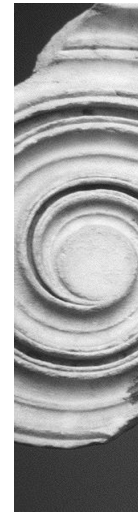


Health Care Compliance Association

**Medicare Prescription Drug
Part D Compliance Conference 2008**

Marketing Brokers & Agents

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OVERVIEW

- Big year for Part D marketing and compensation rules
- One statute and two new regulations issued
- One regulation was revised and reissued after numerous rounds of sub-regulatory guidance
- Issuance of updated/supplemental Medicare Marketing Guidelines

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Marketing Medicare Part D

- The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 created a comprehensive voluntary prescription drug program for Medicare beneficiaries known as Medicare Part D
- Part D coverage for beneficiaries enrolled in a prescription drug Plan began on January 1, 2006
- Part D coverage is delivered through private Plans under contract with the Centers for Medicare & Medicaid Services ("CMS")
- Part D Plans include Private Prescription Drug Plans ("PDPs") and Medicare Advantage Prescription Drug Plans ("MA-PDs"). PDPs are stand-alone drug-"only" Plans, while MA-PDs offer a drug benefit as well as other covered items and services

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"Marketing" Definition (CMS Marketing Guidelines)

- Marketing includes "steering, or attempting to steer, an undecided potential enrollee towards a Plan, or limited number of Plans, and for which the individual or entity performing marketing activities expects compensation directly or indirectly from the Plan for such marketing activities"
- Marketing does not include:
 - "Assisting in Enrollment" - Assisting a potential enrollee with the completion of an application and/or objectively discussing characteristics of different Plans to assist with enrollment based solely on the enrollee's needs and without compensation from the Plan
 - "Education" - Informing a potential enrollee about Medicare programs, but not steering them towards a specific or limited number of Plans

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- Brokers, Agents -

- Plan sponsors may perform marketing through employees, independent brokers and agents
- Insurers are making greater use of independent agents and brokers to market Part D Plans to Medicare beneficiaries
- Plan sponsors are responsible for all of the marketing activities of brokers and agents contracted to perform marketing for the Plan sponsor
- Plan sponsors may employ as marketing representatives only individuals who are licensed by each state to conduct activities in that state
- Plan sponsors must establish in the broker/agent agreement that the broker/agent will comply with all applicable laws and policies regarding marketing (including the CMS Marketing Guidelines)
- Plan sponsors must conduct monitoring to ensure compliance by brokers/agents

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Enforcement of Sales and Marketing Requirements

- The federal government and the states share responsibility for regulating the sale and marketing of Medicare drug Plans. Insurance agents are generally licensed and regulated by state government agencies, but the federal government regulates the Plans
- CMS will take appropriate action against non-compliant Plans:
 - implementing corrective action plans
 - freezing Plan enrollment
 - imposing civil monetary penalties
 - referring Plans to the HHS OIG or to other federal or state law enforcement agencies
- States can fine insurance agents and suspend or revoke their licenses

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New CMS Rules Alter Marketing and Compensation Requirements

- CMS issued notice of proposed rulemaking on May 16, 2008 that would alter a number of marketing requirements
- The Medicare Improvements for Patients and Providers Act ("MIPPA") was enacted in July of 2008
- On September 15, 2008, CMS released two new rules: a Final Rule and a Final Interim Rule
 - The Final Rule implements regulations prohibiting specific marketing and sales activities aimed at beneficiaries
 - The Interim Final Rule sets new compensation requirements for sales and marketing agents
 - Both echo numerous provisions of MIPPA
- Also on Sept. 15, Abby L. Block, Director of the Center for Drug and Health Plan Choice at CMS, released an update to the existing Medicare Marketing Guidelines to help plans implement the new regulations
- Revised compensation final regulations for agents and brokers were released Nov. 14

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Medicare Improvements for Patients and Providers Act - (MIPPA) -

- Enacted on July 15, 2008
- MIPPA imposed new statutory prohibitions and limitations for MA plans and PDPs on certain sales and marketing activities
- MIPPA's requirements superseded a number of the proposed revisions from the May 2008 Proposed Rule
- The September Final Rule and Interim Final Rule thus contain regulations implementing these provisions; they were to go into effect Oct. 1

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MIPPA

- Limits on Marketing Activities -

- MIPPA specifically prohibits, while performing marketing activities to promote or sell MA plans or PDPs, any unsolicited means of direct contact with beneficiaries, cross-selling of non-health related products, and providing meals
- Also prohibits sales and marketing activities in health care settings (excluding common areas) and at educational events
- Limits the following:
 - Scope of the discussion during an appointment set with a beneficiary to discuss an MA plan or PDP to what was agreed upon with the beneficiary in advance
 - Ability to use names and logos of co-branded network providers on plan membership and marketing materials
 - Value of gifts and promotional items

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Final Rule

- Marketing Provisions -

- The Final Rule implements these new marketing provisions, in addition to modifying the disclosure and dissemination of Part D provisions
- New regulations echo those of MIPAA, prohibiting:
 - Providing meals to beneficiaries as part of marketing activities (excludes “light snacks”)
 - Telemarketing, door-to-door solicitation, and other sales contacts made without express invitation
 - Cross-selling of non-health care related products during sales, marketing, or presentation to MA plan or PDP
 - Conducting sales presentations or distributing and accepting plan applications in provider offices
 - Conducting sales activities, distributing, or collecting applications at educational events

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Final Rule

- Scope of Appointment -

- Prior to any marketing appointment, the beneficiary must agree to the scope of the appointment and that agreement must be documented by the plan. This documentation may be in writing or recorded by phone. Additional products may not be discussed until the beneficiary requests the information. Any additional lines of plan business that are not identified prior to the in-home appointment will require a separate appointment.

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Interim Final Rule

- In this separate final rule, CMS prohibits organizations from providing cash or monetary rebates to potential enrollees as inducement for enrollment or otherwise
- The Rule further prohibits giving gifts to potential enrollees unless the gifts are of nominal value (defined in CMS marketing guidelines as \$15.00 or less), are offered to all eligible members without discrimination, and are not in the form of cash or other monetary rebates
- The Rule also finalized the compensation requirements for independent sales and marketing agents
- New regulations aim to protect beneficiaries by eliminating incentives to move beneficiaries from plan to plan – practice known as “churning”

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Final Rules

- Implementation Confusion -

- Shortly after the regulations were issued in September, there was an outcry of confusion regarding the new compensation rules
- Insurance groups said key implementation concerns were left unanswered and that members were worried about their paychecks
- Agents also had questions unrelated to compensation issues, such as how to verify the scope of appointments with beneficiaries
- On Oct. 1, CMS officials deferred the establishment of the new structures for one week

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Final Rules

- Implementation Confusion -

- On Oct. 8, CMS issued a memo seeking to clarify the commission structure set forth in the Interim Final Rule, requiring that plans pay first-year renewal compensation rates for all enrollment changes initiated for 2009
- A second round of subregulatory guidance was issued on Oct. 17
- Congressional leaders argued for a cap or restriction on broker fees, as they claimed the new compensation structure could result in higher-than-ever agent commissions and increased churning
- On Oct. 24, in response to criticism from lawmakers, CMS rescinded the Oct. 8 guidance, citing "significant concern about agent/broker commissions for benefit year 2009"

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Revised Interim Final Rule

- Citing the “bidding war” among MA plans that had erupted in the wake of the September rules, on Nov. 14, CMS issued a new Interim Final Rule
- Revisions are intended to ensure beneficiaries are enrolled in plans that “best meet their health care needs (as required by MIPPA), not because of how much agents can earn from their enrollments
- While CMS is accepting comments until Dec. 15, plans had to incorporate the latest requirements into their sales compensation structures by Nov. 15, when open enrollment began for the 2009 plan year
- All provisions in the September rule not revised remain unchanged and are still in effect

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Interim Final Rule - Key Changes -

- The initial Interim Final Rule said that plans should limit compensation to sales agents for initial enrollments, then pay a fixed compensation amount for each of the next five renewal years
- Compensation in the initial year in this six-year cycle was not to exceed 200 percent of the amount paid for renewal years
- CMS said plans were interpreting the rule in a way inconsistent with its intent

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Interim Final Rule

- Key Changes -

- The regulation was revised to “expressly specify...that the aggregate (commissions, bonuses, etc.) of the compensation amount paid for selling or servicing an enrollee during each of the five individual renewal years of the six-year cycle must be fair market value for the work performed and no more, and no less, than 50 percent of the aggregate (commissions, bonuses, etc.) of the compensation amount paid for that beneficiary for the initial year of the six-year cycle”

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Interim Final Rule

- Key Changes -

- For 2009 initial enrollments, organizations may pay agents/brokers either:
 - (1) The 2006 compensation for that plan type, adjusted by the average change in Medicare Advantage or Part D plan rates
 - (2) An amount equal to the market compensation rate for initial enrollments paid by organizations offering plans in the geographic area for the plan type in question during 2006 and 2007, adjusted by the average change in plan rates
- For renewal compensation, organizations may pay an amount equal to the fair market value of the work performed and equal to 50 percent of the aggregate initial year compensation amount (including commissions, bonuses, etc.)

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Interim Final Rule

- Key Changes -

- To reduce an agent/broker's financial incentive to move a beneficiary in a renewal cycle to a new plan that may be contrary to his or her health care needs, CMS is initially deeming all 2009 enrolling beneficiaries to be in the first renewal year (the second year) of the first-year cycle
- Organizations will first pay agents/brokers renewal compensation; CMS said it would later determine whether initial year compensation rates were due to agents, in which case plans may pay agents the additional compensation retroactively
- However, if a prospective enrollee is in his or her Initial Coverage Election Period (MA Plans) or Initial Enrollment Period (Part D plans) when he or she enrolls, agents/brokers must first be paid for an initial enrollment to compensate them for the additional work involved

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Interim Final Rule

- Key Changes -

- Plans also must structure compensation similarly for field marketing organizations
- Plans must submit to CMS their compensation structures for the previous three years
- Plans must certify that their 2009 compensation structures are compliant with the new CMS rules

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2010 and Beyond

- For 2010 and subsequent years, the compensation amount paid to an agent or broker for an initial enrollment is the prior year's compensation adjusted by the change in MA rates for plans as published in the MA rate announcement, and the change in the Part D rates for PDP plans as published in the Part D rate announcement

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2010 and Beyond

- CMS has said it will be engaging in a "wide variety of oversight and surveillance activities beginning with this fall's 2009 plan year marketing season"
- In her memo regarding supplemental marketing guidance in the wake of the new rules, Abby L. Block wrote "As with all marketing regulation and guidance, it is the responsibility of MA and PDP organizations to monitor the actions of all agents selling their plan(s) and take proactive steps to enforce this prohibition. Oversight activities conducted by CMS will verify that Plans and agents are complying with this provision, and enforcement actions will be taken as necessary."
- Congress may revisit the idea of enhancing state regulators' involvement in Medicare marketing

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