

# Medicare Communications and Marketing Guidance Unchanged for Upcoming Open Enrollment Period



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As Medicare's annual Open Enrollment Period (OEP) approaches, it may come as a relief to know that the [Medicare Communications and Marketing Guidelines](#) (MCMG), which govern outreach and promotion activities for Medicare Advantage (Part C) and Medicare Prescription Drug (Part D) Plans, aren't changing this year. It means that the guidance the Centers for Medicare & Medicaid Services (CMS) issued in 2018 and revised in August 2019, about which CMS' Maureen Kerrigan spoke in last year's Can They Do That? Webinar, remains in effect for now. This article provides an overview of the CMS communications and marketing regulations and highlights some key points in the MCMG that SHIPs and SMPs should keep in mind as they help beneficiaries this fall.

## Guiding Principles

The [federal regulation](#) for Medicare Advantage (MA) plan communications declares that plan sponsors may not provide information that is inaccurate or misleading, engage in activities that could mislead or confuse Medicare beneficiaries, or misrepresent the MA organization. Furthermore, plans may not discriminate based on race, ethnicity, national origin, religion, gender, sex, age, mental or physical disability, health status, receipt of health care, claims experience, medical history, genetic information, evidence of insurability, or geographic location. Neither can they target potential enrollees from higher-income areas, a practice called "cherry-picking," or create the impression that their plans are only available to seniors rather than to all Medicare beneficiaries (except for Special Needs Plans, or SNPs). Medicare's marketing and communications rules also apply to the people who represent the plans. The MCMG manual guidance

makes the MA and Part D plans responsible for overseeing the activities of their subcontractors, so-called downstream entities and delegated entities, to ensure that they, too, comply with the rules. These entities include sales agents and insurance brokers. Failing to ensure compliance with the MCMG could lead to sanctions for the plans, including suspension of enrollment and marketing activities and/or civil monetary penalties.

### Education-Marketing Distinction

When CMS revised its marketing guidance in 2018 and changed the name to Medicare Communications & Marketing Guidelines (MCMG), the agency retained a distinction between marketing

and beneficiary education in its system to regulate plan communications with beneficiaries. The MCMG broadly define communications as “activities and use of materials to provide information to current and prospective enrollees.” The rule defines marketing as:

“Activities and use of materials that are conducted by the Plan/Part D sponsor with the intent to draw a beneficiary’s attention to a plan or plans and to influence a beneficiary’s decision-making process when selecting a plan for enrollment or deciding to stay enrolled in a plan (that is, retention-based marketing).

Additionally, marketing contains information about the plan’s benefit structure, cost sharing, measuring or ranking standards.”

The MCMG don’t define “education” per se, but instead distinguish between educational events and marketing/sales events. The main difference between the two types of outreach is that educational events are limited to informing beneficiaries about the MA, Part D, and other unspecified Medicare programs while the main purpose of marketing events is to steer potential enrollees to a plan or limited number of plans. Other key differences include:

- Requiring plans to explicitly advertise education events as educational.
- Permitting plans to offer full meals at education events but not at marketing/sales events.
- Allowing plans to deploy optional sign-in sheets at marketing/sales events but at educational events they can have sign-in sheets and may distribute business cards and scope of appointment forms with which beneficiaries can initiate further contact if desired.

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Although the MCMG say that plans must explicitly advertise educational events, there is no companion rule for plans to identify marketing/sales events as such. In addition, a [2019 guideline change](#) allows plans to schedule back-to-back education and marketing events at the same venue, potentially blurring a line between the two types of outreach events. The guidelines also specify that plans cannot distribute marketing materials or enrollment forms at educational events. In other words, the MCMG prohibit the use of plan-specific materials that detail benefits, costs, and star ratings at educational events.

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The prohibition on “steering” beneficiaries to specific plans during education events does not imply, however, that brokers and agents can’t point people toward Medicare Advantage and away from Original Medicare. Neither the MCMG nor the National Association of Insurance Commissioners’ (NAIC) [model law for unfair trade practices](#) (adopted by 48 states and territories) instructs agents and brokers to present balanced information about the respective pros and cons of Medicare’s two health care delivery systems during educational events. In fact, financial incentives might weigh against it.

Brokers and agents in some cases can earn hundreds of dollars more when their clients choose Medicare Advantage over Original Medicare. For example, in 2020 a broker in California can earn up to \$636 for a first-time enrollment in an MA plan with drug coverage (MAPD). In contrast, selling a large insurer’s Medigap Policy F to a beneficiary newly enrolled in Original Medicare can earn the agent \$345 based on a 20% commission of the policy’s \$1,725 annual premium; if the agent added a Part D drug plan to the client’s coverage package, the \$78 maximum commission would yield a total commission of only \$423. **Note:** The maximum MA and Part D commissions, set by CMS, are higher in California and a handful of other states than they are in the rest of the country, and commissions for Medigap vary by insurer. Also, commissions for MA plans and Medigap are significantly higher for initial sales than renewals.

It may also be helpful to know that although the MCMG guidelines require plans to submit marketing materials to CMS for review—including scripts that brokers and agents use in sales presentations—there does not appear to be a review requirement for general communications materials distributed at educational

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events. The rules permit agents to create and distribute their own communications materials and/or to use CMS-created materials as long as they're not modified in any way. The NAIC model law says, however, that agents can't misrepresent the benefits, advantages, conditions, or terms of any policy and prohibits false, deceptive, or misleading information and statements regardless of event type.

### **Prohibited Statements and Activities**

Here's a short list of some communications and marketing activities that the MCMG prohibit. SHIPs and SMPs should be aware of them and report violations according to each program's protocols. The rules specify that MA and Part D plans may not:

- Claim that CMS, Medicare, or the Department of Health & Human Services (DHHS) endorses or recommends them
- Use unsubstantiated absolute or qualified superlatives or pejoratives, though they may use unsubstantiated absolute and/or qualified superlatives in logos and taglines
- Use the term "free" to describe a zero-dollar premium or reductions in deductibles or cost sharing
- Use Medicare beneficiaries to endorse or promote an MA or Part D plan who were not enrolled in the plan at the time the plan created the endorsement or testimonial
- Offer health screenings or other activities that may be perceived as, or used for, "cherry-picking"
- Require attendees to provide contact information as a prerequisite for attending a marketing event
- Use door-to-door solicitation, including leaving information such as a leaflet or flyer at a residence
- Approach potential enrollees in common areas (e.g., parking lots, hallways, lobbies, sidewalks, etc.)
- Make telephone calls that include, but are not limited to, the following:
  - Unsolicited calls about other business as a means of generating leads for Medicare plans (e.g., bait-and-switch strategies)
  - Calls based on referrals (if an individual would like to refer a friend or relative to an agent or Plan/Part D sponsor, the agent or Plan/Part D sponsor may provide

- contact information such as a business card that the individual could provide to a friend or relative)
- o Calls to market plans or products to former enrollees who have disenrolled or to current enrollees who are in the process of voluntarily disenrolling
  - o Calls to beneficiaries who attended a sales event, unless the beneficiary gave express permission at the event for a follow-up call (there must be documentation of permission to be contacted) or
  - o Calls to prospective enrollees to confirm receipt of mailed information

### Permitted Marketing Activities

The MCMG allow plans to use various marketing strategies to steer beneficiaries toward specific MA and/or Part D plans. Plans may:

- Offer nominal gifts valued at \$15 or less (or \$75 in total, per person, annually) to beneficiaries, provided the gift is given regardless of whether a beneficiary enrolls in the plan
- Market their ability to enroll beneficiaries through a Special Enrollment Period (SEP) if they are designated as five-star plans
- Include information about rewards and incentives programs in their marketing materials
- Provide refreshments and light snacks, but not meals, at marketing/sales events
- Make unsolicited direct contact with potential enrollees using conventional mail and other print media (e.g., advertisements, direct mail) and by email provided it contains an opt-out function.

For more details on the MCMG, including activities in health care settings and on social media, refer to the SMP Resource Center's Resource Library for the recording and PowerPoint of the [Can They Do That? Webinar](#) and also to the CMS Agent-Broker Dos and Don'ts handout. SHIPs and SMPs have an important role to play during the OEP as trusted sources of objective information about Medicare's many options and as points of contact within the community for beneficiaries who have concerns about marketing violations or inaccurate or misleading information. ↗