



THE SECRETARY OF HEALTH AND HUMAN SERVICES

WASHINGTON, D.C. 20201

October 2, 2009

The Honorable Dave Camp  
House of Representatives  
Washington, DC 20515

Dear Mr. Camp:

Thank you for your recent letters regarding steps taken by the Centers for Medicare & Medicaid Services (CMS) to address information disseminated by certain Medicare Advantage (MA) plans. In particular, you have questioned the motivation underlying the Agency's actions, including the initiation of an investigation into Humana. This letter responds by summarizing the three overarching concerns that led CMS to take immediate action and also identifies several statutory and regulatory authorities supporting the action.

First, under the statute and conforming regulations, CMS is required to ensure that communications provided to Medicare beneficiaries are accurate and not confusing or misleading. Second, CMS is required to ensure that plans do not misuse beneficiary information for purposes inconsistent with restrictions they have agreed to in their contract on the use of such information. Third, CMS is required to ensure that Federal funds paid to contracting entities, including MA plans, are not used for impermissible purposes such as lobbying.

With regard to Humana, the communications in question had the potential to be confusing and/or misleading to beneficiaries. The specific mailing of concern included the following statement on the envelope, "Important information about your Medicare Advantage plan—open today!" Inasmuch as the statement on the envelope purported to have current plan benefit information, it could be misleading to a beneficiary since the information inside the envelope instead discussed pending health reform legislation. Given that MA and Part D prescription drug plans will soon begin mailing annual required notices to beneficiaries about specific changes to plan benefits or plan structures for the upcoming year, wholly unrelated to any possible future legislative changes, the timing and content of this messaging was particularly concerning to the Agency. Under section 1851(h)(1) of the Social Security Act (incorporated for Part D under section 1860D-1(b)(vi)) plans are required to submit all materials defined as marketing to CMS for review and approval prior to sending them to their Medicare enrollees. The regulations define "marketing materials" to include "any information targeted to Medicare beneficiaries" that, among other things, provides information on plan benefits (42 CFR 422.2260; 423.2260). We are concerned that the particular mailing in question violated these regulations because it purported to provide MA enrollees with "information" about their "Medicare Advantage plan" that suggested that the mailing contained "official" information from the Medicare program about the enrollee's Medicare plan, when this was not the case.

October 2, 2009

The Agency had a second concern about misuse of beneficiary information given that Part C and Part D plans sign an attestation under which they agree to use Medicare beneficiary data obtained by virtue of their contracts with CMS only for purposes of administering their plans. CMS is investigating whether plans inappropriately used beneficiary data subject to this limitation in their health care reform outreach efforts.

Finally, we are concerned that Federal funds not be used improperly for activities that are prohibited under the Department of Health and Human Services' (HHS) appropriations acts. HHS's appropriations acts very specifically provide that no appropriated funds may be used to pay the "salary or expenses of any grant or contract recipient, or agent acting for such recipient, related to any activity designed to influence legislation or appropriations pending before the Congress or any State legislature." See Division F, Title V, Section 503(b), Departments of Labor, HHS, and Education Appropriations Act, 2009, as enacted by Section 5, Omnibus Appropriations Act, 2009, Pub. L. 111-8, 123 Stat. 524, 802 (March 11, 2009). Because administrative costs incurred by MA and Part D prescription drug plans are included in their "bids," and these bids form the basis for Medicare payments, CMS needs to ensure that no Federal funds were used for the lobbying activities in question. I should note that under recent audits, it appears that in some cases lobbying costs may have been included as administrative costs in Medicare health and drug plan bids. CMS is therefore committed to ensuring that plans have not done so in this case, and that other contracted organizations contemplating lobbying activities also do not pay for these activities with Federal funds.

To be clear, HHS believes that contracted organizations that sponsor MA and prescription drug plans may communicate their views on pending legislation with no interference from CMS or others in the Department, assuming compliance with the provisions noted above. Indeed, such communication may be outside of HHS review if done by the corporate sponsors of these plans with no interaction (e.g., use of funds or protected beneficiary information) with Medicare.

You also asked about mailings by the Association for the Advancement of Retired Persons (AARP), and specifically whether any enforcement actions were initiated by CMS regarding AARP mailings. The AARP is not a Medicare contractor and maintains its own membership records. The Medicare health and drug plans advertised by AARP are sponsored by United Health Group under contract with CMS, and therefore mailings by United Health Group are included in our overall investigation.

I appreciate your interest in our actions since we share a responsibility to Medicare beneficiaries and taxpayers to ensure fair and appropriate communication and information. To ensure that any compliance and enforcement actions are appropriately and consistently applied, CMS will continue its review to determine whether Medicare contractors that sponsor health and drug plans may have violated marketing guidelines and other provisions noted above. In addition, CMS is preparing a ready reference for Medicare health and drug plan sponsors on outreach related activities. CMS will soon be issuing summary guidance that compiles all the relevant statutes and guiding regulations in this area.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen Sebelius". The signature is written in a cursive, flowing style.

Kathleen Sebelius