DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, Maryland 21244-1850

MEMORANDUM

DATE: October 16, 2009

TO: All Medicare Advantage Organizations, Part D Sponsors, 1876 and 1833 Cost Contractors, PACE and Medicare Advantage Demonstrations

FROM: Teresa DeCaro, RN, M.S., Acting Director
Medicare Drug and Health Plan Contract Administration Group

SUBJECT: Use of Federal funds for non plan-related activities

The purpose of this memorandum is to clarify the prohibition on using Federal Funds for non plan-related activities designed to influence state or federal legislation or appropriations, by Medicare Advantage (MA), Part D Sponsors, Cost Contractors, PACE and MA demonstration plans (including individual market and employer plans).

The Department of Health and Human Services' annual 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, § 503(b), Departments of Labor, HHS, and Education Appropriations Act, 2009, as enacted by § 5, Omnibus Appropriations Act, 2009, Pub. L. 111-8, 123 Stat. 524, 802 (March 11, 2009). While the existing requirements described above have been in effect for years, we want to make clear how this applies to bids and financial audits.

On July 10, 1997, CMS (then HCFA) released guidance that acknowledged identical requirements of the then-applicable appropriations act. The guidance advised that lobbying activities undertaken at the expense of risk contractor Health Maintenance Organizations/Competitive Medical Plans would be permitted subject to certain restrictions intended to ensure that beneficiaries would not confuse such activities with plan marketing materials reviewed and approved by CMS. In concluding that "risk contracts" did not implicate the "lobbying with federal funds prohibition," the guidance relied upon the assumption that a health plan could provide an assurance that, in arriving upon a negotiated fixed price, it had not included costs attributable to the plan's lobbying activities. The guidance distinguished "cost contracts" that involved individually identified cost elements accounted for on a cost report.

Because the Medicare risk contracting program has undergone significant changes in the 12 years since the 1997 guidance was issued, superseding that guidance is warranted, and is being issued by way of this memo. One of the notable changes in the contracting program is the fact that the current bidding methodology employed under the MA and Part D program was not in effect in 1997. The current bidding method used for Parts C and D bids specifically account for administrative costs, and Federal dollars are associated with those amounts. Recent audits indicate that in some cases lobbying costs may have been included as administrative costs in Part C and Part D bids.

CMS therefore is clarifying that MA and PACE organizations, Part D sponsors, and 1876 and 1833 cost contractors that engage in lobbying activities must not include such costs in their bid or cost report. In addition, if an audit identifies that lobbying expenses have been paid with federal funds, entities will be required to return to the Federal government an amount equal to these expenditures.

We also direct organizations and sponsors to our current marketing guidelines that also provide guidance concerning enrollee communications, as well as the HPMS memo entitled "*Allowable Use of Medicare Beneficiary Information Obtained from CMS,*" which includes information specific to lobbying activities that are permissible under our current regulations.

We intend to enforce this guidance on a prospective basis beginning with bids submitted for CY2011. If you have any questions about whether plan communications comply with the MA program requirements and guidance and federal law, we encourage you to contact Camille Brown at camille.brown@cms.hhs.gov.