Medicare Rights Center

Washington, D.C. Office:

1030 15th Street, NW, Suite 250
Washington, DC 20005
Tel: 202-589-1316
Fax: 202-589-1310

Baltimore Office:

102 Pilgrim Landing
Baltimore, MD 21230
Tel/Fax: (410) 752-3292

May 3, 2005

The Honorable Jo Anne Barnhart
Commissioner of Social Security
P.O. Box 17703
Baltimore, MD 21235-7703

By email and mail: regulations@ssa.gov

Dear Commissioner Barnhart:

We write to offer comments and recommendations on the Notice of Proposed Rulemaking (NPRM), published in the March 4, 2005, Federal Register, 70 Fed Reg 10558. The proposed regulation are to be contained in the Social Security Administration's (SSA) new 20 C.F.R. part 418, subpart D, Medicare Part D Subsidies, and contain proposed rules for determining eligibility for low-income subsidies (LIS) under the Medicare Part D program, added by the Medicare Prescription Drug Improvement, and Modernization Act of 2003.

The Medicare Rights Center (MRC) is a nonprofit organization providing independent information, assistance, and education to help older adults and individuals with disabilities secure high quality and affordable health care.

1. In-Kind Support and Maintenance – §§ 418.3335, .3340, .3345

We have serious concerns about SSA's intent to count in-kind support and maintenance (ISM) as income for purposes of determining eligibility for Medicare Part D LIS. Because accurately determining ISM will require exhaustive efforts by applicants, we believe that the inclusion of ISM in counting income will result in fewer applications for LIS from eligible applicants. We believe that people will inappropriately self-exclude because of the burden of reporting; fear of the penalty of perjury certification; or because they will inappropriately calculate in-kind support.

ISM is unearned support received by the applicant in the form of food, shelter, or both. The regulations and the proposed LIS application indicate that the applicant will be responsible for calculating and reporting the level of ISM.[1] In the proposed regulations, ISM is defined to include the market value of food, room, rent, mortgage payments, real property taxes, heating fuel, gas, electricity, water, sewerage, and garbage collection fees. The difficulty of accurately assessing the value of these items is obvious and has been recognized as burdensome by SSA.

[1] Our concern is validated by the proposed LIS application, Question 11, which requires an exact ISM calculation.

For example, if an applicant regularly goes to her daughter's house for dinner, she must calculate the total fair market value of food she received in an average month; or if an applicant lives rent-free in a house with relatives, she must calculate her percentage of the water and electricity costs, bills she would otherwise not see. Every item included as ISM is just as difficult. Of particular concern is detailed language of the proposed regulations. Applicants are even expected to disclose the value of the sewerage services that the applicant receives as ISM.[2]

We recommend that SSA remove any inquiry into ISM from the LIS application.[3] Excluding this information will eliminate the significant burden that ISM calculations pose for applicants and help ensure a higher participation rate in the LIS program. We understand that the statutory authority for LIS, Section 1860D-14 of the Social Security Act, provides that income should be calculated according to the Supplemental Security Income ("SSI") methodology, which includes ISM. Yet there is precedent for leaving an ISM inquiry off the program application. The statute governing the Medicare Savings Programs ("MSP") similarly calculates income with SSI methodology.[4] Yet the model application created by the Center for Medicare and Medicaid Services ("CMS") does not request ISM information when determining income.[5] SSA should follow this example and calculate income only from information readily available to the applicants.

In the alternative, SSA should create a reasonable streamlined methodology that will help all applicants calculate ISM. We do not believe that the proposed regulations, which set a maximum level of ISM that SSA will calculate, offer a useful streamlined approach for determining the applicant's level of ISM. The maximum level of ISM is "one-third of the monthly SSI Federal benefit rate for an eligible individual,"[6] or, for January 2005, approximately $193 of monthly income. Because of the complexity of doing a complete calculation of in-kind support, the fear of the penalty of perjury, and is the lack of a reasonable streamlined methodology, it is likely that some applicants will simply state that they receive the maximum amount of in-kind support if they receive any at all. Since there is no basis in the proposed regulations for setting $193 as a maximum, and (in practice, designating this amount for many applicants), we suggest that the maximum amount be reconsidered and reduced and/or that an alternative streamlined methodology is made available to applicants that allows them to more accurately and simply calculate the value of any ISM they receive.

---

[2] See Proposed § 418.3345(a).
[3] On the proposed LIS application, ISM is requested in question 11.
[4] 42 U.S.C.S. § 1396d.
[5] Available at http://www.cms.hhs.gov/dualeligibles/modelapp.asp. Few states require the calculation of ISM in MSP applications, even if they have not explicitly chosen to loosen the SSI methodology under SSA section 1902(r)(2).
[6] Proposed§ 418.3345(b).

Issue 2: Redeterminations

We are concerned with the lack of details that the regulations provide with regard to the redetermination process. First, the regulations are vague as to how the Commissioner of SSA will create time intervals for redeterminations. The regulations state that the interval will be based on "the likelihood that your situation may change in a way that affects your eligibility,"[7] yet the meaning of this phrase is unclear. We are concerned that this unbridled discretion will result in burdening specific segments of the participating population on a discriminatory basis, and we recommend that SSA use a more transparent and methodologically rigorous standard for initiating redeterminations.

The proposed regulations also provide no limit as to the number of times that an individual can be subject to redeterminations in a given time period. For example, in one year, a single individual could potentially be subject to three separate redeterminations; one originating from information the SSA receives through its data-sharing program, one that occurs systematically as determined by the SSA Commissioner, and one as part of the random sample. The regulations should set a limit as to how often an LIS participant can be subject to SSA-initiated redeterminations, with a maximum of one per year.

Second, the proposed regulations do not explain how redeterminations will be completed. We urge SSA to use a passive redetermination process, whereby SSA could send out information to LIS enrollees including information about their eligibility and ask enrollees to return the postcard with corrections only if the information is not accurate. This approach is commonly used in other programs and is consistent with Congressional exhortations in the MMA conference report to simplify the determination and redetermination processes whenever possible.

Third, we are concerned that the SSA will use data-sharing information[8] only to the detriment of the participant and will only initiate redeterminations when it appears that the participant receives a subsidy that is too high. Any regulations that create a data-sharing arrangement should explicitly provide that the information will also be used for the participant's benefit, such as when the new data shows that the participant could be receiving a more generous level of LIS or when the participant could be eligible for other benefit programs, including the Medicare Savings Programs (MSPs) and Medicaid, as discussed below.

Issue 3: Data Sharing to Improve Enrollment in Other Benefit Programs

The proposed regulations do not provide for any mechanism to ensure, as Congress intended, that LIS applicants be screened for eligibility in Medicaid and the Medicare Savings Program. SSA should provide to states individuals' verified income and asset

[7] Proposed § 418.3125(b)(2).
[8] The data-sharing arrangement is discussed in 42 C.F.R. § 418.3125(b)(4).

information used in LIS determinations. This recommendation has been endorsed by the National Academy of Social Insurance Study Panel on Medicare and Medicaid Dual Eligibles. Specifically, SSA should send to states an automated version of the SSA Income and Resource Summary, which contains verified income and asset information used for the LIS determination. This information would minimize administrative costs for states by obviating the need to separately solicit it from individuals and to complete verifications. Likewise, applicants would be relieved of the burden of submitting exactly the same information twice.

We believe that privacy concerns would be addressed if SSA shared only the Summary of Income and Asset Information (as opposed to affording access to SSA's automated verification database itself) and if SSA retains or improves the existing Privacy Act notice that is currently found on its proposed application.

Issue 4: SSA Processing Timelines and Procedures

In their current form, the proposed regulations do not make clear how quickly SSA will process an LIS application or whether SSA employees will be required to follow up with applicants who have submitted incomplete LIS applications to SSA. Regulatory timeframes are a critical protection for beneficiaries, especially since delayed enrollment into LIS may result in delayed enrollment into a Part D plan and the inappropriate imposition of late enrollment penalties or missing needed medications. Follow up procedures are also critical to minimize the possibility that eligible individuals are not excluded from LIS because they failed to properly fill out the application.

We recommend that SSA adopt in proposed regulations standards at least as rigorous as those established in POMS for the processing of SSI applications – namely, assurances that LIS applications will be processed within 30 days and that certain processes for follow up on incomplete applications will be used.

We urge SSA to revise the regulations to specifically require: (1) that SSA must hold on to an incomplete application for a reasonable and specific amount of time (180 days) to allow an applicant time to complete it; and (2) that SSA be required to follow-up with those who submit incomplete applications and advise them how to complete the applications; and (3) that all LIS applications will be processed within 30 days from submission. We also recommend that a pending application for a low-income subsidy toll the deadline for enrolling in Part D plan to avoid a late enrollment penalty and that time waiting for a decision on an LIS application not count toward the calculation of a late enrollment penalty if the initial enrollment period has already ended.

Allowing time for incomplete applications to be supplemented and requiring SSA follow-up is not a departure from current SSA policy. POMS currently requires field offices who receive incomplete applications for disability benefits to attempt to contact the claimant with a

letter and two follow-up telephone calls for the necessary information.[9] In fact, even if such attempts result in a "failure to cooperate" or "whereabouts unknown" situation, the field office must do further follow-up and applicant tracking to the extent possible. If the information is not provided, the applicant is sent a letter and afforded an opportunity for a hearing.

We feel that such follow-up requirements are proper and logical and should apply to LIS applications. Applications for public benefits are often difficult for the intended applicant to complete properly. It is easy to misunderstand what information a question is seeking and whether it applies to the given person. However, honest mistakes should not be the basis of denying an otherwise eligible applicant. If applicants who submit incomplete applications are given the time and advice necessary to complete their applications, it will be more likely that all necessary information is received and a proper determination is made.

Issue 5: Impairment-Related Work Expenses, § 418.3325(a)(5)

We whole-heartedly support SSA's decision to exclude Income-Related Work Expenses ("IRWE") when computing income in determining LIS eligibility.[10] We certainly agree that an accurate computation of one's income does not include the amount they must pay in work-related expenses.

We also applaud SSA's decision to compute a default percentage for determining IRWE. Such a default properly streamlines the documentation and determination process for both applicants and SSA and, therefore, makes sense in interest of efficiency and expediency. In the same vein, we encourage SSA to make the process of proving that a higher percentage of Gross Income should be excluded as easy for applicants as possible. The proposed regulations specifically allow those applicants whose IRWE are more than the default percentage to apply to the SSA to have that greater percentage excluded from their income. We encourage SSA to accept self-attestation of higher IRWE rather than requiring documentation of it. Self-attestation will ease the process both for applicants and for the SSA office.

Issue 6: Appeals Process, § 418.3625

We have several concerns with respect to the process for administrative review of "initial determinations" made by SSA on LIS applications.[11] The process established by the proposed rules has inadequate protections to ensure that applicants and current recipients of LIS have fair hearings adequate to protect their constitutional rights and to ensure the smooth, efficient, and fair adjudication of appeals.

---

[9] POMS Section DI 11018.001
[10] Proposed § 418.3325
[11] See Proposed § 418.3625

We find it alarming that no time schedule has been set out for appeals of initial application denials. While we understand that the process should not be rushed, conducting the appeals process in an expedited manner is imperative. The people applying for LIS will depend on the financial help the program will provide by paying the costs associated with Part D coverage in order to affordably access medications they must take. While awaiting a determination upon appeal, the person in question will face a large financial burden, either due to a need to pay the costs associated with Part D coverage or, if he is unable to pay such costs, the burden of paying for his medications fully out-of-pocket. Furthermore, if the costs for both participating in Part D without LIS assistance and paying for medications out-of-pocket are too large, he faces the potentially life-threatening burden of going without needed medication until LIS coverage is provided. Even if LIS is ultimately applied retroactively at the conclusion of an appeal, the applicant will face the risk of not getting the drugs he needs during the appeal process if he cannot afford to front the payments. We, therefore encourage you to explicitly mandate within the regulation a deadline of no more than 30 days for reviews and appeals unless the delay is caused by the applicant.

We also find it problematic that the proposed regulations do not identify who will adjudicate appeals except to say that hearings "will be conducted by an individual who was not involved in making the initial determination." People with Medicare who are losing LIS as well as those who are applying for the first time have procedural due process rights that must be protected in the appeals process.[12] These rights include the right to an independent decision maker who can objectively weigh evidence and one who is informed about the legal and evidentiary issues involved in the appeal. For those reasons, we encourage the appeals to be conducted by Administrative Law Judges ("ALJ"), rather than by SSA employees, and for the right to have a hearing conducted by an ALJ explicitly stated in the regulations. If ALJs are not used, hearing officers should be entirely independent of the office that makes the initial determination and should be trained in weighing evidence and making legal judgments.

Finally, we believe that the applicants should be granted the right to either a phone hearing *or* an in-person hearing.[13] While we understand the efficiencies involved in encouraging the use of telephone hearings, and while we know that for some applicants the phone hearings will be optimal, we feel that it is important that people be granted the right to appear in person. In-person hearings allow for greater and more understandable exchange of information. They also often make appellants feel more comfortable, as recently explained by the U.S. Government Accountability Office,[14] and as though the process is more professional. Additionally, given that we believe that not all applicants will avail themselves of an option for an in-person appeal, we do not believe that providing such an option will prove burdensome to the SSA.

---

[12] See Matthew v. Eldridge, 424 U.S. 319, 329 (1976).
[13] Only a phone hearing or file review is permitted by the proposed regulations. Proposed§ 418.3625.
[14] U.S. Government Accountability Office, *Medicare: Incomplete Plan to Transfer Appeals Workload from SSA to HHS Threatens Service to Appellants* October 2004 at 17.

Issue 7: Life Insurance Policies and Pre-paid Burial Accounts: § 418.3425

Life insurance policies and pre-paid burial accounts should be excluded from determinations of "resources" for LIS eligibility. Counting these assets runs afoul of Congressional intent to simplify and streamline LIS eligibility and the proposed rule, 418.3415(b) that would count only "liquid" assets or assets convertible to cash in determining an LIS applicant's resource eligibility.[15] Life insurance policies or burial accounts that theoretically have a cash value may not in fact be easily converted to cash by applicants or otherwise be transferable. Calculating the value of these policies may be extremely difficult for applicants, and the confusing nature of the questions about them on the proposed application may serve to dissuade applicants from applying for the LIS at all.

Issue 8: Work Disincentive for Persons with Disabilities

We would like to raise for your attention, the substantial work disincentive the low income subsidy may have for younger persons with disabilities. Many of these persons require prescription medications to return to work but will be unable to afford the medications if their earnings disqualify them for the low income drug subsidy. We encourage SSA to find ways to mitigate this significant problem.

Finally, we commend SSA for the overall clarity and consumer-friendliness of the proposed regulation text.

Sincerely,

Robert M. Hayes

[15] See 69 Fed. Reg. 46632, 46726 (Aug. 3, 2004)