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Five considerations for health care providers' marketing of Medicare Advantage Plans

During the Medicare Advantage (MA) annual enrollment period, health care providers may be looking to inform their patients of their MA options. Below are five considerations to keep in mind when sharing information related to MA organizations with patients.

1. Know what the MA marketing rules allow and prohibit.

The Centers for Medicare & Medicaid Services (CMS) regulates MA marketing through regulations and the [Medicare Communications and Marketing Guidelines Manual](#). The purpose of these rules is to maintain appropriate beneficiary safeguards while not impeding the provider/patient relationship. Generally speaking, CMS has liberalized the MA marketing rules over the past few years. For example, as of February 2022, the marketing rules:

- No longer state that plans must ensure that the providers remain neutral;
- No longer require the provider to make marketing materials available in common areas for all plans with which the provider participates; and
- No longer require that affiliation announcements state that the provider may also contract with other plans.

In order to understand the requirements these rules impose on a provider, it is necessary to understand the differences between "marketing" and "communications" and the differences between "provider-initiated activities" and "plan-initiated activities". The rules governing marketing are more restrictive than the rules governing communications, and the rules governing plan-initiated activities are more restrictive than the rules governing provider-initiated activities. For example:

- Marketing materials cannot be provided in exam rooms but communication materials can; and
- If an activity is plan-initiated, the plan must ensure that the provider remains neutral, but if an activity is provider-initiated, the provider can discuss the merits of a plan when answering questions in the exam room.

In addition, CMS has specific rules that should be reviewed for provider and MA plan co-branding and provider affiliation announcements.

And finally, providers should be aware that "marketing" activities may be restricted outside of certain CMS allowed enrollment periods (e.g., annual enrollment period which occurs from October 15 through December 7).

We also note that the MA rules are imposed upon the MA plans only and not on the providers; however, non-compliance could have serious repercussions such as termination of the provider agreement, breach of contract, or indemnification claims.

2. Ensure HIPAA compliance.

Providers should ensure that any marketing/communications to patients regarding MA plans complies with HIPAA. For example, a provider should ensure HIPAA compliance before using patient lists to mail marketing materials to patients that describe the MA plan's benefits and cost-sharing.

3. Check provider agreements.

It is important to check each provider agreement to identify whether any contractual roadblocks exist. For example, a provider agreement could prohibit marketing of any MA plans or could require approval of any communications with patients regarding the MA plan.

4. Check if your activities rise to the level of selling, soliciting, or negotiating insurance.

If a provider's activities rise to the level of selling, soliciting, or negotiating insurance, then state insurance laws may require the provider to obtain a producer's license prior to engaging in such activities.

5. Ensure compliance before receiving compensation for marketing.

Providers should be cautious before accepting compensation for MA marketing activities. A fraud and abuse analysis should be performed prior to receiving such compensation and the receipt of compensation may result in the provider being considered a third party marketing organization (TPMO). CMS developed requirements for TPMOs effective in June 2022 to protect against pushy marketing tactics, and these requirements impose several obligations upon TPMOs such as required disclaimers and recording of all calls.

It is important to keep in mind the above factors when sharing information related to MA organizations with patients. While CMS has liberalized the rules recently, there are still significant limitations to remember in order to stay compliant with relevant laws, MA provider agreements, and the Medicare Communications and Marketing Guidelines Manual.

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