2019 Changes to Marketing Rules

Brokers Can Now Initiate Unsolicited Contact Through Email.
The Medicare Marketing Guidelines for 2019 have loosened the rules around unsolicited contact. Sections 30.6 and 40.2 allow brokers to initiate contact via email, conventional mail, and print media. This includes communication and marketing for sales and retention. *The only caveat:* If you are initiating contact via email, you’re required to include an opt-out opportunity.

Direct unsolicited contact, such as text and direct messaging over social media, falls into the same category as unsolicited phone calls and door-to-door solicitation. This means it is not permitted.

Electronic Communication Policy, Section 30.6, now reads:

30.6 – Electronic Communication Policy
42 CFR §§ 422.2268(b), 423.2268(b)

A Plan/Part D sponsor may initiate contact via email to prospective enrollees and to retain enrollment for current enrollees. Plans/Part D sponsors must include an opt-out process on each communication to elect to no longer receive emails. *Note: Text messaging and other forms of electronic direct messaging (e.g., social media platforms) would fall under unsolicited contact and is not permitted.*

Marketing Through Unsolicited Contacts, Section 40.2, now reads:

40.2 – Marketing Through Unsolicited Contacts
42 CFR §§ 422.2268(b)(13), 423.2268(b)(13)

Plans/Part D Sponsors may make unsolicited direct contact with potential enrollees using the following methods:

- Conventional mail and other print media (e.g., advertisements, direct mail)
- Email provided all emails contain an opt-out function

Plans/Part D sponsors may not:

- Use door-to-door solicitation, including leaving information such as a leaflet or flyer at a residence;
- Approach potential enrollees in common areas (e.g., parking lots, hallways, lobbies, sidewalks, etc.); or,
- Use telephonic solicitation, including text messages and leaving electronic voicemail messages.

*Note: Agents/brokers who have a pre-scheduled appointment with a potential enrollee who is a “no-show” may leave information at that potential enrollee’s residence. 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.”

Brokers Can Do More With Attendees at Educational Events.

Section 50.1 of CMS’ Medicare Communication and Marketing Guidelines for 2019 now allow brokers to schedule future appointments during educational events. You may also hand out business cards and contact information to attendees. But brokers are still prohibited from distributing enrollment forms and any type of marketing materials at educational events.

Educational Events, Section 50.1, now reads:

“50.1 – Educational Events
42 CFR §§ 422.2262, 422.2268(b)(7),(8), and (11), 423.2262, 423.2268(b)(7),(8), and (11)
Educational events are designed to inform beneficiaries about Medicare Advantage, Prescription Drug, or other Medicare programs. Educational events:

- Must be explicitly advertised as educational;
- May be hosted in a public venue by the Plan/Part D sponsor or an outside entity;
- May include communication activities and distribution of communication materials;
- May answer beneficiary initiated questions;
- 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);
- Must not include marketing or sales activities or distribution of marketing materials or enrollment forms; and
- May not conduct a marketing/sales event immediately following an educational event in the same general location (e.g., same hotel).”

You Can Ask for Referrals During a One-on-One Appointment.

There is no longer language preventing you from asking for referrals during one-on-one appointments. Just remember: You are still required to fill out a Scope of Appointment (SOA) form before any one-on-one appointments where marketing activities will ensue.

Personal/Individual Marketing Appointments, Section 50.3, now reads:

“50.3 – Personal/Individual Marketing Appointments
42 CFR §§ 422.2268(b)(3-5),(11), 423.2268(b)(3-5) and (11)
Scope of Appointment (SOA) parameters (and documentation) are required for all one-on-one appointments, regardless of venue (e.g., home, telephone). During these appointments, discussions may only concern previously agreed upon plan products documented in the SOA, and may only market health-related products, and not, for example, annuities or life insurance. Individuals may not solicit/accept enrollment applications for a January 1 effective date until
October 15 of the preceding calendar year, unless the beneficiary is entitled under another enrollment period.”

Required Disclaimers, and Their Location, Have Changed. (And Some Are Gone)

Disclaimers are now located in Appendix 2. They resemble the 2018 Appendix format for disclaimers, but much of the language has been shortened or simplified. Brokers may also notice that some required disclaimers from the past years are no longer present:

- Disclaimers about sales persons being present on advertisements and invitations to sales/marketing events are not in the 2019 MCMG.
  - Brokers can erase the following disclaimers from their materials:
    - “A sales person will be present with information and applications.”
- You can finally stop including “Marketing” in email subject lines.
  - Brokers can erase the following disclaimer from their email subject lines:
    - “Marketing”
- Advertising pieces don’t have to state that they are…advertising pieces.
  - Brokers can erase the following disclaimer from their materials:
    - “This is an advertisement”
- Brokers sending non-health and non-wellness information can also stop stating that these pieces are non-health and non-wellness.
  - Brokers can erase the following disclaimer from their materials:
    - “Non-health or non-plan related information”
- You do not have to state the Medicare has not approved of your communications materials.
  - Brokers can erase the following disclaimer from their materials:
    - “Medicare has neither reviewed nor endorsed this information.”

If you are emailing your client list to invite them to an open house you’re having at a local doctor’s office. The email does not include any specific plan information, so it can be considered a communication rather than marketing. For this email, you would not have to include the word “marketing” in the subject line of your email.

Alternatively, if you were sending out direct mail, the same four disclaimers would still need to be included somewhere on the mail piece.

Disclaimers are not required on the following material types:

- ID cards
- Banners and banner-like ads
- Envelopes
- Outdoor advertising
What Medicare Marketing Rules Are New?

The 2019 Medicare Communications and Marketing Guidelines is a complete re-working of the MMGs we’re all used to. Old and new guidance is organized in areas unfamiliar to brokers. Here are a few of those new sections that specifically concern brokers:

- Communications and Marketing Definitions
- Prohibition of Open Enrollment Period Marketing
- Agent/Broker Activities, Oversight, and Compensation Requirements

‘Communications’

Section 20 of the 2019 Medicare Communications and Marketing Guidelines clearly defines communications and marketing, which are determined both by the intent and content of the message.

- “Communications means activities and use of materials to provide information to current and prospective enrollees.”
- Marketing, on the other hand, “includes activities and use of materials that are conducted by the Plan/Part D sponsor with the intent to draw a beneficiary’s attention to a MA plan or plans and to influence a beneficiary’s decision-making process when selecting a MA plan for enrollment or deciding to stay enrolled in a plan (that is, retention-based marketing). Additionally, marketing contains information about the plan’s benefit structure, cost sharing, and measuring or ranking standards.”

What does this mean for brokers?

If your content does not fall within CMS’ definition of marketing, you do not have to follow CMS marketing guidelines. However, the communication guidelines still apply and AlohaCare must review any communications prior to use. For example: emails, fliers, or a Facebook post about an upcoming educational event you’re hosting would not need to be reviewed because the intent is to provide information — not sell a specific plan.

Marketing content, or content that includes plan details or the intent to influence a beneficiary’s purchase, does have to follow CMS’ Medicare Marketing Guidelines for 2019. For example, a broker creates a brochure that has the following statement: “I can help you find a $0 premium plan in your area.” This material would be considered marketing material because it is trying to draw an enrollee’s attention to a plan and mentions a specific amount. This material would have to be reviewed and approved.
Communications and Marketing Definitions, Section 20 and subsequent defining subsections, read:

“20 – Communications and Marketing Definitions
42 CFR §§ 422.2260, 423.2260

Communications means activities and use of materials to provide information to current and prospective enrollees. This means that all activities and materials aimed at prospective and current enrollees, including their caregivers and other decision makers associated with a prospective or current enrollee, are “communications” within the scope of the regulations at 42 C.F.R. Parts 422, 423 and 417.

Marketing is a subset of communications and includes activities and use of materials that are conducted by the Plan/Part D sponsor with the intent to draw a beneficiary’s attention to a MA plan or plans and to influence a beneficiary’s decision-making process when selecting a MA plan for enrollment or deciding to stay enrolled in a plan (that is, retention-based marketing).

Additionally, marketing contains information about the plan’s benefit structure, cost sharing, and measuring or ranking standards.

However, CMS excludes materials that might meet the definition of marketing based on content, but do not meet the intent requirements of marketing. Additionally, CMS excludes certain required materials (as outlined under section 100), and reserves the ability to exclude additional materials based on their use or purpose.

The MCMG discusses requirements applicable to all communication activities and materials, as well as additional requirements only applicable to marketing activities and materials. All marketing, unless otherwise noted, must adhere to the communication requirements.

20.1 – Factors for Activity and Material Determination
42 CFR §§ 422.2260, 422.2262, 422.2268, 423.2260, 423.2262, 423.2268

As outlined above, communication activities and materials are distinguished from marketing activities and materials based on both intent and content.

Intent – the purpose of marketing activities and materials is to draw a prospective or current enrollee’s attention to a plan or group of plans to influence a beneficiary’s decision when selecting and enrolling in a plan or deciding to stay in a plan (retention-based marketing).

Content – based on the exclusions in the definition of marketing and marketing materials and the type of information that would be intended to draw attention to a plan or influence a beneficiary’s enrollment decision, marketing activities and materials include:

- Information about benefits or benefits structure;
- Information about premiums and cost sharing;
• Comparisons to other Plan(s)/Part D sponsor(s);
• Rankings or measurements in reference to other Plan(s)/Part D sponsor(s); and/or
• Information about Star Ratings

To identify marketing activities and materials, CMS will evaluate both the intent and content of the activities and materials to determine if the definition of marketing is met.

Examples:

1. A flyer reads “Swell Health is now offering Medicare Advantage coverage in Nowhere County. Call us at 1-800-SWELL-ME for more information.”

   Marketing or Communication? Communication. While the intent is to draw a beneficiary’s attention to Swell Health, the information provided does not contain any marketing content.

2. A billboard reads “Swell Health Offers $0 Premium Plans in Nowhere County”

   Marketing or Communication? Marketing. The advertisement includes both the intent to draw the viewer’s attention to the plan and has content that mentions zero-dollar premiums being available.

3. A letter is sent to enrollees to remind them to get their flu shot. The body of the letter says, “Swell Health enrollees can get their flu shot for $0 copay at a network pharmacy…”

   Marketing or Communication? Communication. While the letter mentions cost sharing, the intent is not to steer the reader into making a plan selection or to stay with the Plan, but rather to encourage existing enrollees to get a flu shot. The letter contains factual information about coverage and was provided only to current enrollees.

Marketing During OEP Is Limited.

Section 40.7 clarifies what brokers can and cannot do during the Medicare Open Enrollment Period (January 1 – March 31). In short, brokers cannot knowingly (or intentionally) market to Medicare Advantage or Part D enrollees during OEP. However, brokers can:

• Fulfill beneficiaries’ requests for:
  o Information on the OEP
  o One-on-one appointments
  o Marketing materials
• Continue marketing for other enrollment opportunities (such as age-ins and SEPs)

Prohibition of Open Enrollment Period Marketing, Section 40.7, reads:
“40.7 – Prohibition of Open Enrollment Period Marketing” 42 CFR §§ 422.2268(b)(10), 423.2268(b)(10)
Plans/Part D sponsors are prohibited from knowingly targeting or sending unsolicited marketing materials to any MA enrollee or Part D enrollee during the continuous Open Enrollment Period (OEP) (January 1 to March 31). “Knowingly” takes into account the intended recipient as well as the content of the message.

During the OEP, Plans/Part D sponsors may:

- Conduct marketing activities that focus on other enrollment opportunities including but not limited to:
  - Marketing to age-ins (who have not yet made an enrollment decision),
  - Marketing by 5-star plans regarding their continuous enrollment SEP, and
  - Marketing to dual-eligible and LIS beneficiaries who, in general may make changes once per calendar quarter during the first nine months of the year.
- Send marketing materials when a beneficiary makes a proactive request
- At the beneficiary’s request, have one-on-one meetings with a sales agent
- At the beneficiary’s request, provide information on the OEP through the call center

During the OEP, Plans/Part D Sponsors may not:

- Send unsolicited materials advertising the ability/opportunity to make an additional enrollment change or referencing the OEP
- Specifically target beneficiaries who are in the OEP because they made a choice during Annual Enrollment Period (AEP) by purchase of mailing lists or other means of identification
- Engage in or promote agent/broker activities that intend to target the OEP as an opportunity to make further sales
- Call or otherwise contact former enrollees who have selected a new plan during the AEP

For more information on the OEP, please reference to Chapter 2 – Medicare Advantage Enrollment and Disenrollment of the Medicare Managed Care Manual or Appendix 4 to access the CMS Eligibility and Enrollment Guidance link.”

You Can Find Broker-Specific and Compensation Rules in One New Location.

This new section combines much of the broker-related information that was previously scattered throughout the previous MMGs. Some wording has slightly changed, like the use of “may” rather than “must” for initial and renewal compensation. However, much of the content (and implications for brokers) remains the same. Here’s a list of the topics within this section:

- Agent Requirements (Section 110)
- Permitted Agent Activities (Section 110.2)
- Plan/Part D Sponsor Oversight (Section 110.3)
- Compensation Applicability and Definitions (Section 110.4)
- Plan/Part D Sponsor Compensation Reporting Requirements (Section 110.5)
- Compensation (Section 110.6)
- Initial Compensation (Section 110.6.1)
- Renewal Compensation (Section 110.6.2)
- Referral/Finder’s Fees (Section 110.6.3)
- Paying Compensation (Section 110.6.4)
- Paying Initial Compensation (Section 110.6.5)
- Paying Renewal Compensation (Section 110.6.6)
- Other Compensation Scenarios (Section 110.6.7)
- Compensation Recovery Requirements (Charge-backs) (Section 110.7)
- Rapid Disenrollment (Section 110.7.1)
- Other Compensation Recovery (Section 110.7.2)
- Payments Other Than Compensation (Section 110.8)