

# Provider Marketing: Medicare Advantage and Part D Plans

September 27, 2023

# Agenda



- Introduction
- Governing Law
- Enforcement Actions
- Practical Takeaways
- Questions



# Setting the Stage

- Increasing number of providers partnering with agents and brokers to assist patients in selecting a Medicare Advantage plan and/or prescription drug plan
  - Formal, contractual relationships
  - Loose referrals to specific agents and brokers
  - Affiliated agents and brokers
- Various marketing relationships:
  - Education sessions
  - Links from provider's website to agent/broker's website
  - Direct Mail
  - Aging In communications

# Finding the Patient's Right Plan Fit

- Providers have a vested interest in their Medicare patients selecting a medical and/or prescription drug plan in which the provider is in network and that's formulary includes the patient's medications
  - ✓ Provides for continuity of care for patients
  - ✓ Reduces/eliminates administrative red tape associated with plan changes
    - No new prior authorizations using different clinical criteria
    - No waiting for a new patient visit
    - Providers and staff have familiarity with patient and medical history

# Recent Activities Reviewed by Hall Render

- Provider paid an agent/broker to assist patients in locating the best plan for patient (no provider ownership of an MA plan)
- Provider requested to have clinical personnel speak at educational events hosted by agent/broker (no remuneration exchanged)
- Provider provided link from its website to an affiliated agent broker's website with intent to steer patients to enroll in affiliated MA/PD plan
- Provider discontinued relationship with an MA plan and mailed notices re: termination to its patients
- Provider mailed "aging in" letters to its patients turning 65 and provided name and contact information of an independent agent/broker to assist in plan selection





What does CMS say  
about providers and  
marketing efforts?

**NOT  
MUCH**

# Governance

- 42 CFR §422, Subpart V – Medicare Advantage Communication Requirements
- 42 CFR §423, Subpart V – Part D Communication Requirements
- Medicare Communications and Marketing Guidelines (MCMG), last update 2/9/2022
- CMS Memos
  - Definition of Marketing, May 10, 2023



# Marketing and Communications



# Definitions

42 CFR §§ 422.2260, 423.2260

**Communications** - Activities and use of materials created or administered by the plans or any downstream entity to provide information to current and prospective enrollees. All activities and materials aimed at prospective and current enrollees, including their caregivers, are “communications”.

**Marketing** - A subset of communications and must, unless otherwise noted, adhere to all communication requirements. To be considered marketing, communications materials must meet both intent and content standards. In evaluating the intent of an activity or material, CMS will consider objective information including, but not limited to, the audience, timing, and other context of the activity or material, as well as other information communicated by the activity or material. The organization's stated intent will be reviewed but not solely relied upon.

# INTENT and CONTENT

## INTENT

- Material or activities that CMS determines, as described above, are intended to:
- Draw a beneficiary's attention to a plan or plans,
- Influence a beneficiary's decision-making process when making a plan selection, or
- Influence a beneficiary's decision to stay enrolled in a plan (retention-based marketing)

## CONTENT

- Materials or activities that include or address content regarding:
- The plan's benefits, benefits structure, premiums, or cost sharing,
- Measuring or ranking standards (for example, Star Ratings or plan comparisons), or
- Rewards and incentives as defined under 42 CFR § 422.134(a) (for MA and section 1876 cost plans only).
- Benefits definition expanded effective July 2023 to include vision, dental, hearing and premium reduction.



# **Activities with Health Care Providers** (or in the health care setting)

42 CFR §§ 422.2266 and 423.2266



# Activities with Health Care Providers (or in the health care setting)

42 CFR §422.2266 and 42 CFR §422.2266

Location specified :

Prohibited	Permitted
Exam Rooms	Common entryways
Hospital Patient Rooms	Vestibules
Treatment areas where patients interact with provider and clinical team (inc. dialysis treatment facilities)	Waiting rooms
Pharmacy counter areas	Hospital or nursing home cafeterias
	Community, recreational or conference rooms



# Provider Initiated Activities

# Definition

Provider-initiated activities are activities conducted by a provider **at the request of the patient**, or as a matter of a course of treatment, and occur when meeting with the patient as part of the professional relationship between the provider and patient.

Provider-initiated activities do not include activities conducted:

- at the request of the MA organization/Part D plan; or
- pursuant to the network participation agreement between the MA organization/Part D plan and the provider.

42 CFR §422.2266(c), 42 CFR §423.2266(c)

*emphasis added*



# Provider-Initiated Activities

- Distributing unaltered, printed materials created by CMS
- Providing the names or MA organizations/Part D plans with which they contract or participate or both
- Answering questions or discussing the merits of MA/Part D plan(s), including cost sharing and benefit information, including in areas where care is delivered
- Referring patients to other sources of information – SHIP, plan reps, Medicaid, CMS website or 1-800-MEDICARE
- Referring patients to plan marketing materials in common areas
- Providing information and assistance applying for the Limited Income Subsidy (LIS)
- Announcing new or continuing affiliations with MA/Part D plans

# Provider-Initiated Activities – Best Practices

- Answer any question a patient may have truthfully
- Keep answers fact-driven
  - Names of plans in which you participate
  - Drugs included/excluded on formulary
  - Co-payment/cost-sharing amounts for specific services
- Consider having a witness in the room
- Know how to redirect patient if question asked is a prohibited activity by CMS
- Have referral source contact information available:
  - Plans in which you participate
  - CMS website link
  - 1-800-MEDICARE
  - SHIP website and phone number
  - Medicaid website and phone number



# Plan-Initiated Provider Activities



# Definition

Plan-initiated provider activities are those activities conducted by a provider **at the request of an MA organization**. During a plan-initiated provider activity, the provider is acting on behalf of the MA organization. For the purpose of plan-initiated activities, the MA organization is responsible for compliance with all applicable regulatory requirements.

42 CFR §422.2266(d), 42 CFR §423.2266(d)

*emphasis added*

# Permitted Actions

- Make available, distribute and display communication materials, including in areas where care is being delivered
- Provide or make available marketing materials and enrollment forms in common areas

# Prohibited Actions

- Accepting/collecting Scope of Appointment forms
- Accepting enrollment applications
- Making phone calls or directing, urging, or attempting to persuade patients to enroll in a specific plan based on the financial or other interests of the provider
- Mail marketing materials on behalf of the plan
- Offer inducements to persuade patients to enroll in a specific plan
- Conduct health screenings as marketing activity
- Distribute marketing materials or enrollment forms in patient care areas
- Offer anything of value to induce enrollees to select the provider
- Accept compensation from the plan for any marketing or enrollment activities on plan's behalf



# Best Practices

- Be cautious with plan materials in patient care settings – best to have materials in common areas only
- Run any participation in health screenings past your compliance and/or legal counsel to ensure permissible
- Speak truthfully and limit comments to questions asked by patients or in patient's best interest
  - ✓ “I see you are enrolled in Plan X. Please note that we do not participate in Plan X. You may have higher cost-sharing or no access to continue to see us during the next benefit year.” or “Drug Y is not on your plan's formulary. The co-pay for non-formulary drugs is \$x. If you select a plan that the drug is on the formulary, the co-pay is \$x.”
- Do not accept any plan enrollments or appointment forms
- Do not induce a patient to enrollee any a specific plan.



# **Guidance for Marketing Not Occurring in a Health Care Setting**

# Program Regulations Instructive

There are no regulations or guidance to providers with respect to other involvement in marketing. However, Congress did provide guidance to MA and PD plans which are set forth in Subpart V of the Medicare Advantage and Voluntary Part D Program Regulations (42 CFR §§ 422 and 423, which while non-binding is instructive.

- .2261 Submission, review and distribution of materials.
- .2262 General communications materials and activities requirements.
- .2263 General marketing requirements
- .2264 Beneficiary contact
- .2265 Websites
- .2267 Required materials and content
- .2272 Licensing of marketing representatives and confirmation of marketing resources
- .2274 Agent, broker and other third-party requirements.

# Considerations

**TPMO Status** Is the action provider is taking one which would classify it as a third-party marketing organization as defined in 42 CFR §422.2260?

**Third-party marketing organization (TPMO)** means organizations and individuals, including independent agents and brokers, who are compensated to perform lead generation, marketing, sales, and enrollment related functions as a part of the chain of enrollment.

If yes, then provider will be subject to oversight by the MA/PD plan including nearly all provisions of Subpart V.

- 422.2274 MA/PD plan is responsible for ensuring the TPMO adheres to any requirements that apply to the MA/PD plan.

**Beneficiary Contact** – Are the events and activities in which the provider participating ones which are governed by federal regulations and, if so, what can the provider do or not do?

- approach beneficiary in common areas
- send direct messages via social media
- use telephone solicitation, robocalls, text messaging or voicemail messaging without express permission from beneficiary



# Considerations Cont'd

## ***Beneficiary Events***

Educational events (inform beneficiaries about MA/PD Plans)

- May not market specific plans, conduct sales presentations or accept applications
- May: distribute communication materials, answer beneficiary questions re plans, distribute business cards, receive contact info

## ***Sales/Marketing events***

- May not take place within 12 hours on an education event in the same location, require sign-in sheets or contact info, conduct health screenings or surveys, use info collected for raffles or drawings for any purpose other than the raffle or drawing
- May provide marketing materials, accept applications, collect SOA forms, and conduct marketing presentations

# Considerations Cont'd

## General marketing rules:

- Annual enrollment period is October 15 – December 7 each year
- Plans may begin marketing on October 1

## Prohibited activities:

- Cash or monetary rebates
- Gifts of more than nominal value
- Meals
- Comparing plans unless information is accurate, not misleading and can be supported by the MA/PD plan making the comparison
- Displaying co-branding provider name without appropriate disclaimer
- Advertising benefits not available to beneficiaries in the service area
- Marketing products, plan, benefits and costs without naming the MA/PD plan
- Marketing Star Ratings without following CMS rules



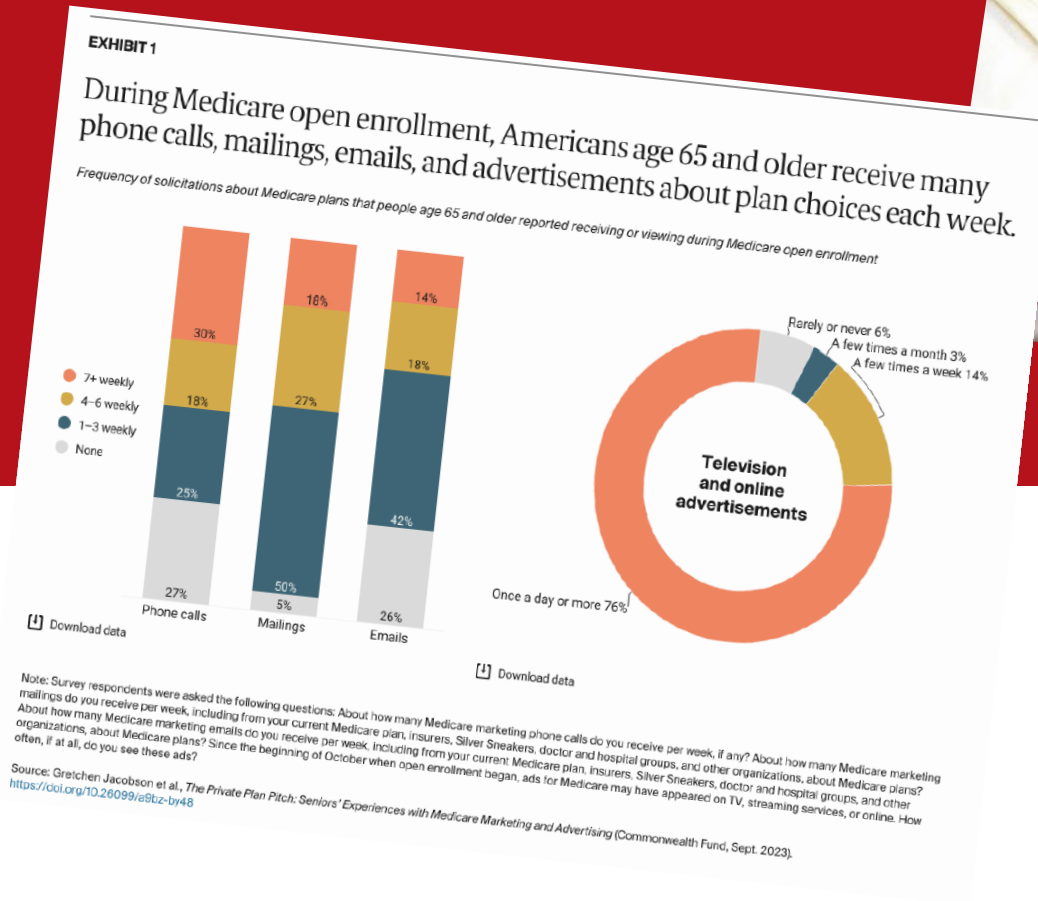
# Enforcement Action

# MCS Advantage – Puerto Rico

- July 2022 OIG False Claims Act enforcement action against MCS Advantage, Inc. for implementation of an incentive program in violation of the Anti-Kickback Statute.
- From November 2019 to December 2020, MCS supplied provider's administrative staff with 1703 gift cards with a total value of \$42,575 to induce staff to refer, recommend or arrange for 1646 Medicare patients to enroll in an MCS MA plan.
- HHS and OIG entered into a \$4.2M settlement with MCS, who did not admit liability as part of the settlement.



# Recent Medicare Marketing Headlines



# Medicare Marketing Under Scrutiny

- US Senate Committee on Finance report on Deceptive Marketing Practices in Medicare, November 2, 2022
- Commonwealth Fund Issue Brief, September 12, 2023, “The Private Plan Pitch: Seniors’ Experiences with Medicare Marketing and Advertising”
- Contract Year 2024 Policy and Technical Changes to the Medicare Advantage Program, Medicare Prescription Drug Benefit Program, Medicare Cost Plan Program, and Programs of All-Inclusive Care for the Elderly, April 12, 2023, 88 FR 22120
- CMS Memo, “Definition of Marketing” to MAOs, PDPs, etc. dated May 10, 2023



**Future**



# Crystal Ball Gazing

- Marketing scrutiny by CMS will continue to increase
  - Issuance of additional marketing memos
  - Continued tightening of regulations in annual final rule
  - Potential off-cycle modifications of regulations
  - Likely provider-specific marketing rules implemented
- Additional enforcement actions against plans and providers for marketing infractions





# Practical Takeaways

# Practical Takeaways

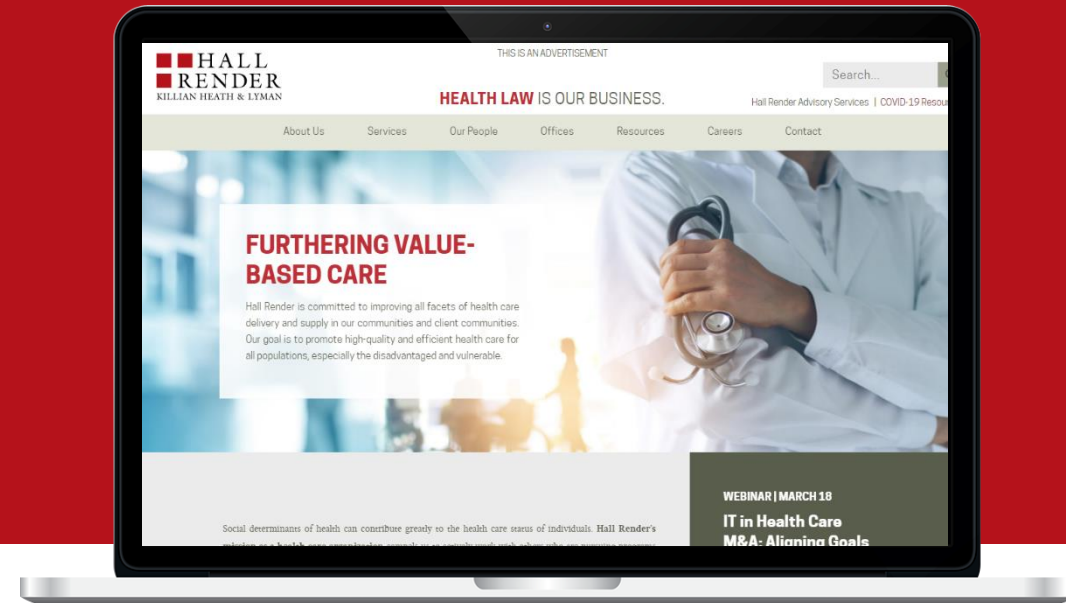
- Keep your patient's best interest in mind
- Be familiar with 42 CFR §§ 422 and 423.2266 permissible actions and locations
- Keep current on media reports regarding Medicare and CMS activities (HPMS or national trade associations or healthcare publications)
- Use CMS regulations and publications on marketing and communications for MA and PD plans as instructive even though non-binding
- Coordinate marketing plans with the MA/PD plans with which you participate
- Ask questions of your legal and/or compliance teams or Hall Render to obtain clarity

**HEALTH LAW**  
IS OUR BUSINESS.

**HALL  
RENDER**  
KILLIAN HEATH & LYMAN

# Questions?

For more information on these topics  
visit [hallrender.com](http://hallrender.com).



Jennifer Hatchett  
Of Counsel  
[jhatchett@hallrender.com](mailto:jhatchett@hallrender.com)  
(859) 361-5706

*This presentation is solely for educational purposes and the matters presented herein do not constitute legal advice with respect to your particular situation.*