



July 11, 2022

The Honorable Chiquita Brooks-LaSure, Administrator
Dr. Meena Seshamani, M.D., Ph.D., Deputy Administrator and Director of Center for Medicare
Cheri Rice, Deputy Director, Parts C and D, of the Center for Medicare
Liz Richter, Deputy Center Director of the Center for Medicare
Centers for Medicare and Medicaid Services
Department of Health and Human Services
200 Independence Avenue SW
Washington DC 20201

RE: CMS-4192-P

Dear Administrator Brooks-LaSure, Dr. Seshamani, Deputy Director Rice and Deputy Director Richter:

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing over 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefits specialists. We would like to reiterate our March comments on the "Medicare Program: Contract Year 2023 Policy and Technical Changes to the Medicare Advantage and Medicare Prescription Drug Benefit Programs," finalized in May of this year and request further guidance on specific areas to ensure compliance with the rules while protecting Medicare beneficiaries.

The members of NAHU work daily to help millions of people purchase, administer and utilize health insurance coverage, including Medicare-eligible individuals purchasing private-market-coverage options. Earlier this year, we assembled a representative group of members who routinely help the Medicare population fulfill their health insurance coverage needs in order to submit comments on what was then the proposed rule. Since then, the final rule has been released but many of our concerns were not addressed, and we believe this puts many Medicare beneficiaries in danger from not being able to receive advice from licensed, certified health insurance professionals during this year's annual enrollment period.

Changes to Medicare Advantage and Part D Marketing Requirements

The final rule made significant changes to existing marketing requirements for both Medicare Advantage and Part D plan marketing requirements. NAHU members understand and support the concept of protecting Medicare beneficiaries from unscrupulous third-party marketing organizations (TPMOs), especially call centers that use deceptive tactics and offer inaccurate information about Medicare products and coverage. Our members who work directly with Medicare beneficiaries battle these misinformation campaigns daily and work tirelessly to make sure that beneficiaries do not make choices based on misleading and inaccurate information. Instead, it is always the



goal of licensed and professional health insurance producers who work in the Medicare field to ensure that their clients purchase coverage that best meets both their personal needs and financial situation.

Definition of TPMO

The final rule seeks to account for unscrupulous marketing behaviors by requiring TPMOs to record all enrollment conversations. However, TPMOs have already had this requirement in place. What is different in the proposed and now final rule is how TPMOs are being defined. The new definition of TPMO is overly broad and will needlessly impact many entities that are acting responsibly, including individual agents and brokers who will now be subject to the recording requirements. This new requirement will add an additional burden to licensed and certified agents attempting to assist Medicare beneficiaries when choosing a suitable health and drug plan.

It is critically important to ensure that the rule's definition of TPMOs targets those it is intended to regulate and is not overly broad. Our association is concerned that the scope and structure of the new definition of TPMOs inadvertently affects independent agents who perform legitimate marketing of their services. They are not the source of these deceptive tactics; instead, they play a critical role in combatting the problems that can be caused by unscrupulous TPMOs. The rule now defines TPMOs as "organizations that are compensated to perform lead-generation, marketing, sales and enrollment-related functions as a part of the chain of enrollment (the steps taken by a beneficiary from becoming aware of an MA plan or plans to making an enrollment decision). TPMOs may be a first tier, downstream or related entity (FDRs), as defined under § 422.504(i), but may also be entities that are not FDRs but provide services to customers, including an MA plan or an MA plan's FDR." Such a broad definition applies the new requirements and restrictions to virtually all professionals who assist Medicare beneficiaries with their coverage and enrollment needs, except SHIPs. NAHU believes that instead of moving forward with the new definition, CMS should rescind this part of the final rule and continue to meet with stakeholders and observe market conduct to pinpoint the scope of its proposed regulation more accurately in this area. At minimum, we request that the definition be altered to merely apply to lead-generation entities and exclude licensed professional health insurance producers appointed to sell MA plans with licensed insurance issuers.

Impact on Beneficiaries

The new regulations will discourage many licensed and certified agents and brokers from representing Medicare Advantage and Prescription Drug Plans, leaving millions of Medicare beneficiaries without access to professional assistance in their enrollment. Independent agents and brokers are often small businesses without the financial resources to implement the recording requirements included in the final rule. The cost of setting up a HIPAA-compliant audio recording system with adequate and protected storage capabilities far exceeds the abilities of many of these licensed and certified agents who are now facing a decision as to whether to participate in this fall's AEP.

There are an estimated 100,000+ licensed and certified independent agents and brokers who certify each year to offer Medicare Part C and D plans. Without these licensed and certified agents assisting in enrollments, Medicare



beneficiaries will have few choices in finding accurate enrollment assistance and will be led directly to the bad actors that this rule seeks to protect them from. Those bad actors are already recording their marketing calls but are still in operation because of the lack of enforcement of current marketing regulations.

With fewer certified agents and brokers, the complaints to Medicare and workload for Medicare.gov will surely increase, not decrease. Fewer certified agents and brokers will also increase the workload of SHIP counselors, who are exempt from the recording requirement rule despite having far less training and education than licensed agents, which leaves beneficiaries with fewer options when considering Medicare health and drug plans.

Request for Delay and Further Guidance

NAHU would like to again request a one-year delay of the implementation of this rule in order for CMS to meet with stakeholders to draft a rule that truly reflects the goals of protecting Medicare beneficiaries from deceiving marketing practices. If a one-year delay is not possible, we would like to request that independent agents be struck from the definition of TPMO as independent agents and brokers truly do not fit in that definition and should not be aligned with TPMOs in this or any other regulation.

NAHU would also like to request guidance on aspects of implementation if CMS does choose to move forward without making any changes to the final rule. What actions should be taken if an agent is working with a Medicare beneficiary who does not consent to being recorded? How should the agent document that while still being in compliance with this rule?

What are the requirements for the maintenance of the recordings? Under the "maintenance of records" rule, all records should be kept for 10 years. Does this apply to this rule? If so, a storage time of 10 years will add to the cost of storage and seems duplicative to what will already be documented with CMS. Since the agent's National Producer Number will be on all enrollment documents, if any unlawful action takes place, the agent can immediately be identified through the application. Storing audio recordings for 10 years following an enrollment is unfeasible.

In addition, clarification is needed as to what qualifies as a marketing or enrollment call. The current definition is very broad and many independent agents and brokers fear noncompliance with the new rule and are considering recording all conversations. This could add up to several hours for one enrollment and require technology that can store large audio files for several years. What if agents receive an incoming call from a beneficiary while out of the office or driving? Do they need to pull over and begin a recording even if an enrollment is not taking place but the information in the conversation could lead to an enrollment during a future call?

Will there be a carveout or safe harbor for current clients? Most independent agents and brokers rely on their book of business and pride themselves with having returning clients every year because of the care they take to make sure their clients are enrolled in the Medicare plan that best meets their needs. Existing clients may be confused by



the new recording requirements and insist on returning to in-person enrollments. There has been much progress over the past two years to digitize Medicare enrollments and modernize the process due to the pandemic and limitations on in-person meetings. This may reset the clock on innovations in the Medicare market because of the barriers for independent agents and brokers to comply with the new rule.

Will CMS be providing any tools for independent agents and brokers to comply with the rule? While insurance carriers are aware of the new rule, to date none have offered support to agents and brokers to comply with the rule and the burden is being placed on the independent agents and brokers. In order to protect Medicare beneficiaries' access to licensed and certified professionals, will CMS be providing any tools to assist in recording telephonic enrollments?

Finally, we are concerned that implementing such profound changes with less than a year to prepare will not be feasible for Medicare Advantage and Part D plan sponsors that would need to update all contracts and oversight processes. This is why in our original comments in March, NAHU requested at least a year delay in the final rule so that CMS could meet with all stakeholders and observe market conduct. We believed that by gathering feedback from all parties and working with carriers, agents, consumer organizations, state regulators and enrollees, it would be possible to craft a comprehensive and quality proposal that protect all Medicare beneficiaries in a truly meaningful fashion. The release of the final rule in May without stakeholder meetings has left many questions unanswered about the implementation of the rule.

Thank you for the opportunity for us to share our concerns with the final rule and to request further guidance and action by CMS prior to this year's AEP. If you have any questions or need more information, please do not hesitate to contact me at 202-595-0639 or jtrautwein.org.

Sincerely,

A handwritten signature in black ink, which appears to read "Janet Stokes Trautwein". The signature is written in a cursive style.

Janet Stokes Trautwein
Executive Vice President and CEO
National Association of Health Underwriters