

**Before the
DEPARTMENT OF HEALTH AND HUMAN SERVICES
CENTERS FOR MEDICARE & MEDICAID SERVICES
Baltimore, MD 21244**

In the Matter of)
)
Medicare Program: Policy and Technical Changes) File Code CMS-4085-P
to the Medicare Advantage and the Medicare)
Prescription Drug Benefit Programs)

**COMMENTS OF THE
FEDERAL TRADE COMMISSION**

I. Introduction

The Federal Trade Commission (FTC) appreciates this opportunity to respond to the Department of Health and Human Services, Centers for Medicare & Medicaid Services' (HHS or CMS) Proposed Rule that, among other things, improves the plan information that enrollees in Medicare Advantage (MA) plans (Part C) and Medicare prescription drug benefit (PDP) plans (Part D) use to identify and select the plan that best suits their needs.¹ We commend efforts to provide enrollees with consumer-tested, standardized information about plan choices. We also support CMS's proposal to require plan sponsors that offer multiple MA or PDP plans to ensure their different plans contain more than just trivial differences in features and benefits. These two policy changes are likely to further competition among MA and PDP plans by reducing enrollee confusion and facilitating their ability to compare plans. Finally, we encourage CMS to explore ways to permit third parties to use plan sponsor claim and performance data to develop quality metrics that further facilitate consumer choice and competition.

The FTC is an independent administrative agency charged with promoting consumer protection, competition, and the efficient functioning of the marketplace. The keystone of the FTC's law enforcement mission is Section 5 of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce."² The scope of Section 5 encompasses a wide range of business practices, including advertising and marketing. Section 5 also authorizes the FTC to challenge "unfair methods of competition," as well as violations of other antitrust laws. This

¹ DEP'T OF HEALTH & HUMAN SERVICES, CENTERS FOR MEDICARE & MEDICAID SERVICES, *Medicare Program: Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs*, 74 FEDERAL REGISTER 54656-57 (Oct. 22, 2009) [hereinafter CMS Federal Register Notice].

² 15 U.S.C. § 45(a).

comment is based on the FTC's extensive experience with consumer marketing, as well as the experience in promoting competition issues in health care markets through cases,³ reports,⁴ workshops,⁵ and studies.⁶

II. Information That Empowers Consumers to Comparison Shop Facilitates a Robust and Competitive Marketplace

In competitive markets, consumers compare products and services among providers and weigh the different terms being offered when making decisions about what to purchase. Where search and other transaction costs (both in terms of time and money) are relatively low, consumers are more likely to rely on such comparisons to satisfy their preferences. By contrast, where search and other transaction costs are relatively high, the information necessary to make these comparisons may be too costly to collect, preventing the markets from operating efficiently to meet consumers' needs.⁷ Research suggests that reductions in the perceived cost of obtaining relevant information increases consumers' participation in health insurance markets.⁸

³ See, e.g., *FTC v. American Medical Association*, 94 F.T.C. 701 (1979), aff'd as modified, 638 F.2D 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982) (order modified 99 F.T.C. 440 (1982), 100 F.T.C. 572 (1982), and 114 F.T.C. 575 (1991)) (the complaint charged the AMA with violations of Section 5 of the FTC Act by agreeing to restrict its members' ability to advertise and solicit patients, and engage in price competition and other competitive practices); Markus Meier, Bradley Albert, & Saralisa Brau, Overview of FTC Antitrust Actions in Health Care Services and Products (June 2009) (150 page document providing an overview of FTC activities in the health care industry), available at <http://www.ftc.gov/bc/0906hcupdate.pdf>.

⁴ See Fed. Trade Comm'n & U.S. Dep't of Justice, *IMPROVING HEALTH CARE: A DOSE OF COMPETITION* (2004), [hereinafter, *A DOSE OF COMPETITION*]; U.S. Dep't of Justice & Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy In Health Care* (1996), available at <http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm> [hereinafter *Health Care Statements*].

⁵ See Federal Trade Comm'n Workshop, *Innovations in Health Care Delivery* (Apr. 24, 2008), available at <http://www.ftc.gov/bc/healthcare/hcd>; FTC Workshop, *Clinical Integration in Health Care: A Check-Up* (May 29, 2008), available at <http://www.ftc.gov/bc/healthcare/checkup>; and FTC Roundtable, *The Competitive Significance of Healthcare Provider Quality Information* (Oct. 30, 2008), available at <http://www.ftc.gov/bc/workshops/hcbio/index.shtml>.

⁶ See Federal Trade Comm'n, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (2002), available at <http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf>; Federal Trade Comm'n, *Pharmacy Benefit Managers: Ownership of Mail-Order Pharmacies* (2005), available at <http://www.ftc.gov/reports/pharmbenefit05/050906pharmbenefitrpt.pdf>; Aileen Thompson, *The Effect of Hospital Mergers on Inpatient Prices: A Case Study of the New Hanover-Cape Fear Transaction*, FTC Bureau of Economics Working Paper 295, January 2009, available at <http://www.ftc.gov/be/econwork.shtm>; Deborah Haas-Wilson and Christopher Garmon, *Two Hospital Mergers on Chicago's North Shore: A Retrospective Study*, FTC Bureau of Economics Working Paper 294, January 2009, available at <http://www.ftc.gov/be/econwork.shtm>; and Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction*, FTC Bureau of Economics Working Paper 293, November 2008, available at <http://www.ftc.gov/be/econwork.shtm>.

⁷ See generally

– can improve consumer understanding and facilitate greater competition on the merits. For example, standardized disclosures for individual health insurance polic

insurance can lessen the financial burden from a catastrophic accident or treatment for a chronic condition, thus allowing consumers to preserve their assets and avoid bankruptcy. Unlike most other forms of insurance, however, consumers may purchase health insurance to facilitate their access to prepaid preventative care and/or negotiated discounts on the price of physician office visits, diagnostic testing, hospital stays, prescription drugs, etc.²¹ Thus, we encourage further consumer research on these purposes as part of the development of standardized templates for use by MA and PDP plan sponsors.

Providing consumers with standardized information about the terms and features, however, is only one part of the recipe for empowering consumers to make informed health plan choices. Some researchers have suggested that too many choices and too much information can make it more difficult for consumers to assimilate the information and make informed decisions.²² As a result, some consumers may make suboptimal choices because it is too difficult or time consuming for them to reach a decision or to focus on, and understand, the most critical information for their particular situation.²³ Some researchers have noted that, with respect to MA plans, “the proliferation of private plans and the dimensions along which they differ has made it increasingly difficult for beneficiaries to become informed about, understand, and compare the available alternatives.”²⁴

In fact, CMS has recognized this problem, noting in the Federal Register notice that “with so many plans to choose from many beneficiaries reportedly find the annual task of selecting one plan from so many overwhelming, and confusing.”²⁵ CMS has stated that it plans to review MA and PDP plan sponsors’ bid submissions to eliminate multiple plan designs by the same company if they provide only trivial differences in benefits. We thus support CMS’s proposals “to ensure

²¹ *Id.*

²² *See*

that when [sponsors] provide multiple plan offerings, those offerings sufficiently differ and thereby provide beneficiaries meaningful options.”²⁶

The appropriate timing of information disclosures also is critical in order to have the greatest pro-competitive and pro-consumer impact. For example, in the context of private student loans, Congress recently required lenders to provide borrowers with a uniform disclosure once they were approved for the loan and to keep the offer open for 30 days.²⁷ Previously, the borrower did not receive the necessary disclosure until he or she consummated the loan. By that time, it was too late for the consumer to comparison-shop, so the disclosure did little to facilitate consumer choice and foster market competition.

Similarly, we encourage CMS to require plan sponsors to make standardized information about plan features and other tools available to consumers before they must choose a plan.²⁸ It is too late to provide meaningful disclosures after consumers choose a particular plan; at this point, consumers can no longer be expected to comparison shop and such late disclosures will do nothing to facilitate robust market competition. Moreover, such information should be based on the most recent data that is feasibly available. If information is out-dated, consumers may discount its utility to their current decisions.

B. CMS Can Facilitate Competition on Plan Performance and Quality by Allowing Third Parties Access to Claims and Plan Performance Data.

different health care needs and may require different types of information to find the plans that best fit those needs, allowing various entities to try different approaches may allow for a broader dissemination of important and helpful information to consumers.

For example, among the different approaches that have been used, some researchers have found that consumers respond favorably to health quality information that is relevant to their decision making and uses:

Symbols they can easily recognize and interpret;
Simple messages with as few caveats as possible; and
Synthesized results across measures with drill down to details for those interested.³¹

Another approach is the use of “patient activation measures” (PAM).³² The goal of PAM “is to build on an individual’s capacity to manage her own health care by assigning discrete tasks that lead to successful outcomes and build consumer confidence.”³³ Patient activation requires “that the consumer audience be clearly defined. It also requires understanding the health care decisions the audience is facing and the context and type of support the decisions require. [It emphasizes] the importance of helping consumers understand and use comparative information about providers and plans.”³⁴

Other researchers have discussed six overarching design principles to support effective consumer engagement. These six principles are: 1) know your audience (*e.g.*, education, socio-economic, age, etc.); 2) tailor messages to promote specific engagement behaviors; 3) create tools that enable and persuade (notion that people are more receptive to information that they help create; 4) if they build it, they will come (referring to web-based information sharing models, although cannot rely solely on this because of the “digital divide” facing many older

³¹ See FTC Roundtable, *The Competitive Significance of Healthcare Provider Quality Information* (Oct. 30, 2008), Barbara Rabson, Tr. at 24 and Presentation at 6, *available at* <http://www.ftc.gov/bc/workshops/hcbio/index.shtml> [hereinafter *FTC Quality Roundtable*]; *see also* *FTC Quality Roundtable*, Beth Nash, Tr. at 38.

³² See Judith Hibbard, et al., *Development of the Patient Activation Measure (PAM): Conceptualizing and Measuring Activation in Patients and Consumers*, 39 *HEALTH SERVICES RESEARCH* 1005 (Aug. 2004) [hereinafter *Hibbard, et al., Development of the PAM*]; Judith Hibbard, et al., *Development and Testing of a Short Form of the Patient Activation Measure*, 40 *HEALTH SERVICES RESEARCH* 1918 (Dec. 2005).

³³ Shoshanna Sofaer, et al., *From Patients to Partners: A Consensus Framework for Engaging Californians in Their Health and Health Care*, UNDER CONTRACT TO THE CALIFORNIA O

adults); 5) build on the existing health care system to create and support engaged health consumers; and 6) focus on activating patients and consumers.³⁵

Still others have noted that consumers value information on other patients' experience with particular plans or providers and use that information to help in their own decision making.³⁶ Some researchers have noted that the use of patient stories can help to "create a compelling consumer "voice" and personal narratives to underscore the performance report statistics. Patient stories can highlight problems and offer action plans to solve problems."³⁷

Given these various approaches and their potential to increase consumer understanding and to facilitate competition, we encourage efforts by CMS to allow third parties to obtain Part C and Part D plan sponsor-specific claims data as well as the underlying plan performance data. CMS already has proposed to release claims data by specific PDP plan sponsor (under limited conditions) to government grantees conducting studies of the Part D program.³⁸ We support this effort and suggest that further efforts could help facilitate competition among plans.

For example, organizations dedicated to specific diseases may be able to analyze claims data about specific plans and inform consumers of those plans that provide the benefits that are most relevant to enrollees with those particular health conditions. Similarly, consumer organizations may be able to organize and/or present health plan performance data in ways that best appeal to specific target audiences. Organizations such as these that have developed a "brand" image over many years may be seen as a trusted source for obtaining objective information and thus can facilitate competition not only on the features of plans, but on unique performance attributes that matter to their constituents.³⁹ Moreover, nongovernmental groups may have more flexibility to experiment and quickly adjust the presentation of plan performance data as they better understand the information needs of Medicare enrollees. By allowing various entities to try different approaches, CMS is likely to facilitate a broader dissemination of important and helpful information to consumers.

³⁵ Sofaer, et al., *supra* note 33, at 8-10; *id.* at 12 (also discussed some of the issues with report cards, noting that different report cards use different performance m

III. Conclusion

The FTC applauds HHS's efforts to improve consumers' access to relevant information about the health and prescription drug plans in which they are considering enrollment. Because customers have different preferences and needs, information provided via marketing or other sources plays a critical role in informing consumers about the variety of choices and plans. If consumers can easily access the information they need to make informed decisions, their