Developing Consumer Marketing Materials in the New ACA Regulatory Environment

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Overview

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• Regulation of Health Insurance Marketing
  – Federal Programs
  – State Bases Rules
• Marketing After the ACA
• Life In the Exchanges
  – Marketing-Related Regulations and Guidance
  – Navigators, In-Person Assisters, Certified Application Counselors, Producers
• Exchange Specific Marketing Rules: Covered California Example
In the beginning . . .

- There were two basic compliance arenas with health plan marketing:
  - Compliance with applicable federal program requirements
    - Medicare Marketing Guidelines (42 C.F.R. §§ 422.2260 – 2276; 42 C.F.R. §§ 423.2260 – 2276; Medicare Managed Care Manual, Ch. 3; Medicare Prescription Drug Benefit Manual, Ch. 3)
    - Medicaid Marketing Rules (42 U.S.C. 1396u–2(d)(2); 42 C.F.R. § 438.104)
    - Other Federal Program Guidance (e.g., Tricare, FEHBP)
  - State law requirements
    - Policy rate and form review
    - Producer regulation and oversight
    - Unfair and deceptive trade practices laws
Now, in the Post-ACA World . . .

• In the brave new ACA world, the federal/state spheres have become increasingly intertwined:
  – MLR rule
  – Exchanges
  – Changed market dynamics

• The ACA relies heavily on existing state law enforcement mechanisms, but raises the specter of federal oversight and enforcement
Regulation of Health Insurance Marketing: Federal Programs

• Medicare Marketing Guidelines (MA, PDP):
  – Robust set of requirements designed to prevent fraud and abuse and to ensure access
  – Requires prior approval by CMS of certain materials, activities, and language
  – Limits member reimbursement for referrals to nominal gifts (less than $15 cash value, no cash at all)

• Medicaid Marketing Guidelines:
  – Similar to Medicare rules, requires prior approval by state agencies
    (see generally 42 U.S.C. 1396u–2(d)(2) and 42 C.F.R. § 438.104)
Regulation of Health Insurance Marketing: Federal Programs (cont’d)

• Other Federal Programs have similarly robust limitations and requirements

• Potential False Claims Act (42 U.S.C. § 1320a-7b(c)) liability for false certifications vis-à-vis federal health care programs
Regulation of Health Insurance Marketing: Federal Programs (cont’d)

• All federal health care programs are subject to the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b)

• “Federal health care program” means:
  (1) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of title 5); or
  (2) any State health care program, as defined in section 1320a–7(h) of this title.

• “State health care programs,” in turn are defined to include Medicaid, CHIP, and certain other state health benefit programs with federal support. (42 U.S.C. § 1320a-7(h)).
Regulation of Health Insurance Marketing: Federal Programs (cont’d)

• In her October 30, 2013 correspondence to Congressman Jim McDermott (D-WA), Secretary of Health & Human Services (“HHS”) Kathleen Sebelius declared that:
  – HHS “does not consider QHPs, other programs related to the Federally-facilitated Marketplace, and other programs under title I of the Affordable Care Act to be federal health care programs.”
  – She explained that this includes:
    The state-based and federally facilitated Marketplaces; the cost sharing reductions and advance payments of the premium tax credit; Navigators for the Federally-facilitated Marketplaces and other federally funded consumer assistance programs; consumer-oriented and operated health insurance plans; and the risk adjustment, reinsurance and risk corridors programs. This may impact QHP marketing activities, such as the payment of referral fees to providers or others for steering membership to certain QHPs.
Regulation of Health Insurance Marketing: Exchanges Are Not Federal Health Care Programs

• Sec. Sebelius’ position is:
  – first, that government funding does not, by itself, constitute the provision of health benefits and,
  – second, that the Exchange health benefit offerings by QHPs, which do “provide” health benefits, are not funded “directly” by the federal government.

• The federal Anti-Kickback law, 42 U.S.C. § 1320a-7b(b), does not apply to Exchanges.
Regulation of Health Insurance Marketing: Exchanges are Not Federal Health Care Programs (cont’d)

• This does not mean that the False Claims Act does not apply to Exchanges.
  – Payments made by, through or in connection with an Exchange are subject to the False Claims Act if the payments include any federal funds. (Section 1313 of the ACA, 42 U.S.C. 18033(a)(6)(A)).

• Barring other state law prohibitions or limitations, QHPs—and providers—may engage in conduct on Exchanges that they cannot perform in other federal health care programs, such as Medicare and Medicaid.
Regulation of Health Insurance Marketing: State-based Rules

• Policy rate and form review:
  – Some states have plain language requirements (e.g., Texas Ins. Code § 1301.157)
• Referral prohibitions or limits
• Regulation of plan names (e.g. Cal. Code Regs. tit. 28, § 1300.66)
• Producer licensure and oversight
• Unfair and Deceptive Trade Practices Acts and other Consumer Protection Statutes
Regulation of Health Insurance Marketing: The ACA

• The ACA does not have a direct focus on marketing activities, but does impact payor marketing in a variety of ways:
  – Medical Loss Ratio rule
  – Changes to guaranteed issue and renewal
  – Exchanges, which lean heavily on states

• After the ACA, the world effectively has been divided into three, and eventually just two, main categories:
  – HIPAA excepted benefits;
  – ACA-compliant policies; and, for the time being,
  – Grandfathered health plans (along with non-ACA compliant individual and small group plans for 2014 . . .)
Regulation of Health Insurance Marketing: The ACA (cont’d)

• Examples of false advertising cases involving the healthcare industry

UPMC Ad: “When I signed up for this insurance, I was told I could go to UPMC, and now you’re trying to push me somewhere else.”

Highmark ad: “UPMC is running a TV ad that, quite honestly, is trying to deceive you.”
Challenging False Advertising

• National Advertising Division (NAD)
  – Industry-funded, self-regulation forum for ad dispute resolution

• Section 43(a), Lanham Act, 15 U.S.C. §1125(a)
  – Provides for competitor standing to challenge false advertising in interstate commerce
Regulation of Health Insurance Marketing: The ACA (cont’d)

Challenging False Advertising (cont’d)

• Section 43(a), Lanham Act, 15 U.S.C. §1125(a) (cont’d)
  – Elements
    1. False/misleading statement
    2. Actual deception or tendency to deceive
    3. Deception is material
    4. Interstate Commerce
    5. Injury to Plaintiff
  – Remedies include injunction, disgorgement, damages and attorney fees
Regulation of Health Insurance Marketing: Marketing After the ACA: the MLR Rule

• ACA MLR Summary:
  – Health insurance issuers offering group or individual health insurance coverage are required to report their MLR each year
  – Minimum MLR for large group market – 85%
  – Minimum MLR for individual market and small group market – 80%
    • States are free to adopt higher minimum MLRs
    • New York, for example, set an 82% minimum MLR
    • HHS Secretary may adjust the minimum MLR for individual market to prevent destabilization
  – Minimum MLR for MA and PDP – 85%
  – Statutory Provision: PHSA § 2718
Regulation of Health Insurance Marketing: Potential MLR-related Marketing Issues

- Broker commission practices
- Mid-year Premium holidays to avoid end of year rebates
- Selective (discriminatory) premium adjustments driven by perceived market positioning
Regulation of Health Insurance Marketing: Broker Commissions

• Issuers could elect not to pay brokers on their own behalf and not to include premiums for broker commissions to customers. If so, this raises some due diligence questions.
  – Issuer should consider acting as a mere conduit in the transaction, i.e., collecting and then relaying payments to producers from employer groups for services rendered to the employers.

• Is there risk that even a straight pass-through of producer commissions could be deemed receipt of earned premium?
  – Response would be that employer groups do not pay money to producers via issuer “as a condition of receiving coverage”
  – Response would be that issuer does not incur non-claims costs when relaying the payment to the producers
Regulation of Health Insurance Marketing: Premium Holidays

• April 20, 2012 Technical Guidance provides that issuers may offer premium holidays if permitted under state law

  – But it goes on to say that:
    
    However, if an issuer chooses to provide a premium holiday and its State regulator allows it to do so, HHS expects that the premium holiday would be provided in a non-discriminatory manner, meaning that it is offered to every policyholder in a State’s market and not based on product type or the experience of a particular policy.*

* Center for Consumer Information and Insurance Oversight, CCIIO Insurance Standards Bulletin 2012-002, Questions and Answers Regarding the Medical Loss Ratio Regulation (Apr. 20, 2012)
Regulation of Health Insurance Marketing: Premium Holidays (cont’d)

• What exactly does this mean? What independent meaning is afforded by the “non-discriminatory” language to the extent that it appears to go beyond similar state law requirements?

• How does timing affect appearances and what difference does it make?
Regulation of Health Insurance Marketing: Cross-Product Promotion, Bundling, and Subsidization

• Cross-selling products such as life or disability along with health is common practice

• Bundling may permit across-the-board reduction in premium for all products purchased
  – Bundling discount may need to be actuarially justified for state regulatory approval

• What if discount is offered only on health insurance for those who also purchase life or disability?
  – Scrutiny as being actuarially unsound?
  – Proper accounting treatment?
  – Potential violation of anti-rebating laws?
Regulation of Health Insurance Marketing: Marketing After the ACA (cont’d)

Changes to Guaranteed Issue and Renewal

• Pre-ACA: Guarantee issue requirements applied only to small groups

• Post-ACA: Guaranteed availability provisions for large group as well as small group in Section 2702 of the Public Health Service Act, codified at 42 U.S.C. §300gg-1(a)
  – With very limited exceptions, the law provides that “each health insurance issuer that offers health insurance coverage in the individual or group market in a State must accept every employer and individual in the state that applies for such coverage.”
Regulation of Health Insurance Marketing: Marketing After the ACA (cont’d)

Changes to Guaranteed Issue and Renewal (cont’d)

• 45 C.F.R. §147.104(a)

    a health insurance issuer that offers health insurance coverage in the individual or group market in a state must offer to any individual or employer in the state all products that are approved for sale in the applicable market, and must accept any individual or employer that applies for any of those products.” (emphasis added).
Regulation of Health Insurance Marketing: Marketing After the ACA (cont’d)

Life in the Exchanges aka Marketplaces

• The Exchanges largely are creatures of state law:
  - 45 C.F.R. § 156.225 re QHP marketing
    • §156.225 Marketing and Benefit Design of QHPs.
    • A QHP issuer and its officials, employees, agents and representatives must—
      (a) State law applies. Comply with any applicable State laws and regulations regarding marketing by health insurance issuers; and
      (b) Non-discrimination. Not employ marketing practices or benefit designs that will have the effect of discouraging the enrollment of individuals with significant health needs in QHPs.
Regulation of Health Insurance Marketing: Marketing After the ACA (cont’d)

Life in the Exchanges aka Marketplaces (cont’d)

– States retain primary enforcement for Exchanges (and the ACA generally, per PHSA § 2736(a)(1)), including the market reforms, though HHS may enforce ACA requirements, such as EHB rules, directly against insurers if a state is not “substantially enforcing” the ACA. (PHSA § 2736(a)(2))

– State laws are not preempted, so long as the state law “does not prevent the application of” the ACA. (ACA § 1321(d))
Regulation of Health Insurance Marketing: Marketing After the ACA (cont’d)

Life in the Exchanges aka Marketplaces (cont’d)

• Regardless of the type of Exchange (State-Based, State Partnership, or Federally-Facilitated) states retain authority for traditional insurance regulatory issues such as:
  – Licensing and solvency;
  – Rate and form review;
  – Consumer protection/complaints; and
  – Market conduct
Regulation of Health Insurance Marketing: Life in the Exchanges

Marketing-related Federal Regulatory Requirements for QHP Issuers

• Standardized consumer information in plain language (45 C.F.R. § 156.220)
• 45 C.F.R. § 155.200
  (d) A QHP issuer certified by an Exchange must adhere to the requirements of this subpart and any provisions imposed by the Exchange, or a State in connection with its Exchange, that are conditions of participation or certification with respect to each of its QHPs.
  (e) Non-discrimination. A QHP issuer must not, with respect to its QHP, discriminate on the basis of race, color, national origin, disability, age, sex, gender identity or sexual orientation.
  (f) Broker compensation in a Federally-facilitated Exchange. A QHP issuer must pay the same broker compensation for QHPs offered through a Federally-facilitated Exchange that the QHP issuer pays for similar health plans offered in the State outside a Federally-facilitated Exchange.
Regulation of Health Insurance Marketing: Life in the Exchanges (cont’d)

Federal Marketing-related Guidance

• CCIIO’s QHP Issuer Webinar Series FAQ #6, April 23, 2013 (Q&A No. 9):
  • CCIIO recommends that:
    – all marketing materials distributed to enrollees and to potential enrollees, contain the following disclaimer: ‘[Insert plan’s legal or marketing name] is a Qualified Health Plan issuer in the [Health Insurance Marketplace].’ A logo for the Health Insurance Marketplace will also be made available for use on marketing materials.
  • CCIIO interprets “marketing materials” to include all communications to consumers and enrollees, such as advertising materials, consumer notices, and brochures.
Federal Marketing-related Guidance (cont’d)

• QHP Issuers must comply with state marketing standards that apply to all issuers.
• QHP Issuers must ensure that all marketing products and materials meet the meaningful access standards.
• QHP Issuers must attest, as part of the QHP application process, that they will market QHPs in accordance with all applicable state laws and regulations and will not employ discriminatory marketing practices in accordance with 45 C.F.R. § 156.225.
Regulation of Health Insurance Marketing:
Life in the Exchanges (cont’d)

QHP Outreach and Partnership Opportunities

• QHP Issuer and Exchange interests are aligned vis-à-vis increasing uptake among “young invincibles”
• State marketing efforts
  – Limited advertising resources
• QHP Issuer outreach initiatives
  – Community and consumer-focused nonprofits
  – Labor, trade, industry, and professional associations/groups
  – Provider groups, but see inapplicability of Anti-Kickback Statute
  – Producers
Regulation of Health Insurance Marketing: Life in the Exchanges: Navigators (required for every Exchange)

Eligibility

• Capable of carrying out duties
• Relationships with potential enrollees
• Meet state licensing, certification, and other standards
• Conflicts of interest
• Meet privacy and security standards
Regulation of Health Insurance Marketing: Life in the Exchanges: Navigators (cont’d)

Eligibility

- Eligible Categories (every Exchange must include *at least two* of these categories, including community and consumer-focused nonprofits):
  - community and consumer-focused nonprofits;
  - trade, industry and professional associations;
  - unions;
  - SBA resource partners;
  - licensed agents and brokers;
  - commercial fishing industry organizations, and ranching and farming organizations; and
  - chambers of commerce
Regulation of Health Insurance Marketing: Life in the Exchanges: Navigators (cont’d)

Eligibility (cont’d)

• Ineligible: Health or stop-loss insurers and their subsidiaries, insurer associations, entities that receive consideration from insurers for enrollment
Funding

- Funded through operating budget (not establishment grants); however, establishment grants can fund training
- Federally-Facilitated Exchanges: $67 million in HHS grants were awarded to Navigators in August 2013
Duties

• Conduct public education activities
• Provide appropriate referrals
• Facilitate QHP selection
• Provide information in fair, accurate, impartial, and culturally and linguistically appropriate manner
Regulation of Health Insurance Marketing: Life in the Exchanges: Navigators (cont’d)

Governing Standards

• State Exchanges: Conflict-of interest, integrity, and training standards (ensure expertise in the needs of underserved populations, eligibility and enrollment rules and procedures, the range of QHP options and insurance affordability programs, privacy and security standards)

• Federal-Facilitated Exchanges: 45 CFR § 155.215 (Identical to IPA standards)
Regulation of Health Insurance Marketing:
Life in the Exchanges: In-Person Assisters
(optional on State Exchanges)

Eligibility

• Must not be ineligible to be a Navigator (Health or stop-loss insurers and their subsidiaries, insurer associations, entities that receive consideration from insurers for enrollment)
Regulation of Health Insurance Marketing: Life in the Exchanges: In-Person Assisters (optional on State Exchanges)

**Certification** (prior to carrying out any consumer assistance functions)

- HHS approved-training, approved certification exams, continuing education and annual recertification, prepared to serve individual Exchange and SHOP consumers
- Training content: Basic health insurance and Exchange concepts, QHPs, eligibility and enrollment rules and procedures, insurance affordability programs (e.g., Medicaid, CHIP), culturally and linguistically appropriate services, access for persons with disabilities, privacy and security standards, outreach and education methods and strategies
Regulation of Health Insurance Marketing: Life in the Exchanges: In-Person Assisters (cont’d)

**Funding**
- Establishment grants (Examples of outreach, education, enrollment grants by State: CA - $37 million, NY - $27 million)

**Duties**
- Same as Navigator
- Governing Standards
- Attestation re eligibility of entity and staff
Regulation of Health Insurance Marketing: Life in the Exchanges: In-Person Assisters (cont’d)

Duties (cont’d)

• Written plan to remain free of conflicts of interest
• Provide information to consumers re full range of QHP options and insurance affordability programs
• Required disclosures to Exchange and consumers re any lines of insurance business, current or past employment relationships with any health or stop-loss insurance issuers or their subsidiaries, and any existing or anticipated financial, business, or contractual relationships with health or stop loss insurance issuers (or subsidiaries)
Regulation of Health Insurance Marketing:
Life in the Exchanges: Certified Application Counselors (required for every exchange)

Eligibility/Certification

- Must be state certified
- More permissive eligibility standards than Navigators and IPAs
- **Certification Standards:** Complete Exchange-approved training | Pass Exchange-approved certification exams | Disclose relationships with QHPs or insurance affordability programs and other potential conflicts of interest to Exchange and potential applicants | Comply with privacy and security standards | Act in applicants’ best interest | Provide services directly or by referral
Regulation of Health Insurance Marketing:
Life in the Exchanges: Certified Application Counselors (required for every exchange) (cont’d)

Eligibility/Certification (cont’d)

Certification Process: Directly by Exchange, through designated organizations (who have an agreement with the Exchange, comply with certification requirements and maintain a registration process), or a combination of the two
Duties

- Consumer-focused Enrollment Assistance
- Not required to engage in education and outreach
Regulation of Health Insurance Marketing: Life in the Exchanges: Producers

- Producers may become Navigators, but are prohibited from receiving commissions from QHPs.
- States may permit producers to enroll individuals in QHPs.
- Producers may enter into agreements with Exchange to enroll individuals in a QHP through an Exchange.
- Federal regulations do not require producers to display all QHPs or to facilitate enrollment in all QHPs, but state requirements may.
Regulation of Health Insurance Marketing: Life in the Exchanges: Private Exchanges

- Private exchanges may be attractive ventures for
  - brokers targeting the large employer market, or
  - insurers offering a single-insurer private exchange

- Web-broker direct sales (45 C.F.R. § 155.220(c)):
  - Must allow consumers to view all QHPs;
  - May not provide financial incentives or giveaways;
  - Display all QHP data provided by the Exchange;
  - Maintain audit trails and records in an electronic format for at least 10 years;
  - Permit consumers to withdraw from the process and use the Exchange Web site at any time; and
  - For the Federally-facilitated Exchange, prominently display a standardized disclaimer provided by HHS, and provide a Web link to the Exchange Web site.
Regulation of Health Insurance Marketing: Examples of Exchange-Specific Marketing Rules

• Covered California QHP Issuer Marketing Guidelines (Sept. 24, 2013)

  The overall purpose of these guidelines is to ensure coordination of spending and marketing strategies to promote the maximum enrollment possible in insurance coverage through Covered California or, on a non-subsidized basis, directly through health plans outside of Covered California. Covered California and its contracted QHP Issuers recognize that higher enrollment and effective use of marketing dollars will benefit consumers by expanding coverage and reducing costs.
Regulation of Health Insurance Marketing: Examples of Exchange-Specific Marketing Rules (cont’d)

• Covered California QHP Issuer Marketing Guidelines (Sept. 24, 2013) (Cont’d)
  – Defines “marketing materials” to include no only advertising materials, but also

[A]ny materials developed or distributed by the QHP Issuer that are aimed at prospective or existing members of the QHP Issuer’s Individual & Family, and small business (SHOP) health benefit plans on the Exchange, as well as substantially similar products outside the Exchange.
Regulation of Health Insurance Marketing: Examples of Exchange-Specific Marketing Rules (cont’d)

• Covered California QHP Issuer Marketing Guidelines (Sept. 24, 2013) (Cont’d)
  – Requires annual sharing of marketing plans between QHP Issuer and Exchange
  – Marketing plans shall include
    • proposed marketing approaches and channels (e.g., radio, television, etc.),
    • detailed activities by channel and target market (e.g., region, demographic, etc.),
  – QHP Issuers must provide this information for each product—both inside and outside of the Exchange—for each market (Exchange, SHOP, etc.) in which it is active.
Regulation of Health Insurance Marketing: Examples of Exchange-Specific Marketing Rules (cont’d)

• Covered California QHP Issuer Marketing Guidelines (Sept. 24, 2013) (Cont’d)
  – Covered California does not require QHP Issuers to submit externally facing advertising, promotional, or outreach materials for prior approval.
  – Covered California does not require QHP Issuers to submit enrollee marketing materials for prior approval.
  – In both cases, Covered California requires advance submission.
  – Co-branding is required for certain items, such as enrollee ID cards and invoices, and optional for others, such as internal communications.
Regulation of Health Insurance Marketing: Examples of Exchange-Specific Marketing Rules (cont’d)

• Covered California QHP Issuer Marketing Guidelines (Sept. 24, 2013) (Cont’d)
  – QHP Issuer is not required to provide prospective enrollees with plan options from competitors.
  – But if the QHP Issuer provides services as a Certified Plan-Based Enroller, then it must comport with fair-play requirements, e.g.
    • Disclose tax credit eligibility;
    • Disclose that a prospective enrollee may choose from among all plans;
    • Disclose that the Certified Plan-Based Enroller works for the Certified Plan-Based Enroller Entity in which they are trying to enroll the caller.
QUESTIONS?

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