Contract Year 2023 Medicare Advantage Marketing Policies – Frequently Asked Questions

On May 9, 2022, CMS published its contract year 2023 Medicare Advantage (MA) (Part C) and Prescription Drug Benefit (Part D) final rule (87 FR 27704), wherein CMS established certain marketing and communications requirements for the Part C and Part D programs. These rules were designed to address complaints of inappropriate marketing that CMS received from beneficiaries and their caregivers. In response to a significant increase in marketing-related complaints, CMS staff reviewed numerous recordings of calls from different marketing entities, including individual agents and brokers, as well as larger call centers. The agents failed to provide the beneficiary with the necessary information or provided inaccurate information to make an informed choice for more than 80 percent of the calls reviewed. Examples included beneficiaries being told that if their medication was not on the formulary, the doctor could tell the plan and the plan would simply add it; or incorrectly stating that "nothing would change" when beneficiaries asked if their current health coverage would stay the same.

As 2023 annual open enrollment begins, CMS has received questions regarding these changes, including , the requirement related to recording calls between beneficiaries and Third-Party Marketing Organizations (TPMOs) and the requirements related to the TPMO disclaimer.

Recording Calls: Which Calls?

Who does this requirement apply to?
The requirement applies to all organizations and individuals that fall under the definition of TPMO as defined in 42 CFR §§ 422.2260 and § 423.2260. The definition of TPMO includes all organizations and individuals, including independent agents and brokers, who are compensated to perform lead generation, marketing, sales, and enrollment related functions as a part of the chain of enrollment. TPMOs may be a first tier, downstream or related entity (FDRs).

Does this new requirement to record calls apply only to call centers?
No. This requirement applies to all organizations and individuals that fall under the definition of TPMO as defined in 42 CFR §§ 422.2260 and § 423.2260.

Does the requirement to record calls pertain to captive agents?
Yes. Captive agents fall under the definition of a TPMO as defined in 42 CFR §§ 422.2260 and § 423.2260.

Is it now a requirement for an agent to record all calls with enrollees, even calls that are outside the scope of the chain of enrollment?
Yes. A plan must ensure that all calls between a TPMO and a beneficiary are recorded.

Does this requirement to record calls apply to both inbound and outbound calls?
Yes.

Are Zoom calls and conversations through other virtual platforms required to be recorded?
Yes. Zoom calls and other calls using virtual presence technology between a Medicare beneficiary and an organization or individual who meets the definition of a TPMO must be recorded.

Does the requirement to record calls apply to in-person interactions?
No. CMS does not require recording of in-person interactions.

We have received multiple questions from agents who want to know what they should do when a beneficiary is refusing to have the call recorded, but still want to enroll in our plan. Are there exceptions to the call recording requirement if a beneficiary refuses to be recorded?
No. There are no exceptions to this requirement. If a beneficiary declines to be recorded, the call must end.

Can an agent complete a sale over the phone if the enrollee declines to be recorded?
No. If a beneficiary declines to have their call with a TPMO recorded, the sales agent must end the call.

Recording Calls: When and How?

When do we have to start recording calls between TPMOs and beneficiaries?
The recording requirement went into effect on October 1, 2022, and it applies to enrollments made for a January 1, 2023 effective date and beyond.

What technology or mechanism should we use to record calls between TPMOs and beneficiaries?
CMS cannot recommend a particular brand or mechanism. TPMOs should work with the plans for whom they sell to determine the method/format of recording and the mechanism by which the recordings are maintained.

We never had to record calls like this before. We are not set up to record calls with beneficiaries. How does CMS expect us to do this?
The requirement to record telephonic enrollments has been in place for some time. If a TPMO engages in telephonic enrollment, they would have been required, under existing policy, to record calls with beneficiaries prior to the implementation of this regulatory requirement. As such, we would expect TPMOs to leverage their existing process for recording telephonic enrollments when recording all calls with beneficiaries.

Many smaller agents/brokers do not have the infrastructure to record conversations, placing them at a severe disadvantage. What flexibility is there for smaller agents/brokers to adhere to the regulation?
CMS is treating all agents and brokers the same. Smaller agents and brokers are not exempt from any requirement based on size. CMS does not believe it is appropriate, or even possible, for the purpose of applying regulatory requirements, to distinguish between independent agents who work for a "large call center" versus those agents who do not, as many of these "independent" agents are associated with an FMO, which may employ hundreds or thousands of agents. And

those FMOs may have contracts with both clearinghouses/lead generators as well as independent agents.

As a reminder, all agents conducting telephonic enrollments should already have had recording mechanisms in place. We recommend smaller agents/brokers that are concerned about their ability to record their calls with beneficiaries speak to the plans with whom they contract to get assistance in recording and maintaining calls.

Isn't the recording of calls with beneficiaries prohibited by HIPAA?
Uses and disclosures of protected health information are permitted under the HIPAA Privacy Rule if they are "required by law" (45 CFR 164.103, 164.512(a)). For any concerns about this requirement, CMS recommends reaching out to the U.S. Department of Health and Human Services Office for Civil Rights ((https://www.hhs.gov/ocr/about-us/contact-us/index.html).

Recording Calls: Retention?

Do these recorded calls between TPMOs and beneficiaries fall under the ten-year storage requirements for other documentation as outlined in Chapter 11 of the Medicare Managed Care Manual?
It depends on the nature of the call. The CMS requirement to maintain certain records for ten years applies to all calls between beneficiaries and plans, including TPMOs, that pertain to the sales and enrollment processes. If a recorded call does not apply to either process (e.g., the beneficiary is calling to make a sales appointment or to find out the times and locations of sales meeting events, or an enrollee is calling to update an ID card), the plan does not need to ensure that the recording is retained. If, however, such a call becomes a sales call at any point (e.g., if the beneficiary begins asking about products), then the recording of the call would need to be retained.

Who is responsible for retaining the recordings of calls between TPMOs and beneficiaries?
CMS holds plans responsible for making sure that the recordings of calls between TPMOs and beneficiaries are recorded and that the recordings are maintained. Plans and TPMOs should arrange for recording and storage of the recordings.

TPMO Disclaimer: Which Materials?

Is the TPMO disclaimer required on all materials, or only the same types of materials that meet the marketing requirements listed in the Medicare Communications and Marketing Guideline's (MCMG) "Definitions (42 CFR §§ 422.2260, 423.2260)"? For example, is the disclaimer required on tv ads, text messages, banner ads, social media, etc.?
CMS requires the disclaimer to be included "in any marketing materials, including print materials and television advertisements, developed, used, or distributed by the TPMO" (42 CFR 422.2267(e)(41)(v); 42 CFR 423.2267(e)(41)(v)). To the extent that a social media post meets the definition of "marketing" as provided in 42 CFR 422.2260 and 423.2260, the TPMO must include the disclaimer in the social media post.

Is the TPMO Disclaimer required on materials created by the plan for a broker to use and distribute to Medicare beneficiaries?

No. If the document was developed by the plan (e.g., Summary of Benefits) and the agent is using exactly as provided by the plan, the disclaimer is not required. If the agent alters the document, the disclaimer would need to appear.

Could the plan use a separate, one-page insert with the above disclaimer to meet the requirements of the TPMO disclaimer (e.g., an insert would be included as part of an enrollment kit)?
No. If the agent has modified the plan document then the disclaimer must appear on the actual material.

TPMO Disclaimer: Existing Materials?

Typically, CMS does not require plans to resubmit existing plan materials (set to expire at the end of the plan year) to CMS when there has been a disclaimer addition/change. The disclaimer appears to apply to the marketing of 2023 plans and forward, specifically all materials for use beyond October 1, 2022. Could CMS please confirm?
The TPMO disclaimer is effective October 1, 2022 for all materials/sales interactions for enrollment effective dates of January 1, 2023 and beyond.

Does CMS expect plans to add the hours of operation to the disclaimer/prominently include it at least once elsewhere, or is this provision not applicable to the language of the disclaimer?
No. Since the TPMO disclaimer is a standardized disclaimer we are not requiring the hours of operation for 1-800-MEDICARE to be listed.