

United States Senate

WASHINGTON, DC 20510

November 11, 2022

The Honorable Xavier Becerra
Secretary
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Dear Secretary Becerra and Administrator Brooks-LaSure,

This summer, the Senate Finance Committee opened an investigation into reported increases in deceptive marketing practices in the Medicare Advantage (MA) program. The Committee's investigation, based on a request for information to 15 state insurance commissioners and state health insurance assistance programs, uncovered a concerning pattern of misleading advertising materials, aggressive marketing tactics, and in some cases flat-out deception harmful to beneficiary access to care and health outcomes.

The investigation showed how unscrupulous marketing practices lured beneficiaries to enroll in MA plans—sometimes without their explicit consent—only to find out that the agent misrepresented the plan's benefits or available providers. As a result, seniors, people with limited financial resources, and people with disabilities were subject to higher out-of-pocket costs, difficulty accessing care, and delayed care due to the uncertainty of their coverage. Pursuant to the public release of the report's findings, we write today to urge the Centers for Medicare & Medicaid Services (CMS) to step up its oversight of marketing practices in the MA program and implement commonsense regulations to ensure beneficiaries can make informed choices about their Medicare coverage.

In 2022, nearly 30 million Americans 65 and older and people with disabilities receive their Medicare benefits through a private MA plan, and nearly 50 million people have a stand-alone Part D plan or an MA plan with Part D coverage. These plans provide Medicare-covered benefits and extra benefits to help beneficiaries maintain and improve their health. False and misleading marketing and fraudulent sales practices create confusion and can undermine continuity of care. In addition to the potential disruptions to medical care and financial upheaval resulting from misleading and fraudulent marketing tactics, the investigation found that beneficiaries feel frustrated and embarrassed that they were scammed and may not always report marketing abuses out of embarrassment.

The investigation shows that the number of complaints regarding misleading MA marketing is growing across the nation; however, concerns regarding misleading marketing are not new. In

2008, Congress addressed marketing abuses in the MA program in order to protect beneficiaries from harm.¹ Government watchdogs subsequently issued reports warning about misleading MA marketing, and in two instances CMS issued civil monetary penalties to MA plans related to their marketing tactics. One of these cases even resulted in CMS opening a Special Enrollment Period for beneficiaries to seek new plans.² Despite these warnings, the Trump Administration weakened the basic consumer protections Congress put in place and found new ways to relax CMS's oversight. At the same time fraudsters have continued to find new ways to skirt the rules and take advantage of vulnerable beneficiaries.

We applaud the steps that CMS has recently taken to better protect Medicare beneficiaries in the CY 2023 Final Rule increasing oversight of third-party marketing organizations,³ and the October guidance that CMS is increasing oversight activities during this year's Annual Enrollment Period.⁴ Nevertheless, we urge you to take additional steps:

1. **Reinstate requirements loosened during the Trump Administration.** CMS should reinstate consumer protections in place prior to the Trump Administration, such as prohibiting educational and marketing events from occurring on the same day at the same location and require marketing materials to describe the grievance and appeals process.
2. **Monitor MA disenrollment patterns and use enforcement authority to hold bad actors accountable.** CMS should track rapid disenrollments and those receiving Special Enrollment Periods (SEPs) for marketing issues by MA plans as well as by brokers and agents. CMS should target low performing contracts for audits to ensure compliance with marketing regulations, and problematic agents and brokers should be reported to the State.
3. **Provide clear guidelines and trainings to ensure agents and brokers understand and adhere to best practices.** CMS should require agents and brokers accountable through the agency's regulations of MA plans to review a beneficiary's prescription drugs and regularly visited health care providers to ensure that a new or renewing plan meets a beneficiary's health care needs.
4. **Implement robust rules around MA marketing materials and close regulatory loopholes that allow cold-calling.** CMS should prohibit MA plans from contracting with entities that design materials to suggest that they are from the Medicare program or another federal agency. MA plans should only be able to advertise benefits that are available in a beneficiary's area. Loopholes allowing cold-calling should be stopped: CMS should prohibit MA plans, agents, and brokers from purchasing lists of "leads", and

¹ Medicare Improvements for Patients and Providers Act of 2008 (P.L. 110-275).

² <https://www.cms.gov/files/document/solishealthplanscmp120419.pdf>;
https://www.cms.gov/Medicare/Compliance-and-Audits/Part-C-and-Part-D-Compliance-and-Audits/Downloads/Clover_CMP_05_26_16.pdf

³ Medicare Program; Contract Year 2023 Policy and Technical Changes to the Medicare Advantage and Medicare Prescription Drug Benefit Programs; Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency; Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency, 87 Fed. Reg. 27704, 27704-27902 (May 9, 2022).

⁴ Health Plan Management System (HPMS) Memorandum, "CMS Monitoring Activities and Best Practices during the Annual Election Period." October, 19, 2022.
<https://www.agentpipeline.com/wp-content/uploads/2022/10/HPMS-Marketing-Practices-Memo.pdf>.

prohibit agents and brokers from calling beneficiaries multiple times a day for days in a row.

5. **Support unbiased sources of information for beneficiaries, including State Health Insurance Assistance Programs (SHIPs) and the Senior Medicare Patrol (SMP).**

Departments of Insurance, the Medicare Ombudsman's office, SHIPs, and the SMP are trusted sources of information for many seniors and people living with disabilities serving the needs of the nearly 60 million seniors and people living with disabilities. They are also valuable partners to CMS in identifying actors who are misleading or deceiving beneficiaries.

We urge you to implement these consumer protections through notice and comment rulemaking and sub-regulatory guidance as soon as possible. We share the same goal to enable the offering of MA plan choices that are valuable to seniors and people living with disabilities. Yet, our first responsibility is to protect beneficiaries and the integrity of the MA program from fraudsters and scam artists who look to take advantage of any opportunity to prioritize profits over beneficiary health and well-being.

Thank you for your attention to this important matter. If you have any questions, please contact Eva DuGoff with the Senate Finance Committee at eva_dugoff@finance.senate.gov or (202) 224-4515.

Sincerely,



Ron Wyden
United States Senator
Chairman, Committee on
Finance



Robert P. Casey, Jr.
United States Senator



Debbie Stabenow
United States Senator



Maria Cantwell
United States Senator



Robert Menendez
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