

Q/As

QUESTION 1. Are states preempted from pursuing a Part D plan sponsor or Medicare Advantage organization (MAO):

(A) For a marketing violation in situations where the materials have been approved by CMS pursuant to Federal standards, but the “approved material” violates a State law (e.g., a phone script approved by CMS), or

(B) In situations where a state believes a plan sponsor or MAO may be violating a Part C or D law or the applicable Medicare Marketing Guidelines?

ANSWER: (A) Generally yes. Other than state laws relating to state licensure and solvency requirements for entities, a state law is preempted when it applies to a field of law that Congress intended CMS to regulate under Part C or D. For example, Congress intended CMS to regulate, via Federal laws and guidance, plan sponsors’ marketing activities and materials.

The Social Security Act sets forth standards governing marketing materials and the dissemination of information by Part D plan sponsors and MAO’s offering MA plans. In addition, CMS has issued additional standards governing plans’ marketing and information dissemination activities under 42 C.F.R. §§ 422.80, 422.111, 423.50 and 423.128 and the Medicare Marketing Guidelines

http://www.cms.hhs.gov/PrescriptionDrugCovContra/07_RxContracting_Marketing.asp#TopOfPage). Because Congress clearly intended for CMS to regulate Part D plan sponsors’ and MAOs’ marketing materials, and CMS has affirmatively issued standards regulating such activities, state laws applicable to Part D and MAO plan marketing materials approved by CMS are preempted. Therefore states may not take enforcement action against a Part D plan sponsor or MAO for an alleged violation of any such state marketing law. As a note, CMS encourages Special Needs Plans (SNPs), to coordinate their activities with an affected state, anytime SNP marketing materials mention Medicaid, or how its benefits interface with a state Medicaid program. However, CMS retains the final review authority over all MA and MA-PD marketing materials.

(B) Yes. Consistent with the discussion in §A above, a State would not be permitted to seek an enforcement action against a PartD plan sponsor or MAO for violating Part C or D law or the applicable Medicare Marketing Guidelines. If a Part D sponsor or MAO allegedly engages in a fraudulent or otherwise potentially inappropriate telemarketing activity in violation of the Medicare Marketing Guidelines, CMS would investigate the allegations and, if warranted, take corrective action against the Part D sponsor or MAO. CMS will forward the complaint to the appropriate federal agency for further action. If the Marketing Guidelines rely on a state law to establish a standard relating to a plan and a state believes that a plan sponsor might be violating the state law, the state should contact CMS so that CMS may investigate the alleged violation of the Marketing Guidelines, and, as necessary, take enforcement action against the plan.

Action:

If a state has a concern about a Part D plan's or MAO's marketing materials that were approved by CMS or a plan sponsor's or MAO's marketing activities, we hope that the state will relay its concerns to CMS by contacting CMS's regional office in the region where the state is located. The state representative should ask to speak with the regional account manager for the plan in question. Or the state may forward its concerns or comments to CMS via its web address that was established specifically for states to correspond with CMS. The email address is Medicare_PartC&D_Complaints@cms.hhs.gov.

QUESTION 2. Are Part D and MA plan telemarketers required to meet the requirements of state law? For example some states require that telemarketers be registered with the state. Would this specific requirement apply to all Part D plans?

ANSWER: With respect to licensing, yes. The Medicare Marketing Guidelines, which cover Parts C and D, require that a plan sponsor or MAO use a state licensed individual to perform marketing. Specifically, the Marketing Guidelines state that a "Plan Sponsor must utilize only a state licensed, certified, or registered individual to perform marketing, if a state has such a marketing requirement. This requirement applies to any individual that performs marketing on behalf of a Plan Sponsor, whether as an employee or under contract directly or downstream." CENTERS FOR MEDICARE AND MEDICAID SERVICES, MEDICARE MARKETING GUIDELINES 136 (November 1, 2005 edition). Therefore if a State requires an individual to be licensed, registered or certified to perform marketing then a Part D plan sponsor must only use an individual who is State licensed, registered or certified to market its plan(s). This would apply to all Part D plan sponsors and MAOs offering an MA plan.

As a note, the Medicare Marketing Guidelines discuss CMS's position on state marketing representative appointment laws. We anticipate changes to the language in the November 1, 2005 edition of the Medicare Marketing Guidelines in the 2007 Marketing Guidelines, so please review both the November 1, 2005 edition of the Marketing Guidelines as well as the 2007 Guidelines when they are posted, for further information. Furthermore, it is otherwise important to check CMS's website for updates to the Medicare Marketing Guidelines because the Guidelines are revised from time to time.