



DATE: December 28, 2020

TO: All Medicare Advantage Organizations, Part D Sponsors, and Medicare-Medicaid Plans

SUBJECT: Contract Year 2021 Coronavirus Disease 2019 (COVID-19) Permissive Actions FAQ

These FAQs address continued application of certain enforcement discretion policies and reiterate certain guidance in light of the continuation of the COVID-19 Public Health Emergency (PHE) into 2021.¹

1. Q: Will CMS continue its policy of relaxed enforcement for Medicare Advantage Organizations (MAOs) in connection with the prohibition on mid-year benefit enhancements provided in CY 2021 in connection with the COVID-19 outbreak?

A: Yes. CMS will continue its policy of relaxed enforcement in connection with the prohibition on mid-year benefit enhancements in CY 2021. CMS will continue to relax enforcement of prohibitions on expanded or additional benefits or more generous cost sharing under the conditions outlined in the May 22, 2020 HPMS memorandum, "Information Related to Coronavirus Disease 2019 - COVID-19," when such mid-year benefit enhancements are (1) provided in connection with the COVID-19 outbreak, (2) beneficial to enrollees, and (3) provided uniformly to all similarly situated enrollees. CMS will exercise its enforcement discretion regarding the administration of MAOs' benefit packages as approved by CMS until it is determined that the exercise of this discretion is no longer necessary in conjunction with the COVID-19 outbreak. CMS will notify MAOs and Part D sponsors through the Health Plan Management System when CMS is ending the enforcement discretion policies described herein. We expect MAOs to continue to share information regarding these mid-year benefit enhancements with their CMS account managers in order for the enforcement discretion policy to apply.

2. Q: Will CMS continue to allow MAOs to waive or reduce enrollee cost-sharing as a mid-year benefit enhancement for beneficiaries enrolled in their Medicare Advantage plans who are impacted by the outbreak?

¹ *Disclaimer: The contents of this document do not have the force and effect of law and are not meant to bind the public in any way, unless specifically incorporated into a contract. This document is intended only to provide clarity to the public regarding existing requirements under the law.*

A: Yes. CMS will continue to allow MAOs to waive or reduce enrollee cost-sharing for beneficiaries enrolled in their Medicare Advantage plans who are impacted by the outbreak as outlined in the May 22, 2020 HPMS memo, where the waiver or reduction in cost-sharing is tied to the COVID-19 outbreak. MAOs may waive or reduce enrollee cost-sharing for COVID-19 treatment, telehealth benefits or other services to address the outbreak provided that MAOs waive or reduce cost-sharing for all similarly situated plan enrollees on a uniform basis. CMS consulted with the HHS Office of Inspector General (OIG) and HHS OIG advised that should an Medicare Advantage Organization choose to voluntarily waive or reduce enrollee cost-sharing, as approved by CMS herein, such waivers or reductions would satisfy the safe harbor to the Federal anti-kickback statute set forth at 42 CFR 1001.952(l).

3. Q: Will CMS continue to allow MAOs to expand coverage of telehealth services as a mid-year benefit enhancement beyond those approved by CMS in their CY 2021 plan benefit packages for similarly situated enrollees impacted by the COVID-19 outbreak?

A: Yes. CMS will continue to exercise its enforcement discretion regarding the administration of MAOs' plan benefit packages as approved by CMS until it is determined that the exercise of this discretion is no longer necessary in conjunction with the COVID-19 outbreak. As stated in the May 22, 2020, HPMS memo, CMS consulted with the HHS Office of Inspector General (OIG), which advised that should an MAO choose to expand coverage of telehealth benefits, as approved by CMS herein, such additional coverage would satisfy the safe harbor to the federal anti-kickback statute set forth at 42 CFR 1001.952(l).

4. Q: Will CMS continue to take into account the circumstances of the COVID-19 PHE when evaluating MAOs on implementation strategies that do not fully comply with their approved SNP model of care (MOC) in order to provide care to enrollees while ensuring that enrollees and health care providers are also protected from the spread of COVID-19?

A: Yes. CMS will continue to take these special circumstances presented by the COVID-19 outbreak into account when conducting MOC monitoring or oversight activities. As previously stated in the May 22, 2020 HPMS memo, CMS understands that MAOs may need to continue to implement strategies that do not fully comply with their approved SNP model of care (MOC) in order to provide care to enrollees while ensuring that enrollees and health care providers are also protected from the spread of COVID-19. For example, CMS recognizes that there may be requirements in the MOC that require face-to-face contact with enrollees and would exercise enforcement discretion should a plan choose not to fulfill that MOC requirement in person.

5. Q: Will CMS continue to allow MAOs to provide a Rewards and Incentive Program as a permissive action related to the outbreak of COVID-19?

A: Yes. CMS will continue to allow MAOs to implement a Rewards and Incentive Program for enrollees in connection with the COVID-19 outbreak, as previously stated in the set of questions and answers published on May 13, 2020 under the title "Updated Guidance for Medicare

Advantage Organizations.” Reward and incentive programs must comply with 42 CFR § 422.134, including that rewards and/or incentives may not be offered in the form of cash or monetary rebates, including reduced cost-sharing or premiums. Otherwise, MAOs have considerable flexibility with regard to what may be offered as a reward or incentive. Gift cards are a permissible form of reward or incentive as long as they are not redeemable for cash and meet the applicable limits in the regulation. MAOs are encouraged to offer enrollees a choice of gift cards from which to choose in order to account for differences in enrollees’ preferences and accessibility of retailers. For additional information, please refer to the Medicare Managed Care Manual, Chapter 4, Section 100.5 – Permissible Rewards and Incentives.

- 6. Q: Will CMS continue its policy of relaxed enforcement in connection with actions Part D sponsors deem reasonable and necessary to keep their enrollees and employees safe and curb the spread of the virus, while still ensuring beneficiary access to needed Part D drugs (as referenced in the section titled “Additional Flexibilities” in the May 22, 2020 HPMS memo, “Information Related to Coronavirus Disease 2019 - COVID-19”) for the duration of the COVID-19 public health emergency (PHE)?**

A: Yes. CMS will continue its policy of relaxed enforcement related to these flexibilities for the duration of the PHE.

- 7. Q: Will CMS continue its policy of relaxed enforcement in connection with prospective waivers or reductions of Part C and Part D premiums referenced in the October 15, 2020 HPMS memo, “Waiver of Premiums Related to COVID-19 Permissive Actions – Questions and Answers,” for the duration of the PHE?**

A: Yes. CMS will continue its policy of relaxed enforcement related to the prospective waivers or reductions of Part C and Part D premiums for the duration of the PHE.

As noted in the October 15, 2020 HPMS memo, this is permissible only if offered to all plan enrollees uniformly and limited to when the waiver or reduction in the Part C or Part D premium is due to the COVID-19 outbreak. Additionally, we remind MAOs and Part D sponsors that Part C and D premiums can only be waived for future months where payment of the premium is not yet due. MAOs and Part D sponsors cannot retroactively waive Part C or D plan premiums or provide refunds of premium amounts that were properly paid by enrollees for coverage in months that precede the date when the premium waiver was effectuated by the plan. MAOs should refer to 42 CFR § 422.270 regarding obligations related to refunding premiums.

If an MAO or Part D sponsor waives or reduces Part C or D premiums in connection with the COVID-19 outbreak, any premium amounts that had been prepaid for future months and which are refunded to enrollees are also excluded from the MLR denominator, as the refunded premiums represent amounts that beneficiaries are not required to pay. Further, MAOs and Part D sponsors may exclude from the MLR denominator unpaid premiums that have been prospectively waived or reduced in connection with the COVID-19 outbreak. Premiums

amounts that MA and Part D enrollees are not obligated to pay because the MAO and/or Part D sponsor has prospectively waived the premium are not considered “unpaid premium amounts that [the plan] could have collected” for purposes of 42 CFR §§ 422.2420(c)(1)(v) and 423.2420(c)(1)(iv).

As noted in the October 15, 2020 HPMS memo, waived Part D premiums will not be excluded from the target amount for purposes of risk corridor reconciliation.

8. Q. Has CMS provided MLR guidance related to the CY 2021 permissive actions?

A: Yes. For related MLR guidance, see our July 10, 2020 memo, “Medicare Loss Ratio and Expenditures Related to COVID-19 Permissive Actions – Questions and Answers” and the October 15, 2020 HPMS memo.

We believe that any guidance in this memorandum relating to CMS’s enforcement discretion is a statement of agency policy not subject to the notice and comment requirements of the Administrative Procedure Act (APA). 5 U.S.C. § 553(b)(A). CMS additionally finds that, even if this guidance were subject to the public participation provisions of the APA, due to the urgent need to ensure that MA and Part D enrollees do not experience disruptions in care or disruptions in pharmacy and prescription drug access during the public health emergency posed by COVID-19, prior notice and comment for this guidance is impracticable, and there is good cause to issue this guidance without prior public comment and without a delayed effective date. 5 U.S.C. § 553(b)(B) & (d)(3). Similarly, even if this guidance were subject to the public participation provisions of 42 USC § 1395hh(b)(1), CMS finds that these public participation provisions also do not apply to this guidance because, for the reasons explained above, 5 U.S.C. § 553(b) does not apply to this guidance pursuant to 5 U.S.C. § 553(b)(B). 42 USC § 1395hh(b)(2)(C).