

Crackdown on Medicare Part C and Part D Marketing in 2008: Will Past be Prologue?

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The 2008 presidential election year was a period of relative calm for many aspects of the healthcare industry. Medicare Part C and Part D plan sponsors, however, endured intensive regulatory activity last year, particularly in the arenas of marketing practices and agent and broker compensation. Due largely to a groundswell of well-publicized marketing abuses, both Congress and the Centers for Medicare & Medicaid Services (“CMS”) enacted sweeping changes to the rules governing Medicare Parts C and D marketing and compensation. Statements from legislators, as well as guidance from regulators, suggest that Medicare Advantage and Prescription Drug Plan sponsors (“MA-PDP Sponsors”) may remain in the healthcare regulatory crosshairs during 2009. This article traces the unusual evolution of the new Medicare Part C and Part D marketing and compensation rules and summarizes their content.¹

Evolution of the New Marketing Rules

In the past few years, state insurance commissioners, CMS, and courts have fielded numerous complaints of marketing abuses by agents and brokers acting on behalf of MA-PDP Sponsors. In February 2008, the Senate Committee on Finance devoted two days to hearings on the topic “Selling to Seniors: The Need for Accountability and Oversight of Marketing and Sales by Medicare Private Plans.”² During those Senate hearings, state and federal regulators, MA-PDP Sponsors, and consumers testified to “overly-aggressive, inappropriate, and sometimes deceptive practices used to market, sell, and enroll seniors into Medicare private plans.”³ Some state insurance commissions took enforcement actions against MA-PDP Sponsors for marketing violations during 2008,⁴ and the National Association of Insurance Commissioners called for the adoption of uniform private Medicare plan marketing standards to address marketing abuses.⁵

CMS proposed new regulations regarding Medicare Part C and Part D marketing and agent and broker compensation on May 16, 2008 (the “Proposed Rule”).⁶ The Proposed Rule addressed, among other things, gifts and meals for potential enrollees, unsolicited marketing, cross-selling non-healthcare products along with Medicare Advantage or Prescription Drug Plan products, appointments with potential enrollees, sales and marketing at educational events and in healthcare settings, and state licensing and appointment of agents.

On the same day the public comment period for the Proposed Rule closed (July 15, 2008), Congress passed the Medicare Improvements for Patients and Providers Act of 2008 (“MIPPA”) ² over President Bush’s veto.⁷ MIPPA includes marketing provisions substantially similar to the marketing regulations contained in the Proposed Rule. The MIPPA went beyond the Proposed Rule in the area of marketing regulation by: (1) directing the Secretary of the Department of Health and Human Services to establish compensation guidelines that “ensure that the use of compensation creates incentives for agents and brokers to enroll individuals” in plans “intended to best meet their health

care needs.”⁸; and (2) directing the Secretary to establish requirements for training, annual retraining, and testing of agents and brokers.⁹

In an attempt to implement the new marketing rules in time for the Medicare Advantage and Prescription Drug Plan open enrollment period for 2008, CMS engaged in a flurry of formal rulemaking activity and issued several informal guidance documents in late 2008. On September 18, 2008, CMS issued an immediately effective rule finalizing a number of the marketing provisions contained in the Proposed Rule and MIPPA (the “Final Rule”).¹⁰ CMS also issued a separate interim final rule with comment period on September 18, 2008 (with an effective date of January 1, 2009) to address regulatory directives contained in MIPAA (compensation and agent training and testing), and Proposed Rule provisions that required further fine-tuning or public feedback.¹¹

In response to “comments and complaints about how the September 18, 2008 regulations were being implemented,” CMS issued a Second Interim Final Rule on November 14, 2008 revising the initial compensation rules contained in the First Interim Final Rule.¹² Recently, CMS issued a guidance memorandum on December 24, 2008 that set an absolute cap on the amount of compensation MA-PDP Sponsors may pay agents and brokers for initially enrolling beneficiaries.¹³ The First and Second Interim Final Rules have not yet been finalized.

The New Rules

Until CMS finalizes the two interim final rules, their provisions may still be revised. The remaining marketing rules have been finalized. Summaries of the new provisions follow.

Agent and Broker Compensation. The MIPPA-mandated rulemaking for compensation yielded several iterations of acceptable compensation structures before CMS arrived at the current rule expressed in the Second Interim Final Rule (as further interpreted by the December 24 Memorandum). In a major change from the Proposed Rule, CMS chose to apply the compensation rules only to non-employed agents and brokers under the Second Interim Final Rule. Although the Proposed Rule applied to all agents, the current rule affects only independent agents.¹⁴ In current form, MA-PDP Sponsors must pay their non-employed agents and brokers a six-year cycle of compensation per beneficiary enrolled. In the first year of the cycle, the maximum payment is \$400.¹⁵ In the second and each subsequent year of compensation cycle, the agent or broker must receive “no more and no less than half” of the initial year compensation.¹⁶ For the 2009 plan year only, CMS will treat all initial enrollments as in the second year of the six year compensation cycle.¹⁷

Marketing through Unsolicited Contacts. The Final Rule prohibits agents and brokers from door-to-door solicitation and “other means of direct contact, including calling a beneficiary 3 without the beneficiary initiating the contact.”¹⁸ Before the Final Rule was enacted, the regulation only explicitly prohibited door-to-door solicitation. In its September 15, 2008 guidance memorandum, CMS clarified that prohibited unsolicited contact also includes outbound, unrequested telephone calls and approaching potential enrollees in person (e.g., in a parking lot or lobby).¹⁹

Nominal Gifts. Although the CMS Medicare Marketing Guidelines already prohibited gifts to potential enrollees worth more than \$15, and cash or cash-equivalent gifts entirely,²⁰ the Interim Final Rule adopted the Guidelines approach in regulation form. MA-PDP Sponsors and their agents may give potential enrollees non-cash and non-cash-equivalent gifts worth \$15 or less.²¹

Meals. The Final Rule prohibits providing meals for potential enrollees, regardless of value.²² CMS explained that potential enrollees may receive light snacks, as long as the light snacks are not “bundled” and provided as if a meal.²³

Cross-selling. Agents and brokers may no longer market or sell any non-health care related products, such as annuities or life insurance, to potential enrollees during any Medicare Part C or D presentation, marketing, or sales activity.²⁴

Scope of Appointments. Agents and brokers must obtain and document a potential enrollee’s consent to a sales and marketing appointment, the scope of which must be described to the potential enrollee and agreed to in advance.²⁵ In its September 15 Memorandum, CMS offered several examples of the consent-and-documentation process. Generally, appointments made by phone should be recorded to meet the documentation requirement and other means of appointment setting should also be documented in writing.²⁶ Because the First Interim Final Rule and current guidance do not adequately address many possible scenarios in which an agent may set an appointment, the final rule or accompanying commentary will likely contain further, detailed guidance.

Sales and Marketing in Healthcare Settings. Although the CMS Medicare Marketing Guidelines already prohibited marketing and enrollment activities in healthcare settings (such as doctor’s offices or hospitals), MIPPA and the Final Rule now give the prohibition statutory and regulatory force.²⁷ Under the Final Rule, agents and brokers may not market or enroll beneficiaries in healthcare settings, unless the activities take place in common areas of a healthcare setting, such as a conference room or cafeteria.²⁸

Sales and Marketing at Educational Events. Educational events may no longer include sales presentations, the distribution of marketing materials, or acceptance of plan applications at educational events.²⁹ CMS explained that the purpose of educational events is to “provide objective information about the Medicare program and/or health improvement and wellness” and not to “steer or attempt to steer a beneficiary towards a specific or limited number of plans.”³⁰

Agent Training and Testing. Under the First Interim Final Rule, commencing with the 2009 plan year, MA-PDP Sponsors must train and test their agents selling Medicare products annually on Medicare rules and regulations pertinent to the products they sell.³¹ In the September 15 4 Memorandum, CMS further explained that agents must pass the annually required tests with a score of 85% or more, and that the training and

testing programs must be “designed and implemented in a way that the integrity of the training and testing is maintained.”³²

State Appointment of Agents and Brokers. The Final Rule requires MA-PDP Sponsors to use only agents and brokers licensed in accordance with state law and appointed in accordance with state law requirements.³³ CMS guidance, now codified through the Final Rule, previously required compliance with state licensure and appointment laws.

Plan Reporting of Terminated Agents. MA-PDP Sponsors must now report to the appropriate state agency all terminations of brokers and agents, including the reasons the sponsor terminated the broker or agent.³⁴

Will Past be Prologue?

CMS has stated flatly that it will engage in “a wide variety of oversight and surveillance activities beginning with [the] 2009 plan year marketing season.”³⁵ The agency has taken internal organizational steps to increase focus on Parts C and D marketing oversight and invoked its regulatory authority to collect data on marketing activities from Part C plan sponsors.³⁶ Based on these and other indicators from federal regulators, the renovation of the Medicare Parts C and D marketing regulatory framework during 2008 may prove to be the prologue to intense enforcement during 2009.

¹ The laws and regulations described in this article include rules governing preparation and approval of compliant marketing materials. This article does not address those provisions, but rather focuses on the rules governing the actions of marketing agents and brokers, which drove the legislative and regulatory activity of Medicare Part C and Part D marketing during 2008.

² *Selling to Seniors: The Need for Accountability and Oversight of Marketing and Sales by Medicare Private Plans before the Senate Finance Comm.*, 110 th Cong. (2008).

³ *Id.*, Testimony of Michael McRaith, Director of the Illinois Division of Insurance at 2.

⁴ See, e.g., *Evercare Practices Reviewed by State; 7 Agents Fired over Medicare Plan Sales*, Boston Globe, July 31, 2008; and *Humana Pays State to Settle Medicare-Related Allegations: Regulators Say Insurer Sold Plans through Unlicensed Agents*, Milwaukee Journal Sentinel, September 10, 2008.

⁵ *States Look to Rein in Private Medicare Plans*, N.Y. Times, May 5, 2008.

⁶ Medicare Program; Revisions to the Medicare Advantage and Prescription Drug Benefit Programs, 73 Fed. Reg. 28,556 (proposed May 16, 2008). ⁷ Medicare Improvements for Patients and Providers Act of 2008, H.R. 6331, 110 th Cong. (2008).

⁸ Medicare Improvements for Patients and Providers Act § 103(b)(2)(D).

⁹ Medicare Improvements for Patients and Providers Act § 103(b)(2)(E)

¹⁰ Medicare Program, Medicare Advantage and Prescription Drug Benefit Programs: Final Marketing Provisions; Final Rule, 73 Fed. Reg. 54,208 (Sept. 18, 2008).

¹¹ Medicare Program; Revisions to the Medicare Advantage and Prescription Drug Benefit Programs; Final Rule, 73 Fed. Reg. 54,226 (Sept. 18, 2008). CMS also issued a guidance memorandum providing further details on the provisions of the Final Rule and Interim Final Rule (“Guidance for regulations in CMS 4131-F and CMS 4138- IFC,” Abby L. Block, Director, Center for Drug and Health Plan Choice, Sept. 15, 2008).

¹² Medicare Program; Revisions to the Medicare Advantage and Prescription Drug Benefit Programs: Clarification of Compensation Plans, 73 Fed. Reg. 67,406 (Nov. 14, 2008).

¹³ 2009 Medicare Advantage and Prescription Drug Program Agent and Broker Compensation Structures, Teresa L. DeCaro, R.N., M.S., Dec. 24, 2008. The agent and broker compensation regulations have caused significant confusion and elicited numerous public comments. In addition to the guidance described

above, CMS issued a guidance memorandum on October 8, 2008 that it rescinded on October 24, 2008 (see *supra*, n. 11, 73 Fed. Reg. at 67,408).

¹⁴ *Supra*, n. 12.

¹⁵ 2009 Medicare Advantage and Prescription Drug Program Agent and Broker Compensation Structures, Teresa L. DeCaro, R.N., M.S., Dec. 24, 2008.

¹⁶ *Supra*, n. 12, 73 Fed. Reg. at 67,410.

¹⁷ *Id.* at 67,408.

¹⁸ 42 C.F.R. §§ 422.2268(d), 423.2268(d).

¹⁹ See *supra*, n. 11, September 15 Memorandum at 16.

²⁰ CMS Medicare Marketing Guidelines for MA, MA-PDs, PDPs and 1876 Cost Plans § 11 at 118 (July 25, 2006).

²¹ 42 C.F.R. §§ 422.2268(b), 423.2268(b).

²² 42 C.F.R. §§ 422.2268(p), 423.2268(p).

²³ September 15 Memorandum at 20.

²⁴ 42 C.F.R. §§ 422.2268(f), 423.2268(f); September 15 Memorandum at 17.

²⁵ 42 C.F.R. §§ 422.2268(g), 423.2268(g).

²⁶ September 15 Memorandum at 18.

²⁷ See *supra*, n. 16, CMS Medicare Marketing Guidelines § 11 at 123.

²⁸ 42 C.F.R. §§ 422.2268(k), 423.2268(k).

²⁹ 42 C.F.R. §§ 422.2268(l), 423.2268(l).

³⁰ September 15 Memorandum at 19.

³¹ 42 C.F.R. §§ 422.2274(b)-(c); 423.2274(b)-(c).

³² September 15 Memorandum at 24.

³³ 42 C.F.R. §§ 422.2272(c), 423.2272(c).

³⁴ 42 C.F.R. §§ 422.2272(d); 423.2272(d).

³⁵ September 15 Memorandum, cover letter.

³⁶ Agency Information Collection Activities; Proposed Collection; Comment Request, 73 Fed. Reg. 36,329 (June 26, 2008).__

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