SOCIAL SECURITY ADMINISTRATION

20 CFR Part 418

RIN 0960–AG03

Medicare Part D Subsidies

AGENCY: Social Security Administration (SSA).

ACTION: Final rules.

SUMMARY: We are adding to our regulations a new part to contain rules that we will apply when we evaluate applications for premium and cost-sharing subsidies under the Medicare program. We are including a new subpart, Medicare Part D Subsidies, to this part. This new subpart contains the rules that we use to determine eligibility for premium and cost-sharing subsidies under the Medicare Part D program, which was added by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Medicare Modernization Act or MMA). These final rules describe: What the new subpart is about; how we determine whether you are eligible for premium and cost-sharing subsidies; how we redetermine your eligibility for a subsidy; how you apply for a subsidy; how we evaluate your income and resources; when your eligibility for premium and cost-sharing subsidies terminates; how you may report changes in your circumstances; and how you can appeal a determination we make under the Part D subsidy program.

DATES: These final rules are effective on December 30, 2005.

FOR FURTHER INFORMATION CONTACT: Craig Streett, Team Leader, Office of Income Security Programs, Social Security Administration, 252 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, 410–965–9793 or TTY 1–800–966–5906, for information about this **Federal Register** document. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Electronic Version

The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html.*

Statutory Provisions

Section 101 of the Medicare Modernization Act (Pub. L. 108–173), which was enacted into law December 8, 2003, adds sections 1860D–1 through 1860D–24 to the Social Security Act (the Act), and establishes a new Part D program for voluntary prescription drug coverage effective January 1, 2006. The Centers for Medicare & Medicaid Services (CMS) has overall responsibility for implementing the voluntary Medicare Part D prescription drug benefit and published final rules on January 28, 2005 at 70 FR 4193. As described in these final rules, we are responsible only for the premium and cost-sharing subsidy (the subsidy) portion of the Medicare Part D prescription drug benefit program. We are authorized to make eligibility determinations, provide appeal procedures, and perform eligibility redeterminations for the Part D subsidy in the 50 States and the District of Columbia. We are not authorized to undertake this task for Medicare beneficiaries who live in the territories or who live outside of the 50 States or the District of Columbia.

Section 702(a)(5) of the Act allows us to make the rules and regulations necessary or appropriate to carry out the functions of SSA. Section 1860D–14 of the Act provides for premium and cost-sharing subsidies of prescription drug coverage for certain individuals with low income and resources. An individual must be entitled to benefits under Medicare Part A or enrolled in Medicare Part B in order to receive a subsidy. Section 1860D–14(a)(3)(B) directs us to make subsidy determinations. It also requires us to provide appeal procedures for subsidy eligibility determinations and to perform redeterminations. (State Medicaid agencies have similar responsibilities that are covered in CMS' final rules. Additionally, CMS will conduct annual redeterminations of deemed status and will reconsider certain CMS low income subsidy (LIS) determinations; CMS LIS reconsideration procedures will be addressed in the agency's operating instructions.) Generally, the agency that processes the subsidy application will handle redeterminations and appeals related to that initial eligibility determination.

Background

The purpose of the subsidy program is to assist some Medicare beneficiaries who have limited financial means with paying for voluntary Medicare prescription drug coverage under the Medicare Part D program. If you have limited income and resources, you may be eligible for a subsidy to help you pay your monthly premium, your copayments, and the annual deductible under your Medicare Part D prescription drug plan. If you are a Medicare beneficiary or are applying for Medicare benefits and you want to receive a subsidy, you must follow a two-step process to obtain prescription drug benefits:

- File a subsidy application either with us or with your State Medicaid Agency to see if you qualify for a subsidy; and
- Enroll with an authorized prescription drug provider for the Medicare Part D prescription drug benefit; i.e., a prescription drug plan. (We do not enroll beneficiaries for Medicare Part D. If you are a Medicare beneficiary, you must take the necessary steps to enroll yourself with a participating approved prescription drug plan or Medicare Advantage plan that offers prescription drug coverage. Sections 423.32–423.34 of 42 CFR discuss the enrollment process, including the enrollment of full benefit dual-eligible individuals. You also may obtain information about enrolling on the Internet at *www.medicare.gov* or by calling CMS at 1–800-Medicare.)

You may take these 2 steps in any order. However, if you have Medicare and receive Medicaid coverage, are enrolled in a Medicare Savings Program within your State, or receive Supplemental Security Income (SSI), you will be deemed eligible for the subsidy effective with the first month you meet any one of these conditions; and you do not need to file a subsidy application.

Certain individuals with both Medicare and Medicaid, with Medicare Savings Programs, or with Medicare and receiving SSI payments but who have not enrolled in a prescription drug plan, will be able to take advantage of special enrollment processes. The special enrollment processes are discussed in the preamble to CMS' final rules published January 28, 2005 at 70 FR 4205–4209 and in CMS's regulations at 42 CFR 423.34.

How To Become Eligible for a Subsidy

Section 1860D–14 of the Act requires us to take applications for subsidies from individuals who are applying for Medicare Part D prescription drug coverage. These final rules describe the requirements you must meet to become eligible for a subsidy and what conditions will prevent you from receiving a subsidy. Criteria for eligibility include:

- You must be entitled to benefits under Medicare Part A (Hospital Insurance) and/or enrolled in Medicare Part B (Supplementary Medical Insurance) under title XVIII of the Act;

• You must be enrolled in a Medicare prescription drug plan or Medicare Advantage plan with prescription drug coverage by the end of your enrollment period;

• You must reside in the United States as defined in § 418.3010;

• You (and your living with spouse, if applicable) must meet the income and resource requirements of the subsidy program; and

• You must apply for the subsidy.

Conditions that could prevent you from receiving a subsidy include:

• You lose entitlement to or are not enrolled in Medicare Part A and you also lose eligibility for or are not enrolled in Medicare Part B, or

• You do not enroll or you are no longer enrolled with a Medicare prescription drug plan or Medicare Advantage plan with prescription drug coverage.

These final rules also tell you that if we made the original determination of subsidy eligibility, we will periodically review your subsidy eligibility to make sure that you are still eligible for a subsidy and to determine whether you should receive a full or partial subsidy. The amount of subsidies for Part D premiums, deductibles, and co-payments will be based on the amount of your income and resources (and those of your spouse, if applicable) and your family size.

Section 1860D–14(a)(3)(B)(ii) of the Act specifies that initial subsidy determinations will remain in effect for a period to be determined by the Secretary of Health and Human Services (HHS) but not to exceed 1 year. Section 1860D–14(a)(3)(B)(iv) provides that we shall conduct redeterminations periodically. We interpret these provisions together as envisioning prospective determinations that remain unchanged until we conduct the next redetermination of eligibility. To comply with the 1-year limitation in section 1860D–14(a)(3)(B)(ii), we will conduct the first redetermination within 12 months of our determination that you are eligible for a subsidy.

However, we recognize that certain life events could have a significant impact on your income, resources or family size which in turn could impact your eligibility for a subsidy or the amount of your subsidy. Therefore, these final rules contain an exception to the general rule that a determination remains in effect until we conduct the next redetermination.

Under that exception, if you are a subsidy-eligible individual and your income, resources or family size changes because of marriage, divorce, annulment, separation, resumption of members of a couple living together, or the death of your spouse, you may ask us to redetermine your subsidy based on your new circumstances. When you report such a change or we receive such a report from another source, we will send you a redetermination form. You must complete the form and return it to us so that we can redetermine your subsidy. The redetermined subsidy, if any, will be effective with the month after the month you request us to redetermine your subsidy. We will process other changes, such as the loss of a job, which you would report, in conjunction with your next redetermination.

Eligibility and Applying for a Subsidy

Attaining eligibility for the subsidy under Medicare Part D is a two-step process. You must:

• Apply for the subsidy with us or your State Medicaid agency, and

• Enroll in Medicare Part D by enrolling in a Medicare prescription drug plan or Medicare Advantage plan with prescription drug coverage.

You may take either step first, but the subsidy will not begin until you are enrolled in a Medicare Part D plan or Medicare Advantage plan with prescription drug coverage. If you file your application for the subsidy before the month you are enrolled in a Medicare Part D plan or Medicare Advantage plan with prescription drug coverage, the earliest month you can receive the subsidy is the month you are enrolled in such a plan.

These final rules apply when you file for a Medicare Part D subsidy with us. As a condition of eligibility for the subsidy, section 1860D–14(a)(3) of the Act requires that you, or your personal representative (as defined in 42 CFR 423.772), file an application with us or a State office that accepts Medicaid applications. Our application may be printed in paper form, completed by our employees on computer screens, or available on our Internet Web site, Social Security Online at *http://www.socialsecurity.gov.*

When you file an application we will determine your eligibility and provide you with appeal rights. If we find that you are eligible for the subsidy, we will also determine whether you should receive a full or partial subsidy. Timely filing also assures that you can receive the subsidy for any months you are eligible. If you inquire orally or in writing about the subsidy and tell us you want to file a subsidy application, or if you partially complete the subsidy application on our Internet Web site, we will use the date of your inquiry or the date we receive a partially completed Internet subsidy application from our Web site as your filing date for the subsidy if the requirements in § 418.3230 are met.

Your application for the subsidy remains in effect until we make a final determination on it. As stated in § 418.3620, our initial determination is binding unless you request an appeal within the time period stated in § 418.3630(a) and our decision on the appeal is binding unless you file an action in Federal district court seeking review of our final decision (see § 418.3675). If you timely file an appeal of our initial determination, your application for the subsidy remains in effect until we make a decision on your appeal. If you are not enrolled in a Medicare Part D plan or Medicare Advantage plan with prescription drug coverage when you file your subsidy application, we will write and tell you about your eligibility for the subsidy and that you must be enrolled in such a plan in order to receive a subsidy.

How We Evaluate Your Income

Section 1860D–14(a)(1)–(3) of the Act establishes income limits for eligibility for the Medicare Part D subsidy. Therefore, we will require you to provide information about the income you receive. If you are married and living with your spouse, we will also require you to provide information about your spouse's income. These final rules explain what we consider income, what we exclude from income counting, and how we will compute the amount of an individual's countable income.

We will count both earned income and unearned income. Earned income consists of wages and net earnings from self-employment. Unearned income is any income that is not wages or net earnings from self-employment. Unearned income includes Social Security benefits, Veterans benefits, public and private pensions, annuities, and any support and maintenance provided to you.

We will not count all of the money you receive when we determine your eligibility for the subsidy. We will apply certain exclusions to income you receive when we determine countable income. As directed by the new legislation, these exclusions are modeled after the exclusions used in the SSI program. For example, we will exclude up to $20 per month ($240 per year) of your income. In addition, we will exclude from unearned income the first $60 per calendar quarter of income that is irregular or infrequent; e.g., cash received as a birthday gift, and the first $30 per calendar quarter of earned income that is irregular or infrequent.

We will also exclude all interest and dividends.

We will exclude up to $65 per month ($780 per year) and one-half of the remainder of your earned income (or your and your spouse's combined earned income). We also will exclude a portion of earned income if you are disabled under Social Security rules and have expenses related to your impairment that you must pay in order for you to work. We call these expenses impairment-related work expenses. Similarly, we will exclude a portion of your earned income if you are blind under Social Security rules and have expenses that must be paid in order for you to work. We will apply these exclusions based on these percentages in lieu of determining the actual work related expense in each case. The amount we exclude will be equal to the average percentage of gross earnings excluded for SSI recipients who have such expenses. Initially, the exclusion for impairment-related work expenses will be 16.3 percent of the gross earnings; the exclusion for blind work expenses will be 25 percent of the gross earnings. However, if you have expenses that exceed the average, we will give you the opportunity to present evidence of your actual expenses and adjust the amount of earned income excluded accordingly. We may adjust the percentages if the average percentage of gross earnings excluded for SSI recipients with disability related or blind work expenses changes. If we make such a change we will publish a notice in the **Federal Register**.

How We Evaluate Your Resources

Section 1860D–14(a)(3)(D) of the Act establishes resource limits for eligibility for the Medicare Part D subsidy. Therefore, we will require you to provide information about your resources. If you are married and living with your spouse we also will require you to provide information about your spouse's resources. These final rules explain what resources we will count and what resources we will not count; i.e., exclude from counting. As directed by the legislation, the resource exclusions are modeled after the resource exclusions in the SSI program.

We will count liquid resources, which are cash, financial accounts, financial instruments, and other property that can be converted to cash within 20 workdays. Liquid resources can include stocks, bonds, mutual fund shares, insurance policies, and financial institution accounts, including checking and savings accounts or retirement accounts, such as individual retirement accounts and 401(k) accounts, revocable trusts, and funds in an irrevocable trust if the individual can direct the use of those funds. We will presume that these types of resources can be converted to cash within 20 workdays and are countable. However, if the individual establishes that a particular resource cannot be converted to cash within 20 workdays, we will not count it as a resource in the subsidy determination. We also will count the equity value of real property that you own except for the home that is your principal place of residence and the land it resides on. We will not count other nonliquid resources such as motor vehicles and irrevocable trusts.

Verification

We will compare the information you provide on your application to information in our records and information we obtain from other Federal agencies. If necessary, we will contact you to reconcile any discrepancies between the information on your application and the information from the Federal agencies. We may ask you to submit documents, such as bank statements, to resolve discrepancies.

Changes in Your Subsidy

Section 1860D–14(a)(3)(B)(iv) of the Act requires us to redetermine your continuing subsidy eligibility periodically. During those redeterminations, we will reevaluate your income and resources to see if you continue to be eligible for a subsidy. If you are still eligible there may be an increase or decrease in the amount of your subsidy. These final rules explain how we will make adjustments to or terminate subsidies as a result of periodic redeterminations or redeterminations based on reports of death, marriage, divorce, annulment, separation, or resumption of living together. Any determinations made as a result of changes in your circumstances will be a new initial determination, and we will notify you of the determination in writing and explain your right to appeal that determination.

If You Disagree With Our Determination of Your Subsidy

Section 1860D–14(a)(3)(B)(iv)(II) of the Act requires us to establish appeal procedures for subsidy eligibility determinations similar to the appeal procedure for the SSI program. The procedures in these final rules will apply only if we, not a State Medicaid agency, make the initial determination. If CMS determines that you no longer meet deemed status because you are no longer eligible for SSI (and CMS determines you are not eligible for Medicaid or the Medicare Savings Program), CMS may refer you to us about your SSI eligibility.

We have a process for you to appeal our eligibility determination on your subsidy application, and our determinations of whether you can receive a full or partial subsidy, of an adjustment to your subsidy, or of a termination of your subsidy eligibility. We also explain the rights of your spouse whose eligibility could be adversely affected by your appeal. In these final rules, the term ''the appeal process,'' means the same as ''the administrative review process,'' and we use these terms interchangeably throughout.

The administrative review process will provide you one level of administrative review. Under these final rules, if you decide you want to appeal, you may choose between either a hearing via telephone or a case review. Both the telephone hearing and the case review are at the same level of the appeals process. You will have an opportunity to review the information we use in making a decision and to give us more information that you may want us to consider. You can also have witnesses at your hearing if you choose.

In addition, you can have a personal representative help you with your appeal or represent you. We will work with your representative just as we would work with you. CMS regulations (42 CFR 423.772), which we will apply here, define a personal representative as:

- An individual who is authorized to act on behalf of the applicant;
- If the applicant is incapacitated or incompetent, someone acting responsibly on his or her behalf, or
- An individual of the applicant's choice who is requested by the applicant to act as his or her representative in the application process.

You must contact us within 60 days of the date you receive notice of the initial determination to ask for an appeal of your subsidy determination. If you miss the deadline for requesting an appeal, you can request more time if you can show us you have good cause for missing the deadline. Once we make a decision on your appeal, we will send you a written notice explaining our decision. If you are dissatisfied with our final decision, you may file an action in Federal district court. As we explain in § 418.3670, if we dismiss your appeal, we will mail a written notice of the dismissal to you, but the dismissal is not subject to judicial review and is binding on you unless we vacate it.

The issues that we will review are the issues with which you disagree. We may consider other issues, but we will provide you with advance notice of these other issues, as explained in § 418.3625.

We may correct clerical errors if discovered within 60 days of the date of our initial determination. We will notify you of our revised determination as explained in § 418.3678.

Explanation of Part 418

Part 418 consists of four subparts. We are reserving subparts A–C for future use. We are adding a new subpart D, Medicare Part D Subsidies, which contains the rules that we use to make determinations and decisions about eligibility for the subsidy.

Following is a description of each section for subpart D.

Introduction, General Provisions, and Definitions

- Section 418.3001 describes what subpart D is about, lists the groups of sections, and the subject of each group.
- Section 418.3005 explains that the purpose of the subsidy program is to offer help with prescription drug costs to individuals with limited financial means who meet specific requirements.
- Section 418.3010 contains definitions of terms used throughout this subpart.

Eligibility for a Medicare Prescription Drug Subsidy

- Section 418.3101 lists the requirements that you must meet to establish eligibility for a subsidy.
- Section 418.3105 provides a cross-reference to CMS' regulations concerning who does not need to file an application for a subsidy.
- Section 418.3110 explains what happens when you apply for a subsidy.
- Section 418.3115 describes what will prevent you from becoming eligible for a subsidy, even if you meet the requirements in § 418.3101.
- Section 418.3120 describes the changes in your circumstances that may affect your eligibility for a subsidy or whether you can receive a full or partial subsidy, explains when we may make a redetermination of your eligibility when your circumstances change, and explains that we will notify you of our determination.
- Section 418.3123 explains when a change in your subsidy is effective.
- Section 418.3125 defines the term ''redetermination'' and explains when we conduct redeterminations.

Filing of Applications

- Section 418.3201 explains that an application is usually necessary for a subsidy and why.
- Section 418.3205 explains when an application for a subsidy becomes a claim for a subsidy.
- Section 418.3210 describes an application for a subsidy.
- Section 418.3215 explains who may file an application for a subsidy.
- Section 418.3220 explains when we consider an application for a subsidy filed and lists places it can be filed.
- Section 418.3225 explains how long an application for a subsidy will remain in effect.
- Section 418.3230 explains when we will use the date you make an oral or written inquiry indicating your intent to file for the subsidy as your subsidy application filing date.

Income

- Section 418.3301 provides the general definition of income that will be used for subsidy determinations.
- Section 418.3305 provides a general description of what is not considered income for purposes of determining eligibility for a subsidy and if eligible, whether you should receive a full or partial subsidy.
- Section 418.3310 explains whose income will be counted when we determine eligibility for a subsidy and if eligible, whether you should receive a full or partial subsidy.
- Section 418.3315 describes earned income.
- Section 418.3320 explains how we count earned income, including when it is considered received, how we count net earnings from self-employment, how we count royalties and honoraria, and how we determine the time periods for which the earned income is counted.
- Section 418.3325 explains that not all earned income will be counted and lists the earned income exclusions that may apply.
- Section 418.3330 provides the general definition of unearned income.
- Section 418.3335 describes the types of unearned income that will be counted.
- Section 418.3340 describes how we count unearned income, including when it is considered received, how we determine how much of your income is countable, and how we determine the time periods for which the unearned income is counted.
- Section 418.3345 explains how we will determine the value of unearned income, if any, received in the form of in-kind support and maintenance.
- Section 418.3350 explains that not all unearned income is countable and lists the exclusions that may apply.

Resources

- Section 418.3401 provides the general definition of resources that will be used for purposes of subsidy eligibility determinations.
- Section 418.3405 describes the types of resources that are considered for purposes of subsidy eligibility determinations and lists the type of resources that are considered liquid.
- Section 418.3410 explains whose resources will be counted.
- Section 418.3415 explains that we determine the value of countable resources as of the first day of the month for which a determination will be made.
- Section 418.3420 explains how we count funds held in financial institution accounts.
- Section 418.3425 provides a list of assets that will not be counted as resources.

Adjustments and Terminations

- Section 418.3501 explains the types of events that could cause us to increase or reduce your subsidy or to terminate your eligibility for a subsidy.
- Section 418.3505 describes the effects of increases, reductions, and terminations of subsidies.
- Section 418.3510 explains that before we increase, reduce, or terminate your subsidy, we must send you a written notice with appeal rights.
- Section 418.3515 explains that after we terminate a subsidy, you must generally file a new application to be eligible for a subsidy again.

Determinations and the Administrative Review Process

- Section 418.3601 explains your rights and your spouse's rights under the administrative review process.
- Section 418.3605 explains that initial determinations are determinations we make that are subject to administrative and judicial review and provides examples of determinations that are initial determinations.
- Section 418.3610 lists administrative actions that are not initial determinations. Although we may review these actions, they are not subject to administrative or judicial review.
- Section 418.3615 explains that we will mail you a notice whenever we make an initial determination in your case. The notice will tell you what our determination is, our reasons for making the determination, and your right to request an appeal of the determination.

- Section 418.3620 explains that an initial determination is binding unless you request an appeal within the stated time period or we revise it as explained in § 418.3678.
- Section 418.3625 describes the administrative review process. This section also explains that if you are dissatisfied with our final decision, you may request judicial review.
- Section 418.3630 explains how to file a request for a hearing and that you may ask for more time to request your appeal if you had good cause for missing the 60-day deadline.
- Section 418.3635 explains who can request administrative review on your behalf.
- Section 418.3640 explains the standards we follow in determining whether you had good cause for missing the 60-day deadline to request a review.
- Section 418.3645 explains under what circumstances the decision-maker may be disqualified.
- Section 418.3650 explains that we make a decision based on the information we have and any other information you provide.
- Section 418.3655 explains that we will send you a notice of our decision on the appeal that gives you the right to judicial review.
- Section 418.3665 explains under what circumstances your request for administrative review may be dismissed.
- Section 418.3670 explains how we will notify you if your request for administrative review is dismissed.
- Section 418.3675 explains that our final decision on appeal is binding unless you request judicial review within the stated time or we revise it as explained in § 418.3678.
- Section 418.3678 explains the process for correcting Agency clerical errors.
- Section 418.3680 explains what happens if a Federal court remands your case to us.

Public Comments

On March 4, 2005, we published proposed rules in the **Federal Register** at 70 FR 10558 and provided a 60-day period for interested persons to comment. We received comments from 22 organizations and one individual. Because some of the comments received were quite detailed, we have condensed, summarized or paraphrased them in the following discussion. We have tried to present all views adequately and carefully address all of the issues raised by the commenters that are within the scope of the proposed rules.

Introduction, General Provisions and Definitions

Comment: One commenter recommended that we revise the proposed rules to provide guidance to States on how to verify income and resources, and how to process redeterminations and appeals.

Response: As noted in the preamble to the proposed rules, these rules only address our processing of applications, redeterminations and appeals. We have no authority to regulate the States in this area. CMS oversees the State's participation in this program and issued its own rules that the States are expected to follow on January 28, 2005 (70 FR 4193). CMS also issued additional guidance to the States in a document dated May 25, 2005. This guidance is available on CMS' Web site at *http://www.cms.hhs.gov/States/03_lowincomesubsidy.asp.*

Comment: Six commenters suggested that the final rules include time limits within which we must process applications, redeterminations, and appeals.

Response: We have designed a largely automated process to ensure timely processing of applications, redeterminations and appeals. We intend to complete all actions as quickly as possible. We expect that most applications and redeterminations will be processed expeditiously. However, there are several aspects of the process that make it impossible to guarantee a specific processing time. For example, if information reported on the application conflicts with information obtained from other Federal agencies regarding an applicant's income or resources, we will need to contact the applicant to reconcile the discrepancy, which might increase the time needed to process the application. We also expect to receive some applications that have not been fully completed that will require additional time to complete before processing. Furthermore, because this is a new program, it is difficult to anticipate the volumes of applications, redeterminations, or appeals that we will receive. The volume of receipts could impact the processing time and make it inappropriate to set specific time limits for acting on an appeal. Lastly, the legislation imposes no such time limits, and we do not believe it advisable for us to do so.

In evaluating this comment and reviewing the relevant proposed rules, we detected an inadvertent error in § 418.3225(c). That section stated that individuals who applied for the subsidy but were not yet entitled to Medicare Part A or enrolled in Medicare Part B would receive a letter explaining their eligibility for the subsidy provided they become so entitled and/or enrolled. However, because entitlement to Medicare Part A or enrollment in Medicare Part B is a criterion for eligibility for a subsidy (in addition to enrollment in a Part D plan), we will not be able to make a subsidy eligibility determination in the absence of entitlement to or enrollment in Medicare Part A or Part B. (The CMS regulations at 42 CFR 423.774 permit a subsidy eligibility determination to be made for Medicare beneficiaries not yet enrolled in a prescription drug plan, but they do not provide similar authority regarding individuals who do not yet have Medicare coverage.) Therefore, we are revising § 418.3225(c) to state that if you apply for the subsidy before you are entitled to Medicare Part A and/or enrolled in Medicare Part B but you appear to be in an enrollment period, the notice we send will advise you that we will not take any action on your application until you become entitled to Medicare Part A and/or enrolled in Medicare Part B. If you do not appear to be in an enrollment period, the notice will advise you that you are not eligible for the subsidy because you are not entitled to Medicare Part A or enrolled in Medicare Part B. This letter will also explain your appeal rights.

Comment: One commenter stated that the Notice of Termination should be sent 30 days prior to the termination date.

Response: The MMA instructed us to establish a simplified program. In keeping with the directive, we are following notice guidelines used in other programs that we administer. As a result, the Notice of Termination explains that the beneficiary will receive continuation of their subsidy if he or she appeals within 10 days, and further explains that the beneficiary has 60 days to appeal. Additionally, the beneficiary can request good cause for late filing of an appeal if he/she fails to meet the 10 and 60-day deadlines.

Comment: One commenter suggested that the regulations should include a provision requiring us to issue all notices in alternate language formats upon claimant request.

Response: Although this is a valid concern that warrants further consideration, we have not adopted this comment. The only alternate language format for notices we are currently able to offer is Spanish; however, this is not available to Railroad Retirement beneficiaries because we do not have a record of their preference for a Spanish notice. We will investigate expanding

our ability to offer other alternate language formats in the future.

Comment: One commenter stated that we should hire enough staff to handle the new workload.

Response: This comment is not within the scope of these rules. However, we have put a great deal of effort into determining the amount of staff that will be needed, as well as the hiring and training of the additional staff.

Eligibility for a Medicare Prescription Drug Subsidy

Comment: Nine commenters said that the rules should state that the low-income subsidy shall not negatively affect the eligibility of any recipient for other Federal benefits programs.

Response: Since the Act does not address the effect of the subsidy on other Federal programs or provide a specific exclusion, and since we have no authority to instruct other agencies, this recommendation is beyond the scope of these rules. However, CMS has prepared several fact sheets explaining the impact of the subsidy on various Federal programs. Those fact sheets are available at CMS' Web site, *www.Medicare.gov.* In evaluating this comment, we noticed that our proposed rules were not sufficiently clear about how income excluded by other Federal programs would be treated for purposes of determining eligibility for the subsidy. Therefore, we are revising § 418.3350(b), by adding a reference to § 416.1124(b) of our rules to clarify that income, excluded by the SSI program because it is excluded under other Federal statutes, will also be excluded for purposes of determining eligibility for the subsidy.

Comment: Nine commenters suggested that we add explicit language to explain when eligibility is effective for beneficiaries with deemed eligibility status.

Response: We agree with this comment and have revised § 418.3105 to clarify that if beneficiaries have deemed eligibility status because they receive Medicaid coverage, are enrolled in a Medicare Savings Program within their State, or receive SSI and have Medicare, then their subsidy is effective with the first month they have deemed eligibility status.

Comment: Nine commenters said that the rules should include a procedure to screen applicants for eligibility for Medicare Savings Programs.

Response: We believe that this is a procedural matter that does not require us to revise our rules. However, our operating guides include instructions on screening for these cases.

Comment: Nine commenters said that we should adopt a policy of continuous eligibility where beneficiaries retain eligibility for a full 12 months, regardless of any income changes.

Response: Following the guidelines in CMS regulations at 42 CFR 423.780, we will determine eligibility and subsidy percentage for a calendar year. CMS will make the subsidy amount determination. These determinations will remain in effect throughout the year, unless a beneficiary reports a subsidy-changing event described in § 418.3120(a) or the beneficiary becomes deemed eligible for a full subsidy.

Comment: Two commenters said that we should use data exchange information to determine if beneficiaries qualify for a more generous subsidy.

Response: The rules state at § 418.3120(b)(1) that we will use information we receive from the beneficiary or from data exchanges with Federal agencies to determine the correct subsidy amount. Depending on the new information we receive, the subsidy may increase, decrease, or remain unchanged. Except as provided in § 418.3120(a), we will use any income or resource information obtained via data exchange when we determine a person's continuing eligibility for the next calendar year.

Comment: One commenter said that we should specify a time frame for enrollment in a Medicare Advantage plan.

Response: Medicare Advantage plans and enrollment rules fall under the jurisdiction of HHS and CMS. Therefore, we do not have the authority to implement rules governing Medicare Advantage plans.

Comment: One commenter said that we should develop processes to advise applicants whose application for the subsidy has been denied that they might qualify for Medicaid or a Medicare Savings Program.

Response: We are aware of the importance of making referrals to other programs. Our notices will advise all applicants of their potential eligibility for a Medicare Savings Program.

Comment: One commenter said that late enrollment penalties should not be assessed for individuals who have their applications denied when they are not enrolled in a plan but later have their claims allowed.

Response: The policies for late enrollment penalties are under the control of CMS. Therefore, we are not authorized to implement policies governing late enrollment penalties.

Comment: Three commenters asked that we provide greater detail in the regulations about how we will conduct redeterminations of subsidy eligibility. They suggested that we adopt a ''passive'' redetermination process, in which we advise the beneficiary about the information we have, and the beneficiary is only required to respond if the information is inaccurate. They suggested that we limit the number of times we will conduct a redetermination in a given period. The commenters explain that this would enable a simple redetermination process that would not be a burden on us or on beneficiaries.

Response: We agree that the redetermination process should be simple and should not be burdensome. For these reasons, we plan to use a ''passive'' redetermination process for a beneficiary's first scheduled redetermination. Further, we do not plan to conduct a redetermination for every beneficiary every year, but will instead schedule redeterminations based on the likelihood that an individual's situation may change. We expect this process to fulfill our responsibility to maintain the integrity and accuracy of the subsidy program, while minimizing burdens placed on us and on beneficiaries. However, without further experience we cannot commit ourselves to the ''passive'' redetermination process or any particular redetermination frequency, and therefore we are not revising the regulation to address these issues. Experience may tell us that a different process better serves the integrity of the program and interests of beneficiaries. The law gives us broad discretion, which we exercise in these regulations, to determine the procedures for conducting redeterminations. However, based on these comments, we are changing § 418.3110(c) and § 418.3225(b) to eliminate the statement that we will terminate subsidy eligibility if an individual has not yet enrolled in a prescription drug plan at the time of a redetermination. We are making this change because some situations could develop in the future where an individual will be enrolled in a drug plan but the effective date will be later than our redetermination. We plan to monitor our redetermination process in order to determine whether any further changes are warranted.

Comment: Four commenters suggest that changes that would affect the subsidy amount, such as in income, resources, household composition, or enrollment in a Medicare Savings Program, could be reported at any time and should become effective immediately, or a month after the month of the report of the change, rather than delaying the effect. They are concerned about the fact that these changes are not

effective until the January following the report. They believe this would be disadvantageous for beneficiaries who have a decrease in income or resources, but will continue to receive the same subsidy amount until a redetermination is completed.

Response: Section 418.3110(d)(3) of these final rules clarify that a person who has been denied eligibility for a prescription drug subsidy may reapply any time their situation changes. Individuals already receiving a subsidy may report significant changes at any time. However, in keeping with the direction provided by section 1860D–14 of the Act, we established a simplified application form and process for this program. One technique that we adopted to maintain a simplified process was that eligibility determinations will be based on determinations of yearly income and resource amounts. The determination remains in effect for a calendar year unless the beneficiary reports one of the six subsidy changing events listed in the rules, appeals the initial determination, or becomes eligible for a program that would cause deemed eligibility for a full subsidy. This approach ensures that the individuals found eligible for subsidies will have continuous eligibility and will not be impacted by monthly income changes. Also, beneficiaries are not burdened with reporting responsibilities. This comment did alert us to one possible subsidy-changing event that we inadvertently omitted, that of a change in household composition due to a separated married couple resuming living together. We have revised § 418.3120 to reflect this change.

Filing of Application

Comment: One commenter said that we should use a term such as ''helper'' as synonymous with ''representative'' and specify that representatives are always allowed to sign an application.

Response: We follow CMS' policy concerning representatives in the Medicare program as defined by CMS' regulations at 42 CFR 423.772. This definition makes it clear, however, that representatives are fully authorized to act on a person's behalf.

Comment: One commenter suggested that we eliminate the penalty clause on the application. Another commenter said that the form should not have been drafted prior to the issuance of these rules and that it should be revised to consider any comments received on these rules.

Response: We published three notices in the **Federal Register** on July 30, 2004 (69 FR 45879), September 30, 2004 (69 FR 58578) and November 17, 2004 (69 FR 67379). In these notices, we gave the public an opportunity to comment on the application form. We received a number of comments on the form which we evaluated before the final version was approved. None of the comments received on these rules will impact the application. However, we will continue to evaluate and revise the form when changes appear necessary.

Comment: Ten commenters made the following comments about various aspects of the application process:

- Allow more time to submit requested information, so that applicants who may be mentally or physically unable to comply will have an adequate opportunity to respond.
- Clarify how we will assist when an applicant fails to submit requested information.
- Contact the applicant and explain what is needed to complete the application.
- Give the applicant 180 days to complete the application.
- Specify a time frame to process incomplete applications and clarify the rules we will follow to process them.
- State that we will send a written notice giving a deadline to submit the required information.

Response: These comments deal with procedural issues and are not within the scope of these rules. However, we have reviewed the operating instructions and believe they address the concerns raised by the commenters. We will continue to monitor the process and make changes if necessary.

Income

Comment: Five commenters recommended that we revise § 418.3335 to remove in-kind support and maintenance from consideration as countable income. They asserted that under MMA, we have the authority to exclude consideration of in-kind support and maintenance in making eligibility determinations. Four of the five commenters pointed out that the Medicare Savings Program uses SSI methodology to determine countable income but the model Medicare Savings Program application created by CMS does not include in-kind support and maintenance. They further pointed out that it could be difficult for individuals to provide information about household expenses which might discourage potential beneficiaries from filing a claim.

Response: After careful consideration, we decided not to adopt this recommended change. Section 1860D–14(a)(3)(C)(i) of the Act provides that income for subsidy eligibility shall be determined in the manner prescribed in section 1905(p)(1)(B) of the Act without regard to the application of section 1902(r)(2). Section 1905(p)(1)(B) of the Act provides that income will be determined under section 1612 of the Act. Section 1902(r)(2) provides the authority for States to use income and resources methodologies for certain groups of Medicaid eligibles that are less strict than those used in the SSI program, but section 1860D–14(a)(3)(C)(i) specifically precludes us from using those less strict rules. Therefore, we must follow the income-counting requirements of section 1612 which provides that in-kind support and maintenance will be counted as income with a maximum value of one-third of the applicable SSI Federal benefit rate, although we have simplified some of the rules consistent with Congress' intent.

Comment: One commenter recommended that we simplify the in-kind support and maintenance determination described in § 418.3345 by allowing beneficiaries to use a default dollar value equal to one-third of the SSI Federal benefit rate unless the beneficiary alleges a dollar amount less than the default value.

Response: We do not agree that permitting beneficiaries to use a default dollar value equal to one-third of the SSI Federal benefit rate would simplify in-kind support and maintenance determinations. In addition, we are concerned that offering individuals the option of using a default amount could inappropriately encourage individuals to allege the default amount instead of the actual amount which could be lower and, therefore, beneficial to the individual. Section 418.3345(b) of the final rules states that we will count in-kind support and maintenance as income only up to one-third of the applicable SSI Federal benefit rate. Section 418.3345(a) of the final rules states that the amount of income derived from in-kind support and maintenance is the current market value of the food and shelter provided by other people. When the current market value of the in-kind support and maintenance is less than one-third of the applicable Federal benefit rate, only the current market value is counted as income. However, to make this clear in the regulations, we have revised § 418.3345(b) to state that if the current market value of in-kind support and maintenance the individual receives is worth less than one-third of the applicable monthly SSI Federal benefit rate, we count only the current market value as income.

Comment: One commenter stated that the rules in § 418.3345 do not offer a streamlined approach that enables beneficiaries to determine how much, if any, in-kind support and maintenance they receive. The commenter recommended that we reduce the amount of the maximum countable in-kind support and maintenance to below one-third of the Federal SSI benefit rate. The commenter further recommended that we provide a streamlined methodology for beneficiaries to calculate in-kind support and maintenance.

Response: After careful consideration, we decided not to adopt these recommended changes. The authority to count in-kind support and maintenance as income is derived from section 1612(a) of the Act. This section provides that the countable income derived from in-kind support and maintenance is equal to one-third of the Federal SSI benefit rate. The statute does not provide the authority to establish a lower maximum countable amount. We will count less than the maximum amount as income when the beneficiary receives in-kind support and maintenance that is worth less than the maximum. Furthermore, we are providing a streamlined process for determining in-kind support and maintenance which requires that the beneficiary answer only one question on the subsidy application. By limiting the application to only one question, we have developed a process that is very streamlined, and is much simpler than the SSI process for determining in-kind support and maintenance.

Comment: Nine commenters stated that the Student Earned Income Exclusion (SEIE) should be applied to individuals who apply for the subsidy. In the SSI program, the SEIE applies to individuals under age 22 who are regularly attending school and who have earned income. The SEIE excludes earned income up to a maximum of $5670 (in 2005) per year. The commenters state that this exclusion would permit disabled students to gain work experience without jeopardizing eligibility for the subsidy.

Response: We expect that prescription drug subsidy claims involving individuals who could meet all of the requirements for the student earned income exclusion will be very rare. We are still analyzing the potential impact of the prescription drug subsidy on the disabled student population who have Medicare coverage and will revisit this area in subsequent regulations if appropriate.

Comment: Nine commenters stated that the rules in § 418.3325 should provide an exclusion for earned income received by a Social Security Disability Insurance (SSDI) beneficiary during a trial work period or an unsuccessful work attempt. The same commenters stated that the regulation also should provide an exclusion for earned income of an SSDI beneficiary received as a result of a work-related subsidy or special condition. Under SSDI rules, a work-related subsidy exclusion is applied when an individual's earnings exceed the reasonable value of the work performed, and we count only the pay that is actually earned. Under SSDI rules, if work is done under special conditions, we may determine that the work does not show that the individual can perform substantial gainful activity. These commenters also stated that the regulations should permit SSDI beneficiaries to deduct unincurred business expenses when determining countable self employment income. An unincurred business expense occurs when a sponsoring agency or another person pays certain business expenses for the individual who is attempting to work. The commenters stated that not providing these earned income exclusions would be a disincentive for SSDI beneficiaries who might not try working because their earnings could cause them to lose eligibility for the subsidy.

Response: After careful consideration, we decided not to adopt these recommended changes. The earned income exclusions proposed by the commenters pertain only to the SSDI program under title II of the Act. For purposes of determining subsidy eligibility, section 1860D–14(a)(3)(C) of the Act provides that income is determined in the manner described in section 1905(p)(1)(B) of the Act; that is, under the SSI methodology provided in section 1612 of the Act. Section 1612 describes what income is countable and what income is excludable and does not provide for these earned income exclusions.

Comment: Fourteen commenters stated that the rules in § 418.3325(b)(5) and (b)(7) should provide that impairment related work expenses (IRWE) and blind work expenses (BWE) should exclude the average percentage of gross earnings or the actual expenses, whichever is greater.

Response: The rules in § 418.3325(b)(5) and (b)(7) already provide that actual expenses for IRWE and BWE will be used if they are greater than the average percentage of such expenses. If the actual expenses are not greater, then the average percentage will be excluded automatically when the individual indicates on the application that he or she has such expenses.

Comment: One commenter stated that if greater than average IRWEs and BWEs are not automatically considered, a clear procedure and timeline for establishing greater than average IRWEs and BWEs must be established so that beneficiaries are aware that their actual expenses will be considered if higher than the average expenses. The commenter further stated that the rules lack procedural availability or timelines within which SSA must respond to requests to consider actual expenses.

Response: The specific procedures and timeline for determining higher than average IRWE and BWE expenses will not be addressed in the regulations. These are operational issues and not appropriate to include in regulations. However, § 418.3325 clearly states that we will exclude greater than average IRWE or BWE expenses when the individual's actual IRWE or BWE expenses are greater than the average. The notices that we send to beneficiaries will state how much income we are counting and how much income is excluded because of IRWE or BWE. The notices will inform the beneficiaries to contact us if they disagree with our income determination. If a beneficiary contacts us with a question about the IRWE or BWE exclusion amount, we will help the individual to establish the actual amount of IRWE or BWE expenses that should be excluded.

Comment: Four commenters who approved of our decision to use the average percentage for computing IRWE encouraged us to make the process of proving higher than average IRWE as easy for beneficiaries as possible. One of these four commenters recommended that we permit self-attestation of higher IRWE to make the process simpler for beneficiaries and for us.

Response: We agree with the commenter that the process for proving higher than average IRWE and BWE should be as easy as possible for beneficiaries. However, we do not believe a change in the regulation is necessary. The procedures we have developed are based on the recognition that determining dollar amounts for IRWE or BWE can be difficult because of the wide variety of expenses that potentially qualify for this exclusion. Therefore, under our procedures our staff will assist beneficiaries establish a higher than average IRWE or BWE exclusion and in obtaining any documentation that might be required to establish a higher than average IRWE or BWE exclusion. We will issue operating

instructions explaining these procedures.

Comment: One commenter recommended that income deductions should be afforded to individuals who use service dogs or guide dogs and incur expenses related to use of these dogs.

Response: The procedures for determining the exclusion of expenses associated with service dogs or guide dogs are provided in our operating instructions and will not be addressed in these regulations. Our procedures exclude expenses associated with service dogs and guide dogs and all associated expenses under either the IRWE or BWE exclusion if the dogs are needed for employment-related activity. To make it clear that BWE exclusions such as guide dogs also apply to subsidy determinations, we are adding a cross-reference in § 418.3325(b)(7) that refers to the SSI BWE provision in § 416.1112(c)(8) of our rules.

Comment: One commenter recommended that we clarify the regulations by stating that cost-of-living increases in Federal benefits are not counted as income until the month following the annual publication of the updated Federal poverty guidelines.

Response: We have clarified § 418.3340(f) of the final rules to state that we will not count the amount of the cost-of-living adjustment (COLA) for Social Security benefits for any month before the Federal poverty guidelines are published. Section 1905(p)(2)(D)(i) of the Act provides that the income of an individual who is entitled to monthly insurance benefits under title II shall not include any amounts attributable to a COLA for each month through the month following the month in which the annual revision of the Federal poverty guidelines are published. However, the statutory authority to not count the COLA applies only to monthly insurance benefits under title II and not to other Federal benefits. Therefore, we have also revised § 418.3120(a)(7) for consistency.

Resources

Comment: One commenter stated that our description in § 418.3405 of liquid resources as those which can be converted to cash within 20 workdays is ambiguous. The commenter stated that § 418.3405 of the rules should include a finite list of the resources that will be counted and a statement that anything not listed will not be counted.

Response: The purpose of § 418.3405 is to describe the types of financial accounts and instruments that will be counted as resources. Liquid resources are resources that are held in financial accounts or other instruments that can be converted to cash within 20 workdays. We will presume that these types of resources can be converted to cash within 20 workdays and are countable. However, if the individual establishes that a particular resource (other than nonhome real property) cannot be converted to cash within 20 workdays, we will not count it as a resource in the subsidy determination. We refer to ''liquid resources'' in order to differentiate them from ''non-liquid'' resources which, except for equity in nonhome real property, will not be counted for purposes of determining subsidy eligibility (*e.g.*, vehicles, household goods, jewelry, musical instruments, etc.). We are adding language to § 418.3405 to clarify that ''20 days'' means ''20 workdays.'' This is how we described this rule in the preamble of the Notice of Proposed Rulemaking (NPRM) and it was an unintended omission that we did not say ''workdays'' in § 418.3405 in the NPRM.

Based on over 30 years of experience making resource determinations for the SSI program, we are convinced that it is not feasible for us, or beneficial to the individual, to provide a finite list of all countable resources. A list could be developed to include most of the common types of financial instruments, but it would not capture all of the many types of financial instruments in existence now. In addition, new types of financial instruments and investment vehicles are being created regularly and often are given names in order to differentiate them from existing products. It would be very difficult to maintain such a list in our regulations. Using a list could also result in unequal treatment of beneficiaries because we would exclude from resource counting some financial products just because they are not on the list even if they are very similar to financial products on the list that are countable.

To further improve the clarity of what resources are generally considered liquid, we will add the following examples to the list of resources that are ordinarily considered liquid, ''trusts if they are revocable or if the trust beneficiary can direct the use of the funds in the trust.'' We consider a revocable trust to be a liquid resource because it can be converted to cash. Also, if a trust beneficiary can direct the use of the funds in a trust, the funds in the trust are a liquid resource because the beneficiary can use those funds for support and maintenance.

Comment: Two commenters recommended that the cash value of life insurance should not count as a resource because life insurance policies may not be easily convertible to cash and therefore would not meet the definition of liquid assets adopted by CMS in 42 CFR 423.772 which states that liquid resources are resources that can be converted to cash in 20 workdays. The commenters also expressed concern that determining the cash value of life insurance could be difficult for beneficiaries and would slow down the application process and could result in some beneficiaries not filing for the subsidy.

Response: After careful consideration, we decided not to adopt this recommended change. As already discussed in this document, we will presume that a financial instrument such as a life insurance policy can be converted to cash within 20 workdays. If the individual establishes that a particular resource (other than nonhome real property) cannot be converted to cash within 20 workdays, it will not be counted as a resource. Normally, information about the cash value of an insurance policy is readily available to the policy owner, and we have procedures to assist beneficiaries who need help determining the value of their insurance policies.

Comment: One commenter expressed concern that the requirement to provide the cash value of life insurance policies would be a significant burden on beneficiaries. The commenter recommended that SSA should work with insurance companies and organizations to develop a process to help beneficiaries get this information quickly and accurately.

Response: We agree with the commenter that it is important to establish procedures that are not burdensome for beneficiaries. The procedure we have developed provides a flexible approach for beneficiaries to make it as simple as possible to provide us with the correct information. We have issued operating instructions explaining these procedures. In addition, our staff will assist beneficiaries who find it difficult to provide this information. We have also held discussions with representatives of the American Council of Life Insurers and the National Association of Insurance Commissioners to ask for their assistance in notifying insurers about the kind of information we need about an individual's policies and how they can help their clients.

Comment: One commenter recommended that we automatically exclude $1,500 in assets for all beneficiaries under the burial exclusion in § 418.3425(j). The commenter expressed concern that some beneficiaries could be disadvantaged if

they did not understand the burial exclusion question and answered it incorrectly.

Response: After careful consideration, we decided not to adopt this recommended change. The $1,500 burial fund exclusion is based on the $1,500 SSI burial fund exclusion in section 1613(d)(1) of the Act. This section creates this exclusion, sets the $1,500 limit, and establishes the requirement that the individual must expect to use a portion of his or her money for burial and related expenses of the individual or spouse. The statute does not permit the $1,500 burial exclusion for an individual who does not expect any of his or her money to be used for burial expenses.

Comment: Two commenters recommended that pre-paid burial contracts should be excluded from determinations of resources because such contracts should not be considered liquid resources due to the difficulty in converting them to cash. One of the two commenters also recommended that irrevocable burial trusts should also be excluded for the same reason and that the regulations should provide an explicit statement that these burial arrangements are not counted as resources.

Response: Although we did not specifically mention prepaid burial contracts and burial trusts in this regulation, irrevocable burial contracts and irrevocable burial trusts will not be considered as countable resources for purposes of determining eligibility for the subsidy. With the exception of equity in nonhome real property, we count only liquid resources for purposes of subsidy eligibility. We have revised § 418.3425(b) to clarify that irrevocable burial trusts and the irrevocable portion of prepaid burial contracts will not be counted as resources.

Comment: One commenter pointed out that § 418.3425(j) provides for a $1,500 exclusion of funds being saved explicitly for burial expense but does not incorporate by reference the SSI burial fund exclusion in § 416.1231(b) of our rules. Section 416.1231(b) of our rules describes the types of funds covered under this exclusion for SSI purposes as well as exceptions to the amount of excluded burial funds. Because § 418.3425(j) does not incorporate § 416.1231(b) of our rules by reference, the commenter recommends that our operating instructions should discuss the types of resources that will be considered excludable as burial funds and any applicable reductions to the excluded amount of burial funds.

Response: We did not incorporate § 416.1231(b) of our rules by reference because the $1,500 burial exclusion applicable for SSI resource determinations is different from the $1,500 burial exclusion applicable to subsidy determinations. Our operating instructions make it clear that for purposes of determining subsidy eligibility, the $1,500 burial fund exclusion is applied to any of a beneficiary's countable liquid resources if the beneficiary states that he or she expects that some of the money will be used for burial expenses. Our operating instructions also make it clear that this $1,500 exclusion, unlike the SSI burial fund exclusion, is not reduced by the value of other burial arrangements that the beneficiary may have such as life insurance, a prepaid burial contract, or a burial trust. We believe that this approach is consistent with Congressional intent that we simplify the subsidy program. However, as explained earlier we will count revocable burial contracts and revocable burial trusts as resources.

Determinations and the Administrative Review Process

Comment: Three commenters asked that we allow reopening of our decision, after an initial determination has been made and an appeal has been filed when the applicant uncovers new information.

Response: When we receive information after an appeal has been filed that would result in a favorable appeal determination, we will make our determination using the new information received while the appeal is pending. Also, if we discover clerical errors within 60 days after we have made an initial determination or decision, we will correct those errors and send notice of our revised determination with appeal rights to a hearing. We have added a new section to these rules at § 418.3678 to clarify this.

Comment: Seven commenters suggested adding another administrative level of appeal in addition to the hearing, and revising the hearing process to allow the individual with the option of having a face-to-face, videoconference, or telephone hearing. They also recommended that the regulations specify that TDD/TTY facilities are available if needed. The commenters voiced concern that we were not providing adequate due process to this low-income population by providing one level of appeal, i.e., a hearing by either telephone or case review, as some of these individuals cannot afford to file a civil action in Federal district court.

Response: Section 1860D–14 authorizes us to establish procedures for appeals of subsidy determinations that are similar to the specified SSI appeal procedures, but not identical. The issues arising in a claim for a subsidy do not involve the types of complicated medical or vocational issues, or issues involving credibility, that are involved in claims for SSI disability benefits. The issues involved in subsidy hearings can be readily resolved with a case review or a hearing by telephone.

Generally, the issues in a subsidy appeal are the amount of an individual's income and resources, living arrangements, and marital status. We have developed a simplified application and appeals process in keeping with the intent of Congress expressed in the language of the MMA. We disagree with the commenters' contention that these rules do not provide individuals with adequate due process. In fact, the appeals process affords the individual with similar due process rights that are provided under the SSI program, including reasonable notice and opportunity to request and be provided with a review of our determination, the opportunity to examine information and submit new information, and the right to present witnesses before we make a decision on appeal. Verification of information will consist of a comparison of claimant-provided information to data obtained from other Federal agencies. We should be able to resolve most issues or discrepancies by a telephone call. In addition, individuals who appear to be ineligible for a subsidy will receive a pre-decisional notice that gives them an opportunity to rebut any issues explained in our notice prior to our issuing the initial determination on the application. Those who do not provide information or provide information that does not change the determination will then receive another notice explaining our initial determination and their appeal rights.

We believe that the subsidy hearing provides a simple appeals process that ensures subsidy applicants receive decisions quickly. It also provides an opportunity for a personal contact with the hearing decision-maker who is reviewing the initial determination on the subsidy claim and making the appeal decision. A hearing by telephone does not require activities such as travel to a hearing, and thus gives the individual quick and easy access, generally in his or her own home, to the appeal decision-maker. Consequently, the appeals process established in these rules provides an efficient and effective means for discussing the issues in question. We plan to provide

individuals who are hearing-impaired or non-English speaking the special accommodations they need.

Comment: Five commenters requested that when an individual requests an appeal of a subsidy initial determination we provide a hearing before an independent, impartial, and qualified third party who is not employed by the agency making the initial determination, preferably an administrative law judge (ALJ).

Response: The hearing decisions will be made by qualified and impartial specialists who have had no involvement in the initial determination. These specially-trained hearing decision-makers are looking at factual information, i.e., income and resources, living arrangements, family size, and marital status in making a decision. They are well-trained in the policies and procedures relating to the eligibility requirements of the Part D subsidy program and administrative review process. To ensure compliance and consistency with our policies, their telephone interviews will be monitored and a sample of their hearing decisions reviewed. We anticipate that our quality assurance efforts will lead to expeditious and accurate decisions for these subsidy applicants.

Comment: One commenter asked that we specify whether the case review is a *de novo* determination or a strictly appellate review. A *de novo* case review would require evaluation of the relevant claims file evidence along with applicable law. A strictly appellate review accepts the initial decision's factual determinations, and then focuses on whether or not the adjudicator properly applied relevant law to those facts.

Response: The decision made on appeal will be a *de novo* review. This is consistent with the policies we apply in the SSI program. The operating procedures as well as the regulations require that the appeal decision-maker must review all facts in the case including those that were used in making the initial determination in addition to the information received subsequent to the initial determination.

Comment: Eight commenters have asked that the regulations specify a time frame for rendering a decision after an appeal has been requested.

Response: Our goal is to implement an appeals process that is similar to the current SSI hearing process, but which minimizes processing time frames and ensures the individual will have our final decision on his or her subsidy claim in an expeditious manner.

Comment: One commenter voiced concern over the lack of aid pending the outcome of an appeal.

Response: The MMA legislation did not authorize us to provide a subsidy for applicants awaiting the outcome of the appeal on his or her subsidy application. However, once we find the individual to be eligible for a subsidy, if the requirements explained in our regulations are met, he or she will be entitled to receive his or her subsidy until the appeal of our determination to reduce the subsidy or to terminate eligibility for a subsidy is decided.

Comment: Five commenters voiced concern over the lack of standards for the hearing appeal decision-maker to use in making a decision.

Response: We believe that these rules and our operating instructions contain the standards for our decision-makers. Our primary role is to determine the individual's resources and his or her income in relation to the poverty level for the family of the size involved and whether or not the individual will be eligible for a full or partial subsidy. The hearing decision-makers are specialists trained in the policies and procedures relating to the eligibility requirements of the Part D subsidy program and administrative review process. As we noted previously, to ensure compliance, the hearing decision process for the subsidy program will be evaluated continuously. We anticipate that our policies and procedures will lead to expeditious and accurate decisions.

Comment: One commenter believes there are a number of areas in which the administrative review process is deficient, i.e., a telephone rather than an in-person hearing; lack of impartial, independent and qualified decision-maker, such as an ALJ; only one level of administrative review; process not commensurate with the right to judicial review; process not similar to title XVI; does not meet requirements of due process under the Fifth Amendment. In addition, the commenter expressed concern about whether SSA has tested the concept of telephone hearings for millions of low-income individuals; how the appeal decision-maker will determine that the person participating in the telephone hearing is the applicant; how the appeal decision-maker will corroborate the identity of witnesses and make determinations of witness credibility over the phone; how an individual will judge whether the appeal decision-maker is prejudiced or partial; and what constitutes the record that is subject to review in the Federal district court.

Response: We believe that we have already addressed some of the concerns of this commenter in our responses to prior comments. The MMA requires the Commissioner to establish appeal procedures for Part D subsidy determinations which are similar to the procedures in section 1631(c)(1)(A) of the Act. While section 1631(c)(1)(A) provides a statutory right to a hearing, it does not require a hearing before an ALJ. Our decision not to use ALJs for this workload is based on our conclusion that the specially-trained paralegal professionals making the hearing decisions are capable of making findings of fact which are involved in making a subsidy eligibility decision. Because the hearing decision-makers are SSA employees, as are the ALJs, they are bound by the Agency's policies and procedures in making a subsidy decision. Moreover, their actions and decisions will be monitored and evaluated.

As we have stated in our response to prior comments, the subsidy determination hearing process conforms to the MMA legislation and the requirements of section 1631(c)(1)(A) of the Act. It provides all the due process rights afforded individuals under the current insurance programs, i.e., proper notice, right to a hearing, right to review and right to submit information used in the decision, and right to present and question witnesses. Further, we believe that we are implementing a process that replicates the current procedures when a civil action is filed, and we have prepared instructions concerning how a case should be documented and prepared for judicial review. We will perform an ongoing evaluation of these court procedures, and plan to make adjustments that are found to be necessary.

The remaining comments on client identification verification, testing, and determining prejudicial decision-makers will be addressed in operating instructions as well. We are using SSA's current process for verifying the identity of the individual with whom we are conducting business. Furthermore, we will review our operating instructions and determine whether further guidance should be considered on these matters. Again, the evaluation of SSA's administrative review policies and procedures and the functions of the hearing decision-makers will be an ongoing initiative and adjustments will be made accordingly.

Other Changes

In addition to any changes already discussed, we have made a few other non-substantive editorial corrections.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these final rules meet the criteria for a significant regulatory action under Executive Order 12866, as amended by Executive Order 13258. Thus, they were reviewed by OMB. Any effect on the economy is attributable to the legislation, not to these final rules. For an analysis of the economic impact of the entire Medicare Part D program, see CMS' final rules published in the **Federal Register** on January 28, 2005 at 70 FR 4454 through 4524.

We have also determined that these final rules meet the plain language requirement of Executive Order 12866, as amended by Executive Order 13258.

In addition, we find good cause for dispensing with the 30-day effective date of a substantive rule, as provided for by 5 U.S.C. 553(d)(3). The MMA establishes the Part D prescription drug program effective January 1, 2006. Starting in May 2005, we began to mail out paper applications with a cover letter and a postage-paid business reply envelope to low-income Medicare beneficiaries who appear eligible for the subsidy based on financial data available to us. The mailing continued through August 2005. In addition, beginning July 1, 2005, individuals could apply online on our Web site (Social Security Online) for a subsidy. In light of the effective date of this program and our obligation to process the subsidy applications, we find it is in the public interest to make these rules effective upon publication.

Regulatory Flexibility Act

We certify that these final rules will not have a significant economic impact on a substantial number of small entities as they affect individuals only. Therefore, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required. However, for an analysis of the economic impact of the entire Medicare Part D program, see CMS' final rules published in the **Federal Register** on January 28, 2005 at 70 FR 4454 through 4524.

Federalism Impact and Unfunded Mandates Impact

We have reviewed these final rules under the threshold criteria of Executive Order 13132 and the Unfunded Mandates Reform Act and have determined that they do not have substantial direct effects on the States, on the relationship between the national government and the States, on the distribution of power and responsibilities among the various levels of government, or on imposing any costs on State, local, or tribal governments. These final rules do not affect the roles of the State, local, or tribal governments but rather, offer an option as intended by the legislation, i.e., whether to apply for a subsidy to SSA or to the States. For an analysis of the Federalism and Unfunded Mandates impact of the entire Medicare Part D program, see CMS' final rules published in the **Federal Register** on January 28, 2005 at 70 FR 4454 through 4524.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 says that no persons are required to respond to a collection of information unless it displays a valid OMB control number. In accordance with the PRA, SSA is providing notice that OMB has approved the information collection requirements contained in §§ 418.3120 through 418.3670 of these final rules. The OMB Control Number for these collections is 0960–0702, expiring May 31, 2008.

(Catalog of Federal Domestic Assistance Program Nos. 93.773, Medicare—Hospital Insurance and 93.774, Medicare—Supplementary Medical Insurance Program)

List of Subjects in 20 CFR Part 418

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI), Medicare subsidies.

Dated: November 18, 2005.

Jo Anne B. Barnhart,

Commissioner of Social Security.

■ For the reasons set out in the preamble, we are adding a new part 418 to chapter III of title 20 of the Code of Federal Regulations as follows:

PART 418—MEDICARE SUBSIDIES

Subparts A–C—[Reserved]

Subpart D—Medicare Part D Subsidies

Introduction, General Provisions and Definitions

Sec.

Eligibility for a Medicare Prescription Drug Subsidy

Filing of Application

Income

Resources

Adjustments and Terminations

Determinations and the Administrative Review Process

Subparts A–C—[Reserved]

Subpart D—Medicare Part D Subsidies

Authority: Secs. 702(a)(5) and 1860D–1, 1860D–14 and –15 of the Social Security Act (42 U.S.C. 902(a)(5),1395w–101, 1395w–114, and –115).

Introduction, General Provisions, and Definitions

§ 418.3001 What is this subpart about?

This subpart D relates to sections 1860D–1 through 1860D–24 of title XVIII of the Social Security Act (the Act) as added by section 101 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Pub. L. 108–173). Sections 1860D–1 through 1860D–24 established Part D of title XVIII of the Act to create a Medicare program known as the Voluntary Prescription Drug Benefit Program. Section 1860D–14, codified into the Act by section 101, includes a provision for subsidies of prescription drug premiums and of Part D cost-sharing requirements for Medicare beneficiaries whose income and resources do not exceed certain levels. The regulations in this subpart explain how we decide whether you are eligible for a Part D premium subsidy as defined in 42 CFR 423.780 and cost-sharing subsidy as defined in 42 CFR 423.782. The rules are divided into the following groups of sections according to subject content:

(a) Sections 418.3001 through 418.3010 contain the introduction, a statement of the general purpose underlying the subsidy program for the Voluntary Prescription Drug Benefit Program under Medicare Part D, general provisions that apply to the subsidy program, a description of how we administer the program, and definitions of terms that we use in this subpart.

(b) Sections 418.3101 through 418.3125 contain the general requirements that you must meet in order to be eligible for a subsidy. These sections set forth the subsidy eligibility requirements of being a Medicare beneficiary, of having income and resources below certain levels, and of filing an application. These sections also explain when we will redetermine your eligibility for a subsidy and the period covered by a redetermination.

(c) Sections 418.3201 through 418.3230 contain the rules that relate to the filing of subsidy applications.

(d) Sections 418.3301 through 418.3350 contain the rules that explain how we consider your income (and your spouse's income, if applicable) and define what income we count when we decide whether you are eligible for a subsidy.

(e) Sections 418.3401 through 418.3425 contain the rules that explain how we consider your resources (and your spouse's resources, if applicable) and define what resources we count when we decide whether you are eligible for a subsidy.

(f) Sections 418.3501 through 418.3515 contain the rules that explain when we will adjust or when we will terminate your eligibility for a subsidy.

(g) Sections 418.3601 through 418.3680 contain the rules that we apply when you appeal our determination regarding your subsidy eligibility or our determination of whether you should receive a full or partial subsidy. They also contain the rules that explain that our decision is binding unless you file an action in Federal district court seeking review of our final decision and what happens if your case is remanded by a Federal court

§ 418.3005 Purpose and administration of the program.

The purpose of the subsidy program is to offer help with the costs of prescription drug coverage for individuals who meet certain income and resources requirements under the law as explained in this subpart. The Centers for Medicare & Medicaid Services (CMS) in the Department of Health and Human Services has responsibility for administration of the Medicare program, including the new Medicare Part D Voluntary Prescription Drug Benefit Program. We notify Medicare beneficiaries who appear to have limited income, based on our records, about the availability of the subsidy if they are not already eligible for this help, and take applications for and determine the eligibility of individuals for a subsidy.

§ 418.3010 Definitions.

(a) *Terms relating to the Act and regulations.*

(1) *CMS* means the Centers for Medicare & Medicaid Services in the Department of Health and Human Services.

(2) *Commissioner* means the Commissioner of Social Security.

(3) *Section* means a section of the regulations in part 418 of this chapter unless the context indicates otherwise.

(4) *The Act* means the Social Security Act, as amended.

(5) *Title* means a title of the Act.

(6) *We*, *our* or *us* means the Social Security Administration (SSA).

(b) *Miscellaneous.*

(1) *Claimant* means the person who files an application for himself or herself or the person on whose behalf an application is filed.

(2) *Date you receive a notice* means 5 calendar days after the date on the notice, unless you show us you did not receive it within the 5-day period.

(3) *Decision* means the decision we make after a hearing.

(4) *Determination* means the initial determination that we make as defined in § 418.3605.

(5) *Family size*, for purposes of this subpart, means family size as defined in 42 CFR 423.772.

(6) *Federal poverty line*, for purposes of this subpart, has the same meaning as Federal poverty line in 42 CFR 423.772.

(7) *Full-benefit dual eligible individual* for purposes of this subpart, has the same meaning as full-benefit dual eligible individual in 42 CFR 423.772.

(8) *Medicare beneficiary* means an individual who is entitled to or enrolled in Medicare Part A (Hospital Insurance) or enrolled in Part B (Supplementary Medical Insurance) or both under title XVIII of the Act.

(9) *Periods of limitations ending on Federal non-workdays* Title XVIII of the Act and regulations in this subpart require you to take certain actions within specified time periods or you may lose your right to a portion of or your entire subsidy. If any such period ends on a Saturday, Sunday, Federal legal holiday, or any other day all or part of which is declared to be a nonworkday for Federal employees by statute or Executive Order, you will have until the next Federal workday to take the prescribed action.

(10) *Representative* or *personal representative* means a personal

representative as defined in 42 CFR 423.772.

(11) *State,* unless otherwise indicated, means:

(i) A State of the United States; or

(ii) The District of Columbia.

(12) *Subsidy eligible individual,* for purposes of this subpart, has the same meaning as subsidy eligible individual as defined in 42 CFR 423.773.

(13) *Subsidy* means an amount CMS will pay on behalf of Medicare beneficiaries who are eligible for a subsidy of their Medicare Part D costs. The amount of a subsidy for a Medicare beneficiary depends on the beneficiary's income as related to household size, resources, and late enrollment penalties (if any) as explained in 42 CFR 423.780 and 42 CFR 423.782. We do not determine the amount of the subsidy, only whether or not the individual is eligible for a full or partial subsidy.

(14) *United States* when used in a geographical sense means:

(i) The 50 States; and

(ii) The District of Columbia

(1) *You* or *your* means the person who applies for the subsidy, the person for whom an application is filed or anyone who may consider applying for a subsidy.

Eligibility for a Medicare Prescription Drug Subsidy

§ 418.3101 How do you become eligible for a subsidy?

Unless you are deemed eligible as explained in § 418.3105 and 42 CFR 423.773(c), you are eligible for a Medicare Part D prescription drug subsidy if you meet all of the following requirements:

(a) You are entitled to or enrolled in Medicare Part A (Hospital Insurance) or enrolled in Medicare Part B (Supplementary Medical Insurance) or both under title XVIII of the Act.

(b) You are enrolled in a Medicare prescription drug plan or Medicare Advantage plan with prescription drug coverage. We can also determine your eligibility for a subsidy before you enroll in one of the above programs. However, as explained in § 418.3225(b), if we determine that you would be eligible for a subsidy before you have enrolled in a Medicare prescription drug plan or Medicare Advantage plan with prescription drug coverage, you must enroll in one of these plans to actually receive a subsidy.

(c) You reside in the United States as defined in § 418.3010.

(d) You (and your spouse, if applicable) meet the income requirements as explained in §§ 418.3301 through 418.3350 and 42 CFR 423.773.

(e) You (and your spouse, if applicable) meet the resources requirements as explained in §§ 418.3401 through 418.3425 and 42 CFR 423.773.

(f) You or your personal representative file an application for a subsidy as explained in §§ 418.3201 through 418.3230.

§ 418.3105 Who does not need to file an application for a subsidy?

Regulations in 42 CFR 423.773(c) explain who is deemed eligible and does not need to file an application for a subsidy to be eligible for this assistance. Full-benefit dual eligible beneficiaries are in this category. If beneficiaries have deemed eligibility status because they receive Medicaid coverage, are enrolled in a Medicare Savings Program within their State, or receive SSI and have Medicare, then their subsidy is effective with the first month they have deemed eligibility status.

§ 418.3110 What happens when you apply for a subsidy?

(a) When you or your personal representative apply for a subsidy, we will ask for information that we need to determine if you meet all the requirements for a subsidy. You must give us complete information. If, based on the information you present to us, you do not meet all the requirements for eligibility listed in § 418.3101, or if one of the events listed in § 418.3115 exists, or you fail to submit information we request, we will deny your claim.

(b) If you meet all the requirements for eligibility listed in § 418.3101, or you meet all the requirements except for enrollment in a Medicare Part D plan or Medicare Advantage plan with prescription drug coverage, we will send you a notice telling you the following:

(1) You are eligible for a full or partial subsidy for a period not to exceed 1 year;

(2) What information we used to make this determination including how we calculated your income and resources;

(3) What you may do if your circumstances change as described in § 418.3120; and

(4) Your appeal rights.

(c) If you are not already enrolled with a Medicare prescription drug plan or a Medicare Advantage plan with prescription drug coverage, you must enroll in order to receive your subsidy.

(d) If you do not meet all the requirements for eligibility listed in § 418.3101 or if § 418.3115 applies to you except for enrollment in a Medicare Part D plan or Medicare Advantage plan with prescription drug coverage as described in § 418.3225, we will send you a notice telling you the following:

(1) You are not eligible for a subsidy;

(2) The information we used to make this determination including how we calculated your income or resources;

(3) You may reapply if your situation changes; and

(4) Your appeal rights.

§ 418.3115 What events will make you ineligible for a subsidy?

Generally, even if you meet the other requirements in §§ 418.3101 through 418.3125, we will deny your claim or you will lose your subsidy if any of the following apply to you:

(a) You lose entitlement to or are not enrolled in Medicare Part A and are not enrolled in Medicare Part B.

(b) You do not enroll or lose your enrollment in a Medicare Part D plan or Medicare Advantage plan with prescription drug coverage.

(c) You do not give us information we need to determine your eligibility and if eligible, whether you should receive a full or partial subsidy; or you do not give us information we need to determine whether you continue to be eligible for a subsidy and if eligible, whether you should receive a full or partial subsidy.

(d) You knowingly give us false or misleading information.

§ 418.3120 What happens if your circumstances change after we determine you are eligible for a subsidy?

(a) After we determine that you are eligible for a subsidy, your subsidy eligibility could change if:

(1) You marry.

(2) You and your spouse, who lives with you, divorce.

(3) Your spouse, who lives with you, dies.

(4) You and your spouse separate (i.e., you or your spouse move out of the household and you are no longer living with your spouse) unless the separation is a temporary absence as described in § 404.347 of this chapter.

(5) You and your spouse resume living together after having been separated.

(6) You and your spouse, who lives with you, have your marriage annulled.

(7) You (or your spouse, who lives with you, if applicable) expect your estimated annual income to increase or decrease in the next calendar year.

(8) You (or your spouse, who lives with you, if applicable) expect your resources to increase or decrease in the next calendar year.

(9) Your family size as defined in 42 CFR 423.772 has changed or will change

(other than a change resulting from one of the events in paragraphs (a)(1) through (6) of this section).

(10) You become eligible for one of the programs listed in 42 CFR 423.773(c).

(b)(1) When you report one of the events listed in paragraphs (a)(1) through (a)(6) of this section, or we receive such a report from another source (e.g., a data exchange of reports of death), we will send you a redetermination form upon receipt of the report. You must return the completed form within 90 days of the date of the form.

(2) When you report one of the events listed in paragraphs (a)(7) through (a)(9) of this section or we receive such a report from another source (e.g., a data exchange involving income records), we will send you a redetermination form between August and December to evaluate the change. You must return the completed form to us within 30 days of the date of the form.

(3) If we increase, decrease, or terminate your subsidy as a result of the redetermination, we will send you a notice telling you:

(i) Whether you can receive a full or partial subsidy as described in 42 CFR 423.780 and 423.782.

(ii) How we calculated your income and resources;

(iii) When the change in your subsidy is effective;

(iv) Your appeal rights;

(v) What to do if your situation changes.

(c) If you become eligible for one of the programs listed in 42 CFR 423.773(c), CMS will notify you of any change in your subsidy.

§ 418.3123 When is a change in your subsidy effective?

(a) If we redetermine your subsidy as described in § 418.3120(b)(1), any change in your subsidy will be effective the month following the month of your report.

(b) If we redetermine your subsidy as described in § 418.3120(b)(2), any change in your subsidy will be effective in January of the next year.

(c) If you do not return the redetermination form described in § 418.3120(b)(1), we will terminate your subsidy effective with the month following the expiration of the 90-day period described in § 418.3120(b)(1).

(d) If you do not return the redetermination forms described in § 418.3120(b)(2), we will terminate your subsidy effective in January of the next year.

§ 418.3125 What are redeterminations?

(a) *Redeterminations defined.* A redetermination is a periodic review of your eligibility to make sure that you are still eligible for a subsidy and if so, to determine whether you should continue to receive a full or partial subsidy. This review deals with evaluating your income and resources (and those of your spouse, who lives with you) and will not affect past months of eligibility. It will be used to determine your future subsidy eligibility and whether you should receive a full or partial subsidy for future months. We will redetermine your eligibility if we made the initial determination of your eligibility or if you are deemed eligible because you receive SSI benefits. Rules regarding redeterminations of initial eligibility determinations made by a State are described in 42 CFR 423.774.

(b) *When we make redeterminations.* (1) We will redetermine your subsidy eligibility within one year after we determine that you are eligible for the subsidy.

(2) After the first redetermination, we will redetermine your subsidy eligibility at intervals determined by the Commissioner. The length of time between redeterminations varies depending on the likelihood that your situation may change in a way that affects your eligibility and whether you should receive a full or partial subsidy.

(3) We may also redetermine your eligibility and whether you should receive a full or partial subsidy when you tell us of a change in your circumstances described in § 418.3120.

(4) We may redetermine your eligibility when we receive information from you or from data exchanges with Federal and State agencies that may affect whether you should receive a full or partial subsidy or your eligibility for the subsidy.

(5) We will also redetermine eligibility on a random sample of cases for quality assurance purposes. For each collection of sample cases, all factors affecting eligibility and/or whether you should receive a full or partial subsidy may be verified by contact with primary repositories of information relevant to each individual factor (e.g., we may contact employers to verify wage information). Consequently, we may contact a variety of other sources, in addition to recontacting you, to verify the completeness and accuracy of our information.

Filing of Application

§ 418.3201 Must you file an application to become eligible for a subsidy?

Unless you are a person covered by § 418.3105, in addition to meeting other requirements, you or your personal representative must file an application to become eligible for a subsidy. If you believe you may be eligible for a subsidy, you should file an application. Filing a subsidy application does not commit you to participate in the Part D program. Filing an application will:

(a) Permit us to make a formal determination on your eligibility for the subsidy and whether you should receive a full or partial subsidy;

(b) Assure that you can receive the subsidy for any months that you are eligible and are enrolled in a Medicare Part D plan or Medicare Advantage plan with prescription drug coverage; and

(c) Give you the right to appeal if you disagree with our determination.

§ 418.3205 What makes an application a claim for a subsidy?

We will consider your application a claim for the subsidy if:

(a) You, or someone acting on your behalf as described in § 418.3215, complete an application on a form prescribed by us;

(b) You, or someone acting on your behalf as described in § 418.3215, file the application with us pursuant to § 418.3220; and

(c) You are alive on the first day of the month in which the application is filed.

§ 418.3210 What is a prescribed application for a subsidy?

If you choose to apply with SSA, you must file for the subsidy on an application prescribed by us. A prescribed application may include a printed form, an application our employees complete on computer screens, or an application available online on our Internet Web site (*www.socialsecurity.gov*). See § 418.3220 for places where an application for the subsidy may be filed and when it is considered filed.

§ 418.3215 Who may file your application for a subsidy?

You or your personal representative (as defined in 42 CFR 423.772) may complete and file your subsidy application.

§ 418.3220 When is your application considered filed?

(a) *General rule.* We consider an application for a subsidy as described in § 418.3210 to be filed with us on the day it is received by either one of our employees at one of our offices or by one of our employees who is authorized to receive it at a place other than one of our offices or it is considered filed on the day it is submitted electronically through our Internet Web site. If a State Medicaid agency forwards to us a

subsidy application that you gave to it, we will consider the date you submitted that application to the State Medicaid agency as the filing date. (See 42 CFR 423.774 for applications filed with a State Medicaid agency.)

(b) *Exceptions.* (1) When we receive an application that is mailed, we will assume that we received it 5 days earlier (unless you can show us that you did not receive it within the 5 days) and use the earlier date as the application filing date if it would result in another month of subsidy eligibility.

(2) We may consider an application to be filed on the date a written or oral inquiry about your subsidy eligibility is made, or the date we receive a partially completed Internet subsidy application from our Internet Web site where the requirements set forth in § 418.3230 are met.

§ 418.3225 How long will your application remain in effect?

(a) Your application will remain in effect until our determination or decision has become final and binding under § 418.3620. If you appeal our initial determination, the determination does not become final until we issue a decision on any appeal you have filed under § 418.3655 (see § 418.3675) or dismiss the request for a hearing under § 418.3670.

(b) If, at the time your application is filed or before our determination or decision becomes final and binding, you meet all the requirements for a subsidy as described in 42 CFR 423.773 except for enrollment in a Medicare Part D plan or Medicare Advantage plan with prescription drug coverage, we will send you a notice advising you of your eligibility for the subsidy and the requirement to enroll in such a plan.

(c) If you are not entitled to Medicare Part A and/or enrolled in Medicare Part B at the time your subsidy application is filed but you appear to be in an enrollment period, we will send you a notice advising you that we will not make a determination on your application until you become entitled to Medicare Part A and/or enrolled in Medicare Part B. If you are not entitled to Medicare Part A and/or enrolled in Medicare Part B at the time your application is filed and you do not appear to be in an enrollment period, we will send you a notice advising you that you are not eligible for the subsidy because you are not entitled to Medicare Part A and/or enrolled in Medicare Part B and explain your appeal rights.

§ 418.3230 When will we use your subsidy inquiry as your filing date?

If you or your personal representative (as defined in 42 CFR 423.772) make an oral or written inquiry about the subsidy, or partially complete an Internet subsidy application on our Web site, we will use the date of the inquiry or the date the partial Internet application was started as your filing date if the following requirements are met:

(a) The written or oral inquiry indicates your intent to file for the subsidy, or you submit a partially completed Internet application to us;

(b) The inquiry, whether in person, by telephone, or in writing, is directed to an office or an official described in § 418.3220, or a partially completed Internet subsidy application is received by us;

(c) You or your personal representative (as defined in 42 CFR 423.772) file an application (as defined in § 418.3210) within 60 days after the date of the notice we will send in response to the inquiry. The notice will say that we will make an initial determination of your eligibility for a subsidy, if an application is filed within 60 days after the date of the notice. We will send the notice to you. Where you are a minor or adjudged legally incompetent and your personal representative made the inquiry, we will send the notice to your personal representative; and

(d) You are alive on the first day of the month in which the application is filed.

Income

§ 418.3301 What is income?

Income is anything you and your spouse, who lives with you, receive in cash or in-kind that you can use to meet your needs for food and shelter. Income can be earned income or unearned income.

§ 418.3305 What is not income?

Some things you receive are not considered income because you cannot use them to meet your needs for food or shelter. The things that are not income for purposes of determining eligibility and whether you should receive a full or partial subsidy are described in § 416.1103 of this chapter.

§ 418.3310 Whose income do we count?

(a) We count your income. If you are married and live with your spouse in the month you file for a subsidy, or when we redetermine your eligibility for a subsidy as described in § 418.3125, we count your income and your spouse's income regardless of whether one or both of you apply or are eligible for the subsidy.

(b) We will determine your eligibility based on your income alone if you are not married or if you are married but you are separated from your spouse (i.e., you or your spouse move out of the household and you are no longer living with your spouse) at the time you apply for a subsidy or when we redetermine your eligibility for a subsidy as described in § 418.3125.

(c) If your subsidy is based on your income and your spouse's income and we redetermine your subsidy as described in § 418.3120(b)(1), we will stop counting the income of your spouse in the month following the month that we receive a report that your marriage ended due to death, divorce, or annulment; or a report that you and your spouse stopped living together.

(d) If your subsidy is based on your income and your spouse's income, we will continue counting the income of both you and your spouse if one of you is temporarily away from home as described in § 404.347 of this chapter.

§ 418.3315 What is earned income?

Earned income is defined in § 416.1110 of this chapter and may be in cash or in kind. We may count more of your earned income than you actually receive. We count gross income, which is more than you actually receive, if amounts are withheld from earned income because of a garnishment, or to pay a debt or other legal obligation such as taxes, or to make any other similar payments.

§ 418.3320 How do we count your earned income?

(a) *Wages.* We count your wages at the earliest of the following points: when you receive them, when they are credited to you, or when they are set aside for your use.

(b) *Net earnings from self-employment.* We count net earnings from self-employment on a taxable year basis. If you have net losses from self-employment, we deduct them from your other earned income. We do not deduct the net losses from your unearned income.

(c) *Payments for services performed in a sheltered workshop or work activities center.* We count payments you receive for services performed in a sheltered workshop or work activities center when you receive them or when they are set aside for your use.

(d) *In-kind earned income.* We count the current market value of in-kind earned income. For purposes of this part, we use the definition of current market value in § 416.1101 of this

chapter. If you receive an item that is not fully paid for and you are responsible for the unpaid balance, only the paid-up value is income to you (see example in § 416.1123(c) of this chapter).

(e) *Certain honoraria and royalties.* We count honoraria for services rendered and royalty payments that you receive in connection with any publication of your work. We will consider these payments as available to you when you receive them, when they are credited to your account, or when they are set aside for your use, whichever is earliest.

(f) *Period for which earned income is counted.* For purposes of determining subsidy eligibility and, if eligible, whether you should receive a full or partial subsidy, we consider all of the countable earned income you receive (or expect to receive) during the year for which we are determining your eligibility for this subsidy. However, in the first year that you or your spouse apply for the subsidy, we consider all of the countable earned income you and your living-with spouse receive (or expect to receive) starting in the month for which we determine your eligibility based on your application for a subsidy through the end of the year for which we are determining your eligibility. If we count your income for only a portion of the year, the income limit for subsidy eligibility will be adjusted accordingly. For example, if we count your income for 6 consecutive months of the year (July through December), the income limit for subsidy eligibility will be half of the income limit applicable for the full year.

§ 418.3325 What earned income do we not count?

(a) While we must know the source and amount of all of your earned income, we do not count all of it to determine your subsidy eligibility and whether you should receive a full or partial subsidy. We apply these income exclusions in the order listed in paragraph (b) of this section to your income. We never reduce your earned income below zero or apply any unused earned income exclusion to unearned income.

(b) For the year or partial year that we are determining your eligibility for the subsidy, we do not count as earned income:

(1) Any refund of Federal income taxes you or your living-with spouse receive under section 32 of the Internal Revenue Code (relating to the earned income tax credit) and payment you receive from an employer under section 3507 of the Internal Revenue Code (relating to advance payments of earned income tax credit);

(2) Earned income which is received infrequently or irregularly as explained in § 416.1112(c)(2) of this chapter;

(3) Any portion of the $20 per month exclusion described in § 416.1124(c)(12) of this chapter which has not been excluded from your combined unearned income (or the combined unearned income of you and your living-with spouse);

(4) $65 per month of your earned income (or the combined earned income you and your living-with spouse receive in that same year);

(5) Earned income you use to pay impairment-related work expenses described in § 416.976 of this chapter, if you are receiving a social security disability insurance benefit, your disabling condition(s) does not include blindness and you are under age 65. We consider that you attain age 65 on the day before your 65th birthday. In lieu of determining the actual amount of these expenses, we will assume that the value of these work expenses is equal to a standard percentage of your total earned income per month if you tell us that you have impairment-related work expenses. The amount we exclude will be equal to the average percentage of gross earnings excluded for SSI recipients who have such expenses. Initially, the exclusion for impairment-related work expenses will be 16.3 percent of the gross earnings. We may adjust the percentages if the average percentage of gross earnings excluded for supplemental security income (SSI) recipients changes. If we make such a change we will publish a notice in the **Federal Register**. If excluding impairment-related work expenses greater than the standard percentage of your earned income would affect your eligibility or subsidy amount, you may establish that your actual expenses are greater than the standard percentage of your total earned income. You may do so by contacting us and providing evidence of your actual expenses. The exclusion of impairment-related work expenses also applies to the earnings of your living-with spouse if he or she is receiving a social security disability insurance benefit, the disabling condition(s) does not include blindness and he or she is under age 65;

(6) One-half of your remaining earned income (or combined earned income of you and your living-with spouse); and

(7) Earned income as described in § 416.1112(c)(8) of this chapter that you use to meet any expenses reasonably attributable to the earning of the income if you receive a social security disability insurance benefit based on blindness and you are under age 65. We consider that you attain age 65 on the day before your 65th birthday. In lieu of determining the actual amount of these expenses, we will assume that the value of these expenses is equal to a standard percentage of your total earned income per month. The amount we exclude will be equal to the average percentage of gross earnings excluded for SSI recipients who have such expenses. Initially, the exclusion for blind work expenses will be 25 percent of the gross earnings. We may adjust the percentages if the average percentage of gross earnings excluded for SSI recipients changes. If we make such a change we will publish a notice in the **Federal Register**. If excluding work expenses greater than the standard percentage of your earned income would affect your eligibility or subsidy amount, you may establish that your actual expenses are greater than the standard percentage of your earned income. You may do so by contacting us and providing evidence of your actual expenses. The exclusion of work expenses also applies to the earnings of your living-with spouse if he or she receives a social security disability insurance benefit based on blindness and is under age 65.

§ 418.3330 What is unearned income?

Unearned income is all income that is not earned income. We describe some of the types of unearned income we count in § 418.3335.

§ 418.3335 What types of unearned income do we count?

(a) Some of the types of unearned income we count are described in § 416.1121(a) through (g) of this chapter.

(b) We also count in-kind support and maintenance as unearned income. In-kind support and maintenance is any food and shelter that is given to you or that you receive because someone else pays for it (see § 418.3345).

§ 418.3340 How do we count your unearned income?

(a) *When income is received.* We count unearned income as available to you at the earliest of the following points: when you receive it, when it is credited to your account, or when it is set aside for your use.

(b) *When income is counted.* For purposes of determining eligibility and whether you should receive a full or partial subsidy, we consider all of the countable unearned income you and your living-with spouse receive (or expect to receive) during the year for which we are determining your eligibility for this benefit. However, in the first year you or your spouse apply

for the subsidy, we consider all of the countable unearned income both you and your living-with spouse receive (or expect to receive) starting in the month for which we determine eligibility for you or your living-with spouse based on an application for the subsidy. If we count your income for only a portion of the year, the income limits for subsidy eligibility will be adjusted accordingly. For example, if we count your income for 6 consecutive months of the year (July through December), the income limit for subsidy eligibility will be half of the income limit applicable for the full year.

(c) *Amount considered as income.* We may include more or less of your income than you actually receive.

(1) We include more than you actually receive where another benefit payment (such as a social security benefit) has been reduced to recover an overpayment. In such a situation, you are repaying a legal obligation through the withholding of portions of your benefit amount, and the amount of this withholding is part of your unearned income.

(2) We also include more than you actually receive if amounts are withheld from unearned income because of a garnishment, or to pay a debt or other legal obligation, or to make any other payment such as payment of your Medicare premiums.

(3) We include less than you actually receive if part of the payment is for an expense you had in getting the payment. For example, if you are paid for damages you receive in an accident, we subtract from the amount of the payment your medical, legal, or other expenses connected with the accident. If you receive a retroactive check from a benefit program, we subtract legal fees connected with the claim. We do not subtract from any taxable unearned income the part you have to use to pay personal income taxes. The payment of taxes is not an expense you have in getting income.

(d) *Retroactive benefits.* We count retroactive monthly benefits such as social security benefits as unearned income in the year you receive the retroactive benefits.

(e) *Certain veterans benefits.* If you receive a veterans benefit that includes an amount paid to you because of a dependent, we do not count as your unearned income the amount paid to you because of the dependent. If you are a dependent of an individual who receives a veterans benefit and a portion of the benefit is attributable to you as a dependent, we count the amount attributable to you as your unearned income if you reside with the veteran or you receive your own separate payment from the Department of Veterans Affairs.

(f) *Social Security Cost-of-Living Adjustment.* We will not count as income the amount of the cost-of-living adjustment for social security benefits for any month through the month following the month in which the annual revision of the Federal poverty guidelines is published.

§ 418.3345 How do we determine the value of in-kind support and maintenance?

(a) You can receive in-kind support and maintenance, such as food and shelter, if you live alone, with others, or in a facility, or in an institution. The amount of income you derive from in-kind support and maintenance is the current market value of the food and shelter provided to you and your living-with spouse by someone other than you or your living-with spouse. Shelter includes room, rent, mortgage payments, real property taxes, heating fuel, gas, electricity, water, sewerage, and garbage collection services.

(b) The maximum amount of income we count from in-kind support and maintenance during a month is limited to one-third of the monthly SSI Federal benefit rate for an eligible individual (as described in § 416.410 of this chapter) that is in effect for the period for which you are applying or are eligible for a subsidy. If you are married and living with your spouse, the maximum amount of income you and your spouse receive from in-kind support and maintenance during a month is limited to one-third of the monthly SSI Federal benefit rate for an eligible couple (as described in § 416.412 of this chapter). If the current market value of the in-kind support and maintenance you receive is less than one-third of the applicable monthly SSI Federal benefit rate, we count only the current market value as income.

§ 418.3350 What types of unearned income do we not count?

(a) While we must know the source and amount of all of your unearned income, we do not count all of it to determine your eligibility for the subsidy. We apply to your unearned income the exclusions in § 418.3350(b) in the order listed. However, we never reduce your unearned income below zero and we never apply any unused unearned income exclusion to earned income except for the $20 per month exclusion described in § 416.1124(c)(12) of this chapter. For purposes of determining eligibility for a subsidy, and whether you should receive a full or partial subsidy, we treat the $20 per month exclusion as a $240 per year exclusion.

(b) We do not count as income the unearned income described in § 416.1124(b), (c)(1) through (c)(12), and (c)(14) through (c)(21) of this chapter.

(c) We do not count as income any dividends or interest earned on resources you or your spouse own.

Resources

§ 418.3401 What are resources?

For purposes of this subpart, resources are cash or other assets that an individual owns and could convert to cash to be used for his or her support and maintenance.

§ 418.3405 What types of resources do we count?

(a) We count liquid resources. Liquid resources are cash, financial accounts, and other financial instruments which can be converted to cash within 20 workdays, excluding certain nonworkdays as explained in § 416.120(d) of this chapter. Examples of resources that are ordinarily liquid are stocks, bonds, mutual fund shares, promissory notes, mortgages, life insurance policies, financial institution accounts (including savings, checking, and time deposits, also known as certificates of deposit), retirement accounts (such as individual retirement accounts (IRA), 401(k) accounts), trusts if they are revocable, funds in an irrevocable trust if the trust beneficiary can direct the use of the funds, and similar items. We will presume that these types of resources can be converted to cash within 20 workdays and are countable as resources for subsidy determinations. However, if the individual establishes that a particular resource cannot be converted to cash within 20 workdays, we will not count it as a resource.

(b) We count the equity value of real property as a resource regardless of whether it can be sold within 20 workdays. However, we do not count the home that is your principal place of residence and the land on which it is situated as a resource as defined in § 418.3425(a).

§ 418.3410 Whose resources do we count?

(a) We count your resources. We count the resources of both you and your spouse regardless of whether one or both of you apply or are eligible for the subsidy if you are married and live with your spouse as of the month for which we determine your eligibility based on an application for a subsidy, as of the month for which we redetermine your eligibility for a subsidy as described in § 418.3125, or as of the month for which we determine

your eligibility due to a change you reported as described in § 418.3120.

(b) We will determine your eligibility based on your resources alone if you are not married or if you are married but you are separated from your spouse at the time you apply for a subsidy or at the time we redetermine your eligibility for a subsidy as described in § 418.3125.

(c) If your subsidy is based on the resources of you and your spouse and we redetermine your subsidy as described in § 418.3120(b)(1), we will stop counting the resources of your spouse in the month following the month that we receive a report that your marriage ended due to death, divorce, or annulment; or a report that you and your spouse stopped living together.

(d) If your subsidy is based on the resources of you and your spouse, we will continue counting the resources of both you and your spouse if one of you is temporarily away from home as described in § 404.347 of this chapter.

§ 418.3415 How do we determine countable resources?

(a) *General rule.* Your countable resources are determined as of the first moment of the month for which we determine your eligibility based on your application for a subsidy or for which we redetermine your eligibility for a subsidy. A resource determination is based on what assets you (and your living-with spouse, if any) have, what their values are, and whether they are excluded as of the first moment of the month. We will use this amount as your countable resources at the point when we determine your eligibility for the subsidy unless you report to us that the value of your resources has changed as described in § 418.3120.

(b) *Equity value.* Resources, other than cash, are evaluated according to your (and your spouse's, if any) equity in the resources. For purposes of this subpart, the equity value of an item is defined as the price for which that item, minus any encumbrances, can reasonably be expected to sell on the open market in the particular geographic area involved.

(c) *Relationship of income to resources.* Cash you receive during a month is evaluated under the rules for counting income during the month of receipt. If you retain the cash until the first moment of the following month, the cash is countable as a resource unless it is otherwise excludable.

§ 418.3420 How are funds held in financial institution accounts counted?

(a) *Owner of the account.* Funds held in a financial institution account (including savings, checking, and time deposits also known as certificates of deposit) are considered your resources if you own the account and can use the funds for your support and maintenance. We determine whether you own the account and can use the funds by looking at how the account is held.

(b) *Individually-held account.* If you are designated as the sole owner by the account title and you can withdraw and use funds from that account for your support and maintenance, all of that account's funds are your resource regardless of the source. For as long as these conditions are met, we presume that you own 100 percent of the funds in the account. This presumption is not rebuttable.

(c) *Jointly-held account.* (1) If you are the only subsidy claimant or subsidy recipient who is an account holder on a jointly held account, we presume that all of the funds in the account belong to you. If more than one subsidy claimant or subsidy recipient are account holders, we presume that the funds in the account belong to those individuals in equal shares.

(2) If you disagree with the ownership presumption as described in paragraph (c)(1) of this section, you may rebut the presumption. Rebuttal is a procedure which permits you to furnish evidence and establish that some or all of the funds in a jointly-held account do not belong to you.

§ 418.3425 What resources do we exclude from counting?

In determining your resources (and the resources of your spouse, if any) the following items shall be excluded:

(a) Your home. For purposes of this exclusion, a home is any property in which you (and your spouse, if any) have an ownership interest and which serves as your principal place of residence. This property includes the shelter in which an individual resides, the land on which the shelter is located, and outbuildings;

(b) Non-liquid resources, other than nonhome real property. Non-liquid resources are resources that are not liquid resources as defined in § 418.3405. Irrevocable burial trusts and the irrevocable portion of prepaid burial contracts are considered non-liquid resources;

(c) Property of a trade or business which is essential to the means of self-support as provided in § 416.1222 of this chapter;

(d) Nonbusiness property which is essential to the means of self-support as provided in § 416.1224 of this chapter;

(e) Stock in regional or village corporations held by natives of Alaska during the twenty-year period in which the stock is inalienable pursuant to the Alaska Native Claims Settlement Act (see § 416.1228 of this chapter);

(f) Life insurance owned by an individual (and spouse, if any) to the extent provided in § 416.1230 of this chapter;

(g) Restricted allotted Indian lands as provided in § 416.1234 of this chapter;

(h) Payments or benefits provided under a Federal statute where exclusion is required by such statute;

(i) Disaster relief assistance as provided in § 416.1237 of this chapter;

(j) Funds up to $1,500 for the individual and $1,500 for the spouse who lives with the individual if these funds are expected to be used for burial expenses of the individual and spouse;

(k) Burial spaces, as provided in § 416.1231(a) of this chapter;

(l) Title XVI or title II retroactive payments as provided in § 416.1233 of this chapter;

(m) Housing assistance as provided in § 416.1238 of this chapter;

(n) Refunds of Federal income taxes and advances made by an employer relating to an earned income tax credit, as provided in § 416.1235 of this chapter;

(o) Payments received as compensation incurred or losses suffered as a result of a crime, as provided in § 416.1229 of this chapter;

(p) Relocation assistance from a State or local government, as provided in § 416.1239 of this chapter;

(q) Dedicated financial institution accounts as provided in § 416.1247 of this chapter;

(r) A gift to, or for the benefit of, an individual who has not attained 18 years of age and who has a life-threatening condition, from an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 which is exempt from taxation under section 501(a) of such Code. The resource exclusion applies to any in-kind gift that is not converted to cash, or to a cash gift that does not exceed $2,000; and

(s) Funds received and conserved to pay for medical and/or social services as provided in § 416.1103 of this chapter.

Adjustments and Terminations

§ 418.3501 What could cause us to increase or reduce your subsidy or terminate your subsidy eligibility?

(a) Certain changes in your circumstances could cause us to increase or reduce your subsidy or terminate your subsidy eligibility. These changes include (but are not limited to) changes to:

(1) Your income;

(2) Your spouse's income if you are married and living with your spouse;

(3) Your resources;

(4) Your spouse's resources if you are married and living with your spouse; and

(5) Your family size.

(b) We will periodically review your circumstances (as described in § 418.3125) to make sure you are still eligible for a subsidy and, if eligible, whether you should receive a full or partial subsidy.

(c) If you report that your circumstances have changed or we receive other notice of such a change after we determine that you are eligible, we will review your circumstances as described in § 418.3120 to determine if you are still eligible.

§ 418.3505 How would an increase, reduction or termination affect you?

(a) An *increase* in your subsidy means that you would be able to pay a lower premium to participate in the Medicare Part D prescription drug program. An increased subsidy may also result in a reduction in any deductible or copayments for which you are responsible.

(b) A *reduction* in your subsidy means that you would have to begin to pay a premium or a higher premium to participate in the Medicare Part D prescription drug program. You may also have to begin to pay a deductible and higher copayments or increase the amounts of these payments.

(c) A *termination* means that you would no longer be eligible for a subsidy under the Medicare Part D prescription drug program.

§ 418.3510 When would an increase, reduction or termination start?

We are required to give you a written notice of our proposed action before increasing, reducing, or terminating your subsidy. We will not give this advance notice where we have factual information confirming your death, such as through a report by your surviving spouse, a legal guardian, a close relative, or a landlord. The notice will tell you the first month that we plan to make the change. The notice will also give you appeal rights which are explained in detail in §§ 418.3601 through 418.3670. Your appeal rights for a reduction or termination will include the right to continue to receive your subsidy at the previously established level until there is a decision on your appeal request if your appeal is filed within 10 days after you receive our notice. You will not be required to pay back any subsidy you received while your appeal was pending.

§ 418.3515 How could you qualify for a subsidy again?

Unless you subsequently qualify as a deemed eligible person (per 42 CFR 423.773(c)), you must file a new application for a subsidy and meet all the requirements in § 418.3101.

Determinations and the Administrative Review Process

§ 418.3601 When do you have the right to administrative review?

You have the right to an administrative review of the initial determination we make about your eligibility and about your continuing eligibility for a subsidy and any other matter that gives you the right to further review as discussed in § 418.3605. If you are married and living with your spouse and your spouse's eligibility for a subsidy may be adversely affected by our decision upon review, we will notify your spouse before our review and give him or her the opportunity to present additional information for us to consider.

§ 418.3605 What is an initial determination?

Initial determinations are the determinations we make that are subject to administrative and judicial review. The initial determination will state the relevant facts and will give the reasons for our conclusions. Examples of initial determinations that are subject to administrative and judicial review include but are not limited to:

(a) The initial calculation of your income and/or resources;

(b) The determination about whether or not you are eligible for a subsidy and if so, whether you receive a full or partial subsidy;

(c) The determination to reduce your subsidy; and

(d) The determination to terminate your subsidy.

§ 418.3610 Is there administrative or judicial review for administrative actions that are not initial determinations?

Administrative actions that are not initial determinations may be reviewed by us, but they are not subject to the administrative or judicial review process as provided by these sections. For example, changes in your prescription drug program or voluntary disenrollment in the Part D program are not initial determinations that are subject to the administrative review process.

§ 418.3615 Will we mail you a notice of the initial determination?

(a) We will mail a written notice of the initial determination to you at your last known address. Generally, we will not send a notice if your premium subsidy stops because of your death or if the initial determination is a redetermination that your eligibility for a subsidy and the amount of your subsidy has not changed.

(b) The written notice that we send will tell you:

(1) What our initial determination is;

(2) The reasons for our determination; and

(3) The effect of our determination on your right to further review.

(c) We will mail you a written notice before increasing, reducing, or terminating your subsidy. The notice will tell you the first month that we plan to make the change and give you appeal rights. Your appeal rights for a reduction or termination will include the right to continue to receive your subsidy at the previously established level until there is a decision on your appeal request if your appeal is filed within 10 days after you receive our notice.

§ 418.3620 What is the effect of an initial determination?

An initial determination is binding unless you request an appeal within the time period stated in § 418.3630(a) or we revise it as provided in § 418.3678.

§ 418.3625 What is the process for administrative review?

The process for administrative review of initial determinations is either a hearing conducted by telephone or a case review. We will provide you with a hearing by telephone when you appeal the initial determination made on your claim, unless you choose not to participate in a telephone hearing. If you choose not to participate in a telephone hearing, the review will consist of a case review. The hearing will be conducted by an individual who was not involved in making the initial determination. The individual who conducts the hearing will make the final decision after the hearing. If you are dissatisfied after we have made a final decision, you may file an action in Federal district court.

(a) *Notice scheduling the telephone hearing.* Once you request a telephone hearing, we will schedule the hearing and send you a notice of the date and time of the hearing at least 20 days before the hearing. The notice will contain a statement of the specific issues to be decided and tell you that you may designate a personal representative (as defined in 42 CFR 423.772) to represent you during the proceedings. The notice will explain the opportunity and procedure for

reviewing your file and for submitting additional evidence prior to the hearing. It also will provide a brief explanation of the proceedings, of the right and process to subpoena witnesses and documents, of the procedures for requesting a change in the time or date of your hearing, and of the procedure for requesting interpreter services.

(b) *Opportunity to review your file.* Prior to the telephone hearing, you will be able to review the information that was used to make an initial determination in your case. You can provide us with additional information you wish to have considered at the hearing.

(c) *Hearing waived, rescheduled, or missed.* If you decide you do not want a hearing by telephone or if you are not available at the time of the scheduled hearing, the decision in your case will be made by a case review. This means that the decision will be based on the information in your file and any additional information you provide. You may ask for a change in the time and date of the telephone hearing; this should be done at the earliest possible opportunity prior to the hearing. Your request must state your reason(s) for needing the change in time or date and state the new time and date you want the hearing to be held. We will change the time and date, but not necessarily to your preferred time or date, of the telephone hearing if you have good cause. If you miss the scheduled hearing and the decision in your case is decided by a case review, we will provide a hearing, at your written request, if we decide you had good cause for missing the scheduled hearing. Examples of good cause include, but are not limited to, the following:

(1) You have attempted to obtain a representative but need additional time;

(2) Your representative was appointed within 30 days of the scheduled hearing and needs additional time to prepare for the hearing;

(3) Your representative has a prior commitment to be in court or at another administrative hearing on the date scheduled for your hearing;

(4) A witness who will testify to facts material to your case would be unavailable to participate in the scheduled hearing and the evidence cannot be obtained any other way;

(5) You are unrepresented, and you are unable to respond to the notice of hearing because of any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) that you may have; or

(6) You did not receive notice of the hearing appointment.

(d) *Witnesses at hearing.* When we determine that it is reasonably necessary for the full presentation of a case, we may issue a subpoena to compel the production of certain evidence or testimony.

§ 418.3630 How do you request administrative review?

(a) *Time period for requesting review.* You must request administrative review within 60 days after the date you receive notice of the initial determination (or within the extended time period if we extend the time as provided in paragraph (c) of this section). You can request administrative review in person, by phone, fax, or mail. If you miss the time frame for requesting administrative review, you may ask us for more time to request a review. The process for requesting an extension is explained further in paragraph (c) of this section.

(b) *Where to file your request.* You can request administrative review by mailing or faxing a request or calling or visiting any Social Security office.

(c) *When we will extend the time period to request administrative review.* If you want a review of the initial determination but do not request one within 60 days after the date you receive notice of the initial determination, you may ask us for more time to request a review. Your request for an extension must explain why it was not filed within the stated time period. If you show us that you had good cause for missing the deadline, we will extend the time period. To determine whether good cause exists, we use the standards explained in § 418.3640.

§ 418.3635 Can anyone request administrative review on your behalf?

Your personal representative (as defined in 42 CFR 423.772) may request administrative review on your behalf. That person can send additional information to us on your behalf and participate in the hearing.

§ 418.3640 How do we determine if you had good cause for missing the deadline to request administrative review?

(a) In determining whether you have shown that you have good cause for missing a deadline to request review we consider:

(1) What circumstances kept you from making the request on time;

(2) Whether our action misled you;

(3) Whether you did not understand the requirements of the Act resulting from amendments to the Act, other legislation, or court decisions; and

(4) Whether you had any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which prevented you from filing a timely request or from understanding or knowing about the need to file a timely request for review.

(b) Examples of circumstances where good cause may exist include, but are not limited to, the following situations:

(1) You were seriously ill and were prevented from contacting us in person, in writing, or through a friend, relative, or other person.

(2) There was a death or serious illness in your immediate family.

(3) Important records were destroyed or damaged by fire or other accidental cause.

(4) You were trying very hard to find necessary information to support your claim but did not find the information within the stated time periods.

(5) You asked us for additional information explaining our action within the time limit, and within 60 days of receiving the explanation you requested a review.

(6) We gave you incorrect or incomplete information about when and how to request administrative review.

(7) You did not receive notice of the initial determination.

(8) You sent the request to another Government agency in good faith within the time limit and the request did not reach us until after the time period had expired.

(9) Unusual or unavoidable circumstances exist, including the circumstances described in paragraph (a)(4) of this section, which show that you could not have known the need to file timely, or which prevented you from filing timely.

§ 418.3645 Can you request that the decision-maker be disqualified?

The person designated to conduct your hearing will not conduct the hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision. If you object to the person who will be conducting your hearing, you must notify us at your earliest opportunity. The Commissioner or the Commissioner's designee will decide whether to appoint another person to conduct your hearing.

§ 418.3650 How do we make our decision upon review?

After you request review of our initial determination, we will review the information that we considered in making the initial determination and any other information we receive. We will make our decision based on this information. The issues that we will review are the issues with which you disagree. We may consider other issues,

but we will provide you with advance notice of these other issues as explained in § 418.3625. If you are dissatisfied with our final decision, you may file an action in Federal district court.

§ 418.3655 How will we notify you of our decision after our review?

We will mail a written notice of our decision on the issue(s) you appealed to you at your last known address. Generally, we will not send a notice if your subsidy stops because of your death. The written notice that we send will tell you:

(a) What our decision is;

(b) The reasons for our decision;

(c) The effect of our decision; and

(d) Your right to judicial review of the decision.

§ 418.3665 Can your request for a hearing or case review be dismissed?

We will dismiss your request for a hearing or case review under any of the following conditions:

(a) At any time before notice of the decision is mailed, you ask that your request for administrative review be withdrawn; or

(b) You failed to request administrative review timely and did not have good cause for missing the deadline for requesting review.

§ 418.3670 How will you be notified of the dismissal?

We will mail a written notice of the dismissal of your request for administrative review to you at your last known address. The dismissal is not subject to judicial review and is binding on you unless we vacate it. The decision-maker may vacate any dismissal of your request for administrative review if, within 60 days after the date you receive the dismissal notice, you request that the dismissal be vacated and show good cause why the request should not be dismissed. The decision-maker shall advise you in writing of any action he or she takes.

§ 418.3675 How does our decision affect you?

Our decision is binding unless you file an action in Federal district court seeking review of our final decision or we revise it as provided in § 418.3678. You may file an action in Federal district court within 60 days after the date you receive notice of the decision. You may request that the time for filing an action in Federal district court be extended. The request must be in writing and it must give the reasons why the action was not filed within the stated time period. The request must be filed with the decision-maker who issued the final decision in your case. If you show that you had good cause for missing the deadline, we will extend the deadline. We will use the standards in § 418.3640 to decide if you had good cause to miss the deadline.

§ 418.3678 What is the process for correcting Agency clerical errors?

If we become aware within 60 days of the date of our initial determination or our decision following a case review or telephone hearing, that a clerical error was made in determining whether or not you are eligible for a subsidy (either in whole or in part), we may issue a revised initial determination which would be effective back to the date you originally filed your application or the effective date of a subsidy changing event, provided you meet the requirements in § 418.3101. We may revise an initial determination or decision regardless of whether such revised determination or decision is favorable or unfavorable to you. If the revised determination or decision (which is a new initial determination) is not favorable to you, you will not be responsible for paying back any subsidy received prior to the revised determination or decision. We will mail you a notice of the revised determination which will explain to you that we have made a revised determination and that this determination replaces an earlier determination, how this determination affects your subsidy eligibility, and your right to request a hearing.

§ 418.3680 What happens if your case is remanded by a Federal court?

When a Federal court remands a case to the Commissioner for further consideration, the decision-maker (as described in § 418.3625) acting on behalf of the Commissioner, may make a decision. That component will follow the procedures in § 418.3625, unless we decide that we can make a decision that is wholly favorable to you without another hearing. Any issues relating to your subsidy may be considered by the decision-maker whether or not they were raised in the administrative proceedings leading to the final decision in your case.

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