



November 7, 2018

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President Donald J. Trump  
The White House  
1600 Pennsylvania Ave. NW  
Washington, DC 20500

Dear Mr. President:

On behalf of the undersigned individuals and organizations representing American citizens nationwide, we write to you with a very specific request: to rescind, by executive action, the current administrative procedures that unlawfully condition seniors' access to Social Security retirement benefits on Medicare enrollment.

These procedures effectively trap seniors in Medicare, but you have the authority to liberate them.

In the past, Americans could waive their Medicare benefits, if they wished, without losing their Social Security. In practice, few availed themselves of this option. Unfortunately, under present procedures, initiated by a prior administration without congressional approval, no one may receive Social Security benefits if they decline Medicare Part A (hospital insurance) benefits.

This effectively traps seniors in Medicare because today private insurers, as a general rule, decline to cover people who are enrolled in or eligible for Medicare. As a result, Medicare has become, for all practical purposes, the only insurance coverage available to elderly Americans, even if they have other preferred coverage they are willing to pay for.

This situation is unfair to seniors. It is also contrary to the intention of Congress. The Medicare Act of 1965 declares: "Nothing contained in this Act shall be construed to preclude . . . any individual from purchasing or otherwise securing, protection against the cost of any health services."<sup>1</sup>

Present procedures render that promise empty.

The Social Security statute (42 U.S.C. §402(a)) bases eligibility for retirement benefits on payments made into the system via payroll taxes. The Medicare statute (42 U.S.C. §426(a)) bases Part A eligibility primarily on age. But in 1993 and 2002 the Social Security and Medicare agencies essentially amended these statutes to make Medicare enrollment a non-negotiable condition of receiving Social Security benefits.

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<sup>1</sup> 42 U.S.C. §1395b.

Why? Reportedly, the agencies claimed the change was necessary because “some individuals entitled to monthly benefits have asked to waive [Part A] entitlement because of religious or philosophical reasons, or because they prefer other insurance,” which requests, the agencies claimed, are ungrantable under the statute. Therefore, the agencies determined, no further waivers may be granted, except to individuals who disenroll from Social Security and repay all past Social Security benefits they have received to date.<sup>2</sup>

Happily, Mr. President, you have the authority to reverse this unfair and misguided policy, which is not a law or a rule. It is an internal, subregulatory instruction, inserted into a program operations manual, without congressional authorization, and without public notice-and-comment rulemaking, nearly 30 years after the Medicare Act took effect. Because the change was made without legal authority, it can (and should) be reversed. Because it was instituted administratively, it can be reversed in the same manner.<sup>3</sup>

To summarize:

- Medicare is, and always has been, a *voluntary* program open to any U.S. citizen who meets the eligibility criteria and “files an application” to enroll.
- Congress has made clear, in the statutory text, its understanding and intention that the program is voluntary. But current administrative procedures effectively defeat this intention.

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<sup>2</sup> The quotation is from a letter, dated September 12, 2017, to our organization from the lead counsel for the plaintiffs in *Hall, et al. v. Sebelius, et al.* (2012).

<sup>3</sup> Here, for convenient reference, is the history of the present procedures, together with the full relevant text:

In 1993 the Social Security and Medicare agencies amended existing guidance for administrative personnel through the federal Program Operations Manual System (POMS) (specifically, sections HI 00801.002 and HI 00801.034) in order to make access to Social Security benefits strictly dependent on enrollment in Medicare Part A (technically known as HI, or Hospital Insurance). In 2002, an additional change was made at section GN 00206.020.

Here are the resulting provisions:

HI 00801.002: “Individuals entitled to monthly benefits which confer eligibility for HI may not waive HI entitlement. The only way to avoid HI entitlement is through withdrawal of the monthly benefit application. Withdrawal requires repayment of all RSDI [Retirement, Survivors, Disability Insurance] and HI benefit payments made [to the individual].”

HI 00801.034: “To withdraw from the HI program, an individual must submit a written request for withdrawal and must refund any HI benefits paid on his/her behalf as explained in GN 00206.095 B.1.c. An individual who filed an application for both monthly benefits and HI may:

- Withdraw the claim for monthly benefits without jeopardizing HI entitlement; or
- Withdraw the claim for both monthly benefits and HI.

The individual may not elect to withdraw only the HI claim. An individual who filed an application for HI only may withdraw the claim at any time (see HI 00801.002).”

GN 00206.020: “We base HI coverage on entitlements to monthly RSDI cash benefits. Therefore, a claimant who is entitled to monthly RSDI benefits cannot withdraw HI coverage and keep the cash benefits only. For information on a waiver of HI entitlement by an RSI beneficiary, see HI 00801.002. The claimant with HI entitlement may withdraw the:

- RSI cash benefits only; or
- Both RSI cash benefits and Medicare coverage ... , or
- Medicare-only claim ... ; or
- End-stage Renal Disease (ESRD) Medicare Application ... ”

- Congress has not enacted a law requiring Medicare enrollment to receive Social Security benefits.
- Neither the eligibility provision of Social Security, nor the eligibility provision of Medicare, requires a citizen to enroll in Medicare Part A as a condition of receiving Social Security.<sup>4</sup>
- When the Social Security Administration (SSA) and the Department of Health and Human Services (HHS), on August 30, 1993, and May 23, 2002, added executive instructions effectively conditioning eligibility for Social Security benefits on Medicare Part A enrollment—under pain of severe financial loss—they acted unlawfully, having no statutory authorization to make such a change, and doing so without notice or benefit of public comment, as required by the Administrative Procedure Act. To the extent they made new law, they acted unconstitutionally, because the U.S. Constitution (Article I) grants legislative power exclusively to Congress.
- Citizens entitled to Social Security benefits may reasonably wish not to be enrolled in Medicare because they:
  - Have religious or philosophical objections.
  - Wish to retain or secure private health insurance.
  - Oppose Medicare’s limits on access to care. For example, they are not allowed to privately purchase medical services denied by Medicare and its contractors unless the practitioner has opted out of the Medicare program or an Advanced Beneficiary Notice has been offered and signed by the patient.
  - Do not want Medicare to become their primary coverage, as automatically occurs today.
- Nothing Congress has ever said or done suggests that its intention is to compel these or any seniors into Medicare against their will.
- Rescinding the present procedures is well within the executive’s purview and existing authorities.

Would fixing this problem lead to adverse selection and a worsening risk pool? Not likely. No adverse selection was seen from 1965 to 1993, when the intent of Congress was still being followed. Medicare is a massive, extremely stable risk pool, and it has always been extremely popular. In practice, we expect very few people will avail themselves of their right to forgo Medicare. But the freedom to do so is part and parcel of Medicare’s design. And it’s a wise feature, offering a helpful feedback mechanism for policymakers.

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<sup>4</sup> While the POMS manual change was challenged in court, and the plaintiffs’ lawsuit (*Hall v. Sebelius* [2012]) was rejected by two out of three judges on a three-judge federal panel, the change can be still be reversed by the same means by which it was adopted, namely, by editing the POMS manual. The majority decision in *Hall* rests on a narrowly literal reading of the statutory term “entitlement to . . . benefits.” But as the dissenting opinion in the case points out, the commonsense, dictionary definition of “entitlement” includes the element of voluntariness. To be “entitled” to a benefit means to be eligible for it, to have a right to it, to be free to claim it (or disclaim it). The majority’s narrow reading amounts to an assumption that Congress intentionally hid an elephant in a mousehole—and indeed, hid it so well that no one suspected its existence for nearly three decades.

Individuals who would benefit from this proposed change include veterans, citizens who have the option of maintaining private insurance coverage through an employer or spouse, and citizens who would prefer to purchase private health coverage.

American taxpayers will also benefit from reduced Medicare expenditures. The Medicare HI trust fund, according to the program's trustees, will be depleted in 2026, eight years from now.

Mr. President, by fixing this problem, you will bring freedom to millions of Americans while making Medicare stronger.

We, the undersigned, urge you to use your authority to do just that.

**Specific Request:** For the sake of all Americans, young and old, we respectfully request that you direct your subordinates to remove the executive instructions found at sections HI 00801.002, HI 00801.034, and GN 00206.020 of the Program Operations Manual System (POMS).

Thank you, Mr. President, for your attention to this important matter.

As a courtesy, we are sending copies of this letter to the Commissioner of Social Security, the Secretary of Health and Human Services, the Director of the Office of Management and Budget, the Director of the National Economic Council, and the Director of the Domestic Policy Council.

If you or anyone in your administration should have questions, please do not hesitate to contact Twila Brase, president of Citizens' Council for Health Freedom: 651-646-8935.

Sincerely,



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Mick Mulvaney, Director, Office of Management and Budget  
Larry Kudlow, Director, National Economic Council  
Andrew Bremberg, Assistant to the President and Director, Domestic Policy Council