



AWHIB

The Association of Web-Based Health Insurance Brokers

March 7, 2022

Ms. Chiquita Brooks-LaSure
Administrator
Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-4192-P
P.O. Box 8016
Baltimore, MD 21244-8016

Submitted electronically via www.regulations.gov

Re: Medicare Program; Contract Year 2023 Policy and Technical Changes to Medicare Advantage and Medicare Prescription Drug Benefit Programs —AWHIB Comments

Dear Administrator Brooks-LaSure:

On behalf of the Association of Web-Based Health Insurance Brokers (AWHIB) and its member companies, we appreciate the opportunity to comment on CMS-4192-P, Medicare Program; Contract Year 2023 Policy and Technical Changes to the Medicare Advantage and Medicare Prescription Drug Benefit Programs (CMS-4192-P). AWHIB is a trade association of web-broker entities (WBEs) that have signed agreements with the Centers for Medicare and Medicaid Services (CMS) and are currently leveraging the Federally-facilitated Exchange's (FFE) Direct Enrollment and Enhanced Direct Enrollment application programming interfaces (APIs). Several of AWHIB's members also actively assist Medicare beneficiaries with selection of, and enrollment into, Medicare Advantage plan and Part D prescription drug benefit plan coverage that best meet their needs. AWHIB collaborates with consumers, issuers, regulators, lawmakers, and other industry groups to continually develop technologies and enrollment strategies that provide Americans with access to health insurance products and services.

Based on a review of the proposed rule, AWHIB understands that CMS is concerned with certain lead generation activities conducted by third parties and resulting confusion caused to beneficiaries. AWHIB supports efforts to ensure that such third parties, their activities and their materials do not cause beneficiary confusion. However, AWHIB is concerned that the proposed rule goes far beyond its stated purpose and is duplicative of existing oversight already in place for plans, agents and brokers and their downstream and related entities. As a result, AWHIB requests the Department consider the following recommendations and perspectives as it finalizes the proposed rule.

Definition of Third-Party Marketing Organization (42 CFR §§ 422.2260 and 423.2260)

AWHIB recommends that CMS narrow the definition of Third-Party Marketing Organizations to Exclude Agents and Brokers and Focus on Third Party Lead Generators.

CMS proposes to define Third-Party Marketing Organizations (TPMOs) in §§ 422.2260 and 423.2260§ as organizations that are compensated to perform lead generation, marketing, sales and enrollment related functions as part of the chain of enrollment. The definition includes first tier, downstream or related entity (FDRs), and other entities that provide services to MA or Part D plans or their FDRs. CMS indicates that it has seen an increase in marketing-related complaints from beneficiaries directly attributable to TPMOs and believes that the increase in complaints is attribute to misleading third-party advertising.

AWHIB shares CMS’ concern about misleading advertising and recognizes that CMS intends to prevent and stop the actions of “bad actors.” However, AWHIB members believe the proposed TPMO definition is overly broad and will potentially lead to duplicative and/or conflicting requirements for agents and brokers. The proposed TPMO definition includes not only third-party lead generating firms, but also agents and brokers.

AWHIB recommends that CMS more narrowly define TPMOs to focus solely on third-party lead generating firms, and not agents and brokers, who are already subject to oversight requirements as first tier entities. Their inclusion in the TPMO definition would unnecessarily duplicate and even potentially conflict with existing requirements. In the preamble, CMS refers to lead generating activities that have generated complaints and have been potentially misleading to beneficiaries. The focus of CMS’ TPMO concerns appears to be on unlicensed entities that are not already subject to direct oversight by the plans, and that are conducting lead generation activities that potentially mislead beneficiaries. Consistent with this focus, the TPMO definition should be narrowed to those unlicensed third-party entities conducting lead generating activities. AWHIB recommends that agents and brokers be removed from the TPMO definition and that the definition be focused on third-party organizations conducting lead generating activities.

TPMO Standardized Disclaimer (42 CFR §§ 422.2267(e)(41) and 423.2267(e)(41))

AWHIB believes that the TPMO standard disclaimer is unnecessary and should not be required, or the disclaimer should be substantially revised and, if required to be provided on a sales call be provided at the time of the Scope of Appointment. CMS proposes to require a standardized “Third-party marketing organization disclaimer” that reads “We do not offer every plan available in your area. Any information we provide is limited to the plans we do offer in your area. Please contact Medicare.gov or 1-800-MEDICARE to get information on all of your options.” CMS proposes that the MA organization will be responsible for ensuring that the disclaimer, among other things, be displayed prominently on the TPMO’s website and marketing materials, including all print materials and TV ads, and that it be conveyed to a beneficiary within the first minute of any “sales call.” This disclaimer would be required to be used by any TPMO that “sells plans on behalf of more than one MA organization unless the TPMO sells all commercially available MA plans in a given service area.”

AWHIB has several concerns with this provision. First, the proposed disclaimer is not necessarily addressing the stated concern, which is beneficiary confusion. Certainly, the last sentence, in which the third party is recommending that the beneficiary “please contact

Medicare.gov or 1-800-MEDICARE to get information on all of your options” is not effectively serving to eliminate confusion. Notably, the disclaimer is substantially similar to a disclaimer that CMS previously required be used with third-party materials. That disclaimer read “For a complete list of available plans please contact 1-800-MEDICARE (TTY users should call 1-877-486-2048), 24 hours a day / 7 days a week or consult www.medicare.gov.” CMS recently chose to eliminate the requirement to provide that disclosure. To the extent the disclaimer is required, we suggest that CMS consider only requiring the first two sentences, or simply advising the beneficiary that all plans may not be available through them.

Furthermore, it is not clear why a TPMO would be required to tell the beneficiary to contact 1-800-MEDICARE or medicare.gov for all options only where a TPMO sells plans on behalf of multiple MA plans, but yet it would not be required for TPMOs that only sell on behalf of one plan or by MA plans themselves. In both cases, the TPMO cannot offer the beneficiary all options that may be available. Yet, a beneficiary who is interacting with a plan itself or with a captive agent for a plan and who is only being offered plans from one organization would not hear the disclaimer informing the beneficiary that they can contact 1-800-MEDICARE or medicare.gov for all available options. On the other hand, a beneficiary interacting with an independent broker who offers most, but not all, available options from multiple plan organizations would hear this information. This result seems directly opposed to the intended purpose.

Second, requiring the disclaimer to be verbally provided to the beneficiary within the first minute of any sales call would have several unintended and undesired consequences. Requiring any disclaimer to be read in the first minute of a sales call would be highly disruptive to the interaction between the beneficiary and the agent. In particular, directing all beneficiaries, at the beginning of every sales call, to contact Medicare.gov or 1-800-MEDICARE, could result in unprecedented levels of call traffic to Medicare.gov and/or 1-800-MEDICARE and it is unclear if those mediums have the capacity to support such traffic. It also undercuts the recognized and valuable role of private agents and brokers within the Medicare system.

More importantly, requesting that a beneficiary contact Medicare.gov or 1-800-MEDICARE for more plan choices does not necessarily serve the best interests of the beneficiaries in all cases and, in some cases, could potentially harm them. If beneficiaries go to Medicare.gov or 1-800-MEDICARE instead of working with an agent or broker, will not be able to access the added valuable services that are provided by agents and brokers. Agents and brokers often provide comprehensive needs analysis, which take into account multiple factors and provide valuable decision support tools. The beneficiary also would be deprived of the various post-enrollment services that many agents and brokers provide at no additional cost. Further, it does not consider that, in the employer directed individual insurance context, employers have already carefully selected private exchanges based on independence, availability of choice, demonstrated ability to independently counsel retirees and aid them in the selection of an appropriate plan, and in some cases, ongoing advocacy services. For these reasons, telling beneficiaries to please call 1-800-MEDICARE or visit Medicare.gov could actually result in harm to some beneficiaries.

Our suggestion is that CMS not require the disclaimer at all on sales calls. To the extent any portion of the disclaimer is required on a sales call, we would suggest that it be made at the time of the Scope of Appointment and not within the first minute of a call.

Concerns About Use of the Statement “We’ll Help Pick the Right Plan for You”

AWHIB recommends clarifying that the statement “We’ll Help Pick the Right Plan for You” may be appropriate based on context. In the preamble discussion related to the proposed TPMO standard disclaimer requirement, CMS indicates that statements such as “we’ll help pick the right plan for you” are misleading because “they generally mean that the TPMO’s help is limited to the plans they offer.” If used as a blanket statement without presenting specific plans, AWHIB concurs that the statement might be misconstrued. However, this statement is not always misleading and can be accurate, depending on the context in which it is presented. When making this statement in a context that makes it clear that the help being provided is limited to the plans being offered, it should be permitted without the need for an additional disclaimer. For example, when the statement is made in an advertisement that lists or displays all of the plans being offered, the statement is accurate and a disclaimer is unnecessary to avoid being misleading. AWHIB recommends clarifying that agents and brokers may continue to use the statement in an appropriate context where it is, in fact, not misleading.

Requirement to Report Staff Disciplinary Actions (42 CFR §§ 422.2274(g)(2)(iii)

AWHIB recommends removing the requirement for monthly reporting of staff disciplinary actions to the health plan. As a part of the plan oversight of TPMOs, CMS proposes that TPMOs report to plans on a monthly basis any staff disciplinary actions associated with Medicare beneficiary interaction. This would be a highly burdensome requirement, particularly for larger agencies to track across all of their own employees plus any downstream TPMOs, with limited benefit to the health plan. Plans already have reporting requirements that obligate agents and brokers to report to plans certain events, such as when an agent is terminated for cause or when a customer complains. Without any direction as to what carriers are supposed to do with this additional information related to disciplinary actions, it is not clear how this requirement will serve to reduce beneficiary confusion. We recommend removing this provision.

Closing

AWHIB appreciates the opportunity to offer comments on the proposed rule. We look forward to continuing to partner with CMS and states to enroll consumers in health insurance coverage across the nation.

Sincerely,

The Association of Web-Based Health Insurance Brokers