

August 27, 2019

SENT ELECTRONICALLY

Seema Verma
Administrator, Centers for Medicare & Medicaid Services
U. S. Department of Health and Human Services
200 Independence Avenue, SW
Washington DC 20201

Dear Administrator Verma:

The undersigned organizations are committed to ensuring that all people with Medicare have unfettered access to the accurate and impartial information they need to make optimal choices about their health care and coverage. We appreciate CMS's efforts to update existing resources, including the Medicare Plan Finder tool and the 2020 marketing guidelines, in ways that will advance these goals. However, we are concerned that these changes—though many are intended to aid beneficiaries in the plan selection process—may instead have the opposite effect because of limitations due to the process, timing, and accessibility of the revisions.

The availability of adequate beneficiary supports, both in terms of published resources and tools as well as capable in-person and phone-based counseling, is especially important in advance of and during times of increased beneficiary decision-making, such as Medicare's Fall Open Enrollment period. Occurring annually from October 15 to December 7, this is the only time of year when beneficiaries can make certain coverage choices. As this critical enrollment window nears we urge CMS to reflect on the ways new materials are produced, distributed, and made available to beneficiaries and the networks that support them, as well as to insurers and their agents, and act without delay to mitigate some potential adverse effects of these recent changes.

Specifically, while we applaud CMS's efforts to improve Medicare Plan Finder (MPF)—the federal government's primary enrollment assistance tool—we have significant concerns about the roll out process. In particular, we find it troubling that the new MPF's late August release may not give third-party assisters, like State Health Insurance Assistance Programs (SHIPs), adequate time to learn the new tool before Fall Open Enrollment begins. Coupled with recent legislative and regulatory changes set to take effect this year, the truncated MPF launch timeline is likely to generate demand for enrollment assistance that these chronically underfunded programs are unable to meet.

Another concerning change is the agency's 2020 marketing guidance for private insurance plans. The Medicare Communications and Marketing Guidelines (MCMG) is a set of rules that govern the selling and promotion of Medicare Advantage and Medicare Prescription Drug plans. Revised each year, these guidelines help ensure that people with Medicare have accurate information about a plan's costs and benefits as well as adequate protections against inappropriate marketing practices. For these guardrails to function as intended, however, CMS must thoughtfully and thoroughly update, apply, and enforce the rules. Here, the 2020 guidance falls woefully short, making changes that appear to primarily act to ease the burden on plans and downstream entities while at best doing little to benefit or protect consumers and at worst increasing the likelihood consumers will experience harm.

To maximize beneficiary access to needed information and supports during the upcoming Fall Open Enrollment Period, we urge you to address the following concerns regarding the Medicare Plan Finder and the 2020 Medicare Communications and Marketing Guidance.

Medicare Plan Finder

Timeline Concerns

In early conversations about the new MPF, advocates were told that the new version of the website would be live for people to use alongside the "legacy" Plan Finder for much of the summer, allowing SHIPs and other counselors to compare the two, provide feedback, and become comfortable with the updated tool. This roll out plan would have allowed counselors sufficient time to not only learn how to use the new MPF in the relatively less busy period before Fall Open Enrollment and fall back on the "legacy" tool if needed, but also to assist developers in identifying technical or other usability issues by providing real-time beta testing.

Unfortunately, this has not been our experience. The tool's release earlier today marks the first opportunity counselors have had to actively use or review it. Even during the annual conference of SHIP directors in July, no live testing was allowed. Further, that demonstration experienced several bugs and gaps in 2019 data that the presenters announced would be filled "by early August" to permit concurrent use of the new and "legacy" Plan Finders before fall. Most recently, today's press release confirms the "legacy" version will not be functional for 2020 plan year enrollments. We are disappointed that CMS failed to anticipate the potential need for more extended redundancy or back-up systems when launching a new site architecture that so many people rely on for critical coverage decisions.

As a result of the later-than-expected roll out, opportunities for valuable counselor learning and feedback have been lost. Pushing SHIP and other counselor training into the busy weeks between now and Fall Open Enrollment may also mean that difficult choices will have to be made regarding counselor education, such as whether to prioritize their proficiency with the

tool or their understanding of substantive Medicare policy changes that will take effect in 2020 and dramatically impact beneficiary choices this fall.

Login Concerns

One of the most dramatic differences between the new and “legacy” Plan Finder tools is the change to the way users can access a personalized search. Under the “legacy” tool, beneficiaries or their advocates enter their name, date of birth, Medicare number, effective date, and “drug list ID” to access previously entered drug information. These login points are readily available to beneficiaries and unlikely to be forgotten or misplaced.

Under the new MPF, in order to access personalized information or save a search, a person must create or utilize a myMedicare account—which requires a username and password. Although we appreciate that changes have been made to eliminate the requirement that account holders have an email address and to ease the burden of restoring a forgotten password, we remain concerned that this new login and/or account creation process will slow or otherwise impede the ability of SHIPs and other assisters to efficiently manage workflow during the busy Fall Open Enrollment period.

Substance Concerns

Because the new MPF has only just been released, we have not yet fully explored its functionality, nor have we assessed it for possible information gaps or to anticipate beneficiary questions. We will follow up accordingly with any such observations or other feedback and appreciate the agency’s efforts to date to consider stakeholder input. As we embark on this review—and based on our experience with the tool as previewed, noted above—we are concerned that improvements may still be needed and that the roll out timeline may make this impossible, to the detriment of beneficiaries who will be relying on the new MPF to make important coverage decisions during Fall Open Enrollment.

In addition, as outlined below, Medicare Advantage (MA) plans will have the flexibility to offer new supplemental benefits in 2020, which will require careful explanation and robust education. We are concerned that the extent to which the new MPF captures this information may be inadequate to effectively aid beneficiary decision-making.

The Need for Monitoring and Failsafes

CMS should carefully monitor the phased roll out of the new MPF in general and for any disruptions in access to the tool or to personalized help in particular. This includes disruptions that may result from the site being down, from unexpected crashes or log-outs, from delays associated with creating new accounts or recovering passwords, and any other technical

barriers. It also includes capacity challenges that SHIPs, 1-800-MEDICARE, and other enrollment counselors may face due to the near-simultaneous uptake of the new tool and other concurrent Medicare policy changes—such as those to the SEP for people who have the Low Income Subsidy (LIS) benefit. This confluence of factors is likely to increase and complicate casework during Fall Open Enrollment. Should any of these complications arise, we urge CMS to provide any enrollment relief that may be needed to prevent beneficiaries from being negatively impacted.

Medicare Communications and Marketing Guidance

Process Concerns

In addition to the substantive concerns below, we also object to the process by which CMS is ushering in the 2020 guidance. While we appreciated the opportunity to provide feedback on the draft 2020 Medicare Communications and Marketing Guidelines (MCMG), we were troubled that unlike in previous years, CMS did not subsequently release a final 2020 version of that guidance. Instead, the agency broke with its longstanding practice and issued an [HPMS memo](#) that lists changes from the 2019 guidance and tells plans that for 2020, they should rely on the 2019 guidance as amended by the memo. This approach, which is a significant step backward in clarity and transparency, is all the more confounding since CMS already created and distributed a redlined draft of the 2020 MCMG for comment.

It also is concerning that the final guidance veers significantly from this draft. Instead of adding some helpful clarifications and tightening of guidance that had appeared in the draft, the final product took a sharp U-turn. Not only were most of the additions that would have been protective of beneficiaries abandoned, important existing provisions were summarily dropped without warning or an opportunity to comment, and new provisions that either did not appear or were not flagged in the draft version were finalized, effectively disregarding the process for stakeholder input.

Weakening Distinction between Marketing and Educational Events

Regarding the content, troublingly, the revised guidelines weaken the distinction between “marketing” events, which are designed to steer or attempt to steer potential enrollees, or the retention of current enrollees, toward a plan or limited set of plans; and “educational” events, which are designed to inform beneficiaries about Medicare Advantage, Prescription Drug, or other Medicare programs.

Such changes appear to directly conflict with current law. Section 103 of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) prohibits “Sales and marketing activities for the enrollment of individuals in Medicare Advantage [and Part D plans] plans that are conducted” at educational events; similarly, 42 C.F.R. §§ 422.2268 and 423.2268(b)(8) state

that “in marketing” MA and Part D plans, sponsors may not “Conduct sales presentations or distribute and accept plan applications at educational events.”

The new MCMG revisions are inconsistent with these requirements. For example, they eliminate the current requirement regarding unsolicited contacts that restricts when an agent or broker can contact someone by removing the following language from the 2019 guidelines: “If a potential enrollee provides permission to be contacted, the contact must be event-specific, and may not be treated as open-ended permission for future contacts.”

Further, the revised guidance removes language requiring marketing appointments generated from an educational event to be distinct in time and place; the revisions delete “future” from the current language, which now reads that agents or brokers “May set up a ~~future~~ marketing appointment, and distribute business cards and contact information for beneficiaries to initiate contact (this includes completing and collecting a Scope of Appointment (SOA) form).” And the subsequent requirement—that an agent or broker “[m]ay not conduct a marketing/sales event immediately following an educational event in the same general location (e.g., same hotel)” is eliminated entirely.

In sum, the updated guidance seemingly allows educational events (which have fewer restrictions and no reporting requirements to CMS) to immediately turn into marketing events. While the guidelines still note that educational events “[m]ust not include marketing or sales activities or distribution of marketing materials or enrollment forms,” it appears that an agent or broker could immediately step out of the room, so to speak, and conduct a sales event. This defeats the purpose of delineating these types of events, and likely violates both the spirit of MIPPA and its implementing regulations.

Removal of Non-English Translations Disclaimer

Also of concern is the removal of several disclaimers in Appendix 2 without explanation, including the one governing the “Availability of Non-English Translations.” This disclaimer is short¹ and had only been required on a subset of communications that are subject to translation requirements pursuant to 42 CFR 422.2268(a)(7) and 42 CFR 423.2267(a)(7). Except for a handful of small markets, the disclaimer was only required in one language, Spanish. In the 2019 MCMG, CMS harmonized the wording of the disclaimer with the wording required by Section 1557 regulations to ensure that this requirement would place no additional burden on plans.

¹ Required Text: “ATTENTION: If you speak [insert language], language assistance services, free of charge, are available to you. Call 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx)”.

We are at a loss to understand the rationale for removing this simple requirement to place at most two lines of text in Spanish on important documents so that Spanish speakers will know the availability of assistance. The burden on plans is miniscule and the need to alert limited-English proficient beneficiaries that they can receive help is great. Beneficiaries must be made aware that interpreter services and translated materials are available, if this assistance is to be effective.

Omitted Language Limiting Marketing of D-SNP Look-Alikes

The draft of the 2020 guidance circulated earlier this year for stakeholder comment included new language intended to ensure more accurate and transparent marketing of Medicare Advantage plans to dual eligibles that are not Duals-Special Needs Plans (known as D-SNP look-alikes). Specifically, the draft language prohibited look-alikes from claiming that their plan is designed for dual eligibles and from primarily targeting dual eligibles in their marketing efforts. The draft also included language prohibiting plans from using a plan name that includes the state's Medicaid program or any language that implies that the plan has a relationship to Medicaid. These changes reflected CMS's own conclusion that look-alike plans impede progress toward developing products that meaningfully integrate Medicare and Medicaid benefits for dual eligibles.² It is therefore confounding that the final memo failed to include the changes outlined in the draft that would have acted to limit the aggressive marketing of these look alike products to duals.

Lack of Information Regarding Supplemental Benefits

We also continue to be disappointed that this guidance fails to sufficiently address the marketing of MA plans with new supplemental benefits. Clarity on this issue is much needed, given the potential for this expanded authority to create incentives for sponsors to inappropriately steer or target potential enrollees. In failing to update the marketing guidelines to forcefully prohibit these practices, CMS is losing an important opportunity to protect people with Medicare.

The availability of supplemental benefits must not become merely or primarily a sales tool and sponsors must not be permitted to use supplemental benefits as a marketing device to persuade beneficiaries into their plans. We are especially concerned that agents and brokers may ask individuals about their health status and use that information to steer them toward

² Centers for Medicare & Medicaid Services, "Announcement of Calendar Year 2020 Medicare Advantage Capitation Rates and Medicare Advantage and Part D Payment Policies and Final Call Letter" (Apr. 1, 2019), pp. 194-196, available at [cms.gov/Medicare/Health-Plans/MedicareAdvtgSpecRateStats/Downloads/Announcement2020.pdf](https://www.cms.gov/Medicare/Health-Plans/MedicareAdvtgSpecRateStats/Downloads/Announcement2020.pdf).

specific plans in violation of anti-discrimination rules. And this guidance continues to do nothing to assuage our concerns. CMS must not enable discriminatory practices through lax oversight.

We urge CMS to establish strict rules against such targeting and suggest that all shareable information about every plan be made available to potential enrollees, empowering them to choose the most appropriate coverage for their unique circumstances. In addition, the roll out of these new benefits must be closely monitored, as even the most thoughtful of policies can have unintended effects. To that end, both CMS and plan sponsors must be vigilant in watching for unusual spikes in enrollment, as well as other patterns that might indicate the existence of inappropriate outreach behavior. Such practices must be reported and corrected when identified.

Rescissions and Corrections are Needed

Many of the incorporated changes appear to prioritize plan interests over beneficiary needs, disregarding the longstanding protective role of the guidance. These damaging provisions and omissions must be corrected without delay. We urge CMS to rescind this update in its entirety. If the agency does proceed, it must at least rescind those sections that weaken the distinction between marketing and educational events and those that remove critical disclaimers. Further the agency should address the need for clarifying language regarding the marketing of D-SNP look-alikes and supplemental benefits.

Conclusion

Again, we appreciate CMS's efforts to update the Medicare Plan Finder tool and the 2020 marketing guidance to better aid beneficiary decision-making. As outlined herein, however, we are concerned that recent revisions may instead complicate these efforts, to the detriment of people with Medicare.

Accordingly, we urge you to closely monitor the roll out and functionality of the new MPF tool and take steps to prevent beneficiaries from experiencing any negative consequences due to these and other changes the federal government is introducing into the upcoming Fall Open Enrollment period. To further ensure people with Medicare are adequately protected, we urge you to make immediate changes to the 2020 MCMG, by rescinding the updates in full or in part, and by adequately addressing the marketing of D-SNP look-alikes and supplemental benefits.

Thank you for your attention to our concerns. We would welcome the opportunity to discuss these issues with you at any time.

Sincerely,

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Justice in Aging
Medicare Rights Center
National Council on Aging

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