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Subjects: Timing of the Six-Month Medigap Open Enrollment Period, and Clarification of the Open Enrollment Rights of Disabled and End Stage Renal Disease (ESRD) Medicare Beneficiaries When They Attain Age 65

Market: Medigap

I. PURPOSE

This bulletin clarifies the rights of Medicare beneficiaries to purchase a Medicare supplemental policy (commonly referred to as a Medigap policy) during the six-month Medigap open enrollment period. The purpose of this bulletin is twofold. First, it explains the correct interpretation of the terms "attainment of age 65" and "enrollment in Part B" as used in section 1882(s)(2) of the Social Security Act (the Act) to define the beginning of the open enrollment period. Second, it clarifies the requirements of that section as they relate to individuals who have already been on Medicare prior to attaining age 65, based on disability or ESRD.

II. BACKGROUND

Section 1882(s)(2) of the Act requires an issuer to make available any Medigap policy it sells in a state, to any Medicare beneficiary, during the first six months the individual is **both** age 65 or older **and** is enrolled in Part B of Medicare. During the Medigap open enrollment period, an issuer may not deny or condition the issuance or effectiveness of a Medigap policy, or discriminate in the pricing of the policy because of health status, claims experience, receipt of health care, or medical condition.¹ An individual uses his or her open enrollment protections by submitting an application for a Medigap policy "before or during the 6 month period beginning with the first month **as of the first day of the month** on which the individual is 65 years of age or older and is enrolled for benefits under part B." (Subsection 1882(s)(2)(A) of the Act, emphasis added.)

As originally enacted as part of the Omnibus Budget Reconciliation Act of 1990 (OBRA'90) Medigap reforms, subsection 1882(s)(2) had the effect of precluding beneficiaries who qualify for Medicare prior to attaining age 65 from ever having an open enrollment period. Revisions to the statute that were enacted as part of the Social Security Act Amendments of 1994 (SSAA'94) made clear that beneficiaries under age 65 are to have open enrollment when they attain age 65. At that time, they are treated like any other beneficiary newly entitled by reason of age.ⁱⁱ

III. ISSUES

A. *The Meaning of "Is 65 Years of Age"*

Occasionally, we have been asked whether an individual's open enrollment period begins on the individual's birthday. The answer is that the period **never** begins on the individual's actual birthday. The Social Security Administration (SSA) and the Centers for Medicare & Medicaid Services (CMS) have consistently, throughout the entire history of both the Social Security and the Medicare programs, applied a rule under which an individual is considered to "attain age 65" on the first day of the month in which the 65th birthday falls, **unless** the individual's birthday falls on the first day of the month. An individual with a birthday on the first of a month is deemed to "attain age 65" for Medicare purposes on the first day of the **preceding** month.ⁱⁱⁱ

B. *The Meaning of "Is Enrolled" in Part B*

We have also been asked what the term "is enrolled for benefits" in Part B means in the context of section 1882(s). Section 1837 of the Act specifies when an individual may enroll in Part B. For purposes of section 1837, "enrolled" is interpreted to mean that the individual has applied (or is being deemed to have applied) for benefits. Section 1838 of the Act establishes the beginning date of "[t]he period during which an individual is **entitled to benefits** under the insurance program established by this part (hereinafter referred to as his coverage period)....." (Emphasis added.) In most cases the enrollment date is NOT the same as the Part B entitlement date. CMS interprets the term "entitled" in section 1838 to mean the status of being in the Medicare program as of a legally specified date.^{iv}

Section 1882(s)(2) states that the Medigap open enrollment period starts when the individual attains age 65 and is "enrolled for benefits." The latter phrase is different than the language used in either section 1837 or 1838. CMS interprets this language as essentially combining the concepts of enrollment and entitlement to benefits, for purposes of defining the Medigap open enrollment period. Accordingly, the Medigap open enrollment period begins on the first day of the first month after the individual has both attained age 65 (as described above) and become entitled to benefits.

This avoids a situation in which an issuer would be required to ascertain the date the individual **applied** for Part B. Instead, issuers can tell whether an individual is enrolled in Part B by looking at the individual's Medicare card, which gives effective dates for Part A and Part B coverage. Similarly, we have advised beneficiaries, through the CMS publication "Choosing A Medigap Policy" (*The Guide to Health Insurance for People with Medicare*) to look at their Medicare card to figure out if they are still in their Medigap open enrollment period.^v

C. *Open Enrollment for Disabled/ESRD Beneficiaries at Age 65*

A disabled or ESRD beneficiary who was entitled to Parts A and B before turning age 65 is reclassified as an aged beneficiary when he/she "attains age 65," as described above. This process is commonly referred to as "aging in." At that time, if a disabled or ESRD beneficiary has been paying a surcharge for late enrollment in Part B, the surcharge is dropped as of the first of the month of attainment of age 65. In addition, because the individual is already entitled to Part B, his or her Medigap open enrollment period begins on the date he or she "attains age 65," as described above.^{vi}

1. Earliest Possible Effective Date of Medigap Coverage

Recently we learned that at least one major Medigap issuer has been taking the view that "age 65 open enrollment" (for disabled beneficiaries and individuals who qualified for Medicare by reason of ESRD before attaining age 65) starts on the individual's birthday. They quote the CMS publication "Choosing A Medigap Policy" (*The Guide to Health Insurance for People with Medicare*) which says, "You will have the right to choose and buy any Medigap policy when you turn 65." They interpret this to mean that, for disabled beneficiaries, a Medigap policy purchased by using the individual's open enrollment protections cannot take effect until the individual's actual birthday. *The Guide* is written in simplified English for the sake of beneficiaries. It cannot be taken as a definitive legal statement of issuer responsibilities. This interpretation denies the beneficiary access to a Medigap policy for up to one month after his or her Medicare Part B entitlement as an aged beneficiary begins. We consider this to be a violation of the issuer's open enrollment obligation under section 1882(s)(2) of the Act.

The statute clearly states that a beneficiary can apply for a policy "prior to" as well as during the open enrollment period. Therefore, if the individual applies early enough,^{vii} he or she can ask to have the policy start on the first day of Part B entitlement as an aged beneficiary.

2. Beneficiary Action Required

At the time the Act was amended to give disabled beneficiaries open enrollment rights when they turned 65, issuers asked what, if any, responsibilities they had toward their disabled policyholders when they turned 65. Some questioned whether the issuer had to notify these "aging-in" policyholders of their rights to repurchase their existing policy at a better rate or to purchase other policies that previously had not been available to them. Other issuers asked if they were required to automatically adjust rates for coverage they were providing to these individuals. CMS and the NAIC both took the position that the statute did not place any explicit notice requirement on issuers who sold policies to the under age 65 market. Nor did it explicitly require rerating of policies, because the requirement that the issuer not discriminate in the pricing of a policy applied to policies at the time they were **issued or sold** with open enrollment protections. Therefore, it is the beneficiary's responsibility to understand that if he or she had purchased a policy prior to attaining age 65, it is possible to reapply for the same or a different policy with the same or a different issuer and thereby take advantage of his or her open enrollment protections.

3. Advantages of Reapplying for a Medigap Policy

Disabled or ESRD beneficiaries who already have a Medigap policy can reap a number of benefits by reapplying for their existing policy or applying for a new Medigap policy at age 65. These include:

- Getting a better rate for the same policy from their current issuer;
- Switching to a different issuer (who may not have sold to the under 65 population);
- Upgrading benefits while taking advantage of the "best rate" being offered to all other 65 year olds.

Approximately 22 states have open enrollment provisions that are more generous than Federal law, especially as they relate to the under 65 population. Typically, these state laws require issuers to sell at least some of their policies to disabled beneficiaries when they first became

entitled to Medicare Part B. (We call these states "mandatory market" states.) In some mandatory market states, beneficiaries under age 65 may have open enrollment rights to only plan A, or only to plans A or B. Other mandatory market states have laws that parallel the open enrollment options available under Federal law or may provide even broader protections.

Most states, however, follow the Federal law and do not provide any type of open enrollment opportunity for beneficiaries under age 65. In these states, some issuers nevertheless will voluntarily sell some of their policies to some disabled individuals on an underwritten basis. (We term these states voluntary market states.)

Regardless of whether a state's market is mandatory or voluntary, rating is generally handled as a separate issue from the right to purchase a policy. In many states, even among those that provide generous open enrollment options, state law may permit issuers to establish rates that may be very high. For instance, in one state with generous open enrollment provisions for individuals under age 65, issuers are nonetheless allowed to rate these individuals at an age 85+ rate. For such individuals, reapplying during open enrollment offers the opportunity to get the same rate being offered to all other 65-year olds during open enrollment because the issuer cannot discriminate in the pricing of a policy during this period.

Also, if the beneficiary bought plan A during a state-mandated open enrollment when he or she first became eligible for Medicare (because that was all state law required issuers to sell to disabled beneficiaries), the beneficiary can "trade up" during open enrollment to a plan with more generous benefits as well as get the better rate offered to all open enrollment applicants for that policy.

IV. ENFORCEMENT

In the event CMS receives a complaint about an issuer engaging in practices that may constitute a violation of section 1882 of the Act, such as not permitting a disabled/ESRD beneficiary to apply or reapply for a policy during open enrollment, we will consider any appropriate enforcement activity. CMS will cooperate with the state involved if requested by the state.

Where to get more information:

If you have any questions regarding this bulletin, contact the Private Health Insurance Group, the Centers for Medicare & Medicaid Services, formerly the Health Care Financing Administration via e-mail at phigmedigap@cms.hhs.gov or by phone at 1-877-267-2323, ext. 61565.

You may obtain an electronic copy of this bulletin and other technical Medigap regulatory resources at <http://www.cms.hhs.gov/medigap>. You can sign up to receive future bulletins and other updates at the Medigap website. Consumer-oriented Medigap materials can be obtained at www.medicare.gov

ⁱ Under section 1882(s)(2) of the Act, when a policy is purchased during open enrollment, the issuer may impose a preexisting condition exclusion period during the first six months the policy is in effect, but this exclusion period must be offset by the length of time the individual had prior health coverage. (When a policy is purchased using guaranteed issue rights under section 1882(s)(3) of the Act, no preexisting condition exclusion period may be imposed.)

ii Section 1882(2)(A) formerly read in relevant part: “. . . for which an application is submitted during the 6 month period beginning with the first month in which the individual (who is 65 years or age or older) first is enrolled for benefits under part B.” (Emphasis added.) This language effectively prohibited anyone already entitled to Part B benefits before attaining age 65 from having an open enrollment period at age 65. Section 171(g) of SSAA'94 revised this subsection to read as cited in Part II of this bulletin.

iii The SSA defines "attainment of age" at CFR 20 §404.2(c)(4). The "first of the month birthday rule" is based on the premise that the person's "birthday" is actually observed on the first day of the **next** year of life. Consequently, an individual is deemed to have "attained" age 65 at the last possible moment before the 65th birthday begins. On the birthday itself, the individual has already begun his or her 66th year of life. Therefore, an individual whose birthday falls on the first of the month is considered to have "attained age 65" during the previous month. His or her Medicare eligibility date is the first day of the preceding month, just as it would be for anybody else who attained age 65 during that month.

iv To illustrate the difference between enrollment and entitlement under sections 1837 and 1838, an individual who attains age 65 in May 2002 and enrolls in Part B during the last month of his or her initial enrollment period (August 2002) is entitled to Part B as of November 1, 2002. This is because the initial enrollment period lasts seven months (the month in which the individual attains age 65, and three months before and after the month in which the individual attains age 65). However, if the individual applies during the latter part of the initial enrollment period, the start of coverage is delayed until a month or two after the month of application. Similarly, an individual who enrolls in Part B during the general enrollment period (January through March) is entitled to Part B as of July 1 of that year.

v This interpretation is supported by the Conference Committee Report accompanying OBRA'90, which originally added section 1882(s) to the Act. See H.R. Rep. No. 964, 101st Cong., 2d Sess. (October 27, 1990). While the House bill used the term "enrolled in Part B" (see Conference Report at page 790), the final Conference agreement states:

The conference agreement includes the House bill regarding the prohibition of medical underwriting for 6 months after an individual becomes **entitled to** Part B, and may not condition issuance or effectiveness of the policy, or discriminate in the price of the policy, on medical or health status or receipt of health care by the individual.

Conference Report at page 804, emphasis added.

vi For individuals who first qualify for Medicare by reason of age, the event that controls the beginning of the Medigap open enrollment period will generally be enrollment in Part B. Individuals who have attained age 65, but delay enrollment in Part B do not have a Medigap open enrollment period until they are actually enrolled in Part B and are entitled to begin receiving Part B benefits.

vii Because Federal law does not dictate how quickly an issuer must process a Medigap policy issued under open enrollment or guaranteed issue protections, we permit issuers to follow their normal application processing procedures. Therefore, if the disabled/ESRD beneficiary applies early enough to have the application processed under the issuer's normal application processing rules, the individual could have coverage start as of the first of the month in which the individual attains Medicare by reason of age. See "Medigap Bulletin Series, Transmittal No. 02-01" on processing applications.