REACH
MUTUAL BENEFIT CORPORATION

Responsible Enterprises Against Consumer Harassment

February 13, 2023

Centers for Medicare & Medicaid Services
Department of Health and Human Service

RE: CMS-4201-P[1]

To Whom It May Concern

The members of Responsible Enterprises Against Consumer Harassment, a Mutual Benefit Corporation ("R.E.A.C.H.") would like to thank CMS for the opportunity to weigh in on the proposed Rule concerning Contract Year 2024 Policy and Technical Changes to the Medicare Advantage Program, Medicare Prescription Drug Benefit Program, Medicare Cost Plan Program, Medicare Parts A, B, C, and D Overpayment Provisions of the Affordable Care Act and Programs of All-Inclusive Care for the Elderly; Health Information Technology Standards and Implementation Specifications.

R.E.A.C.H. responds and comments as follows.

I. About REACH

R.E.A.C.H. is the dawn of a new era where responsible enterprises pursue a common objective of ensuring that consumers receive those calls which they have actually consented to and restore consumers' ability to answer their phone. R.E.A.C.H.'s standards—attached hereto— would alleviate much of the concerns that CMS has identified in this proposed rule while allowing beneficiaries the freedom to shop and benefit from responsible marketing yet allowing businesses – small and large – to compete in a transparent and trustworthy manner.

R.E.A.C.H. – a Mutual Benefit Corporation – has been formed to advance the interests of direct-to-consumer marketers by: i) establishing guidelines, best practices and protections for such companies in order to prevent fraudulent lead sales and reduce the industry-wide damage caused by unwanted robocalls; ii) working to increase contact rates and lower carrier resistance to direct to consumer marketing traffic; and iii) providing education regarding, and advocacy to limit, unfair litigation and media attention targeting such marketing companies.

R.E.A.C.H. seeks to restore credibility to the lead generation industry by requiring all members to earn a certification of compliance with R.E.A.C.H. standards which are more restrictive than current regulations thereby earning the recognition of good actors in revolutionizing the lead generation industry and assuring zero fraud tolerance.

[1] 87 Fed. Reg. 79452 (Dec 27, 2022).

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II. Summary of Position: Banning TPMO Partnerships Will Kill Small Businesses Who Have Done Nothing Wrong While Also Hurting Consumers—and For No Good Reason

The proposed rule preventing TPMOs from partnering with one another[2] destroys small businesses and hurts consumers.

In a word, it is overkill.

There is no denying consumers benefit from engagement with thoughtful and compliant TPMOs that can help them understand their options. Less TPMOs means less information for beneficiaries. It means less engagement. And ultimately it means less beneficiaries have the coverage options that best meet their needs.

Yes, certain Third-Party Marketing Organizations ("TPMOs")—commonly referred to as lead generators or performance marketers—have misbehaved and engaged in business conduct that does not align with any meaningful benefit to consumers. But adopting rules that will punish good actors and bad actors by—as a practical matter—ending their existence is not a well calibrated response. And it does not benefit beneficiaries to have *less* valid, accurate and thoughtful information and service providers eager to engage with them. While there can be no question the current environment is intolerable, the solution is to fashion an appropriately tailored remedy to address the specific concerns at issue. Not to just shut down an entire sub-industry.

Troublingly, CMS has identified only a single "belief" that underlies its proposal to ban TPMO partnerships, that "belief" does not actually support the proposal. R.E.A.C.H. has adopted standards that will meet ALL of CMS' concerns—and in a better-tailored manner— while still allowing room to breathe for the small businesses that operate in this space.

The problems of unwanted robocalls, confusing and misleading advertisements, and the dreadful customer experience of endless transfers between TPMOs must stop. But a better refined rule—more closely aligning with the R.E.A.C.H. standards—will help assure the salutary benefits offered by top-of-class TPMOs are still available to consumers, while the dead weight in the lead generation space is squeezed out.

R.E.A.C.H. respectfully requests CMS *try* this middle ground approach before taking steps that will decimate so many small businesses and the hopes and dreams of business owners and entrepreneurs, many of whom are really good folks who do not deserve to see their businesses taken from them.

[2] "We are proposing to add a new (4) to 42 C.F.R. §§ 422.2274(g) and 423.2274(g) to read, 'Personal beneficiary data collected by a TPMO may not be distributed to other TPMOs.'" 87 Fed. Reg. 79535-36 (Dec 27, 2022).

III. Overview of the Lead Generation Industry—A Story of Good and the Bad, But Also A Story That Can Yet Have a Happy Ending, Thanks To R.E.A.C.H.

R.E.A.C.H. is well situated to provide facts and intel regarding many of the TPMOs most impacted by this ruling. Indeed, many of its members and those within its circle of influence will be directly impacted by this Rule.

Lead generators are companies that serve to connect companies with consumers interested in the goods and services they offer. While it may seem strange that a service provider would not simply engage in its own direct advertising campaigns to generate their own leads, American businesses tend to focus on their core competencies. Just as businesses do not build their own computers or infrastructure, most businesses do not have the where withal and resources to build out robust direct-to-consumer engagement—especially in the challenging and emerging world of digital marketing. So, they turn to professionals (lead generators and performance marketers) to assist.

When it is done right, lead generation and performance marketing is a fantastic and incredibly valuable service for consumers and businesses alike. It assures that businesses do not overspend on creating their own direct to consumer marketing channels at massive expense and development cost, allowing the business to leverage the economies at scale and baked expertise of marketing professionals who can engage with consumers with speed and expertise. This keeps the costs of goods and services in this nation low.

Responsible performance marketing practices are also wonderful for consumers. Not only are they paying less for desired goods and services, any simple request for information on an internet search engine results in a plethora of information on any given subject matter. A consumer can read, learn and compare options. And when they are ready can be connected directly with the providers who can best provide the good or service they are looking for—usually at the lowest cost. And all for free.

The wonderful value offered by compliant companies that connect consumers with brands offering critical services really cannot be overstated. This is a VERY good thing for consumers, businesses, and America as a whole, which has a robust social media and search engine market derivative, in no small part, to the proceeds generated from the efforts of these companies.

There are big players and small players in the TPMO environment. Big companies do not have time to track down and contract with every small company in the space—even though some of the smaller companies offer the best and most compliant engagements with consumers. So, they contract with larger TPMOs, who in turn maintain networks of smaller companies that work directly with the larger players—but not with the large companies selling goods and services. **This means that thousands of small businesses exist that publish and generate leads that are never sold directly to the companies that provide goods and services, but only to other TPMOs.** And, as we shall see, a rule banning the sale of leads between TPMOs is essentially a **death sentence** for these smaller companies operating in the Medicare space. More to come on that.

Importantly, the situation is no different with MA organizations and Part D sponsors. Just like any other American business, these companies are focused on their core value proposition—delivering quality healthcare products to beneficiaries. They do not have the ability to meet the tremendous demand for information that beneficiaries and potential beneficiaries possess—this is apparent from the large number of TPMOs that have sprung up to meet those needs. And just like any other American business, MA organizations and Part D sponsors benefit from not having to invest massive sums of money and other resources to build direct-to-consumer engagement channels on their own. They can leverage the exceptionally knowledgeable and talented participants in the performance marketing and lead generation industries to help bridge the gap. Again—when things are done right—beneficiaries and businesses all benefit from a healthy and competitive TPMO environment. And, just like in the broader environment, there are a handful of big TPMOs and thousands of small family businesses that connect beneficiaries with MA organizations and Part D sponsors indirectly through the larger TPMOs.

That is not to say the picture is this perfect in reality. It is not. Truthfully it is dreadful, and there is no denying that. CMS has itself identified a number of problems that are undeniably present in the TPMO environment right now:

1. Failure to properly inform beneficiaries that they will be contacted by multiple different entities, for what purposes, and for how long;[3]
2. Advertisements that do not identify which product(s), plan(s), or specific plan(s) benefits are being advertised;[4]
3. Companies that bar access to important information unless the consumer accepts a disclosure contact information, which is then used by that entity for unlimited future calls or for providing that information to other entities that then contact the beneficiary;[5]
4. The use of unclear disclaimers at the bottom of a page (and often in much smaller font) providing detrimental language, etc.[6]

While all of these practices must stop, there is no denying that these are issues of inappropriate *practices* within an industry. *Regulating* or *banning* these practices is to be preferred to ending the industry—or forcing numerous industry participants out of business.

R.E.A.C.H. submits that the adoption of the R.E.A.C.H. standards—attached as Exhibit A.—assure that beneficiaries are not endlessly contacted by companies they have no relationship with. It assures consumers are meaningfully and well informed of *precisely* how many businesses will contact them and about what subject matters. The standards assure clear and transparent consent is obtained. The standards limit on the number of times a lead can be sold and assure *warranties* are made by TPMOs directly to consumers that their information will not be used beyond their permission. The standards also prevent the use of prerecorded calls as the initial form of contact—assuring that beneficiaries hear from live and informed agents who are capable of assisting the beneficiary right out of the gate.

[3] *Id.* at 79535.
[4] *Id.* at 79527.
[5] *Id.* at 79536.
[6] *Id.* at 79535.

R.E.A.C.H. submits that the widespread adoption of its standards—which can be aided by a CMS ruling adopting the same—along with CMS' additional work to prevent the use of fraudulent and misleading marketing content, will stop the identified abuses without ending the dreams of so-many small business owners.

IV. Banning TPMO Partnerships Will be The End of How Many Family Businesses?

It must be stated directly—the proposed Rule would put thousands of small businesses out of business. Again, the vast majority of players in the TPMO space are small companies that do not necessarily have direct relationships with MA organizations and Part D sponsors. Their access to these companies flows through intermediary TPMOs—the big fish in the ecosystem—and then on to the Medicare service providers.

Adopting a rule that prevents TPMOs from working with each other, assures that all of the small players are dead. They cannot offer services to beneficiaries when they have no connection to any company that can assist those beneficiaries directly. So the small companies cease operation.

And a business is not just a place where people work. It is a dream that someone turned into reality. Every business takes investment of time, money, and self. No government entity or regulator should carelessly end such a dream or lay such investment to waste without compelling reason—especially where, as here, it is being done without any form of due process.

The companies to be put out of business have not been found to have engaged in illegal activity. Yet, it seems, CMS has found all guilty by association. Because some in their midst have sinned, a collective death penalty is to be issued.

R.E.A.C.H. urges CMS to recognize the impact of its Rule and course correct. There is a better way.

V. Banning TPMO Partnerships Does Not Directly Address Any of the Problems CMS Has Identified – There is a Better Way

CMS has identified the following issues which animate its proposed Rule:

1. Failure to properly inform beneficiaries that they will be contacted by multiple different entities, for what purposes, and for how long;[7]
2. Advertisements that do not identify which product(s), plan(s), or specific plan(s) benefits are being advertised;[8]

[7] *Id.* at 79535.
[8] *Id.* at 79527.

3. Companies that bar access to important information unless the consumer accepts a disclosure contact information, which is then used by that entity for unlimited future calls or for providing that information to other entities that then contact the beneficiary;[9]
4. The use of unclear disclaimers at the bottom of a page (and often in much smaller font) providing detrimental language, etc.[10]

Respectfully, CMS' proposed solution to these problems is a poor fit.

Yes, CMS can ban TPMO partnerships—putting thousands of companies out of business— in an effort to limit the negative consequences of some unidentified players within the industry. But many more suitable options remain.

For instance, CMS could adopt a rule setting a standard for how clearly a consumer must be informed that their information will be transferred, and how many entities it may be transferred to, and for what purposes. It could require all advertisements to identify the product and plan whose benefits are being advertised. It can prevent TPMOs from requiring acceptance of disclosures as a condition of receiving information regarding any plan. And it can provide rules related to the size and position of a disclosure—just as the R.E.A.C.H. standard has accomplished.

Naturally, MA organizations and Part D sponsors would be banned from engaging with any TPMO lead that does not conform to these standards—and place audit requirements to assure they are met.

Indeed, these rules are needed regardless. Even if small player TPMOs are chopped down at the knees, the big players still need regulation as well. R.E.A.C.H. submits that first crafting rules to address the primary concerns CMS has identified—to be followed by all players big and small—is the first step. Only if those rules are not heeded would a culling process be needed—and R.E.A.C.H. submits that culling should not be done on the, de facto, basis of size. Consideration should be given to framing a rule that would assure preference is given to participants—like R.E.A.C.H. members—who strive to assure the highest possible transparency in their dealings with consumers.

Critically, the proposed Rule identifies only a single "belief" animating the decision to end TPMO partnerships: "We believe beneficiaries intend in these scenarios that their information will be received only by one entity, that being the plan that will ultimately receive the beneficiary's enrollment request."[11] This belief is poorly founded. While it is true that the beneficiary may intend to only be *contacted* by the plan that will ultimately receive the beneficiary's enrollment request, but there is no basis to infer from that intention that the consumer would protest or prohibit the smaller TPMO from sending information to the beneficiary through an intermediary TPMO. This belief is particularly poorly founded where a clearcut disclosure to that effect is presented to, and knowingly accepted, by a consumer.

[9] *Id.* at 79536.
[10] *Id.* at 79535.
[11] *Id.* at 79535.

CMS should not supplant the beneficiary's judgment with its own. Perhaps some beneficiaries would be dismayed—despite being fully informed—that their information was passed to a third party before reaching a Plan, but as CMS itself correctly recognizes most Beneficiaries just want to be connected to the Plan. Directly, or indirectly, makes no matter.

Beneficiaries should be afforded the freedom to shop, gain information, and engage with services that will connect them—directly or indirectly—with plans. Again, the existence of a healthy and robust lead generation environment turns on allowing as many compliant companies as the market will endure to exist and compete with another. Competition here means better, brighter and more informative engagement with consumers—at least it should. When competition becomes unfair or misleading—it must be ended. But where businesses compete lawfully, consumers always benefit.

VI. CMS Has Addressed Much of the Ills Sought to be Corrected by Ill-Advised TPMO Partnership Ban Via the Rest of its Proposed Rule—Most of Which R.E.A.C.H. Supports

Again, R.E.A.C.H.'s mission is to prevent unwanted calls to consumers and assure transparency in every interaction between consumers, on the one hand, and lead generators, direct to consumer marketers, and product and good sellers, on the other.

Through that lens, R.E.A.C.H. applauds CMS' efforts to assure consumers are not tricked into providing consents to companies that will afford them no benefit. Hence, R.E.A.C.H. supports CMS' proposals:

- R.E.A.C.H. agrees that Permission to Contact "PTC" should expire every six months.[12] To avoid confusion with other federal regulations—specifically the Telephone Consumer Protection Act (TCPA)—R.E.A.C.H. submits that properly obtained prior express written consent—confirming to the requirements of (cite CFR section) and R.E.A.C.H. standards should be exempt from any six-month limit. Such consent has been repeatedly found to not expire.[13]

- R.E.A.C.H. agrees with the proposed Opt Out Rules.[14] Requiring MA organizations and Part D sponsors to provide opt out information so all of its enrollees, regardless of plan intention to contact, at least annually in writing, instead of just one time. R.E.A.C.H. agrees that "[o]ver time, beneficiaries may realize that having plans contact them regarding marketing is not necessary. Beneficiaries, by only receiving the opt-out option once under current regulations, may fail to realize that they have the option to opt out at any time. By requiring a written annual notification from plans, our proposed new requirement will ensure beneficiaries are reminded that they may decide at any time to opt out of being contacted by their MA organization/Part D Sponsor about plan business."

[12] *Id.* at 79531.
[13] *Van Patten v. Vertical Fitness Grp., LLC*, 22 F. Supp. 3d 1069, 1077 (S.D. Cal. 2014), aff'd,847 F.3d 1037 (9th Cir. 2017)
[14] 87 Fed. Reg. 79529 (Dec 27, 2022).

- R.E.A.C.H. agrees with the proposal to Prohibit Misleading Use of Medicare or CMS Name and Logo and Federal Government.[15] Prohibiting the use of the Medicare name, CMS logo, or official products, including the Medicare card, in a misleading manner is critical to protect consumers.

- R.E.A.C.H. also agrees with the proposal to prohibit marketing of unavailable benefits and marketing of "savings."[16] Any sort of consumer deception of this kind constitutes an unfair business practice that should immediately be stamped out.

R.E.A.C.H. strongly disagrees with one additional proposal, however—banning marketing at educational events.[17] Such events are the single best place for a beneficiary to meaningfully engage with companies that can provide valuable information in a live format, question and answer session. Arguably there is no better form of engagement for beneficiaries seeking to learn about their options. And banning marketing means less events of this sort will occur. No compelling rationale to shut down this important information channel has been suggested. R.E.A.C.H. urges CMS to reconsider.

VII. Conclusion

For these reasons R.E.A.C.H. respectfully requests CMS not adopt the proposed rule banning TPMO partnerships and reconsider or narrow its rule related to marketing at educational events.

Respectfully submitted.

s/ Eric J. Troutman
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[15] *Id.* at 79525.
[16] *Id.* at 79528.
[17] *Id.* at 79529-30.