



MEDICARE-MEDICAID COORDINATION OFFICE

DATE: November 28, 2022

TO: Medicare Advantage Dual Eligible Special Needs Plans

FROM: Kimberly Spalding Bush
Director, Program Alignment Group
Medicare-Medicaid Coordination Office

SUBJECT: Cash, Cash Equivalent, Voucher, Gift Card, and In-kind Benefits for Enrollees Who Are Enrollee Advisory Committee Participants

This memorandum¹ describes considerations for Medicare Advantage (MA) dual eligible special needs plans (D-SNPs) regarding cash, cash equivalent, voucher, gift card, and in-kind benefits for individuals who participate in enrollee advisory committees.

Background

In the Contract Year (CY) 2023 MA and Part D Final Rule ([CMS-4192-F](#)) at 42 CFR 422.107(f), CMS finalized the requirement that any MA organization offering one or more D-SNPs in a state must establish and maintain, for contract year 2023 and subsequent years, one or more enrollee advisory committees that serve the D-SNPs offered by the MA organization in that state. The regulation at 42 CFR 422.107(f) requires that the enrollee advisory committees include a reasonably representative sample of enrollees, or other individuals representing those enrollees, and that the MA organizations solicit input from the enrollee advisory committees on, among other topics, ways to improve access to covered services, coordination of services, and health equity for underserved populations. Beyond these parameters, 42 CFR 422.107(f) allows flexibility to MA organizations in implementing the enrollee advisory committees.²

On August 31, 2022, the CMS contractor Resources for Integrated Care hosted a webinar titled “Best Practices for Implementing Enrollee Advisory Committees,” which provided technical assistance to D-SNPs on many enrollee advisory committee implementation topics.³ Among the best practices discussed on the August 31, 2022 webinar is providing financial support for enrollee participation in enrollee advisory committees.

¹ 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.

² Discussion of the final rule and responses to public comments can be found at 87 FR 27718 through 27726 at <https://www.govinfo.gov/content/pkg/FR-2022-05-09/pdf/2022-09375.pdf>

³ Resources for Integrated Care, “Best Practices for Implementing Enrollee Advisory Committees”, video recording, webinar slides, and other resources are available at: https://www.resourcesforintegratedcare.com/2022_ric_webinar_best_practices_for_implementing_enrollee_advisory_committees/

This memorandum outlines some considerations for such financial support to help avoid plan noncompliance and unintended impacts on enrollee eligibility for public programs. We note that any interpretations or statements made in this guidance are applicable solely to the D-SNP enrollee advisory committees established under 42 CFR 422.107 and have no implications for any other Medicare programs.

Cash and Cash Equivalents vs. In-kind Benefits

Although not applicable specifically to MA organizations, in the context of the Medicare Shared Savings Program, CMS has indicated that it considers a gift card that can be used like cash, for example a Visa or Amazon “gift card,” to be a cash equivalent.⁴ In contrast, vouchers that can be exchanged for particular goods or services (for example, a certificate for one free gym class at a local gym) and gift cards that are in the nature of a voucher (that is, gift cards that can be used only for particular goods or services) are considered “in-kind items or services”.⁵ A gift card that is not in the nature of a voucher, such as a gift card to a general purpose store, would not be an “in-kind item or service”.⁶ Refreshments and meals are in-kind benefits. D-SNPs may find this information useful when determining whether to provide in-kind benefits to enrollees who are advisory committee participants and, if so, what in-kind benefits are appropriate and permissible.

Sections 1851(h)(4) and 1854(d)(1) of the Social Security Act (the Act) prohibit an MA organization from giving enrollees cash or cash equivalents as an inducement for enrollment or otherwise. While enrollee advisory committee participants are already enrolled in the D-SNP hosting the enrollee advisory committee, cash or cash equivalents for participation could be viewed as an inducement to re-enroll in the D-SNP.

The requirements at 42 CFR 422.107(f) are nonprescriptive regarding the enrollee advisory committee format (e.g., in person or virtual). D-SNPs that choose to hold the committees in-person may consider providing transportation to and from the committee meeting and serving food or beverages. As a general matter, a D-SNP’s provision of certain in-kind benefits to enrollees who are advisory committee participants, such as refreshments, reasonable meals, transportation reimbursement or tokens, or gift card incentives (other than cash equivalents) may be appropriate for enrollee advisory committees, as long as the provision of such benefits does not violate the federal anti-kickback statute or any other applicable law.

CMS encourages D-SNPs to remain mindful of the federal anti-kickback statute (section 1128B(b) of the Social Security Act). The federal anti-kickback statute prohibits, in part, knowingly and willfully offering, paying, soliciting, or receiving any remuneration to induce a person to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any item or service reimbursable under a federal health care program. More information about the federal anti-kickback statute, including how to obtain OIG’s legal opinion regarding the application of the federal anti-kickback statute to a particular arrangement involving the provision of in-kind benefits to enrollees who advisory committee participants, can be found at <https://oig.hhs.gov>.

⁴ December 2018 final rule (83 FR 67980) at <https://www.govinfo.gov/content/pkg/FR-2018-12-31/pdf/2018-27981.pdf>

⁵ *Ibid.*

⁶ *Ibid.*

Impact on Enrollees

CMS does not consider enrollee participation in an advisory committee to be a marketing activity nor a target activity that would fall under 42 CFR 422.134, so the authorities and limits that are specific to those activities under MA regulations would not apply.⁷ However, CMS does encourage MA organizations to consider the prohibitions in sections 1851(h)(4) and 1854(d)(1) of the Act when offering vouchers or gift cards to enrollee advisory committee participants.

It is also important that D-SNPs are mindful of how the provision of in-kind benefits to advisory committee participants could affect an enrollee's Medicaid eligibility. CMS expects most D-SNP enrollees have their Medicaid eligibility determined through a non-Modified Adjust Gross Income (non-MAGI) methodology, but there may be some who qualify through MAGI-based methodology (e.g., based on being the caretaker relative of a dependent child). For Medicaid eligibility based on MAGI and non-MAGI methodologies, gift cards for participating in an enrollee advisory committee would generally be considered income. For non-MAGI purposes, any portion of the gift card retained after the month in which it is received would also be considered a resource. However, in the non-MAGI context, the income and/or resource could be disregarded for Medicaid eligibility purposes in a state that has elected a state plan amendment through the authority provided in section 1902(r)(2) of the Act.

CMS reminds D-SNPs that the Social Security Administration does not count against an individual's supplemental security income award (SSI), during each calendar quarter of the year, the individual's first \$60 of infrequent or irregular unearned income or first \$30 of earned income (Social Security Act, as amended, sections 1612(a)(2)(C), 1612(b)(3), and 1612(b)(7); 20 CFR 416.1121(f)). CMS encourages D-SNPs to be attentive to the definition of infrequent income and the acceptable frequency and dollar amounts referenced. CMS also reminds D-SNPs to adhere to any state-specific requirements regarding non-monetary incentives.

Questions

If you have any questions about the contents of this memorandum (other than questions regarding the federal anti-kickback statute), please contact the Medicare-Medicaid Coordination Office at MMCO_DSNPOperations@cms.hhs.gov. Please direct any questions about the federal anti-kickback statute to the Office of Inspector General at (<https://oig.hhs.gov/about-oig/contact-us/>).

⁷ 87 FR 27724 at <https://www.govinfo.gov/content/pkg/FR-2022-05-09/pdf/2022-09375.pdf>