

MEMORANDUM

March 15, 2011

To: Hon. Charles Boustany, Jr.
Attention: Mike Thompson

From: Edward C. Liu, Legislative Attorney, x7-9166

Subject: **Authority of the Secretary of HHS to Make Exceptions to Minimum Earnings Requirement for Eligibility Under the CLASS Act**

This memorandum responds to your request for an analysis of the scope of the authority of the Secretary of Health and Human Services to define exceptions to the minimum earnings requirement for purposes of being considered an eligible beneficiary under § 3202(6)(C) of the Public Health Service Act (PHSA) as added by the Community Living Assistance Services and Supports Act (CLASS Act).¹

Background

The CLASS Act was enacted as Title VIII of the Patient Protection and Affordable Care Act (PPACA)² to create a federal long term care (LTC) insurance program. Individuals who are actively employed may enroll in the program. Enrollees who meet the criteria to be considered eligible beneficiaries may receive benefits under the CLASS Act in the event that they are certified as experiencing a functional limitation with respect to at least two or three activities of daily living (ADLs).³ The Secretary is given the authority to decide whether benefits will be triggered by an inability to perform two or three ADLs.⁴

Among the requirements that must be met for enrollees to be considered eligible beneficiaries is a minimum earnings requirement which provides that enrollees must have earned, with respect to at least three calendar years during the first 60 months for which the individual has paid premiums under the program, at least the amount necessary to be credited with a quarter of coverage under the Social Security Act.⁵ The CLASS Act also provides that the Secretary of HHS “shall promulgate regulations specifying

¹ 42 U.S.C. § 300ll *et seq.* This memorandum does not discuss the scope of the Secretary’s authority to modify the CLASS program under other provisions of law that may provide additional administrative flexibility.

² P.L. 111-148, §§ 8001-8002.

³ 42 U.S.C. § 300ll-2(a)(C)(i). The statutory definition of ADLs encompass eating, toileting, transferring, bathing, dressing, and continence. 42 U.S.C. § 300ll-1(3).

⁴ 42 U.S.C. § 300ll-2(a)(C)(i).

⁵ 42 U.S.C. § 300ll-1(6)(A)(ii). Such amount is determined pursuant to 42 U.S.C. § 413(d), and for 2011 is set at \$1,120. 75 Fed. Reg. 74123, 74125-74126 (Nov. 30, 2010).

exceptions to the minimum earnings requirement [described above] for purposes of being considered an eligible beneficiary for certain populations.”⁶

Analysis

Specifically, you have asked whether, hypothetically speaking, the Secretary could use her delegated authority to define exceptions under § 3202(6)(C) to modify the minimum earnings requirement for eligible beneficiaries so that enrollees would be required to earn more than is currently required by the text of the CLASS Act.⁷ As described above, § 3202(6)(C) explicitly authorizes the Secretary to make exceptions to the statutory minimum earnings requirement for certain populations.⁸ Therefore, the question of whether the type of modification described in the hypothetical above is within the Secretary’s authority appears to turn on whether an increase in the amount that an enrollee would need to earn in order to become an eligible beneficiary would be considered an exception to the existing minimum earnings requirement. In turn, answering this question requires examining the precise scope and meaning of “exceptions” as used in § 3202(6)(C).

The Supreme Court has held that, except where Congress has unambiguously expressed its intent, courts should defer to an agency’s interpretation of a statutory term, if such an interpretation is a reasonable one.⁹ However, “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹⁰ Therefore, the initial question that must be answered is whether Congress’s use of the word “exceptions” is unambiguous in the context of § 3202(6)(C).

The CLASS Act does not provide an explicit definition of the word “exceptions.” However, English language dictionaries define an exception variously as the “exclusion or restriction (as of a class, statement, or rule) by taking out something that would otherwise be included;” “a case to which a rule does not apply;” or as “the act of excepting.”¹¹ The verb except means “to take or leave out from a number or a whole.”¹² Similarly, legal dictionaries define an exception as “something that is excluded from a rule’s operation.”¹³ In the absence of any other factors suggesting that the term is ambiguous, the consistency of dictionary definitions could be viewed by a court as evidence that the term “exceptions” is unambiguous, and that it refers to situations in which a rule of general applicability shall not be applied.

If the meaning of a term is unambiguous, then courts and agencies are bound by that meaning.¹⁴ But, it is still necessary to determine whether an agency’s action is consistent with that understanding of the statutory text. In the context of § 3202(6)(C), application of the meaning of the term “exceptions” described above would mean that the Secretary of HHS would be authorized to promulgate regulations

⁶ 42 U.S.C. § 30011-1(6)(C).

⁷ For purposes of this hypothetical, it is assumed that the minimum earnings requirement would be raised for all enrollees, or for groups of enrollees based on income or other economic metrics.

⁸ 42 U.S.C. § 30011-1(6)(C).

⁹ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (U.S. 1984)

¹⁰ *Id.*

¹¹ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 791 (1976); MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, TENTH EDITION 403 (1996).

¹² *Id.*

¹³ BLACK’S LAW DICTIONARY 644 (9th ed. 2009).

¹⁴ *Chevron*, 467 U.S. at 843.

specifying cases in which the minimum earnings requirement does not apply for purposes of being considered an eligible beneficiary under the CLASS Act.

Defining exceptions in this way would appear to permit the Secretary of HHS to lower or eliminate the minimum earnings requirement in certain cases, but it is not clear that it would similarly permit the Secretary to require enrollees to earn more than is statutorily required before they may be considered eligible beneficiaries. On one hand, requiring an enrollee to earn more than would be required under the statutory minimum earnings requirement would technically fit the definition because it would be a case in which the general rule did not apply. But, on the other hand, a distinction might be made between preventing a rule's operation in a particular case compared with imposing additional requirements that are in excess of what would have satisfied the original rule.

In support of this distinction, a potential litigant might cite the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Public Citizen v. Health and Human Services*.¹⁵ In this case, the court was interpreting the agency's authority under § 1160(a)(2) of the Social Security Act (SSA).¹⁶ That section provides that information collected by Quality Improvement Organizations¹⁷ in response to complaints by Medicare beneficiaries

shall not be disclosed to any person except ... in such cases and under such circumstances as the Secretary [of HHS] shall by regulations provide to assure adequate protection of the rights and interests of patients, health care practitioners, or providers of health care....¹⁸

HHS issued a manual, under this authority, which created an additional circumstance in which information could not be released, specifically if an identifiable health care provider objected to disclosure.¹⁹ The plaintiffs in the *Public Citizen* case argued that this provision in the manual conflicted with another section of the SSA, that directed QIOs to "inform the individual ... of the [quality improvement] organization's final disposition of the complaint."²⁰

In holding that that HHS exceeded its authority in permitting nondisclosure of the QIOs final determination if identified providers' did not consent, the court stated that "[§ 1160(a)(2) of the SSA] does not permit the Secretary to impose his own nondisclosure requirements; rather, it authorizes the Secretary to promulgate regulatory exceptions to the general nondisclosure requirement." Based on this language, it appears that the court made a distinction between a delegation to an agency to create exceptions to a general rule and a delegation to that agency of the authority to promulgate regulations that are more stringent than what the general rule would have required.

As mentioned above, there is a possibility that a court presented with this issue would find that an increase in the minimum earnings requirement constituted a valid exception to the statutory standard. However, based on the ordinary meaning of the word "exceptions" and the opinion in *Public Citizen v. HHS*, it appears that there is a basis upon which a court could conclude that § 3202(6)(C) alone would not

¹⁵ *Public Citizen, Inc. v. HHS*, 332 F.3d 654 (D.C. Cir. 2003).

¹⁶ 42 U.S.C. § 1320c-9(a)(2).

¹⁷ Quality Improvement Organizations are entities that contract with Medicare to review the quality, reasonableness, and efficiency of medical services provided under Medicare, as well as to determine whether the services provided are within Medicare's statutory coverage. 42 U.S.C. §§ 1320c-3(a)(1) and 1395y(g).

¹⁸ 42 U.S.C. § 1320c-9(a)(2).

¹⁹ *Public Citizen v. HHS*, 332 F.3d at 656.

²⁰ 42 U.S.C. § 1320c-3(a)(14).

provide the Secretary with sufficient authority to raise the minimum earnings requirement for eligible beneficiaries under the CLASS Act.²¹

²¹ Although beyond the scope of this memorandum, there may be additional limits on the ability of the Secretary to make exceptions to the minimum earnings requirement for certain populations. For example, if the Secretary were to raise the minimum earnings requirement for certain populations based on health status, that might be found to be in conflict with other provisions of the CLASS Act that prohibit medical underwriting. 42 U.S.C. § 3001l-2(b)(3).
