

CMS Liberalizes Medicare Advantage and Part D Marketing Rules

Manatt on Health

July 31, 2018

Subscribe



Alexander Dworkowitz
Manatt Health



Michael S. Kolber
Manatt Health

On July 20, the Centers for Medicare & Medicaid Services (CMS) issued the new “Medicare Communications and Marketing Guidelines” (MCMG), which governs Medicare Advantage organizations (MAOs) and Part D plan sponsors. The MCMG liberalizes the Medicare Advantage (MA) and Part D marketing rules in many respects, building on last year’s CMS marketing guidance, which similarly loosened restrictions on plans. The MCMG reflects the Trump administration’s more hands-off approach in the policing of Medicare plan marketing, as compared to the Obama administration.

Fewer Materials Subject to Review

The most important change in the MCMG is that it dramatically reduces the scope of materials that are considered “marketing” and therefore subject to CMS review. This policy shift is reflected in the title of the MCMG, as it replaces the prior “Medicare Marketing Guidelines.” Under the MCMG, not all communications made by a plan to an enrollee or potential enrollee qualify as “marketing.” Instead, “marketing” is a subset of communications that have “the intent to draw a beneficiary’s attention to a MA plan or plans and to influence a beneficiary’s decision-making process when selecting a MA plan for enrollment or deciding to stay enrolled in a plan” **and** “contain[] information about the plan’s benefit structure, cost sharing, and measuring or ranking standards.”

In short, in order for a plan-disseminated material to qualify as “marketing,” the plan must have the intent that the material encourages an individual to enroll in its product and the material must include some detail about the product being offered. As an example, the MCMG indicates that a flyer that reads as follows does not qualify as marketing: “Swell Health is now offering Medicare Advantage coverage in Nowhere County. Call us at 1-800-SWELL-ME for more information.” The flyer may be intended to draw the recipient’s attention to Swell Health, but since it lacks any information on the benefit structure, cost sharing or ranking of Swell Health’s plans, it does not meet the definition of “marketing material” and instead is simply a communication material.

The distinction between “marketing” and a “communication” is critical because CMS rules are significantly more lax for materials that do not qualify as “marketing.” Importantly, while all marketing materials need to be submitted to CMS for review prior to use, materials that are merely communications do not need to be submitted to CMS, subject to limited exceptions. That means in the example above, Swell Health could distribute the flyer above without first getting CMS approval to do so.

Expanding Scope of Provider Communications

The narrowing of the definition of “marketing” also has an important implication regarding providers communicating with their patients about MA and Part D plans. CMS rules prohibit providers from disseminating marketing materials in clinical settings, although such materials can be made available in the provider’s common areas such as waiting rooms and lobbies. But the MCMG indicates that this prohibition does not apply to communication materials. Thus, a physician could display the “Swell Health” flyer discussed above in his or her exam room without violating the new rules.

The MCMG also ends the prohibition on contracted providers appearing in a plan’s endorsement or testimonial. Plans are now permitted to quote providers in their marketing materials.

Similarly, CMS clarifies that provider “initiated” activities—that is, those that are not conducted at the request of the plan or pursuant to a participation agreement with the plan—are not subject to restrictions in the MCMG. Thus, providers are free to discuss with patients the merits of different plans, including which plans have the lowest cost sharing, in any setting, so long as they are not doing so on behalf of the plan.

Other Revisions

The MCMG also relaxes Medicare marketing rules in other important areas:

- **Plan comparisons:** Previously, a plan could only make comparisons to other plans by referring to a study or statistical data. Now, plan comparisons are permitted so long as they can be supported and “are factually based.”
- **Agents’ business cards:** Plans’ agents now may distribute their business cards to potential enrollees at educational events, an activity that was previously prohibited.
- **Transferring to sales agents:** CMS had previously indicated that plan call centers could not ask an individual if he or she wanted to be transferred to a sales or enrollment department, nor could the call center representative transfer the individual automatically. That prohibition has been deleted.
- **Emailing potential enrollees:** CMS added more language to the MCMG to clarify an important revision made in the prior version of the MMG: Plans and their agents may now email potential enrollees and market products to those individuals without violating the ban on unsolicited communications.

In addition, rules governing enrollee referral programs and marketing of multiple lines of business have been eliminated.

Conclusion

After soliciting feedback from the industry, CMS has significantly broadened the scope of permissible marketing activities that may be conducted by MAOs and Part D sponsors. Nevertheless, “marketing activities” remains a highly regulated area, and MAOs and sponsors need to continue to exercise vigilance in complying with those rules.

Show Less^



ATTORNEY ADVERTISING

pursuant to New York DR 2-101(f)

© 2018 Manatt, Phelps & Phillips, LLP.

All rights reserved