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CMS ADOPTS FIVE PERCENT TRANSLATION THRESHOLD FOR MEDICARE MARKETING

On April 5, the Centers for Medicare & Medicaid Services (CMS) adopted a final rule that will require Medicare health plans and prescription drug plans to translate marketing materials into any language that is the primary language of at least five percent of individuals in a plan benefit package service area. While more could have been done to address the problems of Medicare beneficiaries with limited English proficiency, the regulation is a step in the right direction.

CMS had originally proposed a 10 percent threshold which would have meant that for Part D prescription drug plans, Spanish speakers in only 10 states would have access to translated materials. No other languages would have been covered in any state. But NSCLC, along with many advocates in the Medicare Language Access Coalition filed detailed comments objecting to the proposal. Coalition members, who have been working with CMS for several years to improve language access for limited English proficient (LEP) individuals, alerted broader networks to their concerns and, as a result, the agency was flooded with comments, over 140 in all, opposing the standard.

Also, in December 2010, NSCLC publicized the results of a survey of plans in California and Florida that showed how most plans were not translating materials online for those with limited English proficiency, a violation of CMS guidance on this issue. The survey findings were widely reported on in state-based and trade media.

The final rule and accompanying commentary also include other provisions urged by advocates. For example, plans are

required to provide interpreter services in their call centers. While this requirement had existed in subregulatory guidance, it is now a regulatory mandate. In addition, CMS indicated that the agency would work to translate some model marketing documents into several languages, which is expected to improve translation quality and improve access of beneficiaries to critical information about their plan benefits. The agency also said that it is exploring creating a model one-page document to inform beneficiaries in multiple languages that free interpreter services are available from plans. In addition, CMS indicated a willingness to consider additional translation requirements for plans that market to beneficiaries in languages other than English and reminded plans that translated marketing materials must be made available on plan websites.

CMS, however, declined to follow the recommendations of most advocates that CMS also set a numerical threshold, with translation obligations being triggered whenever either the numerical or percentage threshold is met.

While the final regulation is a step forward, the decision by CMS not to adopt a numerical threshold to augment the percentage standard is unfortunate. Although Spanish translations will be available to limited English proficient individuals in more states, there still will be no states in which prescription drug plans (PDPs) will be required to translate materials into any other language. Also, the agency indicated that it will base thresholds on the "primary language" of individuals, rather than languages "spoken by" individuals. Clarification is needed to determine how this change will affect access for LEP individuals.

The final rule is available [here](#) (translation requirements are discussed at p. 286 et seq.). It also will appear in the April 15 Federal Register. NSCLC's comments on the proposal are available at [here](#).

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