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

CENTER FOR DRUG AND HEALTH PLAN CHOICE

MEMORANDUM

DATE: November 10, 2008

TO: Medicare Advantage Organizations
Medicare Advantage-Prescription Drug Organizations
Cost-Based Contractors
Prescription Drug Plan Sponsors
Employer/Union-Sponsored Group Health Plans

FROM: Abby L. Block **/s/**
Director, Center for Drug and Health Plan Choice

SUBJECT: Guidance for marketing requirements re: unsolicited contacts, employer/union group plans, scope of appointments, and other marketing provisions

On September 15, 2008, and October 17, 2008, we released guidance to help the industry implement the new Medicare regulations, Center for Medicare and Medicaid Services 4131-F and Center for Medicare and Medicaid Services 4138-IFC. The guidance addressed important changes for Medicare Advantage, Medicare Prescription Drug Plans and Cost-based plans. In addition, we conducted briefings and answered questions related to implementation of the rules. This memo includes guidance previously included in the October 8 Center for Medicare and Medicaid Services memo that was rescinded on October 24, as well as additional information.

Marketing through unsolicited contacts – Sections 422.2268(d) and 423.2268(d) prohibit plans and their representatives from engaging in direct unsolicited contact with potential enrollees, including outbound calls. Center for Medicare and Medicaid Services has become aware of third-party organizations contacting plans and/or agents, providing incorrect interpretations of our regulation/guidance, and offering services that would, if accepted, put the plan out of compliance with our requirements.

- Third-parties may not make unsolicited MA or PDP marketing calls to beneficiaries (other than to current plan members if contracted by a plan, as described below) to set up appointments with potential enrollees.
- Third-parties may not make unsolicited calls to beneficiaries for non-MA and PDP products (for example, a “benefits compare” meeting) and provide those contacts to plans for ultimate use as an MA or PDP sales appointment.
- Sales of MA and PDP products are subject to our scope of appointment guidance, even if conducted during a sales appointment for a Medicare Supplement plan.

Any plan or its representative that accepts an appointment to sell an MA or PDP product that resulted from an unsolicited contact with a beneficiary regardless of who made the contact will be in violation of the prohibition against unsolicited contacts. Once we become aware of the

violation through our surveillance activities or other mechanisms, we will begin the appropriate compliance actions against the plan. Please see the attached Q&A document for more details.

Contacting existing members – On page 16 of the September 15, 2008, guidance document, we broadly stated that the prohibition against outbound calls included calls by plans to existing members. We would like to clarify that plans continue to be allowed to call their current members for any reason. Examples of allowed contacts include, but are not limited to, calls to members aging-in to Medicare from commercial products offered by the same sponsoring organization and calls to an organization's existing Medicaid plan members to talk about its Medicare products. On page 17, we stated that an agent/broker who enrolled a beneficiary into a plan may call that beneficiary while the beneficiary is a member of that organization. We want to reiterate that agents/brokers can make calls only to the beneficiaries they enrolled into the plan.

Payment of appointment fees – On page 21 of the September 15, 2008, guidance document, we stated that organizations are required to pay any fees associated with appointment laws. It was not our intention to specify who should be responsible for payment of appointment fees. Rather, our intention was to make clear the following: if an agent or broker sells MA and PDP products, that agent or broker must be appointed in accordance with the State appointment law and if there are any fees required as part of the appointment law, those fees must be paid.

Agent testing (85% passing score) – On page 23 of the September 15, 2008, guidance document, we indicated that brokers and agents selling Medicare products starting with plan year 2009 must be trained and tested on the Medicare rules and the specifics of the plans they are selling. We indicated that a passing score was now 85% or greater. To clarify, any broker or agent tested after September 18, 2008, must pass with at least a score of 85%.

Employer/Union group plans – We received a number of questions asking us to clarify which marketing provisions apply to employer/union group plans. The attached table identifies the provisions that do/do not apply to employer/union group plans. Please note that for the agent/broker requirements that do apply, these requirements apply to the transactions between the agent/broker selling the plan to the employer/union. All activities conducted by the employer/union or its designees to enroll individual employees in the plan(s) selected by the employer/union are excluded from these provisions.

Scope of appointments –Because Center for Medicare and Medicaid Services received numerous requests surrounding the format or elements necessary in the Scope of Appointment form, we have created a model Sales Appointment Confirmation Form and a new category code for submission. (Originally released on October 8, 2008, an updated model form is attached to this memo.) When used without modification, this model form may be submitted through File & Use. We strongly encourage all plans to use this model form for consistency and to allow beneficiaries to become familiar with the format and content. Please see the attached Scope of Sales Appointment Instructions document for further information.

Compensation of employed agents - Based on public comments and discussions with the industry, we realize that while our current regulations are relevant to the way independent agents are compensated, the relationship and compensation arrangements between organizations/sponsors and employed agents is very different. We anticipate receiving comments

on this issue during the 60-day public comment period. Until the final regulation is published, we will not enforce the provisions of 422 and 423 (.2274(a) (1 – 3)) for employed agents.

In order to be responsive to your questions about the implementation of these new requirements, we have created a mailbox for questions specific to the Medicare Advantage and Prescription Drug provisions of the Medicare Improvements for Patients and Providers Act (MIPPA) and our new regulations. The email address is: regulationquestions@cms.hhs.gov. Center for Medicare and Medicaid Services will develop answers and distribute the questions and answers to the industry, generally in the form of a cumulative summary.

Additionally, we remind MA organizations and Part D sponsors (Center for Medicare and Medicaid Services Contractors) that they are responsible for the actions of plan representatives including subcontractors and downstream entities like brokers and agents. Center for Medicare and Medicaid Services Contractors cannot delegate the responsibility for ensuring that subcontractors and downstream entities are in compliance with Medicare rules, regulations, and other guidance.

Attached are the following enclosures:

Questions & Answers Related to Marketing Questions
Table Describing the Applicability of Marketing Provisions to Employer / Union Plans
Scope of Sales Appointment Confirmation Form Instructions
Model Scope of Sales Appointment Confirmation Form