

bid for, or call to attention. Advertisements can be considered communications or marketing based on the intent and content of the message.

Alternate format means a format used to convey information to individuals with visual, speech, physical, hearing, and intellectual disabilities (for example, braille, large print, audio).

Banner means a type of advertisement feature typically used in television ads that is intended to be brief, and flashes limited information across a screen for the sole purpose of enticing a prospective enrollee to contact the MA plan (for example, obtain more information) or to alert the viewer that information is forthcoming.

Banner-like advertisement is an advertisement that uses a banner-like feature, that is typically found in some media other than television (for example, outdoors and on the internet).

Communications means activities and use of materials created or administered by the MA organization or any downstream entity to provide information to current and prospective enrollees. Marketing is a subset of communications.

Marketing means communications materials and activities that meet both the following standards for intent and content:

(1) Intended, as determined under paragraph (1)(ii) of this definition, to do any of the following:

(i)(A) Draw a beneficiary's attention to a MA plan or plans.

(B) Influence a beneficiary's decision-making process when making a MA plan selection.

(C) Influence a beneficiary's decision to stay enrolled in a plan (that is, retention-based marketing).

(ii) In evaluating the intent of an activity or material, CMS will consider objective information including, but not limited to, the audience of the activity or material, other information communicated by the activity or material, timing, and other context of the activity or material and is not limited to the MA organization's stated intent.

(2) Include or address content regarding any of the following:

(i) The plan's benefits, benefits structure, premiums, or cost sharing.

(ii) Measuring or ranking standards (for example, Star Ratings or plan comparisons).

(iii) Rewards and incentives as defined under § 422.134(a).

Outdoor advertising (ODA) means outdoor material intended to capture the attention of a passing audience (for example, billboards, signs attached to transportation vehicles). ODA may be communications or marketing material.

Third-party marketing organization (TPMO) means organizations and individuals, including independent agents and brokers, who are compensated to perform lead generation, marketing, sales, and enrollment related functions as a part of the chain of enrollment (the steps taken by a beneficiary from becoming aware of an MA plan or plans to making an enrollment decision). TPMOs may be a first tier, downstream or related entity (FDRs), as defined under § 422.2, but may also be entities that are not FDRs but provide services to an MA plan or an MA plan's FDR.

[86 FR 6103, Jan. 19, 2021, as amended at 87 FR 27898, May 9, 2022]

§ 422.2261 Submission, review, and distribution of materials.

(a) *General requirements.* MA organizations must submit all marketing materials, all election forms, and certain designated communications materials for CMS review.

(1) The Health Plan Management System (HPMS) Marketing Module is the primary system of record for the collection, review, and storage of materials that must be submitted for review.

(2) Materials must be submitted to the HPMS Marketing Module by the MA organization or, where materials have been developed by a Third Party Marketing Organization for multiple MA organizations or plans, by a Third Party Marketing Organization with prior review of each MA organization on whose behalf the materials were created or will be used.

(b) *CMS review of marketing materials and election forms.* MA organizations may not distribute or otherwise make available any marketing materials or election forms unless one of the following occurs:

(1) CMS has reviewed and approved the material.

(2) The material has been deemed approved; that is, CMS has not rendered a disposition for the material within 45 days (or 10 days if using CMS model or standardized marketing materials as outlined in § 422.2267(e) of this chapter) of submission to CMS; or

(3) The material has been accepted under File and Use, as follows:

(i) The MA organization may distribute certain types of marketing materials, designated by CMS based on the material's content, audience, and intended use, as they apply to potential risk to the beneficiary, 5 days following the submission.

(ii) The MA organization must certify that the material meets all applicable CMS communications and marketing requirements in §§ 422.2260 through 422.2267.

(c) *CMS review of non-marketing communications materials.* CMS does not require submission, or submission and approval, of communications materials prior to use, other than the following exceptions.

(1) Certain designated communications materials that are critical to beneficiaries understanding or accessing their benefits (for example, the Evidence of Coverage (EOC)).

(2) Communications materials that, based on feedback such as complaints or data gathered through reviews, warrant additional oversight as determined by CMS, to ensure the information being received by beneficiaries is accurate.

(d) *Standards for CMS review.* CMS reviews materials to ensure the following:

(1) Compliance with all applicable requirements under §§ 422.2260 through 422.2267.

(2) Benefit and cost information is an accurate reflection of what is contained in the MA organization's bid.

(3) CMS may determine, upon review of such materials, that the materials must be modified, or may no longer be used.

[86 FR 6104, Jan. 19, 2021, as amended at 88 FR 22335, Apr. 12, 2023]

§ 422.2262 General communications materials and activities requirements.

MA organizations may not mislead, confuse, or provide materially inaccurate information to current or potential enrollees.

(a) *General rules.* MA organizations must ensure their statements and the terminology used in communications activities and materials adhere to the following requirements:

(1) MA organizations may not do any of the following:

(i) Provide information that is inaccurate or misleading.

(ii) Use of superlatives, unless sources of documentation or data supportive of the superlative is also referenced in the material. Such supportive documentation or data must reflect data, reports, studies, or other documentation that applies to the current or prior contract year.

(A) Including data older than the prior contract year is permitted provided the current and prior contract year data are specifically identified.

(B) [Reserved]

(iii) Engage in activities that could mislead or confuse Medicare beneficiaries, or misrepresent the MA organization.

(iv) Engage in any discriminatory activity such as attempting to recruit Medicare beneficiaries from higher income areas without making comparable efforts to enroll Medicare beneficiaries from lower income areas, or vice versa.

(v) Target potential enrollees based on income levels, unless it is a dual eligible special needs plan or comparable plan as determined by the Secretary.

(vi) Target potential enrollees based on health status, unless it is a special needs plan or comparable plan as determined by the Secretary.

(vii) State or imply plans are only available to seniors rather than to all Medicare beneficiaries.

(viii) Employ MA plan names that suggest that a plan is not available to all Medicare beneficiaries, unless it is a special needs plan or comparable plan as determined by the Secretary. This prohibition does not apply to MA plan names in effect prior to July 31, 2000.

(ix) Display the names or logos or both of co-branded network providers on the organization's member identification card, unless the provider names or logos or both are related to the member selection of specific provider organizations (for example, physicians or hospitals).

(x) Use a plan name that does not include the plan type. The plan type should be included at the end of the plan name, for example, "Super Medicare Advantage (HMO)." MA organizations are not required to repeat the plan type when the plan name is used multiple times in the same material.

(xi) Claim they are recommended or endorsed by CMS, Medicare, the Secretary, or HHS.

(xii) Convey that a failure to pay premium will not result in disenrollment, except for factually accurate descriptions of the MA organization's policies adopted in accordance with § 422.74(b)(1) and (d)(1) of this chapter.

(xiii) Use the term "free" to describe a \$0 premium, any type of reduction in premium, reduction in deductibles or cost sharing, low-income subsidy, or cost sharing pertaining to dual eligible individuals.

(xiv) Imply that the plan operates as a supplement to Medicare.

(xv) State or imply a plan is available only to or is designed for beneficiaries who are dually eligible for Medicare and Medicaid, unless it is a dual-eligible special needs plan or comparable plan as determined by the Secretary.

(xvi) Market a non-dual eligible special needs plan as if it were a dual-eligible special needs plan.

(xvii) Target marketing efforts primarily to dual eligible individuals, unless the plan is a dual eligible special needs plan or comparable plan as determined by the Secretary.

(xviii) Claim a relationship with the state Medicaid agency, unless a contract to coordinate Medicaid services for enrollees in that plan is in place.

(xix) Use the Medicare name, CMS logo, and products or information issued by the Federal Government, including the Medicare card, in a misleading way. Use of the Medicare card image is permitted only with authorization from CMS.

(2) MA organizations may do the following:

(i) State that the MA organization is approved to participate in Medicare programs or is contracted to administer Medicare benefits or both.

(ii) Use the term "Medicare-approved" to describe benefits or services in materials or both.

(iii) Use the term "free" in conjunction with mandatory, supplemental, and preventative benefits provided at a zero cost share for all enrollees.

(b) *Product endorsements and testimonials.* (1) Product endorsements and testimonials may take any of the following forms:

(i) Television or video ads.

(ii) Radio ads.

(iii) Print ads.

(iv) Social media ads. In cases of social media, the use of a previous post, whether or not associated with or originated by the MA organization, is considered a product endorsement or testimonial.

(v) Other types of ads.

(2) MA organizations may use individuals to endorse the MA organization's product provided the endorsement or testimonial adheres to the following requirements:

(i) The speaker must identify the MA organization's product or company by name.

(ii) Medicare beneficiaries endorsing or promoting the MA organization must have been an enrollee at the time the endorsement or testimonial was created.

(iii) The endorsement or testimonial must clearly state that the individual was paid for the endorsement or testimonial, if applicable.

(iv) If an individual is used (for example, an actor) to portray a real or fictitious situation, the endorsement or testimonial must state that it is an actor portrayal.

(c) *Requirements when including certain telephone numbers in materials.* (1) MA organizations must adhere to the following requirements for including certain telephone numbers in materials:

(i) When a MA organization includes its customer service number, the hours of operation must be prominently included at least once.