

Developing Compliant Marketing Guidelines that Meet CMS Muster

Managing the Broker Network

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Sources

- 42 C.F.R. Parts 422 (Medicare Advantage) and 423 (Part D)
 - Contractor Oversight - 42 C.F.R. §422.504(i) and 423.505(i)
 - Marketing Materials - 42 C.F.R. §422.2262 and §423.2262
 - Marketing Standards - 42 C.F.R. §422.2268 and §423.2268
 - Producer Licensing - 42 C.F.R. §422.2272 and §423.2272
 - Compensation - 42 C.F.R. §422.2274 and 42 C.F.R. §423.2274
- Medicare Marketing Guidelines (Ch. 3, Medicare Managed Care Manual)
- CMS sub-regulatory guidance (e.g. Memoranda)
- State law - producer licensing, appointment and termination

Types of Arrangements

- Individual Producer
 - Plan sponsor employs or contracts directly with licensed producer
- Third Party Marketing Organization (“TMO”)
 - “Retained to sell or promote a plan sponsor’s Medicare products on the plan sponsor’s behalf either directly or through sales agents or a combination of both” (Medicare Marketing Guidelines, Section 20)
 - Administrative services arrangement
- Types of TMOs
 - Agencies and General Agents
 - Field Marketing Organizations (“FMO”)

Marketing Oversight

- Plan sponsor is responsible for the sales and marketing activities of its producers and TMOs, including use of marketing materials
- Producer/TMO must submit proposed marketing materials to plan sponsor for approval, and for submission to CMS for approval
- Marketing materials for use with multiple plan sponsors must be submitted to each plan sponsor for approval
- Sales and marketing activities of producers and TMOs is considered marketing by the plan sponsor

Producer Licensing and Appointment

- Producers must be licensed in the state in which the sale is made
- Producers must be appointed by the plan sponsor in accordance with State appointment laws
- Producer terminations must be reported to the state in accordance with state law
- The state can take action against the producer for prohibited sales conduct, but not the plan sponsor

Producer Training and Testing

- Plan sponsor must ensure all contracted and employed producers are annually:
 - Trained and tested on Medicare rules and regulations, with at least an 85% passing score
 - Trained on details of the plan sponsor's products
- Producers cannot use certification as a marketing tool

Marketing – Prohibited Inducements

- Plan sponsors and producers cannot provide anything of value to induce enrollment or retention of a beneficiary
- Promotional activities, items and gifts of nominal value are permitted, with limitations
- Plan sponsors and producers cannot provide meals at marketing events

Marketing – Prohibited Contact

- General prohibition against unsolicited contact
 - Email
 - Door to door solicitation
 - Common areas
 - Telephone
- Permission is short-term, event-specific and not open-ended
- Does not include mail and print media

Marketing Events

- Designed to steer beneficiaries toward a plan or limited set of plans
 - Provide plan specific information
 - Distribute marketing materials
 - Accept enrollment forms
- CMS must be notified, and must approve sales scripts and presentations
- Includes one-on-one sales appointments with producers
- Cannot cross-sell non-Medicare products

Individual Sales Appointments

- Scope must be agreed to in advance by the beneficiary
- Must be documented in advance (e.g. Scope of Appointment form)
- Walk-ins acceptable, if contemporaneously documented
- Appointment is limited to products documented in SOA
- Producer cannot –
 - Market non-health care related products
 - Ask for beneficiary referrals

Producer Compensation - Background

- Since PY 2009, producer compensation has been heavily regulated
- Implementation of the marketing requirements of the Medicare Improvements for Patients and Providers Act of 2008 (“MIPPA”)
- Prior to MIPPA, producer commissions were unregulated
 - Concerns that beneficiaries were sold into plans most profitable to the producer, and not the most appropriate for the beneficiary
 - Concerns of “churning” – moving beneficiaries when unnecessary to collect higher commissions

Producer Compensation - Defined

- Compensation – “pecuniary or non-pecuniary remuneration of any kind relating to the sale or renewal of a policy”
 - Includes commissions, bonuses, gifts, prizes, awards and referral/finder’s fees
 - Does not include state appointment fees; training, certification, and testing costs; mileage; actual costs for sales appointments
 - Bottom line – it is generally “compensation” if based on number of sales or is contingent on enrollment of the beneficiary
- Example 1 – mileage, but contingent on a sale
- Example 2 – costs, but through a “per application fee”

Producer Compensation - Amount

- Producer compensation consists of “initial compensation” and “renewal compensation”
 - Initial compensation paid for the 1st year of plan enrollment
 - Renewal compensation paid for 5 years thereafter
 - Creates a 6-year sales cycle that follows the beneficiary
- Renewal compensation must be 50% of the initial compensation
 - Beneficiary “like plan type” change paid at renewal amount
 - Includes same-carrier and carrier to carrier plan changes
- Rates cannot exceed CMS-established ceiling

Producer Compensation – Other Rules

- Compensation limitations do not apply to:
 - Plan sponsor employees
 - EGWP enrollment
- Compensation cannot be paid in advance
- Referral fees must be deducted from producer compensation payment, but are not paid on a renewal basis
- Producers cannot supplement compensation through beneficiary marketing fees, etc.

Producer Compensation - Chargebacks

- Payment of compensation is based on the plan year
- Compensation is prorated for enrollments of less than 1 year
- Compensation must be recovered:
 - Entirely for rapid disenrollment (within 3 months of enrollment)
 - On a prorated basis for months the beneficiary is not enrolled
- Ex.: If producer is paid a \$200 renewal on January 1 and the beneficiary disenrolls July 1, the plan sponsor must charge back \$100 (6/12ths) representing months the beneficiary is not enrolled

Administrative Arrangements

- TMO payment typically consists of administrative fee (override) and producer compensation amount
- Administrative fee must be fair market value
- CMS does not differentiate between entity type for producer compensation amount
- Type of administrative arrangement should not be based on value or volume of sales
- Type of administrative arrangement should be based on scope of administrative services performed
- TMO payments to producers should be audited!

Contracting Tips

- Do not allow sales or marketing without a contract
- Include Medicare flowdown language
- Incorporate Medicare requirements specifically and by reference
- Clearly define –
 - Payment terms and termination
 - TMOs producer payment responsibility
 - TMOs administrative responsibilities
 - “Broker of Record”

Broker Network Oversight Principles

- Implement secret shopper program
- Audit scopes of appointment
- Conduct appointment “ride-alongs”
- Audit producer payments
- Monitor enrollment calls
- Monitor rapid disenrollments and cancellations
- Investigate sales allegations
- Document and adhere to enforcement standards

AND REMEMBER!!

- The plan sponsor is responsible for the sales and marketing activities of its producers and TMOs!!

Questions?

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