**BENES Act Template Comments**

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**[Insert Submission Date]**

Chiquita Brooks-LaSure, Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services

**Re: CMS-4199-P—Medicare Program; Implementing Certain Provisions of the Consolidated Appropriations Act, 2021 and Other Revisions to Medicare Enrollment and Eligibility Rules**

Dear Administrator Brooks-LaSure:

**[Organization name appreciates/I appreciate]** this opportunity to comment on the Centers for Medicare & Medicaid Services (CMS) proposed rule—Medicare Program; Implementing Certain Provisions of the Consolidated Appropriations Act, 2021 and Other Revisions to Medicare Enrollment and Eligibility Rules.

**[Description of organization or self]** Below, **[I/we]** address the proposed changes to Medicare enrollment, which would improve access to affordable coverage and care.

The Medicare Part B enrollment system was developed more than 50 years ago, when Medicare was first established. Still largely in place, those rules are now woefully outdated and overly complex, creating serious hardships for far too many. For example, in 2021 alone, nearly 780,000 Medicare enrollees were paying a Part B Late Enrollment Penalty (LEP), and the average penalty amounted to nearly a 30% increase in their monthly premium.[[1]](#footnote-2) In addition to this considerable financial burden, many older adults and people with disabilities have faced large out-of-pocket costs, gaps in coverage, and disruptions in care continuity over the years due Medicare Part B enrollment pitfalls.

The Beneficiary Enrollment Notification and Eligibility Simplification (BENES) Act offers long-overdue solutions. As signed into law in December 2020 and as outlined in the proposed rule, it would improve Medicare enrollment for the first time in decades.[[2]](#footnote-3) In part, it would eliminate lengthy waits for coverage by making Medicare effective the month following enrollment. Today, beneficiaries who sign up during Medicare’s initial or annual enrollment windows may wait several months for their coverage to begin. It would further reduce barriers to care by allowing CMS to establish “exceptional circumstances” Special Enrollment Periods (SEPs) program wide, a flexibility that is currently limited to Parts C and D. Together, these changes would streamline systems, advance equity, and strengthen beneficiary health and financial security—helping more people more easily access their earned coverage without penalty or extensive delay.

### **Effective Dates of Entitlement**

As proposed, beginning on January 1, 2023, Medicare coverage would become effective the first day of the month immediately following enrollment for individuals enrolling in the last three months of their Initial Enrollment Period or in the General Enrollment Period, thereby reducing any potential gaps in coverage. Currently, these individuals can wait up to seven months for their coverage to take effect.

CMS expects the new coverage timelines to “increase access to continuous coverage under Medicare Part B, both by expediting these individuals' entitlement dates and decreasing enrollees' confusion about when their coverage becomes effective.”[[3]](#footnote-4) Therefore, the agency anticipates “this change having a positive impact on Medicare beneficiaries, including those in communities who may be disproportionately impacted by lack of continuous health coverage.”3 We agree and urge CMS to finalize this proposal, without delay.

The proposed rule also notes that CMS will “update all public facing materials to reflect the date changes from any final rule. This would include updated information in CMS publications, on Medicare.gov, and in training materials.”[[4]](#footnote-5) We appreciate this recognition. We encourage CMS to engage stakeholders throughout this process, and to work with the Social Security Administration (SSA) on parallel updates and coordinated outreach strategies.

**Special Enrollment Periods for Exceptional Circumstances**

Under the statutory authority now granted by Section 120(a)(2)(A), the Secretary of the U.S. Department of Health and Human Services can establish SEPs for individuals who satisfy the requirements for enrollment in Medicare and “meet such exceptional conditions as the secretary may provide, beginning January 1, 2023.”[[5]](#footnote-6) Below, we discuss the proposed SEPs.

1. **SEP for Individuals Impacted by an Emergency or Disaster**

We strongly support the proposed establishment of an SEP for people who are not able to enroll in premium Part A and/or Part B, if they reside in an area where federal, state, or local government entity has declared a disaster or other emergency.

We do not support limiting the SEP timeframe based on the type of emergency or requiring individuals to demonstrate the emergency explicitly prevented their timely enrollment. It is not clear what would be achieved by restricting relief in these ways. It is highly unlikely that a beneficiary would strategically delay enrollment in expectation of an emergency or disaster and requiring them to prove a nexus between the emergency and their missed enrollment creates a burden for both the individual and the SSA workforce.

We encourage CMS to revisit the proposed geographic limitation. We support aligning it with the SEPs for Medicare Parts C and D during other emergencies, which has allowed an individual to qualify if a person on whom they relied for assistance in managing their financial or health care affairs lived in a location affected by an emergency or disaster.[[6]](#footnote-7)

1. **SEP for Health Plan or Employer Misrepresentation or Providing Incorrect Information**

We support the establishment of an SEP for individuals whose “non-enrollment in premium Part A or Part B is unintentional, inadvertent, or erroneous and results from material misrepresentation or reliance on incorrect information provided by the individual's employer or GHP, or any person authorized to act on behalf of the employer or GHP.”[[7]](#footnote-8) **[Explain any interactions you have with this scenario. For example, individuals who relied on employer or other advice to their detriment.]**

We strongly encourage CMS to revisit the following aspects of this SEP, however, to ensure it best meets beneficiary needs:

* *Expand the List of Sources*—First, we urge CMS to expand the sources of misinformation that give rise to the SEP to include non-employer insurance sources, such as insurance agents and individual policy sellers, as well as non-federal government entities and agents, including Medicaid, the Marketplace, and State Departments of Insurance or similar. It is not necessary to artificially circumscribe the sources of misinformation or incorrect information. **[Include any relevant examples]**
* *Accept Additional Types of Evidence*—Second, we ask that CMS more closely align the proposed evidentiary standard with the beneficiary experience. In practice, the type of misinformation targeted by this SEP is almost always verbal; letters or other documentary evidence reflecting misinformation are rare or non-existent. It is also very unlikely that any of the misinforming parties would readily admit error, particularly in writing, even if the beneficiary were to continue to have access to them when applying for the SEP. Which raises another issue: employers could be out of business, or the person who provided the misinformation may no longer be present. **[Include any relevant examples]**

In situations where documentary evidence of misrepresentation is not practical or otherwise available, enrollees should be permitted to show situation-specific evidence that a misrepresentation caused their delayed enrollment. For example, they could submit their own records or notes of conversations, proof of payment of premiums for alternative coverage, or other evidence that demonstrates good faith.

* *Consider Omissions Misinformation*—Third, CMS should revisit the position that “an omission by the employer or GHP or the representative of such organization would not be considered a misrepresentation for purposes of this proposed SEP, as employers and GHPs do not have an affirmative responsibility to educate employees about Medicare.”[[8]](#footnote-9) It is true that no such affirmative responsibility exists. However, providing relief for individuals harmed by such omission does not actually create that responsibility on behalf of the employer or GHP, because the relief is neither harmful nor costly to the informing entity.

The proposed rule also solicits comment on whether CMS “should require additional evidence, for example, evidence of what new information was received that caused discovery of the misinformation and evidence of when the discovery was made.” We do not support such additions. The burden of proof contemplated for this SEP is already significant, as is the administrative burden to review such proof. Instead, we urge CMS to consider that such proof could be useful, not in addition to the enumerated requirements, but in its place. In cases where documentary evidence is unavailable, proof of later-received information and subsequent action could serve as persuasive evidence of prior-received misinformation.

1. **SEP for Formerly Incarcerated Individuals**

We strongly support this SEP, which would allow formerly incarcerated individuals to avoid gaps in coverage and LEPs. We urge CMS to revise the proposed SEP timeline to better consider the circumstances facing individuals who are exiting incarceration. Specifically, we support a pre-release SEP start date to allow for enrollment at a time that minimizes the chance of gaps in coverage rather than one that begins with the date of discharge, and an SEP end date at least 12 months post-release, rather than six. **[Include any examples or experiences to highlight the need for an expanded SEP timeline]**

1. **SEP to Coordinate with Termination of Medicaid Coverage**

We strongly support this SEP to provide relief in situations where the transition from Medicaid to Medicare is mismanaged, delayed, or confusing. While this flexibility will be particularly important as the COVID-19 Public Health Emergency (PHE) winds down, it will be critical well beyond that shift.[[9]](#footnote-10) Regardless of the circumstances, failure to enroll timely in Medicare in reliance on or upon the loss of Medicaid coverage can be extremely disruptive and costly. **[Share any experiences with mismanaged Medicaid-to-Medicare transitions to underscore the importance of this SEP]**

We also appreciate and support CMS’s proposal to reimburse and remove any LEPs for those who would have been eligible for this SEP but enrolled in Medicare during the COVID-19 PHE.

1. **SEPs for Other Exceptional Conditions**

We support CMS granting future SEPs for currently unanticipated circumstances that could create a barrier to enrollment. The proposed rule rightly acknowledges the need for such flexibility, as “there is no way to predict the full range of circumstances that would warrant an SEP—they are ‘exceptional.’ ”[[10]](#footnote-11)

We also suggest that CMS and SSA track and report any trends or patterns in the use of the new SEPs. We applaud CMS’s stated desire to use information and experience gained from this authority to establish other SEPs and encourage the agency to do so in a transparent, data-driven, and public way.

**Conclusion**

Thank you for the opportunity to comment on this important issue. If you have further questions, please contact **[Name]** at **[Organization name (if any), Contact Information]**.

Sincerely,

**[Name]**

**[Title (if any)]**

**[Organization Name (if any)]**

1. Congressional Research Service, “Medicare Part B: Enrollment and Premiums,” May 19, 2022, available at: <https://www.everycrsreport.com/files/2022-05-19_R40082_143a23f28239eec6ef87bac952856d5a14d0a22e.pdf>. [↑](#footnote-ref-2)
2. Section 120 of Title I, Subpart B of the Consolidated Appropriations Act of 2021 [↑](#footnote-ref-3)
3. 25094. [↑](#footnote-ref-4)
4. *Id.* [↑](#footnote-ref-5)
5. *Id.* [↑](#footnote-ref-6)
6. *See* "Enrollment and Operations Issues Related to Hurricane Sandy: Frequently Asked Questions,” December 10, 2012, available at: [https://khn.org/news/medicar](https://khn.org/news/medicare-extends-enrollment-period-for-those-affected-by-sandy/)e-extends-enrollment-period-for-those-affected-by-sandy/ [↑](#footnote-ref-7)
7. 25097 [↑](#footnote-ref-8)
8. *Id.*  [↑](#footnote-ref-9)
9. Medicare Rights Center; et al, “Joint Letter on Medicare PHE Unwinding,” May 11, 2022, available at: <https://www.medicarerights.org/policy-documents/joint-letter-on-medicare-enrollment-and-the-phe-unwinding>. [↑](#footnote-ref-10)
10. *Id.* [↑](#footnote-ref-11)