

MEMORANDUM

DATE: September 26, 2008

TO: All PDP, MA-PD, MA, CCP, PFFS, RPPO, MSA, HCPPs, Employer/Union Only Group Waiver Plans (EGWP) and Cost Organizations

FROM: Abby L. Block /s/
Director, Center for Drug and Health Plan Choice (CPC)

SUBJECT: Final Marketing Provisions and CMS Marketing Surveillance

The Medicare Improvements for Patients and Providers Act (MIPPA)¹ which became law in July 2008, made a number of changes to the Medicare Advantage (MA) and Medicare Prescription Drug benefit programs. CMS recently issued final and interim final regulations codifying the MIPPA provisions and a guidance document which outlines requirements designed to protect Medicare beneficiaries from deceptive or high-pressure marketing tactics by private insurance companies and their agents and brokers during the upcoming 2009 open enrollment period. Appendix A summarizes some of these key provisions.

CMS reminds organizations of their obligation to fulfill the requirements outlined in MIPPA, the final regulations, and the guidance document for the 2009 marketing and contract year. First tier and downstream entities, including contracted agents and brokers must also comply with these requirements. CMS takes seriously organizations' responsibility for their downstream arrangements and therefore, for the behavior of their agents and brokers. Organizations will be held responsible for the actions of any representative selling their products to Medicare beneficiaries. Organizations must put in place proactive measures to avoid aggressive and misleading marketing tactics by affiliated agents and brokers. CMS expects organizations to implement a plan designed to detect prohibited tactics early and to appropriately address agents and brokers engaging in misconduct.

This memorandum will describe CMS' strategic approach in ensuring that organizations have fulfilled their obligations in complying with the new MIPPA marketing provisions. This strategy includes:

- Use of a secure online monitoring tool to conduct a marketing readiness assessment of contracted organizations with these new marketing provisions.

¹ P. L. 110-275: The Medicare Improvement for Patients and Providers Act of 2008, July 23, 2008.

- Implementation of a comprehensive marketplace surveillance strategy to detect prohibited marketing tactics and enable CMS to take appropriate actions against organizations found to be out of compliance.
- Encouraging organizations to implement their own strategic measures to prevent, detect, and respond to agent and broker misconduct.

Marketing Readiness Assessment

In a few weeks, CMS will be releasing a marketing readiness assessment to all contracted organizations via our secure online monitoring tool. This assessment will require contracted organizations to certify their level of readiness with the new MIPPA marketing requirements and prohibitions. Additionally, the assessment will ask each organization to provide information to CMS on their oversight strategy, the steps they have taken to ensure compliance with the new marketing provisions and a description of best practices. CMS will utilize the responses from this assessment to issue a best practices document later this fall.

CMS Marketing Surveillance and Oversight

For the fall 2008 annual election period, CMS will employ a comprehensive marketplace surveillance strategy to ensure organizations are compliant with the new marketing regulations, particularly those related to agent and broker compliance.

This will include:

- Increasing the number of secret shopping events.
- Expanding the scope of surveillance activities to encompass the performance of all contracted organizations, including Medicare Advantage and Prescription Drug Plans.
- Utilizing all information available, such as marketing misrepresentation complaints in the CTM, to target surveillance activities to high-risk organizations and activities involving beneficiaries at high risk for marketing abuse.
- Collaborating with each state to quickly and efficiently share information concerning marketing matters so that CMS and the states can fulfill their respective oversight roles and thereby prevent, detect, and address agent and broker marketing issues.

CMS will take immediate steps to respond to the information collected through this surveillance activity, and if necessary, conduct additional focused audits. Organizations found out of compliance may be subject to formal compliance activity including requests for corrective actions plans or formal enforcement actions.

Implementation of Strategic Measures to Prevent, Detect, and Respond to Agent/Broker Misconduct

We require all organizations to implement a strategy designed to prevent prohibited marketing practices from occurring, to detect prohibited marketing tactics at their early stages, and to take immediate corrective action to respond to aggressive and misleading marketing tactics. While CMS will issue a best practices document later in the fall based on the feedback received from the marketing readiness assessment, there are numerous strategic approaches that can be implemented immediately. Some examples include:

- Creation of an organization-wide task force responsible for overseeing and responding to agent and broker complaints.
- Creation of an oversight team responsible for agent and broker profiling based on statistics such as high enrollment cancellation rates connected to a particular agent or broker.
- Implementation of an internal secret shopping program.
- Development of special policies and procedures designed to protect particularly vulnerable beneficiaries (e.g., group homes) from being targeted by aggressive marketing agents.
- Implementation of strong corrective actions against unscrupulous agents and brokers as a means of deterrence.

Marketing Events Upload Reminder

Finally, we have noticed that many organizations have been negligent in uploading marketing event data in the HPMS MA and PDP Marketing modules. All organizations are required to submit this information timely and accurately. Please see HPMS memorandum dated October 31, 2007, “Release of new HPMS Marketing Events Upload Functionality,” for instructions on uploading plan events. Organizations that do not submit this information or submit inaccurate information are at risk for further compliance actions.

If you have any questions related to the contents of this memorandum, please contact Betty Burrier at 410-786-4649 or betty.burrier@cms.hhs.gov.

Appendix A

Summary of New Marketing Requirements and Prohibitions

Note: The following provisions are effective October 1, 2008, when plans begin marketing for contract year 2009.

- Plans may offer gifts to potential enrollees as long as such gifts are of nominal value and are provided whether or not the individual enrolls in the plan. Nominal value currently is defined as an item worth \$15 or less, based on the retail purchase price of the item regardless of the actual cost.
- Plans and any downstream contractors are prohibited from door-to-door solicitations and other instances of unsolicited contacts that may occur outside of advertised sales or educational events.
 - For those circumstances where outbound calls are permitted, outbound scripts must be submitted for review and approval prior to use in the market place. Scripts must include a privacy statement clarifying that the beneficiary is not required to provide any information to the plan representative and that the information provided will in no way affect the beneficiary's membership in the plan.
- Plans may not market non-health care related products (such as annuities and life insurance) to prospective enrollees during any Medicare Advantage Organizations (MAO) or Prescription Drug benefit program (PDP) sales activity or presentation.
- Plan marketing representatives must clearly identify the types of products that will be discussed before marketing to a potential enrollee.
- Prior to any marketing appointment, the beneficiary must agree to the scope of the appointment and that agreement must be documented or recorded by the plan.
- Plans may not conduct sales activities in healthcare settings except in common areas.
- Educational events may not include sales activities, such as the distribution of marketing materials or distribution or collection of plan applications.
- Plans are prohibited from using names and/or logos of co-branded network partners on membership plan identification cards and must include a disclaimer on other marketing materials that include and logos of co-branded network partners.

- Plans may not provide or subsidize meals for prospective enrollees at any event or meeting at which plan benefits are being discussed and/or plan materials are being distributed.
- Plans that conduct marketing through independent agents must use state-licensed, certified, or registered individuals. Both independent agents and internal sales staff that perform marketing must be licensed and appointed.
- Plans must report the termination of any brokers or agents and, if required by state law, the reason for the termination to the state in which the broker or agent has been appointment by law.
- Plans must ensure that brokers and agents selling Medicare products are annually trained on Medicare rules, regulations, and plan details specific to the plan products being sold by the brokers and agents. MAOs and Part D Organizations must also ensure that brokers and agents selling Medicare products are tested annually on their knowledge of Medicare rules and regulations, as well as, on the plan specific details of the plan products being sold.
- Plans must establish limits on agent and broker compensation, consistent with CMS guidance, to ensure that agents and brokers enroll individuals in the MAO or PDP plans that are intended to best meet the beneficiary's health care needs. These compensation rules are designed to minimize churning.