

HEALTH LAW ALERT

May 20, 2009

CMS Publishes Draft of Revised Medicare Marketing Guidelines Comments Due June 1

The Centers for Medicare and Medicaid Services (“CMS”) has published draft revisions to the Medicare Marketing Guidelines—Chapter 3 of the Medicare Managed Care Manual (and Chapter 2 of the Prescription Drug Benefit Manual) (the “Marketing Guidelines”). The Marketing Guidelines dictate how Medicare Advantage Organizations and Medicare Part D Plan Sponsors (among other entities) are permitted to market their products. CMS proposes to require that two employees attest that marketing material complies with applicable requirements prior to submitting the material for CMS review. The new draft also addresses “regulatory requirements and other policy clarifications” CMS has implemented since the Marketing Guidelines were last revised in July 2006 and imposes other new requirements.

CMS released the draft to obtain public comments, which are due by June 1.

Marketing Material Attestations

The draft Marketing Guidelines would require Medicare Advantage Organizations and Part D Plan Sponsors (“Sponsors”) to have two employees evaluate any marketing materials that are to be submitted for CMS review. Prior to submitting the materials to CMS, the two employees would be required to attest that the material meets the requirements outlined in a CMS-created checklist. CMS intends to develop “a number of checklists that will correspond to all required materials,” as well as a “standard checklist” for other (non-required) materials. The checklists will list relevant requirements and disclaimers. CMS reviewers will use the same checklists to help “eliminate discrepancies and confusion.”

Regulatory and Policy Clarifications

The draft Marketing Guidelines incorporate and clarify regulatory requirements and other guidance that CMS has published since the last version of the Marketing Guidelines was published nearly three years ago. CMS consolidates and elaborates on guidance provided in a number of publications, including guidance on:

- Provision of meals to beneficiaries;
- Telephone contacts and scripts;
- Compliance with State appointment laws;
- Reporting agent/broker terminations;

- Agent/broker training and testing;
- Agent/broker compensation; and
- Standardized terminology for plan-type labels (*e.g.*, HMO, PFFS, PDP) that must be attached to plan names beginning with the 2010 plan year.

Other Guidance

The Marketing Guidelines currently prohibit Sponsors from sending non-health related direct mail marketing material to beneficiaries without an authorization. This is consistent with the HIPAA Privacy Rule's prohibition on marketing without an authorization. The draft Marketing Guidelines would expand this prohibition to "non Medicare health-related direct mail marketing materials." This change would prohibit Sponsors from marketing coverage such as dental, vision, and (possibly) even Medigap policies to Medicare beneficiaries without first obtaining written authorization.

CMS will establish an "expedited" review process for template marketing materials, to allow Sponsors with multiple plans to more easily and quickly publish documents such as the Summary of Benefits. Sponsors would be permitted to submit materials without specific cost-sharing and benefit information and later populate the material with appropriate information without the need to separately submit to CMS for approval a document with specific information for each benefit plan.

The draft Marketing Guidelines make clear that Sponsors must implement a system "to account for and control the materials that are being utilized by all third party contractors." The Guidelines also list marketing requirements that do and do not apply to employer/union group plans.

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