

Supporting Statement Part A
Medicare Advantage and Prescription Drug Program:
Communications and Marketing Provisions
CMS-10837, OMB 0938-1442

Note: This collection of information request is associated with our April 12, 2023 (88 FR 22120) final rule (CMS-4201-F, RIN 0938-AU96). Pages 79679 and 79691 of our December 27, 2022 (87 FR 79452) proposed rule had mistakenly set out CMS-10260 (OMB 0938-1051) as the collection of information request's CMS ID number and the OMB control number. The correct numbers are CMS-10837 and 0938-1442, respectively.

Background

In accordance with our statutory to develop marketing standards under sections 1851(h), 1851(j), 1860D-1(b)(1)(vi), and 1860D-4(l) of the Social Security Act (hereinafter, "the Act"), as well as the statutory requirements in sections 1852(c) and 1860D4(a) of the Act requiring MA organizations and Part D sponsors to disclose specific types of information to enrollees, we are promulgating the following changes to strengthen beneficiary protections and improve MA and Part D marketing.

With regard to CMS-4201-F, we have finalized the following proposed provisions with no or certain modifications.

- (1) Reinstate the prohibition on MAOs and Part D sponsors marketing outside of their service areas (unless unavoidable) – FINALIZED AS PROPOSED;
- (2) Reinstate the prohibition on sales presentations following educational events – FINALIZED AS PROPOSED;
- (3) Reinstate the prohibition on distribution and collection of Scope of Appointment and Business Reply Cards by agents at educational events – FINALIZED WITH MODIFICATION: retain the prohibition on distribution and collection of Scope of Appointment documents, but allow business reply cards to be made available at events (as opposed to being distributed);
- (4) Reinstate the prohibition on conducting a sales/marketing or enrollment meeting with a beneficiary before 48 hours after the beneficiary's initial consent to the meeting (via scope of appointment) FINALIZED WITH MODIFICATION: we are allowing certain exceptions to this requirement per comments we received including when beneficiaries lack transportation and cannot return after 48 hours, when beneficiaries have walked into an agents/broker's office and want to review plans immediately, and when waiting 48 hours would move the beneficiary's enrollment into a new month and thus change the effective date of the enrollment (or the option to enroll at all);
- (5) Clarify the requirement of a plan to notify CMS of any agent that fails to adhere to CMS requirements – FINALIZED AS PROPOSED;
- (6) Add the requirement that agents/brokers inform beneficiaries that the beneficiaries can obtain complete Medicare information from 1-800-MEDICARE, SHIPs, or Medicare.gov – FINALIZED AS PROPOSED;

- (7) Require that agents/brokers ask a standardized list of questions prior to enrolling the beneficiary in a plan (CMS has already developed the questions as part of the Pre-Enrollment Check List) – FINALIZED AS PROPOSED;
- (8) Require that agents/brokers inform beneficiaries of all the plans the agent/broker actually sells – FINALIZED WITH MODIFICATION: where this requirement applies to telephonic communications, the agent/broker need only mention how many organizations they represent and how many plans are available from these organizations; and
- (9) Clarify the prohibition of the use of the term “Medicare” or CMS’s logos in a way that is misleading or confusing or which misrepresents the plan – FINALIZED AS PROPOSED.

Overall, the provisions add 6,273 responses, 2,266 hours, and \$172,671. See section 12 of this Supporting Statement for a more in depth discussion of the finalized changes and burden estimates.

There are no reporting instruments or instructions other than what was published in CMS-4201-F.

A. JUSTIFICATION

1. Need and Legal Basis

Since late 2019, CMS has become increasingly aware of aggressive activities used by sales agents and insurance brokers to enroll beneficiaries in MA and Part D plans that the beneficiaries did not request. The tactics have resulted in an extreme increase in marketing-related complaints to 1-800 MEDICARE as well as to the CMS Regional Office staff. On investigation, the complaints arose out of perspectives and regulatory changes made under different administrative direction. The changes made in this regulation are focused on reversing the changes made previously that resulted in the increase in complaints to CMS.

Sections 1851(h), 1851(j), and 1852(c) of the Act, which address Medicare Part C, provide CMS the authority to review marketing materials, develop marketing standards, and ensure that marketing materials are accurate and not misleading. These provisions also provide CMS with the authority to prohibit certain marketing activities.

Section 1856(b)(1) of the Act provides CMS the authority to add additional standards to the MA program that the Secretary determines are necessary for CMS to carry out the program.

In addition, sections 1876(i)(3)(D), 1857(e)(1) and 1860D-12(b)(3)(D) of the Act provide CMS with the authority to adopt additional contract terms for cost plans, MA plans, and Part D plans when necessary and appropriate.

Likewise, section 1860D-1(b)(1)(B)(vi) of the Act directs that the Secretary use rules similar to and coordinated with the MA rules at section 1851(h) of the Act for approval of marketing materials and application forms for Part D plan sponsors.

Section 1860D-4(l) of the Act applies certain prohibitions under section 1851(h) of the Act to Part D sponsors in the same manner as such provisions apply to MA organizations.

In addition, under section 1852(c) and 1860D-4(a) of the Act, CMS can require organizations to provide certain materials to Medicare beneficiaries concerning MA and Part D plan choices.

These statutory provisions help ensure Medicare beneficiaries are informed and protected when making an election to enroll in an MA (including MAPD) or Part D plan.

We believe the changes in CMS-4201-F strengthen CMS' ability to ensure MA and Part D marketing to beneficiaries is not misleading, inaccurate, or confusing.

Additionally, under 42 CFR 417.428, most marketing requirements in subpart V of part 422 apply to section 1876 cost plans as well.

2. Information Users

MA organizations and Part D sponsors use the information as do their first tier and downstream entities such as third-party marketing organizations (TPMOs) and lead generators. Only MA and cost organizations and Part D sponsors are bound by the requirement to create and maintain policy and procedure records.

3. Use of Information Technology

MA organizations and Part D sponsors will edit their policy and procedure documents on their own computer systems. Otherwise, there are no information collection or reporting requirements involving the use of automated, electronic, or other technological collection techniques.

4. Duplication of Efforts

The information collection requirements discussed herein are not duplicated through any other effort.

5. Small Businesses

The collection of information will have a minimal impact on small business since MA organizations and Part D sponsors must possess an insurance license and be able to accept substantial financial risk. Generally, state statutory requirements effectively preclude small businesses from being licensed to bear risk needed to serve Medicare enrollees.

6. Less Frequent Collection

All of the collection of information of information requirements are one-time efforts to revise policies and procedures.

7. Special Circumstances

There are no special circumstances that would:

- Require respondents to report information to the agency;
- Require respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;
- Require respondents to submit any documents;
- Require respondents to retain any records;
- Make use of a statistical survey that is not designed to produce valid and reliable results that can be generalized to the universe of study,
- Require the use of a statistical data classification that has not been reviewed and approved by OMB;
- Include a pledge of confidentiality that is not supported by authority established in statute or regulation that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or
- Require respondents to submit proprietary trade secret, or other confidential information.

8. Federal Register/Outside Consultation

Serving as the 60-day notice, our proposed rule (CMS-4201-P; RIN 0938-AU96) published in the Federal Register on December 27, 2022 (87 FR 79452). Comments were received on the proposed rule, but none pertained to the COI section of the rule or the PRA.

Our final rule (CMS-4201-F; RIN 0938-AU96) published in the Federal Register on April 12, 2023 (88 FR 22120).

9. Payments/Gifts to Respondents

There are no payments/gifts to respondents.

10. Confidentiality

No information is being collected or reported. As such, there are no confidentiality issues.

11. Sensitive Questions

All of the collection of information of information requirements are one-time efforts to revise policies and procedures. None of which are of a sensitive nature.

12. Information Collection Requirements and Associated Burden Estimates

Wages Estimates

To derive average costs, we used data from the U.S. Bureau of Labor Statistics' May 2021 National Occupational Employment and Wage Estimates for all salary estimates (http://www.bls.gov/oes/current/oes_nat.htm). In this regard, the following table presents BLS' mean hourly wage, our estimated cost of fringe benefits and other indirect costs (calculated at 100 percent of salary), and our adjusted hourly wage.

Occupation Titles and Wages

Occupation Title	Occupation Code	Mean Hourly Wage (\$/hr)	Fringe Benefits and Other Indirect Costs (\$/hr)	Adjusted Hourly Wage (\$/hr)
Business Operations Specialist	13-1199	38.10	38.10	76.20

As indicated, we are adjusting our employee hourly wage estimates by a factor of 100 percent. This is necessarily a rough adjustment, both because fringe benefits and other indirect costs vary significantly from employer to employer, and because methods of estimating these costs vary widely from study to study. Nonetheless, we believe that doubling the hourly wage to estimate total cost is a reasonably accurate estimation method.

Information Collection Requirements and Associated Burden Estimates

The following collection of information requirements and burden estimates are associated with our April 12, 2023 (88 FR 22120) final rule (CMS-4201-F, RIN 0938-AU96).

For the reinstatement of the prohibition on MAOs and Part D sponsors marketing outside of their service areas (unless unavoidable), we estimate that it would take 30 minutes (0.5 hr) at \$76.20/hr for a business operations specialist to change the MAO’s policies and procedures. In aggregate, we estimate a burden of 349 hours (697 contracts x 0.5 hr) at a cost of \$26,594 (349 hr x \$76.20/hr).

For the reinstatement of the prohibition on sales presentations following educational events, we estimate that it would take 15 minutes (0.25 hr) at \$76.20/hr for a business operations specialist to change the MAO’s policies and procedures. In aggregate, we estimate a burden of 174 hours (697 contracts x 0.25 hr) at a cost of \$13,259 (174 hr x \$76.20/hr).

For the reinstatement of the prohibition on distribution and collection of Scope of Appointment and Business Reply Cards by agents at educational events, we estimate that it would take 15 minutes (0.25 hr) at \$76.20/hr for a business operations specialist to change the MAO’s policies and procedures. In aggregate, we estimate a burden of 174 hours (697 contracts x 0.25 hr) at a cost of \$13,259 (174 hr x \$76.20/hr).

For the reinstatement of the prohibition on conducting a sales/marketing or enrollment meeting with a beneficiary before 48 hours after the beneficiary’s initial consent to the meeting (via scope of appointment), we estimate that it would take 15 minutes (0.25 hr) at \$76.20/hr for a business operations specialist to change the MAO’s policies and procedures. In aggregate, we estimate a burden of 174 hours (697 contracts x 0.25 hr) at a cost of \$13,259 (174 hr x \$76.20/hr).

For the clarification of the requirement of a plan to notify CMS of any agent that fails to adhere to CMS requirements, we estimate that it would take 30 minutes (0.5 hr) at \$76.20/hr for a business operations specialist to change the MAO’s policies and procedures. In aggregate, we estimate a burden of 349 hours (697 contracts x 0.5 hr) at a cost of \$26,594 (349 hr x \$76.20/hr).

For the requirement that agents/brokers inform beneficiaries that the beneficiaries can obtain complete Medicare information from 1-800-MEDICARE, SHIPs, or Medicare.gov, we estimate that it would take 30 minutes (0.5 hr) at \$76.20/hr for a business operations specialist to change the MAO’s policies and procedures. In aggregate, we estimate a burden of 349 hours (697 contracts x 0.5 hr) at a cost of \$26,594 (349 hr x \$76.20/hr).

For the requirement that agents/brokers ask a standardized list of questions prior to enrolling the beneficiary in a plan, we estimate that it would take 30 minutes (0.5 hr) at \$76.20/hr for a business operations specialist to change the MAO’s policies and procedures. In aggregate, we estimate a burden of 349 hours (697 contracts x 0.5 hr) at a cost of \$26,594 (349 hr x \$76.20/hr).

CMS has already developed the questions as part of the Pre-Enrollment Check List. CMS does not require agents/brokers to develop the questions themselves. As the questions were already developed, and the development was performed by CMS staff, development of the questions does not incur such burden on the part of any MA organizations.

For the requirement that agents/brokers inform beneficiaries of all the plans the agent/broker actually sells, we estimate that it would take 15 minutes (0.25 hr) at \$76.20/hr for a business operations specialist to change the MAO’s policies and procedures. In aggregate, we estimate a burden of 174 hours (697 contracts x 0.25 hr) at a cost of \$13,259 (174 hr x \$76.20/hr).

For the changes that clarify the prohibition of the use of the term “Medicare” or CMS’s logos in a way that is misleading or confusing or which misrepresents the plan, we estimate that it would take 15 minutes (0.25 hr) at \$76.20/hr for a business operations specialist to change the MAO’s policies and procedures. In aggregate, we estimate a burden of 174 hours (697 contracts x 0.25 hr) at a cost of \$13,259 (174 hr x \$76.20/hr).

Summary of Finalized Collection of Information Requirements and Associated Burden Estimates

Requirement: Changes to Policies and Procedures	Number of Respondents	Number of Responses	Time per Response (hr)	Total Time (hr)	Labor Cost (\$/hr)	Total Labor Cost (\$)
Reinstatement of the prohibition on MAOs and Part D sponsors marketing outside of their service areas (unless unavoidable)	697 MA organizations	697 contracts	0.5	349	76.20	26,594
Reinstatement of the prohibition on sales presentations following educational	697 MA organizations	697 contracts	0.25	174	76.20	13,259

events						
Reinstatement of the prohibition on distribution and collection of Scope of Appointment (and allowing BRCs to be made available) by agents at educational events	697 MA organizations	697 contracts	0.25	174	76.20	13,259
Reinstatement of the prohibition on conducting a sales/marketing or enrollment meeting with a beneficiary before 48 hours after the beneficiary's initial consent to the meeting (via scope of appointment) with exceptions	697 MA organizations	697 contracts	0.25	174	76.20	13,259
Clarification of the requirement of a plan to notify CMS of any agent that fails to adhere to CMS requirements	697 MA organizations	697 contracts	0.5	349	76.20	26,594
Agents/brokers inform beneficiaries that the beneficiaries can obtain complete Medicare information from 1-800-MEDICARE, SHIPs, or Medicare.gov	697 MA organizations	697 contracts	0.5	349	76.20	26,594
Agents/brokers ask a standardized list of questions	697 MA organizations	697 contracts	0.5	349	76.20	26,594

prior to enrolling the beneficiary in a plan						
Agents/brokers inform beneficiaries of the number of organizations and plans the agent/broker represents	697 MA organizations	697 contracts	0.25	174	76.20	13,259
Clarify the prohibition of the use of the term "Medicare" or CMS's logos in a way that is misleading or confusing or which misrepresents the plan	697 MA organizations	697 contracts	0.25	174	76.20	13,259
TOTAL	697 MA organizations	6,273	Varies	2,266	Varies	172,671

Collection of Information Instruments and Instruction/Guidance Documents

There are no reporting instruments or instructions other than what is published in CMS-4201-F and what is codified in the CFR.

13. Capital Costs

Not applicable.

14. Annual Cost to the Federal Government

The burden associated with the expectations for MA organizations to revise their policy and procedure documents is strictly borne by those organizations.

None of the costs associated with the organization's revisions would be incurred by the Federal Government. Regardless, the following is an assessment of the costs incurred in the normal course of business operations.

CMS Central Office Staff: 1 FTE (GS-13 Step 1) working at 5% of assigned duties.

Annual Time: 104 hours (2,080 hr x 0.05)

Adjusted Hourly Wage: \$94.40/hr (\$47.20/hr + \$47.20/hr)

Annual Cost: = \$9,818 (\$94.40/hr) x (104 hr)

\$47.20/hr is derived from OPM's 2023 Salary Table at https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/RUS_h.pdf

\$94.40/hr is calculated from 100% of the hourly wage (\$47.20/hr x 2) to account for fringe benefits and overhead.

15. Changes to Burden

Since this is a New collection of information request, there are no changes.

16. Publication/Tabulation Dates

There are no publication or tabulation dates.

17. Expiration Date

CMS does not object to displaying the expiration date.

18. Certification Statement

There are no exceptions to the certification statement.

B. Collections of Information Employing Statistical Methods

This collection does not employ statistical methods.