

(iii) OMB-approved forms/documents, except those materials specified in § 423.2267.

(iv) Corporate notices or forms (that is, not Part D-specific) meeting the definition of communications such as privacy notices and authorization to disclose protected health information (PHI).

(v) Agent-developed communications materials that are not marketing.

(4) Non-English and alternate format materials, based on previously created materials, may have the same SMID as the material on which they are based.

[86 FR 6122, Jan. 19, 2021, as amended at 88 FR 22340, Apr. 12, 2023]

§ 423.2263 General marketing requirements.

Marketing is a subset of communications and therefore must follow the requirements outlined in § 423.2262 as well as this section. Marketing (as defined in § 423.2260) must additionally meet the following requirements:

(a) Part D sponsors may begin marketing prospective plan year offerings on October 1 of each year for the following contract year. Part D sponsors may market the current and prospective year simultaneously provided materials clearly indicate what year is being discussed.

(b) In marketing, Part D sponsors may not do any of the following:

(1) Provide cash or other monetary rebates as an inducement for enrollment or otherwise.

(2) Offer gifts to beneficiaries, unless the gifts are of nominal value (as governed by guidance published by the HHS OIG), are offered to similarly situated beneficiaries without regard to whether or not the beneficiary enrolls, and are not in the form of cash or other monetary rebates.

(3) Provide meals to potential enrollees regardless of value.

(4) Market non-health care related products to prospective enrollees during any Part D sales activity or presentation. This is considered cross-selling and is prohibited.

(5) Compare their plan to other plans, unless the information is accurate, not misleading, and can be supported by the Part D sponsor making the comparison.

(6) Display the names or logos or both of pharmacy co-branding partners on marketing materials, unless the materials clearly indicate via a disclaimer or in the body that “Other pharmacies are available in the network.”

(7) Knowingly target or send unsolicited marketing materials to any Part D enrollee during the Open Enrollment Period (OEP).

(i) During the OEP, a Part D sponsor may do any of the following:

(A) Conduct marketing activities that focus on other enrollment opportunities, including but not limited to marketing to age-ins (who have not yet made an enrollment decision), marketing by 5-star plans regarding their continuous enrollment special election period (SEP), and marketing to dual-eligible and LIS beneficiaries who, in general, may make changes once per calendar quarter during the first nine months of the year;

(B) Send marketing materials when a beneficiary makes a proactive request;

(C) At the beneficiary’s request, have one-on-one meetings with a sales agent;

(D) At the beneficiary’s request, provide information on the OEP through the call center; and

(E) Include educational information, excluding marketing, on the Part D sponsor’s website about the existence of OEP.

(ii) During the OEP, a Part D sponsor may not:

(A) Send unsolicited materials advertising the ability or opportunity to make an additional enrollment change or referencing the OEP;

(B) Specifically target beneficiaries who are in the OEP because they made a choice during Annual Enrollment Period (AEP) by purchase of mailing lists or other means of identification;

(C) Engage in or promote agent or broker activities that intend to target the OEP as an opportunity to make further sales; or

(D) Call or otherwise contact former enrollees who have selected a new plan during the AEP.

(8) Advertise benefits that are not available to beneficiaries in the service area(s) where the marketing appears, unless the advertisement is in local media that serves the service area(s)

where the benefits are available and reaching beneficiaries who reside in other service areas is unavoidable.

(9) Market any products or plans, benefits, or costs, unless the Part D sponsor or marketing name(s) as listed in HPMS of the entities offering the referenced products or plans, benefits, or costs are identified in the marketing material.

(i) Part D sponsor or marketing names must be in 12-point font in print and may not be in the form of a disclaimer or in fine print.

(ii) For television, online, or social media, the Part D sponsor or marketing name(s) must be either read at the same pace as the phone number or must be displayed throughout the entire advertisement in a font size equivalent to the advertised phone number, contact information or benefits.

(iii) For radio or other voice-based advertisements, Part D sponsor or marketing names must be read at the same pace as phone numbers or contact information.

(10) Part D sponsors may not include information about savings available to potential enrollees that are based on a comparison of typical expenses borne by uninsured individuals, unpaid costs of dually eligible beneficiaries, or other unrealized costs of a Medicare beneficiary.

(c) The following requirements apply to how Part D sponsors must display CMS-issued Star Ratings:

(1) References to individual Star Rating measure(s) must also include references to the overall Star Rating for MA-PDs and the summary rating for PDP plans.

(2) May not use an individual underlying category, domain, or measure rating to imply overall higher Star Ratings.

(3) Must be clear that the rating is out of 5 stars.

(4) Must clearly identify the Star Ratings contract year.

(5) May only market the Star Ratings in the service area(s) for which the Star Rating is applicable unless using Star Ratings to convey overall Part D sponsor performance (for example, “Plan X has achieved 4.5 stars in Montgomery, Chester, and Delaware Counties, in which case the Part D sponsor

must do so in a way that is not confusing or misleading.

(6) The following requirements apply to all 5 Star PDP contracts:

(i) May not market the 5-star special enrollment period, as defined in § 423.38(c)(20), after November 30 of each year if the contract has not received an overall 5 star for the next contract year.

(ii) May use CMS’ 5- star icon or may create their own icon.

(7) The following requirements apply to all Low Performing MA contracts:

(i) The Low Performing Icon must be included on all materials about or referencing the specific contract’s Star Ratings.

(ii) Must state the Low Performing Icon means that the Part D sponsor’s contract received a summary rating of 2.5 stars or below in Part D for the last 3 years.

(iii) May not attempt to refute or minimize Low Performing Status.

[86 FR 6123, Jan. 19, 2021, as amended at 88 FR 22340, Apr. 12, 2023]

§ 423.2264 Beneficiary contact.

For the purpose of this section, beneficiary contact means any outreach activities to a beneficiary or a beneficiary’s caregivers by the Part D sponsor or its agents and brokers.

(a) *Unsolicited contact.* Subject to the rules for contact for plan business in paragraph (b) of this section, the following rules apply when materials or activities are given or supplied to a beneficiary or their caregiver without prior request:

(1) Part D sponsors may make unsolicited direct contact by conventional mail and other print media (for example, advertisements and direct mail) or email (provided every email contains an opt-out option).

(2) Part D sponsors may not do any of the following if unsolicited:

(i) Use door to door solicitation, including leaving information of any kind, except that information may be left when an appointment is pre-scheduled but the beneficiary is not home.

(A) Contact is unsolicited door-to-door contact unless an appointment, at the beneficiary’s home at the applicable time and date, was previously scheduled.

(B) [Reserved]
 (ii) Approach enrollees in common areas such as parking lots, hallways, lobbies.

(iii) Send direct messages from social media platforms.

(iv) Use telephone solicitation (that is, cold calling), robocalls, text messages, or voicemail messages, including, but not limited to, the following:

(A) Calls based on referrals.

(B) Calls to former enrollees who have disenrolled or those in the process of disenrolling, except to conduct disenrollment surveys for quality improvement purposes.

(C) Calls to beneficiaries who attended a sales event, unless the beneficiary gave express permission to be contacted.

(D) Calls to prospective enrollees to confirm receipt of mailed information.

(3) Calls are not considered unsolicited if the beneficiary provides consent or initiates contact with the plan. For example, returning phone calls or calling an individual who has completed a business reply card requesting contact is not considered unsolicited.

(b) *Contact for plan business.* Part D sponsors may contact current, and to a more limited extent, former members, including those enrolled in other products offered by the parent organization, to discuss plan business, in accordance with the following requirements:

(1) A Part D sponsor may conduct the following activities as plan business:

(i) Call current enrollees, including those in non-Medicare products, to discuss Medicare products. Examples of such calls include, but are not limited to the following:

(A) Enrollees aging into Medicare from commercial products.

(B) Existing enrollees, including Medicaid enrollees, to discuss other Medicare products or plan benefits.

(C) Members in an MA or cost plan to discuss other Medicare products.

(ii) Call beneficiaries who submit enrollment applications to conduct business related to enrollment.

(iii) With prior CMS approval, call LIS enrollees that a plan is prospectively losing due to reassignment. CMS decisions to approve calls are for lim-

ited circumstances based on the following:

(A) The proximity of cost of the losing plan as compared to the national benchmark; and

(B) The selection of plans in the service area that are below the benchmark.

(iv) Agents/brokers calling clients who are enrolled in other products they may sell, such as automotive or home insurance.

(v) Part D sponsors may not make unsolicited calls about other lines of business as a means of generating leads for Medicare plans.

(2) If the Part D sponsor reaches out to beneficiaries regarding plan business, as outlined in this section, the Part D sponsor must provide notice to all beneficiaries whom the plan contacts at least once annually, in writing, of the individual's ability to opt out of future calls regarding plan business.

(c) *Events with beneficiaries.* Part D sponsors and their agent or brokers may hold educational events, marketing or sales events, and personal marketing appointments to meet with Medicare beneficiaries, either face-to-face or virtually. The requirements for each type of event are as follows:

(1) Educational events must be advertised as such and be designed to generally inform beneficiaries about Medicare, including Medicare Advantage, Prescription Drug programs, or any other Medicare program.

(i) At educational events, Part D sponsors and agents/brokers may not market specific Part D sponsors or benefits.

(ii) Part D sponsors holding or participating in educational events may do any of the following:

(A) Distribute communication materials.

(B) Answer beneficiary initiated questions pertaining to Part D plans.

(C) Distribute business cards.

(D) Make available and receive beneficiary contact information, including Business Reply Cards, but not including Scope of Appointment forms.

(iii) Part D sponsors holding or participating in educational events may not conduct sales or marketing presentations or distribute or accept plan applications.