



## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **Centers for Medicare & Medicaid Services**

**42 CFR Parts 405, 417, 422, 423, 460, and 498**

**[CMS-4182-CN2]**

**RIN 0938-AT08**

**Medicare Program; Medicare Program; Contract Year 2019 Policy and Technical Changes to the Medicare Advantage, Medicare Cost Plan, Medicare Fee-for-Service, the Medicare Prescription Drug Benefit Programs, and the PACE Program; Correction**

**AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.**

**ACTION:** Final rule; correction.

**SUMMARY:** This document corrects technical and typographical errors that appeared in the final rule published in the **Federal Register** on April 16, 2018 titled "Medicare Program; Contract Year 2019 Policy and Technical Changes to the Medicare Advantage, Medicare Cost Plan, Medicare Fee-for-Service, the Medicare Prescription Drug Benefit Programs, and the PACE Program."

**EFFECTIVE DATE:** This correcting document is effective June 15, 2018.

#### **FOR FURTHER INFORMATION CONTACT:**

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#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

In FR Doc. 2018-07179 of April 16, 2018 (83 FR 16440), there were a number of technical and typographical errors that are identified and corrected in the Correction of

Errors section of this correcting document. The provisions in this correction document are effective as if they had been included in the document that appeared in the April 16, 2018 **Federal Register**. Accordingly, these corrections are effective June 15, 2018.

## **II. Summary of Errors**

### A. Summary of Errors in the Preamble

On page 16498, in our response to a comment regarding default enrollment, we made an error in referencing the Medicare and Medicaid programs.

On page 16503, in our response to a comment on passive enrollment eligibility, we included a footnote that contains a hyperlink to the document by Health Management Associates titled “Value Assessment of the Senior Care Options (SCO) Program” that is no longer valid.

On pages 16679 through 16684, we made technical and typographical errors in the table numbering and references of the stop-loss insurance deductible tables.

On page 16684, in summarizing a comment and response regarding stop-loss coverage, we inadvertently included a response as part of the comment and excluded a sentence from part of a response.

On page 16703, in the regulatory impact analysis section, we erroneously stated the percentages of Medicare health plan organizations and Part D sponsors that are not-for-profit. In addition, we made factual and typographical errors in our discussion of the percentage of Medicare Advantage organizations (MAOs) that meet the minimum threshold for classification as small businesses.

On page 16710, in our discussion of the percentage of enrollees that are receiving services under capitated arrangements, we made technical and typographical errors in an

assumption and our terminology.

#### B. Summary of Errors in the Regulations Text

On pages 16731 and 16732, in the regulations text changes for §422.208, we made technical and typographical errors in the table numbering and references of the stop-loss insurance deductible tables.

On pages 16735 and 16754, in the regulations text for §§ 422.2260 and 423.2260, respectively, we made technical errors in the language and paragraph designations for the definitions of "marketing," "marketing materials," and "materials that do not include the following are not considered marketing materials."

On page 16735, in the regulations text for §422.2268 we erroneously indicated that we were revising two paragraphs instead of indicating that we were revising the entire section.

On page 16738, in the regulations text for §423.120, we made an inadvertent typographical error in punctuating the end of the paragraph.

On page 16755, in the regulations text for §423.2262, we inadvertently omitted the asterisks before paragraph (d), indicating that paragraphs (a) through (c) are retained without change.

### **III. Waiver of Proposed Rulemaking and Delay in Effective Date**

Under 5 U.S.C. 553(b) of the Administrative Procedure Act (APA), the agency is required to publish a notice of the proposed rule in the Federal Register before the provisions of a rule take effect. Similarly, section 1871(b)(1) of the Act requires the Secretary to provide for notice of the proposed rule in the **Federal Register** and provide a period of not less than 60 days for public comment. In addition, section 553(d) of the APA, and section 1871(e)(1)(B)(i) of the Act mandate a 30-day delay in effective date

after issuance or publication of a rule. Sections 553(b)(B) and 553(d)(3) of the APA provide for exceptions from the notice and comment and delay in effective date APA requirements; in cases in which these exceptions apply, sections 1871(b)(2)(C) and 1871(e)(1)(B)(ii) of the Act provide exceptions from the notice and 60-day comment period and delay in effective date requirements of the Act as well. Section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act authorize an agency to dispense with normal rulemaking requirements for good cause if the agency makes a finding that the notice and comment process are impracticable, unnecessary, or contrary to the public interest. In addition, both section 553(d)(3) of the APA and section 1871(e)(1)(B)(ii) of the Act allow the agency to avoid the 30-day delay in effective date where such delay is contrary to the public interest and an agency includes a statement of support.

We believe that this correcting document does not constitute a rule that would be subject to the notice and comment or delayed effective date requirements of the APA or section 1871 of the Act. This correcting document corrects technical and typographic errors in the preamble and regulation text of the final rule but does not make substantive changes to the policies that were adopted in the final rule. As a result, this correcting document is intended to ensure that the information in the final rule accurately reflects the policies adopted in that final rule.

In addition, even if this were a rule to which the notice and comment procedures and delayed effective date requirements applied, we find that there is good cause to waive such requirements. Undertaking further notice and comment procedures to incorporate the corrections in this document into the final rule or delaying the effective date would be contrary to the public interest because it is in the public's interest to ensure that final rule accurately reflects our policies. Furthermore, such procedures would be unnecessary, as

we are not altering payment eligibility or benefit methodologies or policies, but rather, simply implementing correctly the policies that we previously proposed, received comment on, and subsequently finalized. This correcting document is intended solely to ensure that the final rule accurately reflects these policies. Therefore, we believe we have good cause to waive the notice and comment and effective date requirements.

#### **IV. Correction of Errors**

In FR Doc. 2018-07179 of April 16, 2018 (83 FR 16440), make the following corrections:

##### A. Corrections of Errors in the Preamble

1. On page 16498, third column, first full paragraph, line 19, the phrase “Medicare or Medicare is issued” is corrected to read “Medicaid or Medicare is issued”.
2. On page 16503, third column, footnote paragraphs (footnote 29), first bulleted paragraph, lines 3 through 5, the hyperlink “[http://www.mahp.com/unify-files/HMAFinalSCOWhitePaper\\_2015\\_07\\_21.pdf](http://www.mahp.com/unify-files/HMAFinalSCOWhitePaper_2015_07_21.pdf)” is corrected to read “[http://www.mahp.com/wp-content/uploads/2017/04/SCO-White-Paper-HMA-2015\\_07\\_20-Final.pdf](http://www.mahp.com/wp-content/uploads/2017/04/SCO-White-Paper-HMA-2015_07_20-Final.pdf). “
3. On page 16677, third column, first partial paragraph, lines 26 and 27, the parenthetical reference, "(Table PIP-11)" is corrected to read "(Table 1)".
4. On page 16679,
  - a. Top two-thirds of the page, third column, partial paragraph--
    - (1) Lines 22 and 23, the parenthetical reference, "(Table PIP-11)" is corrected to read "(Table 1)".
    - (2) Line 27, the reference, "Table PIP-11" is corrected to read "Table PIP-1".
    - (3) Line 29, the reference, "Table PIP-11" is corrected to read "Table PIP-1".

(4) Line 36, the reference, "Table PIP-11" is corrected to read "Table PIP-1".

b. Lower third of the page--

(1) In the table titled "TABLE PIP-11--COMBINED STOP-LOSS INSURANCE DEDUCTIBLES", the table title is corrected to read as follows:

"TABLE PIP-1--COMBINED STOP-LOSS INSURANCE DEDUCTIBLES"

(2) After the table, first column, partial paragraph, line 2, the reference "Table 1" is corrected to read "Table PIP-1".

5. On page 16680,

a. First column--

(1) First partial paragraph, line 11, the reference "Table 1" is corrected to read "Table PIP-1".

(2) Second partial paragraph, line 4, the phrase "proposed Table 1" is corrected to read "proposed Table PIP-1".

b. Second column,

(1) Line 6, the parenthetical reference, "(Table PIP-12)" is corrected to read "(Table PIP-2)".

(2) Line 15, the reference, "Table PIP-12" is corrected to read "Table PIP-2".

(3) Line 17, the reference, "Table PIP-11" is corrected to read "Table PIP-1".

(4) Line 19, the reference, "Table PIP-12" is corrected to read "Table PIP-2".

c. Third column, partial paragraph--

(1) Line 2, the reference, "Table PIP-11" is corrected to read "Table PIP-1".

(2) Line 4, the reference, "Table PIP-12" is corrected to read "Table PIP-2".

(3) Line 8, the reference, "Table PIP-11" is corrected to read "Table PIP-1".

(4) Lines 13 and 14, the reference, "Table PIP-12" is corrected to read "Table

PIP-2".

(5) Line 16, the reference, "Table PIP-12" is corrected to read "Table PIP-2".

6. On pages 16681 and 16682,

a. Top of the page, in the table titled "TABLE PIP-12--SEPARATE STOP-LOSS INSURANCE DEDUCTIBLES", the table title is corrected to read as follows:

"TABLE PIP-2--SEPARATE STOP-LOSS INSURANCE DEDUCTIBLES"

b. Bottom of the page,

(1) Second column, partial paragraph, line 2, the reference, "Table PIP-12" is corrected to read "Table PIP-2".

(2) Third column, partial paragraph, line 2, the reference, "Table PIP-11" is corrected to read "Table PIP-1".

7. On page 16683,

a. First column,

(1) First partial paragraph,

(a) Lines 4 and 5, the reference, "Table PIP-11" is corrected to read "Table PIP-1".

(b) Line 5, the reference, "Table PIP-12" is corrected to read "Table PIP-2".

(c) Line 14, the reference, "Table PIP-12" is corrected to read "Table PIP-2".

(d) Lines 18 and 19, the reference, "Table PIP-12" is corrected to read "Table PIP-2".

b. Third column--

(1) Second full paragraph, lines 12 and 13, the parenthetical reference, "(Tables PIP-11 and PIP-12)" is corrected to read "(Tables PIP-1 and PIP-2)".

(2) Fourth full paragraph, lines 5 and 6, the parenthetical reference, "(Table PIP-

11)" is corrected to read "(Table PIP-1)".

(3) Fifth full paragraph, lines 3 and 4 the parenthetical reference, "(Table PIP-11 and Table PIP-12)" is corrected to read "(Tables PIP-1 and PIP-2)".

8. On page 16684, lower two-thirds of the page (following the equation), first column--

a. Third full paragraph, the paragraph, "Comment: We received a comment recommending that CMS consult with stop loss coverage experts in developing this regulation. We believe that this regulation, as finalized, is consistent with the applicable actuarial principles and practices." is corrected to read "Comment: We received a comment recommending that CMS consult with stop-loss coverage experts in developing this regulation."

b. Fourth full paragraph, the paragraph "Response: Over the years, CMS has had numerous discussions with qualified actuaries regarding our method of determining stop-loss insurance requirements." is corrected to read "Response: We believe that this regulation, as finalized, is consistent with the applicable actuarial principles and practices. Over the years, CMS has had numerous discussions with qualified actuaries regarding our method of determining stop-loss insurance requirements."

c. Last paragraph--

(1) Line 23, the parenthetical reference, "(Table PIP-11)" is corrected to read "(Table PIP-1)".

(2) Line 25, the parenthetical reference, "(Table PIP-12)" is corrected to read "(Table PIP-2)".

9. On page 16703, first column—

a. Second full paragraph, lines 5 through 8, the sentence "42% of all Medicare



health plan organizations are not-for-profit and 32% of all Part D sponsors and MA plans are not for profit” is corrected to read “Forty-three percent of all Medicare health plan organizations are not-for-profit and 31 percent of all Part D sponsors and MA plans are not-for-profit.”.

b. Third full paragraph, lines 14 through 16, "which we have actual data on MAO net worth, also shows that 32 percent of all MAO falls" is corrected to read, "which we have complete data on MAO net worth, shows that 33 percent of all MAOs fall."

10. On page 16710, first column, last paragraph--

a. Lines 4 through 8, the phrase “based on CMS observation of managed care industry trends, we believe that the percentage is now higher, and we assume that 11 percent” is corrected to read "based on CMS observation of managed care industry trends, we assume that 11 percent".

b. Line 9, the phrase "now paid under" is corrected to read "now receiving services under".

c. Line 13, the phrase "MA members are paid under" is corrected to read " MA members are receiving services under".

d. Line 21, the phrase "beneficiaries paid under" is corrected to read "beneficiaries receiving services under".

#### B. Correction of Errors in the Regulations Text

##### **§ 422.208 [Corrected]**

1. On page 16731, third column, amendatory instruction 23a, lines 3 and 4, the parenthetical reference "(Table PIP-11)" is corrected to read “(Table PIP-1)”.

##### **§ 422.208 [Corrected]**

2. On page 16732,

a. First column—

(1) First full paragraph, line 2, the parenthetical reference “(Table PIP-11)” is corrected to read “(Table PIP-1)”.

(2) Second full paragraph, line 9, the reference “Tables PIP-11 and PIP-12” is corrected to read “Tables PIP-1 and PIP-2”.

(3) Third full paragraph,

(a) Line 6, the reference “Table PIP-11” is corrected to read “Table PIP-1”.

(b) Line 8, the reference “Table PIP-12” is corrected to read “Table PIP-2”.

(4) Sixth full paragraph—

(a) Lines 12 and 13, the reference “Table PIP-11” is corrected to read “Table PIP-1”.

(b) Line 14, the reference “Table PIP-11” is corrected to read “Table PIP-1”.

(c) Line 15, the reference “Table PIP-12” is corrected to read “Table PIP-2”.

b. Second column,

(1) First partial paragraph, line 3, the reference “Tables PIP-11 and PIP-12” is corrected to read “Tables PIP-1 and PIP-2”

(2) First full paragraph, line 1, the reference “Table PIP-11” is corrected to “Table PIP-1”.

(3) Fourth full paragraph--

(a) Line 1, the reference “Table 1” is corrected to read “Table PIP-1”.

(b) Line 3, the reference “Table PIP-11” is corrected to “Table PIP-1”.

(4) Fifth full paragraph, line 25, the reference “Table PIP-11” is corrected to “Table PIP-1”.

(5) Last partial paragraph, line 2, the reference “Table PIP-11” is corrected to

“Table PIP-1”.

c. Third column,

(1) First partial paragraph, line 3, the parenthetical reference “(Table PIP-12)” is corrected to read “(Table PIP-2).”

(2) Second full paragraph, line 6, the reference “Table 2” is corrected to read “Table PIP-2”.

(3) Third full paragraph—

a. Line 5, the reference “Table PIP-11” is corrected to read “Table PIP-1”.

b. Line 6, the reference “Table PIP-12” is corrected to read “Table PIP-2”.

c. Line 9, the reference “Table PIP-12” is corrected to read “Table PIP-2”.

d. Line 11, the reference “Table PIP-11” is corrected to read “Table PIP-1”.

e. Line 13, the reference “Table PIP-12” is corrected to read “Table PIP-2”.

f. Lines 15 and 16, the reference “Table PIP-11” is corrected to read “Table PIP-1”.

(4) Fourth full paragraph—

a. Line 1, the reference “Table PIP-12” is corrected to read “Table PIP-2”.

b. Lines 2 and 3, the reference “Table PIP-11” is corrected to read “Table PIP-1”.

(5) Eighth full paragraph, line 5, the reference “Table PIP-11 and PIP-12” is corrected to read “Table PIP-1 and PIP-2.”

3. On page 16735, in the first column, §422.2260 is corrected to read as follows:

**§ 422.2260 Definitions.**

As used in this subpart—

Communications means activities and use of materials to provide information to current and prospective enrollees.

Communication materials means all information provided to current and prospective enrollees. Marketing materials are a subset of communication material.

Marketing means activities and use of materials that meet the following:

- (1) Conducted by the MA organization or downstream entities.
- (2) Intended to draw a beneficiary's attention to a MA plan or plans.
- (3) Intended to influence a beneficiary's decision-making process when selecting a MA plan for enrollment or deciding to stay enrolled in a plan (that is, retention-based marketing).

Marketing materials—(1) Include, but are not limited to following:

(i) Materials such as brochures; posters; advertisements in media such as newspapers, magazines, television, radio, billboards, or the internet; and social media content.

(ii) Materials used by marketing representatives such as scripts or outlines for telemarketing or other presentations.

(iii) Presentation materials such as slides and charts.

(2) Marketing materials exclude materials that--

(i) Do not include information about the plan's benefit structure or cost sharing;

(ii) Do not include information about measuring or ranking standards (for example, star ratings);

(iii) Mention benefits or cost sharing, but do not meet the definition of marketing in this section;

(iv) Are required under §422.111, unless otherwise specified by CMS based on their use or purpose; or

(v) Are specifically designated by CMS as not meeting the definition of the marketing definition based on their use or purpose."

**§422.2268 [Corrected]**

4. On page 16735, in the second column, amendatory instruction 47, the instructions beginning with the phrase "a. Revising the section" and ending with the phrase "read as follows:" are corrected to read as follows:

"Section 422.2268 is revised to read as follows:"

**§423.120 [Corrected]**

5. On page 16738, in the third column, sixth full paragraph (§423.120(b)(5)(C)(2)), line 7, the phrase "423.578; and" is corrected to read "423.578."

**§423.160 [Corrected]**

6. On page 16743, first column, eighth full paragraph (§ 423.160(b)(1)(iv)), line 1, the date "October 31, 2019" is corrected to read "December 31, 2019".

**§423.2260 [Corrected]**

7. Beginning on page 16754, in the third column fourth full paragraph, § 423.2260 is corrected to read as follows:

**"§ 423.2260 Definitions.**

As used in this subpart—

Communications means activities and use of materials to provide information to current and prospective enrollees.

Communication materials means all information provided to current and prospective enrollees. Marketing materials are a subset of communication materials.

Marketing means activities and use of materials that meet the following:

(1) Conducted by the MA organization or downstream entities.

(2) Intended to draw a beneficiary's attention to a MA plan or plans.

(3) Intended to influence a beneficiary's decision-making process when selecting a MA plan for enrollment or deciding to stay enrolled in a plan (that is, retention-based marketing).

Marketing materials—(1) Include, but are not limited to following:

(i) Materials such as brochures; posters; advertisements in media such as newspapers, magazines, television, radio, billboards, or the internet; and social media content.

(ii) Materials used by marketing representatives such as scripts or outlines for telemarketing or other presentations.

(iii) Presentation materials such as slides and charts.

(2) Marketing materials exclude materials that--

(i) Do not include information about the plan's benefit structure or cost sharing;

(ii) Do not include information about measuring or ranking standards (for example, star ratings);

(iii) Mention benefits or cost sharing, but do not meet the definition of marketing in this section;

(iv) Are required under §423.128, unless otherwise specified by CMS based on their use or purpose; or

(v) Are specifically designated by CMS as not meeting the definition of the marketing definition based on their use or purpose."

**§423.2430 [Corrected]**

8. On page 16756, first column, amendatory instruction 113b, line 1, the words "republishing the" are corrected to read "adding a new".



CMS-4182-CN2

Dated: June 11, 2018

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**Ann C. Agnew,**

Executive Secretary to the

Department,

Department of Health and Human

Services.

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