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November 21, 2007

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-4129-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

**Re: Comments on Proposed Rule – Medicare Program; Special Enrollment Period
and Medicare Premium Changes (RIN 0938-A077)
CMS-4129-P**

To Whom It May Concern:

This letter contains comments on the proposed rule entitled Medicare Program; Special Enrollment Period and Medicare Premium Changes that was published in the Federal Register on September 28, 2007 (the “Proposed Rule”). There are two “issue identifiers” for our comments – the Special Enrollment Period for Volunteers Outside of the United States (§ 406.25) and the Special Enrollment Period for Volunteers Outside of the United States (§ 407.21). All of our comments apply equally to both sections.

Historic Background

We represent Deseret Mutual Benefit Administrators (“DMBA”), which is an affiliate of The Church of Jesus Christ of Latter-day Saints (the “LDS Church”), an I.R.C. § 501(c)(3) organization. DMBA administers health care coverage for full time volunteers of the LDS Church. The LDS Church operates an extensive volunteer program that includes numerous individuals that are eligible for or participants in Medicare. Over the last five years, this program

has included approximately 4,700 Medicare-eligible members of the LDS Church who have volunteered to serve outside the United States on a full-time basis for at least 18 months (under the LDS Church program, a volunteer must be willing to serve for a period of at least 18 months before they are assigned to serve outside the United States). For purposes of this comment, those Medicare-eligible LDS Church volunteers that are assigned to serve outside the United States on a full-time basis for at least 18 months shall be referred to as "International Volunteers".

We initially contacted the Centers for Medicare & Medicaid Services ("CMS") on behalf of DMBA a number of years ago to discuss a problem faced by International Volunteers. As described in greater detail below, the problem arose because: (i) with very limited exceptions, Medicare does not cover medical services received outside the United States; (ii) if an International Volunteer disenrolled from Medicare upon leaving for their foreign service, in the absence of an applicable special enrollment period ("SEP"), they faced a penalty and waiting period upon reenrolling in Medicare when they returned from their foreign service and (iii) there was not an SEP for which International Volunteers could qualify. This meant that International Volunteers (and other similarly situated volunteers) had to choose among three poor choices with respect to their health care coverage. First, they could pay premiums for two forms of health care coverage (Medicare and private) with only one form of coverage (private) providing any meaningful benefit. Second, they could disenroll from Medicare and rely solely upon their private health care coverage. While this would save them the cost of their Medicare premiums, they would be subject to a Medicare penalty and waiting period upon reenrollment. Third, they could forego private coverage and rely solely upon Medicare. While this would save them the cost of private coverage and allow them to avoid being subject to the Medicare penalty and waiting period, they would essentially be without health care coverage during their foreign service.

Given the risks with the second and third choices, substantially all of the International Volunteers simply paid both Medicare premiums and private coverage premiums during their foreign service. Having to maintain two forms of health care coverage dramatically increased the financial burden of foreign service for International Volunteers, likely precluding many would-be International Volunteers from being able to serve. DMBA and the LDS Church were hopeful that a means of relieving this financial burden could be found so that it would be easier for individuals to volunteer to serve outside the United States.

The Social Security Act ("SSA") and its accompanying regulations govern the provision of Medicare benefits. As we understand it, International Volunteers' hardship is due to the interaction of several different SSA provisions. First, the extent to which Medicare provides payment for medical services is in part dependent upon where those services are furnished. With respect to services rendered outside the United States, Part A will only pay for a very limited amount of inpatient hospital services furnished by certain Canadian hospitals, and Part B will only pay for limited physicians' and ambulance services furnished in connection with covered inpatient care in a Canadian hospital – all other services furnished outside the United States are excluded from Medicare coverage. *See* 42 C.F.R. §§ 411.9 and 424.121. Therefore, the vast

majority of International Volunteers receive no benefit from having Medicare coverage during their foreign service.

Given the limits on Medicare coverage and the length of time they plan on being outside the United States, International Volunteers usually find it necessary to purchase private health care coverage to ensure they will have adequate coverage during their foreign service. Although Medicare provides practically no benefits to individuals outside the United States, there is no corresponding reduction in their Medicare premiums regardless of how long they are outside the United States. The cost of paying full premiums for two forms of health care coverage (Medicare and private) is a significant burden. This cost can be avoided in one of two ways, each of which has significant risks or drawbacks associated it. First, individuals can simply decide not to purchase any private health care coverage. This is an extremely risky approach, however, as that leaves them without any meaningful health care coverage during their foreign service. Going overseas for an extended period without health care coverage would be risky for anyone, but it would be especially risky for anyone that is old enough to be eligible for Medicare. Because this option involves such substantial risk, it is not a feasible option for the vast majority of International Volunteers.

The other option is to disenroll from Medicare while serving outside the United States. Although disenrolling from Medicare allows International Volunteers to avoid having to pay Medicare premiums during their foreign service, they will be subject to a penalty once they return to the United States and seek to reenroll in Medicare. If an individual's coverage period begins "pursuant to an enrollment after his initial enrollment period . . . and not pursuant to a special enrollment period under section 1837(i)(4)," the individual must pay a penalty in the form of increased monthly premiums. *See* SSA § 1839(b). The amount by which the premiums increase is a function of how long the individual could have been but was not enrolled in Medicare, with premiums increasing by 10% for each such 12-month period. Therefore, depending upon how long International Volunteers are disenrolled from Medicare and how long they remain in Medicare once they reenroll, the penalty imposed by SSA § 1839(b) could largely offset or even substantially exceed the amount saved by disenrolling during their foreign service. Importantly, because the SSA § 1839(b) penalty applies to every "monthly premium determined under subsection (a) of this section (without regard to any adjustment under subsection (i) of this section)," it is applied every month for the rest of the individual's life.

For example, assume that John and Jane Smith serve as volunteers for two years outside of the United States. Further assume that their combined Medicare premiums are \$200 a month when they leave for such service, and that there are no increases in Medicare premiums for the remainder of their lives. When the Smiths return from their foreign service and reenroll in Medicare, they will be subject to a \$40 monthly penalty so that their combined monthly premium will increase to \$240 a month, which translates into a \$480 annual penalty. At no time will their combined monthly premiums be reduced to the pre-penalty amount of \$200 a month – they will be paying the \$40 penalty every month for the rest of their lives. Therefore, while the Smiths can save \$4,800 by disenrolling from Medicare during their foreign service, those savings will be

quickly offset and eventually exceeded by the penalties they will be required to pay for the rest of their lives.

The Smiths' savings from disenrolling from Medicare will be offset and eventually exceeded by the penalties even quicker if Medicare premiums increase over time, as they certainly will. For example, assume Medicare premiums increase 5% each year during the Smiths' foreign service and each year thereafter. The pre-penalty monthly premium upon their return would then be \$220.50,¹ and the post-penalty monthly premium would be \$264.60.² Thus, the penalty for their first year would be nearly \$530,³ and the amount of such annual penalty would increase every year (in an increasing amount each year) as Medicare premiums increase.⁴ Thus, depending upon how long the Smiths live after they complete their foreign service, they could pay substantially more in penalties than they would save by disenrolling from Medicare during such service.

The SSA § 1839(b) penalty is not the only disadvantage to disenrolling from Medicare during foreign service. Returning International Volunteers are also subject to a waiting period before they can reenroll in Medicare. Because the general enrollment period under SSA § 1837(e) only runs from January 1 to March 31 of each year, an International Volunteer who returns to the United States after March 31 will be forced to wait until the following January 1 before being able to reenroll in Medicare. In addition, individuals who enroll pursuant to the SSA § 1837(e) general enrollment period are not covered until the following July 1. *See* SSA § 1838(a)(2)(E). Therefore, returning International Volunteers are subject to a waiting period of at least three months (April 1 to July 1) to as many as fifteen months (April 1 to July 1 of the following year) before they can reenroll in Medicare.

Previously, the only way to avoid being subject to the SSA § 1839(b) penalty and the SSA §§ 1837(e) and 1838(a)(2)(E) waiting period was to qualify for one of the SEPs contained in SSA § 1837(i). DMBA and CMS worked together at length to find a way for the International Volunteers to qualify for one of those SEPs, but were ultimately unsuccessful. International Volunteers typically cannot qualify for such SEPs because they are conditioned upon enrollment in a "group health plan . . . by reason of the individual's (or the individual's spouse's) current employment status." SSA § 1837(i)(1)(A). While there may be occasional exceptions, in nearly

¹ The initial \$200 pre-penalty combined premium would increase \$10 to \$210 after the first year (\$200 premium x 5% increase = \$10 increase), and it would increase another \$10.50 after the second year (\$210 premium x 5% increase = \$10.50 increase). Therefore, once the Smiths return after two years, their pre-penalty premium would be \$220.50 (\$200 initial premium + \$10 first year increase + \$10.50 second year increase = \$220.50 premium).

² The 20% penalty would increase from \$40 a month to \$44.10 a month due to the higher pre-penalty combined premium amount (\$220.50 premium x 20% penalty = \$44.10 penalty). Therefore, the Smiths' post-penalty combined premium would be \$264.60 (\$220.50 premium + \$44.10 penalty = \$264.60).

³ The Smiths' exact total annual penalty would be \$529.20 (\$44.10 monthly penalty x 12 months = \$529.20).

⁴ For example, the monthly penalty would increase to \$277.83 the next year (\$264.60 post-penalty premium + \$13.23 increase (\$264.60 x 5% = \$13.23) = \$277.83 post-penalty premium), which would be \$46.31 a month more than the pre-penalty premium (\$277.83 post-penalty premium - \$231.53 pre-penalty salary (\$220.50 pre-penalty premium + \$11.03 increase (\$220.50 x 5% = \$11.03)) = \$46.31).

every case International Volunteers will not be both enrolled in a group health plan and have current employment status. Therefore, International Volunteers typically cannot qualify for any of the SEPs available under SSA § 1837(i).

Once it was determined that International Volunteers typically could not qualify for an SEP under SSA § 1837(i), and that no other practical solution was available, it was decided that the burden faced by International Volunteers could only be removed through the enactment of new legislation creating an SEP for International Volunteers. Thereafter we worked closely with the office of Senator Hatch to draft legislation that was eventually enacted as Section 5115 of the Deficit Reduction Act of 2005 ("DRA").

DRA § 5115 created a new SEP for individuals who serve outside the United States through a program sponsored by an I.R.C. § 501(c)(3) organization that covers at least a 12-month period. The sole purpose of the legislation was to relieve International Volunteers and other similarly situated volunteers from the burden of having to pay premiums for both Medicare and private health care coverage during their foreign service by allowing such volunteers to qualify for an SEP. The guaranteed ability to participate in the SEP allows such individuals to disenroll from Medicare once they begin their foreign service, which means that they only have to pay for one form of health care coverage during such service, knowing that they will be able to reenroll in Medicare upon their return without being subject to a waiting period or having to pay any penalties.

DRA § 5115 created a new SEP under SSA § 1837(k). This new SEP applies to two classes of individuals – those individuals who qualify as "international volunteers" when they first qualify under SSA § 1836(o), and those individuals who qualify as "international volunteers" when they terminate their enrollment in Medicare. DRA § 5115(a)(3) defines an "international volunteer" as an individual who –

- (A) is serving as a volunteer outside of the United States through a program –
 - (i) that covers at least a 12-month period; and
 - (ii) that is sponsored by an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code; and
- (B) demonstrates health insurance coverage while serving in the program.

An individual must therefore satisfy six requirements to qualify for the new SEP. First, the individual must be serving as a volunteer. Second, the individual must be serving as a volunteer outside the United States. Third, the individual must be serving as a volunteer through a program. Fourth, the program in which the individual is serving as a volunteer must cover at least a 12-month period. Fifth, the program in which the individual is serving as a volunteer must be sponsored by a I.R.C. § 501(c)(3) organization. Finally, the individual must have health insurance coverage while serving in the program.

While most of the requirements are self-explanatory, a few require additional comment. First, the “program” and “sponsorship” requirements make it clear that there needs to be an overarching system created and sponsored by a tax-exempt organization that dictates the terms of the program, and organizes and oversees the activities of the individual volunteers serving in the program. Second, the 12-month period requirement applies only to the program, not to the duration of an individual volunteer’s service within that program. Not only is such a reading of DRA § 5115 the correct reading under the normal rules of grammar, but such a reading is the only reading that allows DRA § 5115 to accomplish its intended purpose.

If the 12-month period is applied to each individual’s service, then individuals would not know whether they qualified for the SEP, and therefore could not disenroll from Medicare, until they had already been serving outside the United States for more than 12 months. Imposing what in effect amounts to a 12-month waiting period would completely frustrate the purpose of DRA § 5115. The new SEP only works if someone knows, when he or she begins a period of foreign service, that they will qualify for the SEP upon their return. If individuals do not know that they will qualify for the SEP until they have been serving outside the United States for at least 12 months, they will be forced to maintain Medicare coverage during that 12-month period for the various reasons discussed above. Thus, the hardship of having to maintain two forms of health care coverage would not be relieved until an individual has been serving outside the United States for at least 12 months.

Reading DRA § 5115 as requiring an individual’s foreign service to last at least 12 months (which requirement cannot be satisfied until after such a 12-month period has elapsed) renders DRA § 5115 a practically useless attempt to relieve the burden of having to maintain two forms of health care coverage during foreign service. DRA § 5115 can accomplish its intended purpose only if all the requirements for the SEP can be objectively determined on a prospective basis – any retrospective requirement, such as having to in fact serve for 12 months, prevents DRA § 5115 from accomplishing its intended purpose.

Proposed Rule

We are concerned that the Proposed Rule is inconsistent with the express language of DRA § 5115 and can be read as contrary to the clear legislative intent of DRA § 5115. Our concerns with the Proposed Rule derive from two sources – the Proposed Rule itself and the Program Operations Manual System HI 00805.350 (the “Policy”),⁵ CMS’s previously announced policy for administering the new SEP, and informal conversations with CMS officials.⁶ As discussed below, the Proposed Rule has certain inherent inconsistencies and

⁵ For your convenience, we have attached a copy of the Policy and our prior comment (in an e-mail dated August 29, 2007) regarding the Policy.

⁶ CMS officials have indicated to us that CMS’s position in the Policy that the 12-month requirement applies to the individual’s period of service rather than the program in which the individual serves is based, at least in part, upon the Conference Report for DRA § 5115 (copy of relevant portion attached). We summarized the basis for our disagreement with that position, which is contrary to both the plain language and clear intent of DRA § 5115, in the attached e-mail dated September 12, 2007.

problems that ought to be addressed. Of greater concern, however, is the fact that the Proposed Rule may be read as being consistent with the Policy, which is completely inconsistent with the purpose of DRA § 5115 and would prevent it from accomplishing its intended purpose.

We will first address our concerns with the Proposed Rule's internal inconsistencies. We understand that DRA § 5115's amendments to SSA §§ 1837-1839, which are part of SSA Part B, effectively amended SSA Part A as well by virtue of SSA § 1818(c). Therefore, we understand why CMS has proposed to add new Section 406.25 (under SSA Part A) and Section 407.21 (under SSA Part B). What we do not understand, however, is why the two new sections, which both implement DRA § 5115, have such different provisions in terms of what is required for an international volunteer to qualify for the same SEP under DRA § 5115. In particular, we do not understand why Section 406.25 faithfully tracks the language of DRA § 5115, but Section 407.21 adopts new language that can be interpreted as imposing different standards. The substantial differences between the preambles for Section 406.25 and Section 407.21 only reaffirm our conclusion that the Proposed Rule creates two different standards under Part A and Part B.

Although the different requirements under Section 406.25 and Section 407.21 for an individual to qualify for the SEP are similar, there are inexplicable differences. For example, Section 406.25 provides that the eligibility requirements are satisfied by "an individual [that] is serving as a volunteer outside of the United States through a program that covers at least a 12-month period," which language comes directly from DRA § 5115. In contrast, Section 407.21 uses, for supposedly the same requirement, this different language: "if while serving as a volunteer outside of the United States the individual is in a program that covers at least a 12-month period of service outside of the United States." This language, which does not come from DRA § 5115 and is of unknown origin, can be read as creating different requirements for what type of service is required of an individual to qualify for the SEP.

The possibility that Section 406.25 and Section 407.21 contain different eligibility requirements seems to be confirmed by the differences between the preambles for the two sections. For example, the preamble to Section 406.25 merely states that "an individual volunteer must demonstrate that his or her period of service is sponsored by an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of the Internal Revenue Code." Consistent with the language of DRA § 5115, which is also the language used in Section 406.25, there is no mention of how long the "period of service" must last. This is consistent with our understanding of the Congressional intent for DRA § 5115 that individuals qualify regardless of how long they serve in the program. Conversely, the preamble to Section 407.21 states that an individual must "[v]olunteer in a program for a 12-month or longer period of service outside of the United States." This language seems to imply that the 12-month requirement applies to the period of service rather than the program, thereby creating a retrospective requirement that frustrates the express purpose of DRA § 5115.

There are similar differences in the two preambles with respect to their descriptions of the burdens associated with the eligibility requirements and what individuals must demonstrate to establish their satisfaction of those requirements. The preamble to Section 406.25 states that individuals must demonstrate “the tax-exempt status of the organization sponsoring the individual” and “that he or she has health insurance that covers medical services received outside of the United States during his or her period of service.” There is no mention of any need to demonstrate how long the individual served outside the United States. On the other hand, the preamble to Section 407.21 states that in addition to verifying the tax-exempt status of the sponsoring organization and demonstrating that they have the required health insurance coverage (the only requirements that are mentioned in the preamble to Section 406.25), an individual must “verify[] the individual’s volunteer period of service,” an implicit retrospective requirement. Thus, once Section 406.25 and Section 407.21 are read in light of their respective preambles and the Policy, one is forced to conclude that they contain different requirements.

Although we understand the need for separate regulations for Part A and Part B, we are not aware of anything that would require different standards under Part A and Part B for the SEPs that are both a function of a single statutory provision. There is nothing in DRA § 5115 that requires separate standards, and we are not aware of anything in either the legislative history of DRA § 5115, the SSA or its accompanying regulations that would require separate standards.

We believe that there should be a single, uniform standard in terms of what is required to qualify for the SEP for volunteers outside the United States. That single standard would apply to the SEP for both Part A and Part B. Specifically, we believe that just as § 406.25(b)-(c) and § 407.21(b)-(c) of the Proposed Rule are substantively identical, with the only differences being internal cross references and terminology, we believe that § 406.25(a) and § 407.21(a) should also be substantively identical. Any individual that qualifies under Section 406.25 should also qualify under Section 407.21 (and vice versa), and there should not be any differences in terms of what individuals must demonstrate to establish their qualification under Section 406.25 and Section 407.21. Therefore, in the revised provisions that we have attached, we made the substantive requirements of § 406.25(a) and § 407.21(a) identical. Because the proposed language for § 406.25(a) does a better job of incorporating the language of DRA § 5115, we have revised § 407.21(a) so that it tracks the language of § 406.25(a) (and therefore DRA § 5115).

Even more troubling than the internal inconsistencies described above is the fact that the Proposed Rule can be read as requiring a retrospective determination of eligibility for the SEP. The Policy indicates the CMS would adopt such a reading. This is especially true with respect to Section 407.21, the preamble of which requires the verification of the volunteer’s period of service. It is impossible to make such a verification prospectively – it can only be made on a retrospective basis. This retrospective determination is not required by DRA § 5115, which merely requires (as Section 406.25 and its preamble appear to require) that the individual serve in a program that lasts for more than 12 months. As discussed above, any retrospective approach completely frustrates the purpose of the new SEP – the new SEP only works if there is a

prospective test that allows International Volunteers to know at the beginning of their foreign service that they will qualify for the SEP upon their return.

If the Proposed Rule is not amended to make it clear that all requirements for eligibility for the new SEP are to be determined solely on a prospective basis, International Volunteers and other similarly situated volunteers will not be able to take advantage of the new SEP until they have completed 12 months of foreign service. Regardless of how long an individual sincerely intends to volunteer to serve outside the United States, it is impossible to know beforehand how long such service will last. Given the risk, however remote, that an individual's service outside the United States may last for less than a year, international volunteers will not be able to disenroll from Medicare when they begin their foreign service. Therefore, in the revised provisions that we have attached, we have added a new provision to Section 406.25 and Section 407.21 that makes it clear that all requirements for the SEP are determined on a prospective rather than a retrospective basis.

Stated another way, our concern with the Proposed Rule is that it does not expressly answer a basic question that appears to be clearly answered in the statute but which is answered to the contrary in the Policy. Namely, what happens if an individual who has volunteered to serve as a volunteer outside the United States in a qualifying program disenrolls from Medicare, but for some unforeseeable circumstance is required to return to the United States after less than 12 months? Under those circumstances, does that individual qualify for the SEP? We believe the statutory language clearly answers this question in the affirmative and the individual qualifies for the SEP. Individuals relying upon DRA § 5115 may be led to disenroll from Medicare upon leaving for foreign service expecting that they will qualify for the SEP upon their return. However, if an unexpected emergency (which in most cases will be a health-related emergency) requires them to return earlier than expected, and they do not qualify for the SEP because their service did not last 12 months, then DRA § 5115 only provides a mirage of relief and would constitute a trap for the unwary. We do not believe that this what the language of DRA § 5115 provides, but the Policy clearly has this result, and we are concerned that the Proposed Rule, especially Section 407.21, could also be read as creating such a trap by prohibiting such an individual from qualifying for the SEP.

We recognize that CMS has a legitimate concern that individuals not be allowed to take advantage of the new SEP. One way of managing the potential for abuse is to adopt, as CMS appears to have done in Section 407.21 and clearly did in the Policy, a retrospective test for determining eligibility for the SEP. Because this retrospective test does not work for the reasons discussed above, we have proposed that CMS adopt a purely prospective test. A prospective test may not be as effective in managing potential abuse, so we think that it would be reasonable for CMS to incorporate into its prospective test the requirement that individuals demonstrate that they have a good faith intent to serve outside the United States for more than 12 months. This could be accomplished with a simple representation by international volunteers on their standard paperwork. Such an approach would allow CMS to limit eligibility for the new SEP to those individuals who plan to serve outside the United States for more than 12 months without punishing those individuals who, due to unforeseeable circumstances, were not able to serve as

long as they had planned. We believe that the number of persons who intend to serve outside the United States but will be unable to do so will be fairly limited. For example, over the past five years, the LDS Church has had approximately 4,700 Medicare-eligible missionaries serving outside the United States, and only 37 of them (less than 1%) have returned to the United States after less than 12 months of foreign service. Therefore, in the revised provisions that we have attached, we have also added a new provision to Section 406.25 and Section 407.21 that requires individuals to demonstrate that they have a good faith intent to serve for more than 12 months. To the extent that a demonstration of good faith intent does not fully resolve CMS's concern, we believe that it would be appropriate for CMS to be able to inquire into whether the program in question is a bona fide program in which participants are expected to serve in the program outside the United States for more than 12 months. Therefore, we have also added a requirement that the subject program be "bona fide."

In addition to the substantive problems discussed in the preceding paragraphs, the Proposed Rule also contains a number of incorrect internal references. We identify the incorrect references below, all of which have been corrected in the revised provisions that we have attached.

- Section 406.25(a) refers to "an individual described in paragraph (a)(2)." The individuals that qualify for the SEP are actually described in paragraph (a)(3).
- Section 406.25(a) also refers to the SEP "as defined in § 406.24(a)(4) of this section." Section 406.24(a)(4) is not part of § 406.25; it is, however, part of the same subchapter as § 406.25.
- Section 406.25(b) refers to "the description in paragraph (a)(2) of this section." The description being referred to is contained in paragraph (a)(3).
- Section 407.21(b) refers to "the provisions of paragraph (b) of this section." The provisions being referred to are actually contained in paragraphs (a)(1) through (a)(3).

If you have any questions concerning the foregoing or the attached, or would like to receive any additional information from us before the publication of final regulations, please do not hesitate to contact us.

Sincerely,

KIRTON & McCONKIE



Lorin C. Barker

Enclosures

Clean Versions of Section 406.25 and Section 407.21

§ 406.25 Special enrollment period for volunteers outside the United States.

(a) *General Rule.* An individual described in paragraph (b) qualifies for a SEP, as defined in § 406.24(a)(4) of this subchapter, if –

(1) At the time the individual first met the requirements of §§ 406.10 through 406.15 or § 406.20(b), the individual elected not to enroll in premium Part A (hospital insurance) during the individual's initial enrollment period; or

(2) The individual terminated enrollment in premium Part A (hospital insurance) during a month in which the individual was described in paragraph (b) of this section.

(b) *Volunteer Outside the United States.* For purposes of paragraph (a) of this section, an individual is described in this paragraph if at the time such individual is first described in paragraph (a)(1) or (a)(2) the individual –

(1) Is serving as a volunteer outside of the United States through a bona fide program that covers at least a 12-month period and that is sponsored by an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code;

(2) Can demonstrate that he or she has health insurance that covers medical services that the individual receives outside the United States while serving in the program; and

(3) Can demonstrate that he or she has a good faith intent to serve in the program for at least 12 months.

An individual will not cease to qualify under this paragraph (b) if the individual serves in the program described in paragraph (b)(1) for less than 12 months due to circumstances that were not reasonably foreseeable at the time the individual terminated the individual's enrollment in premium Part A (hospital insurance).

(c) *Duration of SEP.* The SEP is the 6-month period beginning on the first day of the month which includes the date that the individual no longer meets the description in paragraph (b) of this section.

(d) *Effective date of coverage.* If the individual enrolls in premium Part A (hospital insurance) in accordance with a SEP authorized by this section, coverage begins on the first day of the month following the month in which the individual enrolls.

§ 407.21 Special Enrollment Period for volunteers outside the United States.

(a) *General Rule.* An individual described in paragraph (b) qualifies for a SEP, as defined in § 406.24(a)(4) of this subchapter, if –

(1) At the time the individual was first eligible to enroll or to be deemed enrolled in premium Part B (SMI), the individual elected not to enroll or to be deemed enrolled; or

(2) The individual terminated enrollment in premium Part B (SMI) during a month in which the individual was described in paragraph (b) of this section.

(b) *Volunteer Outside the United States.* For purposes of paragraph (a) of this section, an individual is described in this paragraph if at the time such individual is first described in paragraph (a)(1) or (a)(2) the individual –

- (1) Is serving as a volunteer outside of the United States through a bona fide program that covers at least a 12-month period and that is sponsored by an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code;
- (2) Can demonstrate that he or she has health insurance that covers medical services that the individual receives outside the United States while serving in the program; and
- (3) Can demonstrate that he or she has a good faith intent to serve in the program for at least 12 months.

An individual will not cease to qualify under this paragraph (b) if the individual serves in the program described in paragraph (b)(1) for less than 12 months due to circumstances that were not reasonably foreseeable at the time the individual terminated the individual's enrollment in premium Part B (SMI).

(c) *Duration of SEP.* The SEP is the 6-month period beginning on the first day of the month which includes the date that the individual no longer meets the description in paragraph (b) of this section.

(d) *Effective date of coverage.* If the individual enrolls in premium Part B (SMI) in accordance with a SEP authorized by this section, coverage begins on the first day of the month following the month in which the individual enrolls.

Redline Versions of Section 406.25 and Section 407.21

§ 406.25 Special enrollment period for volunteers outside the United States.

(a) *General Rule.* An individual described in paragraph ~~(a)(2)~~ (b) ~~may use~~ qualifies for a SEP, as defined in § 406.24(a)(4) of this ~~section~~ subchapter, if –

(1) At the time the individual first met the requirements of §§ 406.10 through 406.15 or § 406.20(b), the individual elected not to enroll in premium Part A (hospital insurance) during the individual's initial enrollment period; or

(2) The individual terminated enrollment in premium Part A (hospital insurance) during a month in which the individual was described in paragraph ~~(a)(2)~~ (b) of this section.

~~(3) For purposes of paragraphs (a)(1) and (a)(2) of this section, an individual –~~

(b) Volunteer Outside the United States. For purposes of paragraph (a) of this section, an individual is described in this paragraph if at the time such individual is first described in paragraph (a)(1) or (a)(2) the individual –

(i) (1) Is serving as a volunteer outside of the United States through a bona fide program that covers at least a 12-month period and that is sponsored by an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code; and

(ii) (2) Can demonstrate that he or she has health insurance that covers medical services that the individual receives outside the United States while serving in the program; and

(3) Can demonstrate that he or she has a good faith intent to serve in the program for at least 12 months.

An individual will not cease to qualify under this paragraph (b) if the individual serves in the program described in paragraph (b)(1) for less than 12 months due to circumstances that were not reasonably foreseeable at the time the individual terminated the individual's enrollment in premium Part A (hospital insurance).

~~(b) (c)~~ (c) Duration of SEP. The SEP is the 6-month period beginning on the first day of the month which includes the date that the individual no longer meets the description in paragraph ~~(a)(2)~~ (b) of this section.

~~(e)~~ (d) Effective date of coverage. If the individual enrolls in premium Part A (hospital insurance) in accordance with a SEP authorized by this section, coverage begins on the first day of the month following the month in which the individual enrolls.

§ 407.21 Special Enrollment Period for volunteers outside the United States.

(a) *General Rule.* An individual described in paragraph (b) qualifies for a SEP, as defined in § 406.24(a)(4) of this subchapter, is provided for an individual who does not elect to enroll or to be deemed enrolled in Part B (SMI) when first eligible, or who terminates SMI enrollment, if while serving outside of the United States if –

(1) At the time the individual was first eligible to enroll or to be deemed enrolled in premium Part B (SMI), the individual elected not to enroll or to be deemed enrolled; or

(2) The individual terminated enrollment in premium Part B (SMI) during a month in which the individual was described in paragraph (b) of this section.

(b) *Volunteer Outside the United States.* For purposes of paragraph (a) of this section, an individual is described in this paragraph if at the time such individual is first described in paragraph (a)(1) or (a)(2) the individual –

(1) ~~The individual is in a~~ Is serving as a volunteer outside of the United States through a bona fide program that covers at least a 12-month period ~~of service outside of the United States~~

(2) ~~The program and that~~ is sponsored by an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code; and

(3) ~~The individual~~ (2) Can demonstrates that he or she has health insurance that covers medical services that the individual receives outside the United States ~~during his or her period of service~~ while serving in the program; and

(3) Can demonstrate that he or she has a good faith intent to serve in the program for at least 12 months.

An individual will not cease to qualify under this paragraph (b) if the individual serves in the program described in paragraph (b)(1) for less than 12 months due to circumstances that were not reasonably foreseeable at the time the individual terminated the individual's enrollment in premium Part B (SMI).

(b) (c) *Duration of SEP.* The SEP is the 6-month period beginning on the first day of the month which includes the date that the individual no longer satisfies meets the provisions of description in paragraph (b) of this section.

(e) (d) *Effective date of coverage.* ~~For individuals enrolling in an SEP under~~ If the individual enrolls in premium Part B (SMI) in accordance with a SEP authorized by this section, coverage begins on the first day of the month following the month in which the individual enrolls.

Social Security Administration Policy Site: POMS Section HI 00805.350

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TN 24 (03-07)

HI 00805.350 Special Enrollment Period for International Volunteers

A. Policy - Special Enrollment Period for International Volunteers

Section 5115 of the Deficit Reduction Act of 2005, provides a 6-month special enrollment period (SEP) for SMI and/or Premium-HI for individuals who:

- Performed volunteer service outside of the U.S. through a program sponsored by a tax-exempt organization (See [HI 00805.350B](#). for definition of sponsoring organization) for at least 12 consecutive months; and
- Have (or had) health insurance that provided coverage to the individual while he/she was outside of the U.S for the duration of the volunteer service.

EXCEPTION: Individuals who are eligible for Premium-HI and SMI under the Premium-HI for the Working Disabled provision are not eligible to enroll during the SEP for International Volunteers.

B. Definition - Sponsoring Organization

A sponsoring organization may be a social, religious, educational, scientific, and/or charitable organization as described in section 501(a) and (c)(3) of the Internal Revenue Code of 1986. The sponsoring organization can be a corporation(s), or any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition Also included are organizations for the prevention of cruelty to children or animals.

C. Policy - General Eligibility Requirements

An individual is eligible to enroll during the SEP if he/she meets the requirements discussed in [HI 00805.350A](#). and one of the following requirements:

1. No previous SMI and/or Premium - HI Enrollment

If the individual did not enroll in the initial enrollment period (IEP), he/she had to meet the requirements in [HI 00805.350A](#). in the first month of eligibility for SMI and/or Premium-HI and all months thereafter.

2. Previous SMI and/or Premium - HI Entitlement

- a. If the individual enrolled during the IEP and later terminated coverage, he/she had to meet the requirements in HI 00805.350A. at the time of SMI and/or Premium-HI termination and all months thereafter.
- b. If the individual previously enrolled during the general enrollment period (GEP), he or she must have been enrolled in SMI and/or Premium-HI or met the requirements in HI 00805.350A. in the first month of eligibility.

D. Policy - Effective Date

The SEP for international volunteers is effective January 1, 2007. Premium surcharge rollback only applies to months of international volunteer service (as defined in section HI 00805.350A.) beginning January 1, 2007.

An individual who meets the requirements in HI 00805.350A. and HI 00805.350D. effective July 1, 2006, or later is eligible to enroll in SMI and/or Premium-HI during the SEP. If the last month of volunteer service was July 2006, then January 2007 is the last month of the SEP. If the last month the individual met the requirements in HI 00805.350A. and HI 00805.350D. was August 2006, then February 2007 is the last month of the SEP, etc.

E. Policy - When Enrollment can Occur

The SEP is the 6-month period that begins the earlier of the first day of the month following the 12th consecutive month of volunteer service that:

- The individual is no longer serving as a volunteer outside of the United States; or
- The organization no longer has tax exempt status; or
- The individual no longer has health insurance that provides coverage outside of the United States.

F. Policy - Effective Date of SMI/PREMIUM-HI Coverage

Coverage is effective the first day of the month following the month of SMI or Premium-HI enrollment.

G. Reference

See HI 00801.170 for the Premium-HI for the Working Disabled provision.

Lorin Barker

From: Lorin Barker
Sent: Wednesday, August 29, 2007 2:33 AM
To: 'Stafford, Leslie (HHS/OGC)'
Subject: RE: I'm not ignoring your calls...I just haven't found out anything from Margaret.

Leslie,

The problem we are struggling with is that the policy seems to impose a stricter standard than the statute and, in practice, takes away the very benefit the statute was intended to confer by making it too risky for a volunteer to elect out of Medicare. Let me explain:

The statute describes individuals who are eligible for the SEP as "an individual who is serving as a volunteer outside of the United States through a program-- (i) that covers at least a 12-month period;". On the other hand, the policy describes these individuals as "individuals who: Performed volunteer service outside of the U.S. ... for at least 12 consecutive months;" (this concept is in both Section A and Section E of the policy). While the statute requires only that the person be serving in a program that covers at least a 12 month period the policy requires that the individual actually perform service for 12 months. Usually a volunteer will serve the entire period of at least 12 months. On occasion, however, there may be a serious health or other problem that causes a volunteer to leave their volunteer service early. In such a case the volunteer would still meet the standard of the statute because, although they did not serve for a full 12 months, they were still serving through a program that covers 12 months. But, such an individual may not meet the standard of the policy because they did not actually serve 12 months. Of course, an individual who is called to serve as a volunteer cannot predict if they will have problems causing them to cut their service short. In fact, it rarely happens. Nevertheless, the risk of not being eligible for the SEP because of an unpredictable health or similar problem is significant enough that Church volunteers would be foolish to drop Medicare coverage and rely on a SEP they may not qualify for. This result does not seem to follow from either the language or intent of the statute and we request that the policy be changed to follow the statute language and intent.

One other question we have about the policy is the meaning of the language "and all months thereafter" in Paragraphs 1 and 2a of Section C. Perhaps I simply do not understand, but it seems this language requires meeting the eligibility requirements for the SEP for too long. Surely volunteers do not need to meet the eligibility requirements after they have returned home and cannot meet such requirements but are still in the 6 month SEP.

Could you call me with your thoughts on the above concerns and then, if necessary, help us to set up a meeting or conference call with Margaret to resolve matters. We are quite anxious as we have been uncomfortable to advise Church volunteers of a benefit they should have been able to avail themselves of since January 1, 2007.

Thanks,
Lorin

From: Stafford, Leslie (HHS/OGC) [mailto:Leslie.Stafford@HHS.GOV]
Sent: Tuesday, August 28, 2007 7:16 AM
To: Lorin Barker
Subject: RE: I'm not ignoring your calls...I just haven't found out anything from Margaret.

Lorin, t

I rec'd your voice mail. Let me see I since I last checked anything else has been put into place. If not, and you continue to have concerns, it's time to get you directly together with Margaret, or someone from that division who can address your concerns.

Leslie

From: Lorin Barker [mailto:lbarker@kmclaw.com]

Sent: Tuesday, March 13, 2007 10:14 PM

To: Stafford, Leslie (HHS/OGC)

Subject: RE: I'm not ignoring your calls...I just haven't found out anything from Margaret.

Thanks. Is there anything I can do to help things move along. If it would help to arrange a meeting with you and Margaret where we could bring some concerns/proposals to talk about, please let me know. My client is a little frustrated with the law being effective but the administration of it not being in place, such that missionaries would likely run into administrative problems if they pursue what the law allows them to pursue.

a

Lorin C. Barker

Kirton & McConkie

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From: Stafford, Leslie (HHS/OGC) [mailto:Leslie.Stafford@HHS.GOV]

Sent: Tuesday, March 13, 2007 8:37 AM

To: Lorin Barker

Subject: I'm not ignoring your calls...I just haven't found out anything from Margaret.

SEC. 5114. DELIVERY OF SERVICES AT FEDERALLY QUALIFIED HEALTH CENTERS.

(a) COVERAGE.—

(1) IN GENERAL.—Section 1861(aa)(3) of the Social Security Act (42 U.S.C. 1395x(aa)(3)) is amended—

(A) in subparagraph (A), by striking “, and” and inserting “and services described in subsections (qq) and (vv); and”;

(B) in subparagraph (B), by striking “sections 329, 330, and 340” and inserting “section 330”; and

(C) in the flush matter at the end, by inserting “by the center or by a health care professional under contract with the center” after “outpatient of a Federally qualified health center”.

(2) CONSOLIDATED BILLING.—The first sentence of section 1842(b)(6)(F) of such Act (42 U.S.C. 1395u(b)(6)(F)) is amended—

(A) by striking “and (G)” and inserting “(G)”; and

(B) by inserting before the period at the end the following: “, and (H) in the case of services described in section 1861(aa)(3) that are furnished by a health care professional under contract with a Federally qualified health center, payment shall be made to the center”.

(b) TECHNICAL CORRECTIONS.—Clauses (i) and (ii)(II) of section 1861(aa)(4)(A) of such Act (42 U.S.C. 1395x(aa)(4)(A)) are each amended by striking “(other than subsection (h))”.

(c) EFFECTIVE DATES.—The amendments made by this section shall apply to services furnished on or after January 1, 2006.

SEC. 5115. WAIVER OF PART B LATE ENROLLMENT PENALTY FOR CERTAIN INTERNATIONAL VOLUNTEERS.

(a) IN GENERAL.—

(1) WAIVER OF PENALTY.—Section 1839(b) of the Social Security Act (42 U.S.C. 1395r(b)) is amended in the second sentence by inserting the following before the period at the end: “or months for which the individual can demonstrate that the individual was an individual described in section 1837(k)(3)”.

(2) SPECIAL ENROLLMENT PERIOD.—

(A) IN GENERAL.—Section 1837 of such Act (42 U.S.C. 1395p) is amended by adding at the end the following new subsection:

“(k)(1) In the case of an individual who—

“(A) at the time the individual first satisfies paragraph (1) or (2) of section 1836, is described in paragraph (3), and has elected not to enroll (or to be deemed enrolled) under this section during the individual’s initial enrollment period; or

“(B) has terminated enrollment under this section during a month in which the individual is described in paragraph (3), there shall be a special enrollment period described in paragraph (2).

“(2) The special enrollment period described in this paragraph is the 6-month period beginning on the first day of the month which includes the date that the individual is no longer described in paragraph (3).

“(3) For purposes of paragraph (1), an individual described in this paragraph is an individual who—

“(A) is serving as a volunteer outside of the United States through a program—

“(i) that covers at least a 12-month period; and

“(ii) that is sponsored by an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code; and

“(B) demonstrates health insurance coverage while serving in the program.”.

(B) **COVERAGE PERIOD.**—Section 1838 of such Act (42 U.S.C. 1395q) is amended by adding at the end the following new subsection:

“(f) Notwithstanding subsection (a), in the case of an individual who enrolls during a special enrollment period pursuant to section 1837(k), the coverage period shall begin on the first day of the month following the month in which the individual so enrolls.”.

(b) **EFFECTIVE DATE.**—The amendment made by subsection (a)(1) shall apply to months beginning with January 2007 and the amendments made by subsection (a)(2) shall take effect on January 1, 2007.

Subtitle C—Provisions Relating to Parts A and B

SEC. 5201. HOME HEALTH PAYMENTS.

(a) **2006 UPDATE.**—Section 1895(b)(3)(B)(ii) of the Social Security Act (42 U.S.C. 1395fff(b)(3)(B)(ii)) is amended—

(1) in subclause (III), by striking “each of 2005 and 2006” and inserting “all of 2005”;

(2) by striking “or” at the end of subclause (III);

(3) in subclause (IV), by striking “2007 and” and by redesignating such subclause as subclause (V); and

(4) by inserting after subclause (III) the following new subclause:

“(IV) 2006, 0 percent; and”.

(b) **APPLYING RURAL ADD-ON POLICY FOR 2006.**—Section 421(a) of Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Public Law 108-173; 117 Stat. 2283) is amended by inserting “and episodes and visits beginning on or after January 1, 2006, and before January 1, 2007,” after “April 1, 2005,”.

(c) **HOME HEALTH CARE QUALITY IMPROVEMENT.**—Section 1895(b)(3)(B) of the Social Security Act (42 U.S.C. 1395fff(b)(3)(B)) is amended—

(1) in clause (ii)(V), as redesignated by subsection (a)(3), by inserting “subject to clause (v),” after “subsequent year,”; and

(2) by adding at the end the following new clause:

“(v) **ADJUSTMENT IF QUALITY DATA NOT SUBMITTED.**—

“(I) **ADJUSTMENT.**—For purposes of clause (ii)(V), for 2007 and each subsequent year, in the case of a home health agency that does not submit data to the Secretary in accordance with subclause (II) with respect to such a year, the home health market basket percentage increase applicable

Lorin Barker

From: Lorin Barker
Sent: Wednesday, September 12, 2007 11:23 AM
To: 'Stafford, Leslie (HHS/OGC)'
Cc: mstapley@dmha.com
Subject: New SEP Legislation Interpretation

Leslie,

Thank you for your response and additional information. Needless to say, the approach CMS is taking on this matter is very troubling to us. We believe this approach is contrary to the clear language and obvious intent of the statute.

First, some background on the issue in general and on the statute. Prior to the statute being contemplated, we raised the concern with CMS that LDS Church senior missionaries serving outside of the US were, effectively, having to pay Medicare premiums while serving overseas without receiving any benefit of Medicare coverage. In the absence of Medicare benefits, they need to obtain and pay for other health coverage while overseas and end up paying two premiums (Medicare and private coverage) for only one type of coverage. If they did not pay Medicare premiums and dropped Medicare coverage, they suffered a penalty and waiting period upon re-enrollment. We tried various approaches within the statutory framework at the time to deal with this problem and appreciated the help of CMS in this regard. However, notwithstanding our efforts and the assistance of CMS, we were not able to come up with a workable solution to the problem. We then sought the help of Senator Hatch to enact legislation to deal with the problem and the subject legislation was the result. We actually assisted Senator Hatch's office in drafting the legislation.

With respect to the statutory language, we do not agree with your interpretation. There is not any reference in the statutory language to the volunteer having to serve at least 12 months. The 12 month reference is only to the program and can in no way be read to apply to the service. The language is very clear - the person has to serve outside of the US in a "program" that covers at least a 12 month period. The LDS program satisfies this requirement. So long as the volunteer is acting in good faith (we would have no problem with a good faith requirement being part of the rule or policy interpreting the statute), that ought to be the end of the inquiry with respect to the 12 month period requirement. We anticipate this could be simply administered with a requirement that when the volunteer disenrolls, they send to the applicable CMS office (they may be overseas so they cannot hand deliver it) evidence that they are serving in a program that meets the length and other criteria.

Statistics demonstrate the good faith of LDS missionaries in this regard. Over the last 5 years there have been 4,737 Medicare eligible missionaries who have volunteered to serve outside of the US for a period longer than 12 months (generally missionaries assigned to serve overseas are required to commit to serve for periods of either 18 or 24 months). Of this number, only 37 came back to the US prior to serving at least 12 months. In other words, to the extent there is a perceived problem of LDS missionaries not actually serving overseas for a full 12 months, it is clear that the vast majority do indeed serve the required period. The few that do return early do so because of an unforeseeable health or other emergency. Although all LDS missionaries expect to serve at least 12 months and nearly all do such, under the CMS interpretation of the statute, if a volunteer disenrolls upon leaving, the penalty in the event of an early return is so severe that few if any volunteers will ever disenroll. This result frustrates the obvious intent and purpose of the statute.

With respect to the Conference Report provision you reference, it is at best ambiguous and likely irrelevant given the unambiguous statutory language. The ambiguity, if any, of the report is in the meaning of the word "volunteer," which can be interpreted as either "to sign up" or "to serve." If it means "to sign up," it is entirely consistent with the statutory language in that the 12 month period would refer to the program rather than the service, as though the Report read "volunteer to serve outside...". If "volunteer" means "to serve," we acknowledge a conflict with the statute in that the 12 month period arguably refers to the service rather than the program, but the Conference Report should be read consistent with, rather than in conflict with, the statute. The statute is controlling not the Conference Report. If

"volunteer" in the Conference Report is read to mean "to serve," the Conference Report appears to simply contain an erroneous summary of the statute on this issue. Again, under the plain language of the statute, the 12 month period refers to the program rather than the service. Not even a clear statement in a conference report, let alone an ambiguous statement, can override or add a new requirement to an unambiguous statute.

With respect to legislative intent, we previously mentioned that we assisted Senator Hatch's office in drafting the statute. There is no question that the interpretation we are arguing for is what was intended in the statute. Senator Hatch's office could confirm this if that would help.

Given not only the plain language of the statute, but also the history and the clear legislative intent to relieve a specific and targeted hardship, we believe CMS should reconsider its position. Frankly, we cannot understand why CMS is pushing for its current interpretation of the statute. Our intent, and we thought the intent of CMS when we first began working with CMS, was to find an administrative solution to the problem of LDS missionaries and similarly situated individuals being required to pay Medicare premiums while overseas with no benefit. Unless CMS reconsiders its position, this intent will be frustrated. We would be pleased to offer any support or other assistance if that would be helpful in the process.

Best Regards,
Lorin

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From: Stafford, Leslie (HHS/OGC) [<mailto:Leslie.Stafford@HHS.GOV>]
Sent: Wednesday, September 05, 2007 12:24 PM
To: Lorin Barker
Subject: RE: I'm not ignoring your calls...I just haven't found out anything from Margaret.

Sorry for the delay in replying to you on this issue. I wanted to talk it over with Margaret, and my Deputy here in OGC. As to your first point about CMS' interpretation of the statutory language, I am going to have to disagree with your analysis. I think the statutory language requires that a person not only be enrolled in the 12 month (or more) program, but that the person actually serve the 12 months. To the extent you believe there is any ambiguity in the statute, I refer you to the conference agreement which I have attached. Take a look at page 227 at the language which says in part "Those individuals **who volunteer outside of the U.S. for at least 12 months**....would be permitted to delay enrollment in Part B."

On your second question about the language "and all months thereafter" I read that to say the individual has to meet the full requirements (volunteer service for 12 months and coverage for those 12 months) not just at the time chose note to enroll/terminated coverage, but also for the duration of the overseas volunteer service (whether it is 12 months or more).

Also, Margaret let me know that they will be publishing a Notice of Proposed Rulemaking for the implementing regulations, hopefully shortly.

Leslie

From: Lorin Barker [mailto:lbarker@kmclaw.com]
Sent: Wednesday, August 29, 2007 4:33 AM
To: Stafford, Leslie (HHS/OGC)
Subject: RE: I'm not ignoring your calls...I just haven't found out anything from Margaret.

Leslie,

The problem we are struggling with is that the policy seems to impose a stricter standard than the statute and, in practice, takes away the very benefit the statute was intended to confer by making it too risky for a volunteer to elect out of Medicare. Let me explain:

The statute describes individuals who are eligible for the SEP as "an individual who is serving as a volunteer outside of the United States through a program-- (i) that covers at least a 12-month period;". On the other hand, the policy describes these individuals as "individuals who: Performed volunteer service outside of the U.S. ... for at least 12 consecutive months;" (this concept is in both Section A and Section E of the policy). While the statute requires only that the person be serving in a program that covers at least a 12 month period the policy requires that the individual actually perform service for 12 months. Usually a volunteer will serve the entire period of at least 12 months. On occasion, however, there may be a serious health or other problem that causes a volunteer to leave their volunteer service early. In such a case the volunteer would still meet the standard of the statute because, although they did not serve for a full 12 months, they were still serving through a program that covers 12 months. But, such an individual may not meet the standard of the policy because they did not actually serve 12 months. Of course, an individual who is called to serve as a volunteer cannot predict if they will have problems causing them to cut their service short. In fact, it rarely happens. Nevertheless, the risk of not being eligible for the SEP because of an unpredictable health or similar problem is significant enough that Church volunteers would be foolish to drop Medicare coverage and rely on a SEP they may not qualify for. This result does not seem to follow from either the language or intent of the statute and we request that the policy be changed to follow the statute language and intent.

One other question we have about the policy is the meaning of the language "and all months thereafter" in Paragraphs 1 and 2a of Section C. Perhaps I simply do not understand, but it seems this language requires meeting the eligibility requirements for the SEP for too long. Surely volunteers do not need to meet the eligibility requirements after they have returned home and cannot meet such requirements but are still in the 6 month SEP.

Could you call me with your thoughts on the above concerns and then, if necessary, help us to set up a meeting or conference call with Margaret to resolve matters. We are quite anxious as we have been uncomfortable to advise Church volunteers of a benefit they should have been able to avail themselves of since January 1, 2007.

Thanks,
Lorin

From: Stafford, Leslie (HHS/OGC) [mailto:Leslie.Stafford@HHS.GOV]
Sent: Tuesday, August 28, 2007 7:16 AM
To: Lorin Barker
Subject: RE: I'm not ignoring your calls...I just haven't found out anything from Margaret.

Lorin, t

I rec'd your voice mail. Let me see I since I last checked anything else has been put into place. If not, and you continue to have concerns, it's time to get you directly together with Margaret, or someone from that division who can address your concerns.

Leslie

From: Lorin Barker [mailto:lbarker@kmclaw.com]

Sent: Tuesday, March 13, 2007 10:14 PM

To: Stafford, Leslie (HHS/OGC)

Subject: RE: I'm not ignoring your calls...I just haven't found out anything from Margaret.

Thanks. Is there anything I can do to help things move along. If it would help to arrange a meeting with you and Margaret where we could bring some concerns/proposals to talk about, please let me know. My client is a little frustrated with the law being effective but the administration of it not being in place, such that missionaries would likely run into administrative problems if they pursue what the law allows them to pursue.

a

Lorin C. Barker

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From: Stafford, Leslie (HHS/OGC) [mailto:Leslie.Stafford@HHS.GOV]

Sent: Tuesday, March 13, 2007 8:37 AM

To: Lorin Barker

Subject: I'm not ignoring your calls...I just haven't found out anything from Margaret.