CALIFORNIA HEALTH ADVOCATES
Medicare: Policy, Advocacy and Education

February 4, 2022

Marlene Caride, Chair
Jon Pike, Vice Chair
Senior Issues Task Force
Attn: David Torian

Subject: CHA Comments on CMS Proposed Rule on Stricter Marketing Guideline for MA Plans

Dear Commissioners Caride and Pike:

California Health Advocates (CHA) would like to contribute our comments on the Centers for Medicare and Medicaid's proposed rule on Stricter Marketing Guidelines for Medicare Advantage Plans in anticipation of the Task Force's discussion of this topic at the meeting on February 7th. We hope our comments will be helpful to state regulators about issues that are important to consumer groups and our thoughts on better enforcement in regard to complaints against agents, brokers, and Third Party Marketing Organizations (TPMO) in the marketing and sale of Medicare Advantage plans.

CHA is the leading resource for consumers with Medicare in California. CHA provides training, topic specific materials, and expert technical assistance to our state's SHIP network and to consumers on a wide variety of topics related to Medicare. In addition one of CHA's projects is the state's Senior Medicare Patrol (SMP), the federally funded program for fraud involving Medicare and Medicaid.

The competition for Medicare Advantage (MA) market share has been intense in California and in other large states over the last several years. The number of MA plan choices during the 2021-22 AEP was overwhelming for many beneficiaries. Nationally the average beneficiary had 39 MA plans to choose from, the largest number of options in a decade according to the Kaiser Family Foundation latest issue brief Medicare Advantage 2022 Spotlight: First Look. In California almost half of our 6.5 million Medicare beneficiaries were enrolled in an MA plan as of December 2021.

MA plan advertising has generated numerous complaints to CHA, SMP, and the individual SHIP counseling projects around our state for many years. During the past several years advertising for these plans have increased and emphasized extra or chronic care benefits often only available in particular sets of circumstances and not to the average MA plan enrollee. For instance celebrity ads promise a wide array of enticing benefits that are often only available following surgery or in the presence of other serious or incapacitating medical conditions. CMS notes that marketing complaints have more than doubled last year. In 2020 CMS received a total of 15,497 complaints related to marketing and in 2021, excluding December, CMS received 39,617 complaints; an indication of the fierce competition for sales commissions and market share.

Marketing firms that specialize in providing leads to insurance agents and brokers have often steered beneficiaries only to those MA plans they represent and receive a commission from, without revealing other MA plans or options that may be available.

In addition, we have experienced many instances in which beneficiaries have enrolled in, or been enrolled in plans with narrow networks that didn't include their current providers, had pharmacy benefits with higher costs, imposed higher copayments than expected, didn't have the benefits they'd seen advertised, or that were completely inappropriate for their particular needs and not what they thought they were buying. These sales often involve brokerages or third party marketing groups that represent only some of the options available to Medicare beneficiaries.

In our view the proposed rule does little to change the current situation. The proposed marketing guidelines appear to require weak disclaimer language and a vague and unstructured responsibility that MA plans must adhere to, and stricter marketing standards for their downstream marketers and sellers. It's hard to discern what standards exist currently that are being strengthened and what guidelines exist for supervising, reporting, and punishing violations made by TPMOs or those who enroll beneficiaries in unwanted or inappropriate MA plans.

CHA will be submitting comments to CMS about these proposed guidelines, but we encourage SITF members to consider how the current proposed guidelines might be strengthened and how state regulators could have a greater role in the enforcement of marketing and sales of MA plans.

Disclaimer Is Not Disclosure:

The proposed rule requires TPMOs to use a standard disclaimer to be prominently displayed on websites, in marketing and print materials, and in television ads as follows:

> "We do not offer every plan available in your area. Any information we provide is limited to those plans we do offer in your area. Please contact Medicare.gov or 1-800-MEDICARE to get information on all of your options."

We contend that is disclaimer is inadequate and will propose the following disclosure language:

> *We do not offer all the plans that may be available to you in your area, nor do we provide any information about those plans. You can contact your state SHIP at [800 phone number and website address] for help and objective information and assistance about all of your options as a Medicare beneficiary. You can also contact Medicare.gov or 1-800-MEDICARE for more information about plans that are available to you in your area.*

At a minimum, any language involving enrollment for Medicare coverage should require a referral to the state SHIP. These programs are the obvious Medicare resource in each state, and how beneficiaries can get objective assistance and verify the information they are receiving from third party marketers, brokers or agents.

This disclosure requirement should also apply to agents and brokerage firms so that beneficiaries understand the limitations of any solicitations for coverage. In addition, agents and brokerage firms should be required to sign an attestation that whatever product is sold is appropriate for that beneficiary. Such an attestation would ensure that duals are not enrolled in products that are

inappropriate for their needs or situation. Such an attestation is currently required for the sale of a Medigap and that consumer protection should also apply to the sale of MA plans.

Administrative Structure And Complaints

It is not clear to us what structure currently exists for enforcement of existing standards, how complaints against agents, brokers, or TPMO's are received and processed, what enforcement process exists, or what actions if any are taken by a MA plan or by CMS as the result of a complaint.

It is unclear what role if any a state regulator plays in the receipt, processing, or enforcement involving a complaint against an agent or broker. It appears that CMS relies upon complaints registered with 1-800-Medicare, or in rare instances when a complaint is received through an MOU with a state where that process exists. Current regulations contain requirements related to state licensing and license revocation, agent training and compensation but do not address an administrative process for receiving complaints, investigating complaints, and resolving complaints against agents, brokers, or TPMO's. Any role for state regulators seems to be absent from current regulations and is not addressed in the proposed regulation.

We suggest that tightening oversight of MA plans and their downstream marketing and sales entities should include a clear administrative process for complaints, and that process should include coordination with state regulators.

We hope the Task Force finds these comments useful.

Sincerely,

Bonnie Burns, Consultant
NAIC consumer representative