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CENTERS FOR MEDICARE & MEDICAID SERVICES
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MEDICARE DRUG & HEALTH PLAN CONTRACT ADMINISTRATION GROUP

DATE: October 19, 2022

TO: All Medicare Advantage Organizations and Prescription Drug Plan Sponsors

FROM: Kathryn A. Coleman
Director

SUBJECT: CMS Monitoring Activities and Best Practices during the Annual Election Period

The Centers for Medicare & Medicaid Services (CMS) issues this memorandum informing Medicare Advantage (MA) organizations and Part D sponsors of CMS monitoring activities and sharing plan and sponsor best practices during the 2023 Annual Election Period (AEP), running from October 15, 2022 to December 7, 2023.

CMS is concerned about the marketing practices of all entities, including Third-Party Marketing Organizations. We have reviewed thousands of complaints and hundreds of audio calls and have identified numerous issues with information provided to beneficiaries that is confusing, misleading and/or inaccurate. CMS has conducted so-called "secret shopping" by calling numbers associated with television advertisements, mailings, newspaper advertisements, and internet searches to monitor the experience beneficiaries have engaging these entities. Our secret shopping activities have discovered that some agents were not complying with current regulation and unduly pressuring beneficiaries, as well as failing to provide accurate or enough information to assist a beneficiary in making an informed enrollment decision.

CMS reminds MA organizations and Part D sponsors that they are responsible for the marketing activities of the agents and brokers and other third-party entities with whom they contract. CMS is closely monitoring marketing activities during the 2023 open enrollment, including marketing that is misleading, confusing, or misrepresents a benefit or product, and will take compliance action against plans for activities and materials that do not comply with CMS' requirements.

CMS Oversight Activities During the Annual Enrollment Period

As described in §§ 422.2261(b)(3) and 423.2261(b)(3), CMS may designate that certain types of marketing materials can be accepted through CMS's File and Use framework. A material submitted under File and Use is "accepted" and may be distributed five days following its submission, provided the plan certifies the material complies with all applicable standards. Consistent with 42 CFR 422.2261(b)(3) and 423.2261(b)(3), CMS may review File and Use materials for compliance with all applicable standards before or after the date on which such materials are "accepted." All other marketing materials that are not designated by CMS as qualifying for File and Use framework must be prospectively reviewed and approved or disapproved during the 45-date review timeframe described in §§422.2261(b)(1) and (2) and

423.2261(b)(1) and (2). If the material is not approved or disapproved within 45 days, it is considered deemed approved.

CMS has designated television advertisements as a marketing material that qualifies for File and Use and CMS is reminding MA organizations that we may review television advertisements promoting MA health plans during the 5-day File and Use wait time consistent with our longstanding authority under 42 CFR 422.2261. CMS is particularly concerned with recent national television advertisements promoting MA plan benefits and cost savings, which may only be available in limited service areas or for limited groups of enrollees, overstate the available benefits, as well as use words and imagery that may confuse beneficiaries or cause them to believe the advertisement is coming directly from the government.

Due to these concerns, beginning January 1, 2023, no television advertisements will qualify for submission under our File and Use authority. Additionally, CMS will continue to review all previously submitted television advertisements to confirm the materials meet CMS requirements (§§422.2260 through 422.2267 and §§ 423.2260 through 423.2267). Television advertisements found to be out of compliance with applicable requirements must be discontinued. Plans that continue to use CMS-disapproved advertisements may be subject to compliance action.

CMS is also taking the following immediate actions during the 2023 AEP, and into Contract Year 2023, including:

- Enhancing CMS review of select marketing materials submitted under File & Use criteria. During AEP, CMS may exercise its authority to prohibit the distribution of File & Use materials prior to the expiration of the five-day plan waiting period. CMS may, at any time, determine an accepted material is not in compliance with our rules and require modification and resubmission.
- Reviewing selected marketing materials previously submitted under File & Use criteria.
- Reviewing all marketing complaints received during the AEP, and targeting our oversight and review on MA organizations and Part D sponsors with higher or increasing rates of complaints during the AEP.
- Reviewing recordings of agent and broker calls with potential enrollees.
- Secretly shopping marketing events by reviewing television, print, and internet marketing and calling related phone numbers and/or requesting information via online tools.

Best Practices and Reminders for Medicare Advantage Organizations and Part D sponsors

CMS recommends that organizations and sponsors immediately implement the following requirements and best practices during the AEP:

- Ensure beneficiaries know how to file a marketing complaint with 1-800-MEDICARE or the plan, as well as highlight for beneficiaries that it is important to provide an agent or broker name, if possible. Plans must clearly display this information on plan websites and include this information in all mailings.
- Immediately review all allegations raised by any source against an agent or broker.
- Take all necessary and appropriate action to address inappropriate agent behavior.

- Track complaints against each agent or broker, looking for any outliers with respect to rapid disenrollments.
- Ensure agents and brokers obtain Scope of Appointment (SOA) forms. Plans should remind agents and brokers that they may *only* discuss products with potential enrollees that have been agreed to in advance on the SOA. CMS retains the right to request copies of SOAs.
- Review "upstream" entities associated with agents who are outliers with respect to complaint numbers and determine potential patterns or connections to potentially inappropriate Field Marketing Organization activities.
- Ensure all agents and plan marketing materials clearly state when certain benefits may not be available to all enrollees. CMS may determine that the agent's activity or marketing is misleading if the benefits being marketed are only available to a subset of plan members.
- Ensure all agents and brokers review the required Pre-Enrollment Checklist with a beneficiary *prior* to enrollment. The items in this checklist must be covered in full and the agent must confirm that the beneficiary understands all items addressed.
- Provide translation services for beneficiaries with limited English proficiency. For those beneficiaries who have requested documents in a language other than English, the plan must continue to provide required documents in that language until the beneficiary has changed his or her request.
- Provide agents a list of required questions or topic that they must cover in their sales presentations particularly basic topics or questions, such as use of provider specialists, whether the beneficiary is looking for a lower premiums and copays, may need DME, or whether the beneficiary has questions about the costs associated with the plan.