



## CALIFORNIA HEALTH ADVOCATES

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February 20, 2007

Anthony Culotta, Director  
Medicare Enrollment and Appeals Group  
Centers for Medicare and Medicaid Services

By email to: Anthony.Culotta@cms.hhs.gov

### **Re: CMS' Interpretation of Limited Open Enrollment Period (L-OEP)**

Dear Mr. Culotta:

On behalf of the organizations that represent Medicare beneficiaries listed below, we are writing to express our belief that CMS is misinterpreting Medicare law with respect to elections permitted under the new "Limited Open Enrollment Period (L-OEP)" created by §206 of the Tax Relief and Health Care Act of 2006, as described in a recent CMS memorandum. In particular, we believe that the cancellation of Part D coverage of individuals who enroll in certain Medicare Advantage-only coordinated care plans is not only prohibited by statute, but is also of dangerous consequence to these beneficiaries.

CMS' February 7, 2007 memorandum to All Medicare Advantage Organizations entitled "New Medicare Advantage Enrollment Period for MA-Only Plans" describes the new L-OEP and its application to beneficiaries in Original Medicare who are also enrolled in a stand-alone PDP. We agree that, as stated in the memo, current law allows beneficiaries in Original Medicare with a PDP who seek enrollment in a Medicare Advantage plan to remain enrolled in their PDP only if they enroll in Private Fee-for-Service (PFFS) plans without Part D coverage (other than permissible enrollments into Medical Savings Accounts). We strongly disagree, however, that the following logic, as stated in the memo, thus applies to the L-OEP: "*if an individual in Original Medicare and a stand-alone PDP elects to enroll in an MA-only coordinated care plan, such as an HMO, PPO or Regional PPO, his or her enrollment in the PDP will be automatically cancelled as of the effective date of enrollment in the MA-only plan.*"

In short, we believe that the statute does not allow someone to lose or drop Part D coverage during the L-OEP. The plain language of 42 USC §1395w-21(e)(2)(E)(iv) describing the L-OEP – as added by The Tax Relief Act – reads: "NO EFFECT ON COVERAGE UNDER A PRESCRIPTION DRUG PLAN.—Nothing in this subparagraph shall be construed as permitting an individual exercising the right under clause (i)—

- (I) **who is enrolled in a prescription drug plan under part D, to disenroll from such plan** or to enroll in a different prescription drug plan; or
- (II) who is not enrolled in a prescription drug plan, to enroll in such a plan. [emphasis added]"

At the same time, Medicare law does not allow someone in an MA-only plan (other than a PFFS or MSA plan) to enroll in a PDP (Section 1860D-1(a)(B)(ii)). To resolve this apparent conflict in the statute, we believe that the L-OEP provisions should be interpreted to prohibit someone in Original Medicare with a PDP from enrolling in an MA-only coordinated care plan (other than a PFFS plan) because this would require disenrolling from his/her PDP. To allow otherwise, as CMS appears to do, would create a dangerous scenario in which Medicare beneficiaries could lose their Part D coverage for the balance of the year if they joined an MA-only plan. While we have serious overall reservations about the L-OEP and its special treatment of PFFS plans, we believe that the current language of the law bars Original Medicare enrollees with a PDP from joining any MA-only plan other than a PFFS, and more importantly, from losing Part D coverage during this period.

During the Medicare Advantage Open Enrollment Period (OEP—January 1 through March 31), beneficiaries are limited by CMS regulation to enrolling in the same type of plan (regarding Medicare prescription drug coverage). In other words, during the OEP, someone can neither pick up nor drop Part D coverage altogether (see, e.g., 42 CFR §422.62(a)(5); Medicare Managed Care Manual, Ch. 2, §30.3.2). CMS should interpret the new L-OEP in a consistent manner in order to prevent beneficiaries from losing, and being locked out of drug coverage, during the course of the year.

Without revising CMS' interpretation of the L-OEP, beneficiaries in Original Medicare with a PDP will be subject to the marketing activities of MA-only HMO and PPO plans that will not likely include adequate explanation that enrollment in these plans will result in a loss of their drug coverage. Further, we do not believe that the safeguards that plans must follow for applicants who already have Part D coverage, as outlined in the February 7<sup>th</sup> memo, are adequate to prevent such involuntary loss.

We hope that CMS will rescind and reissue its February 7, 2007 memorandum, and draft regulations and other guidance implementing the L-OEP accordingly. We also hope that CMS will support legislative changes to repeal the L-OEP provision so that all MA plans will again have the same enrollment period, and beneficiaries will not be further confused. Thank you for your attention to this matter. We look forward to your response.

Sincerely,

David Lipschutz  
California Health Advocates

Paul Precht  
Medicare Rights Center

Georgia Burke  
Jeanne Finberg  
National Senior Citizens Law Center

Vicki Gottlich  
Patricia Nemore  
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Cc: Kathleen McGuan, Associate General Counsel, Department of Health & Human Services, Office of the General Counsel, Centers for Medicare and Medicaid Services Division (via email to [Kathleen.McGuan@hhs.gov](mailto:Kathleen.McGuan@hhs.gov) )

Via facsimile to:

Senate Finance Committee  
Honorable Max Baucus, Chair  
Honorable Charles Grassley, Ranking Member

House Ways & Means Committee  
Honorable Charles B. Rangel, Chair  
Honorable Jim McCrery, Ranking Member  
Honorable Fortney Pete Stark, Chair, Subcommittee on Health  
Honorable Dave Camp, Ranking Member, Subcommittee on Health