

# Tribal Technical Advisory Group

To the Centers for Medicare & Medicaid Services

c/o National Indian Health Board 910 Pennsylvania Avenue, SE Washington, DC 20003 (202) 507-4070 (202) 507-4071 fax

March 7, 2022

The Honorable Chiquita Brooks-LaSure  
Administrator  
Centers for Medicare and Medicaid Services  
Department of Health and Human Services  
7500 Security Boulevard  
Baltimore, MD 21244

*Submitted via regulations.gov*

**Re: Medicare Program; Contract Year 2023 Policy and Technical Changes to the Medicare Advantage and Medicare Prescription Drug Benefit Programs (CMS-4192-P)**

Dear Dr. Brooks-LaSure:

On behalf of the CMS Tribal Technical Advisory Group (TTAG), I write to provide a response to the Centers for Medicare and Medicaid Services (CMS) proposed rule, “Medicare Program; Contract Year 2023 Policy and Technical Changes to the Medicare Advantage and Medicare Prescription Drug Benefit Programs”.

The TTAG continues to work toward a Medicare program that works with the Tribal health care delivery system and improves the health of American Indian and Alaska Native (AI/AN) people across this nation. We appreciate the agency’s recognition of the need for changes related to marketing and communications around Medicare Advantage (MA) plans, and we support changes to strengthen CMS oversight of the aggressive marketing tactics we have seen in Indian Country.

As noted by the agency, CMS has seen an increase in beneficiary complaints about marketing practices of third-party marketing organizations (TPMOs) who sell MA products. While it is unclear if AI/AN communities are being intentionally targeted by these TPMOs, we are hearing from Tribes across the country that their citizens and health care workers are frustrated with the TPMOs coming onto reservations and using deceptive tactics to entice beneficiaries to switch from Medicare coverage to MA plans. We have heard of insurance agents showing up to homes unannounced and unprompted, causing confusion for beneficiaries, and impacting care options for our citizens. Due to deceptive marketing tactics in these encounters, some beneficiaries believe they are dealing with Medicare, rather than a private plan, which further exacerbates the confusion and frustration.

Even more, commercials for MA plans discuss free options and reduced costs, but advertisers are not always clear about the impact of switching to an MA plan. Tribal members are often enticed to enroll in Part C to access covered devices such as eyeglasses or hearing aids, but they need to be aware of other implications of enrollment. AI/AN citizens may enroll in an MA plan unknowingly or without understanding that the coverage will not be optimal for them.

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Insurance carriers must be transparent about what MA plans can offer and ensure anyone enrolling understands how the plan change will affect access to benefits they are used to. For example, the change impacts eligibility for Purchase/Referred Care (PRC) for medical and dental care through the Indian Health Service (IHS). When a Tribal member enrolls in MA, they must go to their new primary care provider, who would be a non-IHS provider, and would therefore no longer be eligible for PRC. Tribal leaders and members, along with providers in Tribal communities, need to be aware of this impact. Sometimes, even insurance agents do not understand that MA plans may not work for Tribal members, since the agents are unfamiliar with the relationship CMS has with IHS and Tribal facilities providing care to Medicare beneficiaries.

As you know, the United States owes a special duty of care to Tribal nations, which animates and shapes every aspect of the federal government's trust responsibility to Tribes. Rooted in treaties and authorized by the U.S. Constitution, the federal government's unique responsibilities to Tribal nations have been repeatedly reaffirmed by the Supreme Court, legislation, executive orders and regulations. In 1977, the Senate report of the American Indian Policy Review Commission stated that, "[t]he purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian [T]ribes and people."

The trust responsibility establishes a clear relationship between the Tribes and the federal government. The federal government is responsible for ensuring the health of the Indian health system and its ability to provide health care to AI/ANs. Any action that impairs that ability is a violation of the trust responsibility. Therefore, CMS has a duty to remedy the harm caused to Tribal members by the aggressive and misleading marketing of MA plans.

**Recommendations:**

**I. TTAG recommends that CMS require MA plans to clearly disclose, on all marketing materials, that they are private companies and not Medicare**

In this rule, CMS proposed adding a new disclaimer that would be required when TPMOs market MA plans and Part D products, and the TTAG wholly supports this proposal. We urge CMS to ensure that this disclaimer is clear, unambiguous, and easily identified in all marketing products. This is essential in ensuring that beneficiaries are properly informed of their options and made appropriately aware of who they are dealing with. Some Tribal health advocates have communicated to us that it is not always made clear to beneficiaries that they are communicating with a private company, rather than a representative of the federal Medicare program. A clear disclaimer will help to ensure that beneficiaries are properly informed of their options for receiving care.

**II. TTAG recommends CMS provide additional outreach and education to TPMOs to ensure sufficient familiarity with the Indian health system**

As you know, the Tribal healthcare system is unique, and TPMOs may not even be aware that they may be misleading in their marketing to Indian Country. TPMOs need to be aware of the intricacies

of the Indian healthcare system to ensure that they do not misrepresent coverage and other options for AI/AN beneficiaries. Because there are various nuances to health coverage for many AI/AN peoples, it is important that insurance agents be fully informed in order to properly serve beneficiaries receiving care through IHS or Tribal facilities. CMS should provide the resources and guidance necessary to ensure TPMOs are properly informed on the relevant nuances of the Indian healthcare system and how their MA plans will affect Tribal members' healthcare options.

**III. TTAG recommends that CMS create an enforcement mechanism that holds these TPMOs accountable for inappropriate marketing tactics**

An enforcement mechanism is necessary to hold TPMOs accountable for inappropriate or uninformed marketing tactics. Education and outreach can only do so much. It is also valuable that CMS have effective enforcement mechanisms in place to hold TPMOs accountable for inappropriate marketing tactics, and any measures that mislead beneficiaries to change their coverage. The enforcement mechanisms should be developed with Tribal consultation to account for the special circumstances in Indian Country and the detrimental impact that an inappropriate switch to an MA plan could have on the care that AI/AN beneficiaries receive, further exacerbating the health disparities that exist.

**IV. TTAG recommends that CMS ensure that there are designated contacts available to respond to specific AI/AN concerns**

It has been reported that AI/AN beneficiaries often have a difficult time contacting Medicare with their questions and concerns. They have reported long call wait times, connectivity issues in rural areas that exacerbate the impact of remaining on call waiting, and concern over the lack of alternatives for reporting such concerns (e.g., an online portal reporting option). In addition, the unique nature of the Indian healthcare system requires a special knowledge in those assisting callers with their coverage concerns.

The TTAG suggests that this could be addressed by creating a special contact number for AI/AN beneficiaries to utilize in order to contact Medicare with concerns over their MA plan or other coverage. This could be created by a special number, or, in the alternative, a redirect prompt at the beginning of a call to 1-800-MEDICARE that could redirect a caller to someone with the requisite knowledge of the intersection of IHS or Tribal health care delivery systems and the Medicare program and its Part C counterpart. Not only would this provide AI/AN callers with correct guidance on their coverage, but it would also alleviate some of the wait-time concern that beneficiaries have reported.

It is critical that Tribal citizens have access to sufficient information to make informed choices about their health plans. Beneficiaries have reported feeling pressured into believing they will receive the same or better care if they make the switch from their original Medicare coverage to an MA plan. This is not always true. In addition, it is critical to inform beneficiaries that not all MA plans are built the same. There is a lot of variation among plans, and MA plans in general are not always optimal for Tribal citizens if they receive care through an IHS facility. A dedicated

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Medicare AI/AN contact would be able to help Tribal beneficiaries understand these nuances, or to connect them with a patient benefit coordinator before making any changes to their coverage, to discuss how an MA plan may work – or not work – for them. If additional support is needed, the Tribal member can be directed to their Tribal enrollment assister or benefit coordinator at their IHS or Tribal facility. AI/AN beneficiaries need easy access to specialized Medicare support who can answer their questions about MA plans and ensure beneficiaries are able to make fully informed decisions about their health care.

### **Conclusion**

The TTAG looks forward to the continued partnership and work with CMS in developing policies and programs that work for and with the Tribal healthcare system, in accordance with the nation's trust responsibility to provide for the health of Tribal nations. We appreciate the acknowledgment that the marketing of these plans needs more safeguards, and we look forward to working with CMS to develop solutions that work for Indian Country. We urge CMS to continue to work with Tribes to identify solutions to these issues. The Medicare program is vital to many of our elders and vulnerable populations, especially during this difficult time throughout the COVID-19 pandemic. We appreciate your consideration of the above comments and recommendations and look forward to engaging with the agency further.

Sincerely,

A handwritten signature in black ink that reads "W. Ron Allen". The signature is written in a cursive style with a large, stylized "W" and "A".

W. Ron Allen, CMS/TTAG Chair  
Jamestown S'Klallam Tribe, Chairman/CEO