State Solutions
An Initiative to Improve Enrollment in Medicare Savings Programs

Overcoming Privacy Concerns: How Applicant Data for the Part D Low Income Subsidy Can Boost Enrollment in Medicare Savings Programs

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Introduction

As of January 2006, the Social Security Administration (SSA) had received 3.6 million applications for the Low Income Subsidy (LIS) for the new Medicare Part D drug benefit and had granted eligibility for LIS, also known as Extra Help, to some 1.1 million.[1] Many of those in the applicant pool, and an even greater percentage among those enrolled in LIS are also likely eligible for one of the Medicare Savings Programs (MSPs), which help individuals with Medicare premiums and cost sharing and are administered by state Medicaid agencies.

In its final rule on the Part D benefit, the Centers for Medicare & Medicaid Services (CMS) stated that it would work with SSA to increase enrollment in MSPs during the LIS application process by designing a process to provide eligibility determinations to states to help identify individuals who may also qualify for MSPs. CMS indicated that they expected states to perform an initial assessment of an individual's MSP eligibility, based on either the individual's application for LIS taken at the state office or on eligibility information provided to the state by SSA.[2]

In the spring of 2005, CMS issued guidance to the states, *strongly encouraging them but not requiring them*, to screen and enroll people into MSPs based on the information SSA collects from LIS applicants.[3] However, the value of the LIS information that SSA plans to pass on to the states, called "leads data," is limited. LIS "leads data" will include: an applicant's mailing address, income as a percentage of Federal Poverty Level (FPL), whether the income is that of an individual or a couple, whether assets were above or below the LIS limit, whether the LIS application was approved, the LIS approval or disapproval date, and the LIS effective date or the reason for the denial.[4] Leads data, however, will not include specific verified income or asset information required by states to enroll people in MSPs.[5] As a result, the leads data do not provide states the information they need to screen and enroll LIS applicants into MSPs based on the

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data shared by SSA. Without additional funding for outreach, the leads data is alone may not fail to maximize the additional MSP enrollment that could flow from SSA's LIS enrollment efforts.

Given the existing verification requirements for the MSPs, those states that chose to screen and enroll LIS applicants into MSPs based on information provided by SSA may have no administrative use for leads data except to direct outreach efforts. This is because virtually all states require verified specific income and asset information from individuals to fulfill MSP verification requirements[6]. Provided only with income as a percentage of the Federal poverty level (FPL), states with strict verification standards will need additional information. Further, the asset information being passed from SSA to the states is limited to whether an LIS applicant's assets are above or below the LIS limit. Such information is of little use to states contemplating a screen and enroll process as the LIS asset limit differs from the MSP assets limits.[7]

Five states, Alabama, Arizona, Delaware, Mississippi, and Minnesota, have asset criteria for MSPs that are less restrictive than the LIS standards.[8] For these states, leads data may serve to verify eligibility for MSP for a subset of individuals. In the remaining states, the absence of specific income or asset test in the leads data limits the value for screen and enroll efforts. Many states have highly specific exemptions in both the asset and income tests; specific verified income and asset data from SSA would be necessary to determine eligibility.

The limited utility of this aggregated income and asset data provided by SSA means that states will have to reach out to prospective MSP applicants in order to obtain the same income information already secured from the applicant by SSA, an administratively duplicative process that puts undue burden on eligible individuals.[9] Given that outreach efforts to the population eligible for MSP have historically been difficult, as evidenced by both SSA's recent efforts for the LIS and the generally low enrollment rates of the MSPs, it would be more cost-effective and result in higher enrollment rates if SSA could provide the detailed unaggregated information provided on the LIS applications directly to the states. This would avert or minimize the need to go back to MSP eligible individuals for further information.[10]

In the Final Rule implementing the Medicare Prescription Drug Benefit, CMS cites privacy protections in the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA)[11] and the Privacy Act of 1974[12] as prohibiting the SSA from providing specific income and asset information directly to the states.[13]

The purpose of this brief is to explore a legal interpretation of privacy statutes that would allow a more robust data exchange between SSA and the states. In addition, we will touch on efforts by states to deal with privacy issues in sharing data across state agencies that might help inform a more effective screen and enroll process.[14]

Sharing Specific Individual Data between SSA and the States May Not Violate Privacy Rules

If SSA provided individuals' verified income and asset information used in LIS determinations to the states, this would minimize administrative costs for states and burden on individuals by eliminating the need to separately collect the same data for MSP application and verification. There is no bar to this exchange of information in either the Privacy Act of 1974 or the HIPAA Privacy Rule.

Privacy Rules Allow LIS Disclosure under Current Consent or Routine Use

The Privacy Act restricts the way agencies of the Federal Government collect, maintain, use, or disseminate information, including personal health information, and provides certain safeguards for the protection of this information.

Under the Privacy Act, however, certain disclosures are permitted, including any disclosure required by law, any disclosure for which prior consent has been obtained, and any disclosure for a routine use.[15]

Thus, even in the absence of a specific law requiring a disclosure, disclosure of information is permitted by the Privacy Act if prior written consent for the disclosure has been obtained.[16] SSA's LIS application acknowledges this requirement and in collecting an applicant's signature states:

> *By submitting this application I am/we are authorizing SSA to obtain and disclose information related to my/our income, resources, and assets, foreign and domestic, consistent with applicable privacy laws. This information may include, but is not limited to, information about my/our wages, account balances, investments, insurance policies, benefits, and pensions.*

The Privacy Act notice on SSA's LIS application further clarifies what SSA may do with an applicant's information stating:

> *We may provide information collected on this form to another Federal, State, or local government agency to assist us in determining your eligibility for the extra help or if a Federal law requires the release of information. We may also use the information you give us when we match records by computer.*

This consent allows for the currently planned exchange of leads data between SSA and the states. But it also allows for a more comprehensive and useful exchange of data.

A more robust data exchange may also be allowed under the "routine use" provision. Routine use is defined by the Privacy Act as the use of a record for a purpose which is compatible with the purpose for which it was collected.[17] The Privacy Act allows and SSA's privacy and disclosure regulation permits the disclosure of information for a published routine use.[18]20 C.F.R. § 401.150(c) of SSA's disclosure procedure regulations permits SSA to disclose information under a routine use for compatible purposes,

where necessary, to carry out SSA programs or assist other agencies in administering similar programs. 20 C.F.R. § 401 states:

> *We disclose information for routine uses where necessary to carry out SSA's programs. It is also our policy to disclose information for use in other programs which have the same purposes as SSA programs if the information concerns eligibility, benefit amounts, or other matters of benefit status in a social security program and is relevant to determining the same matters in the other program.*

Undeniably, the purpose of the SSA LIS application is to help individuals apply for LIS. Under the current statute and rules, Congress and CMS have acknowledged that enrollment in an MSP may be the only entry into the LIS subsidy for some beneficiaries.[19] Thus, it follows that the exchange of leads data with verified income and asset information could be considered a routine use of data for compatible purpose and therefore permitted under the Privacy Act.

Further we believe that the legal rationale developed by SSA to allow it to pass on limited leads data to states can also be used to permit exchange of more specific income and asset information. While limited in practical value, the information currently planned to be passed from SSA to the states as leads data does not meet the standards of de-identified information. Thus we interpret any exchange of leads data as evidence that the activities necessary for an effective screen and enroll, including disclosure of income and asset information, have already been established as allowed under the Privacy Act.

SSA is Not Subject to HIPAA Privacy Rules

The HIPAA Privacy Rule establishes federal standards concerning the privacy of health information and how it can be used or disclosed. Health information, as defined by the rule, is any information that pertains to the past, present, or future health of an individual, or the past, present, or future payment for the provision of health care to an individual.[20] Because income and asset information is collected by SSA in making subsidy determinations, this information could be considered health information by HIPAA standards. However, in order to be protected by HIPAA, health information must be individually identifiable[21] and it must be created or received by a “covered entity”. Covered entities are defined as Health Plans, including government sponsored health programs like Medicare and Medicaid, Health Care Clearinghouses, and certain Health Care Providers.[22]

Since SSA does not provide or pay for health services, it is not a HIPAA covered entity and HIPAA has no bona fide bearing on the scope of information SSA releases to the states as leads data.

The final HIPAA Privacy Rule, issued on December 28, 2000,[23] states:

> *We note that in certain instances eligibility for or enrollment in a health plan that is a government program providing public benefits, such as Medicaid or SCHIP, is determined by an agency other than the agency that administers the program, or individually identifiable health information used to determine enrollment or eligibility in such a health plan is collected by an agency other than the agency that administers the health plan. In these cases, we do not consider an agency that is not otherwise a covered entity, such as a local welfare agency, to be a covered entity because it determines eligibility or enrollment or collects enrollment information as authorized by law. We also do not consider the agency to be a business associate when conducting these functions, as we describe further in the business associate discussion . . .*

SSA itself recognizes that it is not a HIPAA covered entity stating: *Once medical information is disclosed to SSA, it is no longer protected by the health information privacy provisions mandated by the Health Insurance Portability and Accountability Act.*[24] Accordingly, since SSA is neither a covered entity nor a business associate, it has no obligations under HIPAA in this context, and should be able to share LIS application information with states for screen and enroll purposes.

HIPAA Permits States to Use Protected Health Information for Payment or Reimbursement

HIPAA regulates the use and disclosure of protected health information by covered entities. HIPAA is a federal standard which generally preempts all state privacy laws except for those that establish stronger privacy protections. However, even stronger state privacy protections, such as laws in effect in New York, may not prohibit states from using LIS data (see sidebar0.

Use of health information under HIPAA is defined as the sharing, employment, application, utilization, examination, or analysis of such information within an entity that maintains such information.[25] It follows that HIPAA rules apply to the use of leads data by state Medicaid agencies, which are HIPAA covered entities, for screen and enroll purposes.

However, under the HIPAA Privacy Rule, certain uses of protected health information are permitted without the written authorization of an individual.[26] For instance, a covered entity may use and disclose protected health information for its own payment activities.[27] Payment activities include those undertaken by a health care provider or health plan to obtain or provide reimbursement for the provision of health care including health care premiums.[28] As the MSPs provide reimbursement of Medicare premiums and cost-sharing to eligible individuals, it follows that screening and enrolling LIS applicants in the MSPs is a payment activity permitted under HIPAA.

In addition, the HIPAA Privacy Rule permits the use and disclosure of protected health information for 12 national priorities, including uses for essential government functions.[29] Essential government functions are defined under the Privacy Rule to include those activities undertaken by covered entities that are

government programs providing public benefits to determine eligibility for or conduct enrollment in certain government benefit programs where the programs serve the same or similar populations and the disclosure[30] of protected health information is necessary to coordinate the covered functions of such programs or to improve administration and management relating to their covered functions.[31]

LIS and the MSPs encompass the same population; that is, the programs serve the Medicare population at or below 135% of the Federal Poverty Level by providing complimentary benefits. By making use of leads data to screen and enroll LIS applicants for the MSPs, state Medicaid programs will provide better access to a broader set of coordinated assistance program and also result in administrative cost savings for Medicaid agencies. Provided with verified income and asset information for LIS applicants, states will no longer have to perform outside verification of this information when evaluating MSP eligibility.

Conclusion

By improving the value of the leads data and compelling a more vigorous screening and enrollment process by state Medicaid agencies, the original intent of Congress to coordinate these programs will be better realized. Privacy concerns have been considered the greatest hurdle to accomplishing such an effective screen and enroll process. However, the sharing of verified income and asset data between SSA and the states may meet the special conditions allowed under the federal privacy standards established under the Privacy Act and HIPAA, and therefore could be incorporated into the screen and enroll process.

Endnotes

[1] Kaiser Family Foundation, "Medicare Prescription Drug Coverage Enrollment Update," January 2006.
[2] 70 Fed. Reg. 4419, January 28, 2005.
[3] The Centers for Medicare and Medicaid Services: Guidance to the States on the Low-Income Subsidy, May 25, 2005.
[4] The Center for Medicare and Medicaid Services: Guidance to the States on the Low-Income Subsidy, Appendix VIII, May 25, 2005.
[5] *Id.*
[6] States have considerable flexibility in designing both their eligibility verification systems and the criteria they use for income and assets, subject to approval by CMS. New York, for example, allows self-attestation of resources. However, some state officials have said that CMS would also need to exempt MSP applications based on eligibility derived from LIS from Medicaid Eligibility. Quality Control (MEQC) penalties. Finally, it is unclear whether any states have set all income and asset criteria such that LIS eligibility would allow for automatic enrollment in the QI program.
[7] Additionally, a number of states have abolished or increased asset tests for the MSPs, pursuant to section 1902(r)(2) of the Social Security Act.
[8] Centers for Medicare & Medicaid Services, Medicare Savings Programs (MSP) Eligibility Criteria, June 9, 2005
[9] North Carolina plans to develop these leads by sending them a new mail-in application form. Similarly, New York currently plans to mail letters to citizens who receive the LIS, using the contact information included in the leads data elements, to inform them that they may be eligible for help with Part B premiums and cost-sharing and to urge them to contact a district office to apply for benefits.
[10] "Comparing Beneficiaries of the Medicare Savings Programs with Eligible Non-Participants." *Social Security Bulletin.* 64(3): 76-80.
[11] P.L. 104-191, August 21, 1996.
[12] P.L. 73-579, as codified at 5 U.S.C. Sec. 552a, 1974.
[13] 70 Fed. Reg. 4193, January 28, 2005.
[14] HIPAA and the Privacy Act are federal standards which will generally preempt all state privacy laws except for those that establish stronger protections. Fully investigating the role of state law is beyond the scope of this brief.
[15] 5 U.S.C. § 552a (b)
[16] 5 U.S.C. § 552a (b)
[17] 5 U.S.C. § 552a (a)(7) and (b)(3)
[18] In order to identify a disclosure as a routine use, notice of it must be published in the Federal Register.
[19] 70 Fed. Reg. 4419, January 28, 2005.
[20] 45 C.F.R. § 160.103.
[21] 45 C.F.R. § 160.103.
[22] 45 C.F.R. § 160.102, § 160.103.
[23] 65 Fed. Reg. 82479, December 28, 2000.
[24] Electronic Communication from SSA to Melinda Roberts, August 17, 2005 (on file with author).
[25] 45 C.F.R. §160.103
[26] 45 C.F.R. § 164.512
[27] 45 C.F.R. § 164.502
[28] 45 C.F.R. § 164.501
[29] 45 C.F.R. § 164.512(k).
[30] "Disclosure" refers to sharing information with an outside entity; "use" refers to internal utilization of data.
[31] 45 C.F.R. § 164.512(k)(6)(ii).

Stricter State Privacy Laws Impede Data Sharing; Should Not Bar Use Of SSA Data

This brief argues that both HIPAA and the Privacy Act allow SSA to share verified asset and income data with state Medicaid agencies and permit state Medicaid agencies to use such data to determine MSP eligibility. However, some states have more stringent privacy laws which have been cited as potential obstacles to data sharing of this nature. Although state laws that are less protective than federal regulation are preempted, state privacy laws that are more stringent than the federal rule remain in effect, even if they are contrary to federal regulation. This section looks at how New York's privacy laws have prevented data sharing across state agencies, but presents the argument that even these stricter privacy rules do not prevent New York's Medicaid program from using verified SSA data to determine MSP eligibility.

In 2003, the New York State Medicare Savings Program Coalition approached the New York State Department of Health (DOH) and the Elderly Pharmaceutical Insurance Coverage Program (EPIC), New York's State Pharmacy Assistance Program, to discuss targeting EPIC enrollees for MSP outreach. One idea was to have EPIC identify enrollees who were potentially eligible for the MSPs. In doing so, EPIC was to cross-reference its enrollment list with New York State's MSP enrollment list and send outreach letters only to those on EPIC who seemed eligible for the MSPs, but were not already enrolled in the programs. However, citing New York Social Services Law §369.4, New York State decided it was legally prevented from sharing its MSP enrollment data for this purpose.[31] The relevant section of the statute reads:

"All information received by social services and public health officials and service officers concerning applicants for and recipients of medical assistance may be disclosed or used only for purposes directly connected with the administration of medical assistance for needy persons. . ."[31]

New York's DOH has maintained, in this instance, that this statutory language bars it from providing applicant data to the EPIC program, even though it could be argued that the information is "directly connected with the administration of medical assistance of needy persons." In any case, the statute does not similarly restrict DOH from receiving and making use of SSA data. It is therefore our interpretation that §369.4 should not prevent New York State from making use of SSA's leads data and implementing an effective screen and enroll process into the MSP program, a purpose "directly connected with the administration of medical assistance."

New York DOH is also free to accept income data from EPIC that could be used in a screen and enroll process. Moreover, the privacy statement on the EPIC application states:

"EPIC has the right**,** based on your authorization (permission) during enrollment, to use and disclose your personal health related information to pay for your medications and to operate the EPIC Program."[31]
Since New York has eliminated the asset test for the QI program, it follows that QI may be the only means for some EPIC members to enroll in the LIS. Therefore it can be argued that such disclosure is a means for EPIC to have the LIS pay for the medication.

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The Medicare Savings Programs are publicly financed programs that help people pay for costs associated with Medicare, such as premiums, co-payments and deductibles. It is estimated that 5 million people are eligible to receive financial help through the Medicare Savings Programs, but only half are enrolled. Eligibility is generally granted to Medicare enrollees with low incomes, including people with disabilities and seniors.

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