices based on misleading and inaccurate iformation. Instead, it is always the goal of licensed and professional health insurance producers who work in the Medicare field to ensure that their clients purchase coverage that best meets their personal needs and financial situation

The final rule seeks to account for unscrupulous marketing behaviors by requiring TPMOs to cord all enrollment conversations. However, TPMOs already have this requ What is different in the proposed and now final rule is how TPMOs are being defined. The new definition of TPMO is overly broad and will needlessly impact many entities that are acting



Director, Division of Surveillance, Compliance and Marketing Christine M. Reinhard

Technical Advisor, Division of Surveillance, Compliance and Marketing Centers for Medicare and Medicaid Services 7500 Security Blvd Baltimore, MD 21244

RE: CMS-4192-P Guidance for Independent Agents and Brokers

Dear Tim and Christine

The Medicare Annual Enrollment Period is a little less than a month away and we want our agents to be prepared to comply with the new marketing rules for recording. Unfortunately, agents are getting mixed messages from carriers, leading to further confusion. It is our intention to provide as much guidance to our members as possible, through webinars and other communications, on how to be compliant with the

Below is a list of questions that will help us to ensure a smooth AEP next month

- 1) What happens if a beneficiary refuses to be recorded:
- Does the decision of the beneficiary need to be documented if they do not wish to be recorded?
- 2) Are any conversations specifically 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
- There remains great concern about PHI and HIPAA. Does the storage for the recordings need to be HIPAA-compliant or follow the maintenance-of-records rules? What is the agent liability if there is
- 5) Do Zoom meetings have to be recorded or does CMS consider this the same as face-to-face? 6) Are there requirements for being able to recall a recording? Does the agent need to be able to pinpoint specific conversations in the recordings or will arranging them to be stored by
- beneficiary be sufficient?
- 7) What type of complaints will trigger an audit?
 8) Will call centers be audited in the same way as an independent agent?



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



- 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?



- 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 preenrollment 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.



- 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.



- 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.



- 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.



- 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.

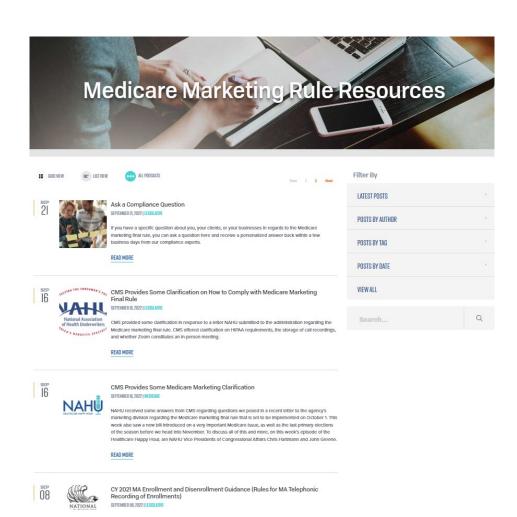


- If I am a captive agent and only work for one plan do the recording and disclaimer requirements apply to me?
 - Yes, they apply to all TPMOs, included independent agents and brokers, regardless of how many plans you work with.



- 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





- 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/membershipresources/medicare-portal/medicare-marketingrule-resources



Letters from the Hill

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United States Senate

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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. 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." 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

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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.

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Susan M. Collins
United States Senator



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¹ https://www.federalregister.gov/d/2022-09375/p-129

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?



9/22/2022