

DEPARTMENT OF HEALTH & HUMAN SERVICES  
Centers for Medicare & Medicaid Services  
7500 Security Boulevard  
Baltimore, Maryland 21244-1850



**MEDICARE PARTS C AND D OVERSIGHT AND ENFORCEMENT GROUP**

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May 26, 2016

Mr. Vivek Garipalli  
Chief Executive Officer  
Clover Health  
Harborside Financial Center  
Plaza 10 Suite 803  
Jersey City, NJ 07311

Re: Notice of Imposition of Civil Money Penalty for Medicare Advantage-Prescription Drug  
Contract Number: H5141

Dear Mr. Garipalli:

Pursuant to 42 C.F.R. § 422.752(c)(1), § 422.760(b), § 423.752(c)(1), and § 423.760(b), the Centers for Medicare & Medicaid Services (CMS) is providing notice to Clover Health (Clover) that CMS has made a determination to impose a civil money penalty (CMP) in the total amount of **\$106,095** for Medicare Advantage-Prescription Drug (MA-PD) Contract Number: H5141.

CMS has determined that Clover engaged in marketing activities during the Contract Year (CY) 2016 Annual Election Period (AEP) that misled or confused potential enrollees about their ability to always receive covered services from any out-of-network (OON) provider, and that Clover failed to correct the misleading statements after repeated notifications from CMS. This conduct is in violation of 42 C.F.R. §§ 422.2264(d), 422.2268(e), 423.2264(d) and 423.2268(e). Clover also failed to ensure that its website contained all necessary information to enable potential enrollees to make informed decisions about their Medicare health and prescription drug options for the 2016 plan benefit year in violation of 42 C.F.R. §§ 422.2264(a), (d), and (e); 422.2268(e) and (o); 423.2264(a), (d), and (e); 423.2268(e) and (o); 422.2262(c); and 423.2262(c).

**Summary of Noncompliance**

In advance of the CY 2016 AEP, Clover developed and utilized marketing and advertising materials that contained inaccurate statements regarding the extent of the plan's OON benefit. Specifically, Clover's materials incorrectly stated that OON providers and facilities participating in Medicare are obligated to accept Clover enrollees. CMS initially notified Clover executives of the misleading language issue during a telephone conversation on November 12, 2015. Clover acknowledged CMS' concerns and stated that appropriate actions would be taken to resolve the

issues. CMS subsequently determined that Clover had not updated its materials, so it sent a letter to Clover on November 23, 2015 warning that CMS would consider imposing an enforcement action if the materials were not immediately updated. The letter instructed Clover to make a clear distinction between in-network and OON providers and facilities in all of its member materials and communications, including its member identification cards, all advertising, website content, directories, and customer service scripts. On November 24, 2015, Clover notified CMS that it had corrected its member identification cards, online directories, and customer service scripts.

CMS conducted a secret shopper operation on December 5, 2015 at an insurance event where Clover brokers/agents told the secret shopper that, under Medicare law, an OON provider must accept any beneficiary who is enrolled in Clover's plan. The agents/brokers also distributed sample member identification cards displaying the misleading OON provider statement that Clover had previously stated it had corrected.

CMS subsequently reviewed Clover's website and discovered similar misleading references and additional marketing violations, such as, failing to include a disclaimer that an industry award was not given and/or endorsed by Medicare, failing to display CMS' Star Rating of the plan, failing to notify users that they were leaving Clover's website when clicking on links to external articles embedded within the site, and inappropriately modifying a standardized document. As a result, CMS sent a letter to Clover on December 9, 2015 requiring it to immediately correct the manner in which its plan network was being portrayed and the other violations discovered on Clover's website. Clover did not resolve the deficiencies until December 18, 2015, which was 10 days after the AEP closed.

CMS received a high volume of complaints in January and February 2016 from new Clover enrollees who were denied services by OON providers after being told by Clover that they could see any provider they wished. CMS provided the enrollees who filed the complaints with a Special Election Period, and required Clover to inform all of its enrollees that OON providers are under no obligation to accept Clover's Medicare Advantage coverage.

### **Relevant Part C and Part D Marketing Requirements**

*(42 C.F.R Part 422, Subpart V; 42 C.F.R. Part 423, Subpart V; see also IOM Pub. 100-16, Medicare Managed Care Manual, Chapter 3)*

Medicare Advantage Organizations (MAOs) and Prescription Drug Plan Sponsors are required to comply with a number of marketing requirements based on statute, regulation, and program instruction as part of their contractual agreement with CMS to provide health and drug benefits to Medicare beneficiaries. The marketing standards and guidance relevant to Clover's violations obligate MAOs and Sponsors to adhere to the following requirements:

- Medicare beneficiaries are entitled to all the information necessary to make fully informed decisions regarding their health and drug coverage for the upcoming plan year. As a result, MAOs and Sponsors are prohibited from engaging in marketing and advertising activities that are misleading or confusing, or otherwise misrepresent the Medicare products they are selling. This includes the distribution of marketing materials that contain terminology or statements that are materially inaccurate, misleading, or misrepresent plan benefits. 42 C.F.R. §§ 422.2264(a), 422.2268(e), 423.2264(a),

423.2268(e); see also IOM Pub. 100-16, Medicare Managed Care Manual, Chapter 3, § 40.4.

- MAOs and Sponsors must adhere to restrictions when referencing studies, statistical data, or non-CMS awards in their marketing materials. If a marketing piece cites a non-CMS award, the MAO or Sponsor must indicate that the award was not given by CMS, state the plan's official CMS Star Rating, and give equal prominence to the Medicare Star Rating relative to the other awards mentioned. 42 C.F.R. §§ 422.2264(a), 422.2268(e), 423.2264(a), 423.2268(e); see also IOM Pub. 100-16, Medicare Managed Care Manual, Chapter 3, § 40.3.
- MAOs and Sponsors are required to provide translation services to non-English speaking or limited-English proficient Medicare beneficiaries in their call centers. To further that objective, MAOs and Sponsors are required to post the Multi-Language Insert on their websites. The Multi-Language Insert is a standardized document developed by CMS that contains a general statement about the availability of free interpreter services in 15 different languages. MAOs and Sponsors are prohibited from altering the Multi-Language Insert, except to add additional languages. 42 C.F.R. §§ 422.2264(e), 423.2264(e); see also IOM Pub. 100-16, Medicare Managed Care Manual, Chapter 3, § 30.5.1.
- MAOs and Sponsors must ensure that their websites and other social/electronic forums are in compliance with CMS regulations and implementing guidance. MAOs and Sponsors must post pertinent documents about their Medicare plans on their websites. For example, by September 30<sup>th</sup> of every year, the Annual Notice of Change and Evidence of Coverage for the next calendar year should be posted. Additionally, if links to external websites are embedded within the Medicare portion of the site, the website must notify users that they are being taken to an external site when clicking on the links. 42 C.F.R. §§ 422.111(h)(2), 422.2264(a), 422.2268(e), 423.128(d)(2), 423.2264(a), 423.2268(e); see also IOM Pub. 100-16, Medicare Managed Care Manual, Chapter 3, § 100.1.

## **Violations Related to Marketing Requirements**

CMS identified violations of the marketing requirements that resulted in Clover's enrollees being misled about the extent of their benefits and/or unable to make fully informed decisions regarding their Medicare health and drug coverage for CY 2016. Clover's violations include:

- Clover continued to engage in marketing activities that misled or confused beneficiaries about the plan's OON benefit after repeatedly being told by CMS to correct the issues. As a result, Clover's new enrollees<sup>1</sup> were misled (or substantially likely to have been misled) about the extent of Clover's benefits for CY 2016. These issues violate 42 C.F.R. §§ 422.2264(d), 422.2268(e), 423.2264(d) and 423.2268(e); see also IOM Pub. 100-16, Medicare Managed Care Manual, Chapter 3, Section 40.4.

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<sup>1</sup> New enrollees who filed an application to enroll into contract H5141 on or after November 13, 2016.

- Clover’s website did not include a disclaimer indicating that an industry award was not given and/or endorsed by Medicare, state Clover’s official CMS Star Rating, and give equal prominence to the CMS Star Rating relative to other awards mentioned. These issues violate 42 C.F.R. §§ 422.2264(a)(4), 422.2268(e), 423.2264(a)(3), and 423.2268(e); see also IOM Pub. 100-16, Medicare Managed Care Manual, Chapter 3, Section 40.3.
- Clover inappropriately modified the standardized CMS Multi-Language Insert. This issue violates 42 C.F.R. §§ 422.2262(c), 422.2264(a)(4) and (e), 423.2262(c), and 423.2264(a)(3) and (e); see also IOM Pub. 100-16, Medicare Managed Care Manual, Chapter 3, Section 30.5.1.
- Clover did not notify individuals that they were leaving Clover’s website when clicking on links to different websites. This issue violates 42 C.F.R. §§ 422.2264(d), 422.2268(e) and (o), 423.2264(d), 423.2268(e) and (o); see also IOM Pub. 100-16, Medicare Managed Care Manual, Chapter 3, Section 100.1.

### **Basis for Civil Money Penalty**

Pursuant to 42 C.F.R. §§ 422.752(c)(1)(i), 423.752(c)(1)(i), 422.760(b)(2), and 423.760(b)(2), CMS has determined that Clover’s repeated failure to correct the misleading and confusing language in its marketing materials directly adversely affected (or had the substantial likelihood of adversely affecting) enrollees who relied on the misrepresentations when enrolling in Clover’s plan and warrants the imposition of a CMP. Clover substantially failed to:

- Carry out its contract in a manner that is consistent with the efficient and effective administration of Parts C and D (42 C.F.R. §§ 422.510(a)(2) and 423.509(a)(2));
- Comply with the requirements in Subpart V relating to marketing (42 C.F.R. §§ 422.510(a)(4)(viii) and 423.509(a)(4)(v)(A))

Pursuant to 42 C.F.R. §§ 422.752(c)(1)(ii), 423.752(c)(1)(ii), 422.760(c)(1), and 423.760(c)(1), CMS has determined that Clover’s website violations warrant the imposition of a CMP. Clover failed substantially:

- To comply with the marketing requirements in Subpart V or applicable implementing guidance (42 C.F.R. §§ 422.752(a)(11) and 423.752(a)(9))

### **Right to Request a Hearing**

Clover may request a hearing to appeal CMS’s determination in accordance with the procedures outlined in 42 C.F.R. Parts 422 and 423, Subpart T. Clover must send a written request for a hearing to the Departmental Appeals Board office listed below within 60 calendar days from receipt of this notice or by July 26, 2016. The request for hearing must identify the specific issues and the findings of fact and conclusions of law with which Clover disagrees. Clover must also specify the basis for each contention that the finding or conclusion of law is incorrect. The request should be sent to:

Civil Remedies Division  
Department of Health and Human Services  
Departmental Appeals Board  
Medicare Appeals Council, MS 6132  
330 Independence Ave., S.W.  
Cohen Building Room G-644  
Washington, D.C. 20201

A copy of the hearing request should also be sent to CMS at the following address:

John Scott  
Director, Division of Compliance Enforcement  
Centers for Medicare & Medicaid Services  
7500 Security Boulevard  
Baltimore, MD 21244  
Mail Stop: C1-22-06  
Email: John.Scott@cms.hhs.gov

If Clover does not request an appeal in the manner and timeframe described above, the initial determination by CMS to impose a CMP will become final and due on July 27, 2016. Clover may choose to have the penalty deducted from its monthly payment, transfer the funds electronically, or mail a check to CMS. To notify CMS of your intent to make payment and for instructions on how to make payment, please call or email the enforcement contact provided in the email notification.

Please note that further failures by Clover may result in additional applicable remedies available under law, up to and including contract termination, the imposition of intermediate sanctions, penalties, or other enforcement actions as described in 42 C.F.R. Parts 422 and 423, Subparts K and O.

If Clover has any questions about this notice, please call or email the enforcement contact provided in the email notification.

Sincerely,

/s/

Gerard J. Mulcahy  
Director  
Medicare Parts C and D Oversight and Enforcement Group

cc: Reginald Slaten, CMS/ CMHPO/Region II  
Rachel Walker, CMS/ CMHPO/Region II  
Jessica Quesada, CMS/ CMHPO/Region II

John Scott, CMS/CM/MOEG/DCE  
Kevin Stansbury, CMS/CM/MOEG/DCE  
Stephanie Brown, CMS/CM/MOEG/DCE  
Erica Sontag, CMS/CM/MCAG/DSCM