

The CLASS Act Program: Designed to Promote Functional Independence for Individuals with Long-Term Care Needs, But Is It Self-Sustainable?

By Cynthia S. Marietta, J.D., LL.M. (Health Law)
csmarie@central.uh.edu

Introduction

The Community Living Assistance Services and Supports Act (“CLASS Act”)¹ is the federal government’s first voluntary, self-funding, long-term insurance program.² It is designed to promote functional independence for individuals with long-term care needs, and over time, should help millions stay in their homes versus reside in long-term care institutions.³ But critics of the program question whether it will be self-sustainable, and according to a Congressional Budget Office analysis of the bill,⁴ the program will eventually add to the federal budget deficit unless modifications are made.⁵

What is the CLASS Act?

The CLASS Act, as outlined within the Patient Protection and Affordable Care Act (PPACA),⁶ was signed into law on March 23, 2010. The PPACA amends the Public Health Services Act⁷ by establishing and adding the CLASS Act.⁸

The CLASS Act program provides working adults with a new option to finance non-medical, long-term care and support services in the event of functional and/or cognitive impairment or disability.⁹ This long-term care insurance program is structured to help offset the costs incurred by the millions of adults suffering from chronic, disabling conditions. It is for employed individuals who will pay premiums through a payroll deduction system¹⁰ or direct contribution.¹¹ All employees are automatically enrolled in

¹ Community Living Assistance Services and Supports Act (“CLASS Act”), Pub. L. No. 111-148, 124 Stat. 119, Tit. VIII, §§ 8001 – 8002, Subtit. XXXII, §§ 3201-3210 (Mar. 23, 2010).

² The White House, *Putting Americans in Control of their Health Care: Title VIII. Community Living Assistance Services and Supports Act*, <http://www.whitehouse.gov/health-care-meeting/proposal/titleviii> (last accessed June 10, 2010).

³ William La Jenuesse, *Little-Known Health Care Law Provision is a Budget Buster, Critics Say*, Fox News.com, Mar. 26, 2010, (citing Jim Firman, Dir. of the Nat’l Coun. on Aging), *available through* <http://www.foxnews.com>.

⁴ Congressional Budget Off., Correspondence to Chairman George Miller, Nov. 25, 2009, *available through* <http://www.cbo.gov>.

⁵ La Jenuesse, *supra* note 3 (citing Rep. Devin Nunes (R-CA)).

⁶ Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (Mar. 23, 2010).

⁷ Public Health Services Act, 42 U.S.C. 201, *et seq.*

⁸ CLASS Act, *supra* note 1, at Tit. VIII, § 8002(a)(1).

⁹ *Putting Americans in Control of their Health Care*, *supra* note 2; *see also* CLASS Act, *supra* note 1, at Subtit. XXXII, § 3201(1).

¹⁰ *Putting Americans in Control of their Health Care*, *supra* note 2; CLASS Act, *supra* note 1, at Subtit. XXXII, § 3204(e).

¹¹ CLASS Act, *supra* note 1, at Subtit. XXXII, § 3204(e)(2).

the program unless they opt-out.¹² Enrollees will need to participate in the program for a 5-year vesting period before they are eligible to receive benefits.¹³

Eligible beneficiaries will receive cash benefits of not less than an average of \$50 per day that can be used to purchase a variety of non-medical community support services, ranging from respite care to home care.¹⁴ The actual cash benefit amount will be scaled depending on the individual's degree of impairment,¹⁵ which is expected to average roughly \$75 per day or more than \$27,000 per year.¹⁶ The cash benefits are intended to help individuals with functional limitations maintain their independence at home, in the community, or in an institutional setting.¹⁷ These benefits are not intended to replace the health care benefits for which a beneficiary is eligible under Medicaid or any other federally funded program that provides health care benefits or assistance, but instead will supplement them.¹⁸ Moreover, these benefits will not affect eligibility or continued eligibility for receipt of benefits under any other federal, state, or locally-funded governmental assistance program.¹⁹ The CLASS Act program is not intended to replace or displace public or private disability insurance benefits, including income replacement benefits.²⁰

No taxpayer funds will be used to pay benefits under the CLASS Act program.²¹ Safeguards will be put in place to ensure solvency of the program,²² and the U.S. Department of Health and Human Services (HHS) will be responsible for issuing regulations that (1) define the CLASS benefit plan,²³ (2) determine adequate premiums to cover costs of the program,²⁴ (3) outline the eligibility assessment process and appeals process,²⁵ and (4) describe the ongoing administrative operations of the program, among other things.²⁶

The CLASS Act will become effective on January 1, 2011.²⁷ The deadline for HHS to establish a benefit eligibility determination process is January 1, 2012.²⁸ The deadline for HHS to issue final regulations outlining the details of the CLASS benefit plan is no later

¹² *Id.* at Subtit. XXXII, § 3204(a).

¹³ *Id.* at Subtit. XXXII, § 3203(a)(1)(B).

¹⁴ *Putting Americans in Control of their Health Care, supra* note 2; CLASS Act, *supra* note 1, at Subtit. XXXII, § 3203(a)(1)(D).

¹⁵ *Id.*

¹⁶ The Henry J. Kaiser Family Found'n, *Health Care Reform and The Class Act*, Apr. 2010, <http://www.kff.org/healthreform/upload/8069.pdf> (last accessed June 10, 2010).

¹⁷ CLASS Act, *supra* note 1, at Subtit. XXXII, §§ 3201(1), 3205(c).

¹⁸ *Id.* at Subtit. XXXII, § 3205(c)(7), (f).

¹⁹ *Id.* This includes assistance programs that pay benefits under Titles II, XVI, XVIII, or XXI of the Social Security Act, 42 U.S.C. §§401, *et seq.*, 1381, *et seq.*, 1395, *et seq.*, 1396, *et seq.*, 1397aa, *et seq.*

²⁰ CLASS Act, *supra* note 1, at Tit. VIII, § 8002(f).

²¹ *Id.* at Subtit. XXXII, § 3208(b); *Putting Americans in Control of their Health Care, supra* note 2.

²² CLASS Act, *supra* note 1, at Subtit. XXXII, § 3208.

²³ *Id.* at § 3203(a)(3).

²⁴ *Putting Americans in Control of their Health Care, supra* note 2.

²⁵ CLASS Act, *supra* note 1, at Subtit. XXXII, § 3205(a)(2).

²⁶ *Id.* at § 3208(c).

²⁷ *Id.* at § 8002(e).

²⁸ *Id.* at § 3205(a)(2).

than October 1, 2012, with a period for public comment.²⁹ Enrollees will not be able to receive CLASS Act cash benefits until 2017, at the earliest.

Brief Overview of Pertinent Provisions of the CLASS Act

The regulations to be promulgated by HHS will provide greater detail of the following information:

1. Purpose of the CLASS Act Program³⁰

The purpose is to establish a national voluntary insurance program for purchasing community living assistance services and supports that will:

- (a) provide individuals with functional limitations with tools that will allow them to maintain their personal and financial independence and live in the community;
- (b) establish an infrastructure that will help address the Nation’s community living assistance services and supports needs;
- (c) alleviate burdens on family caregivers; and
- (d) address institutional bias by providing a financing mechanism that supports personal choice and independence in the community.

2. Secretary of HHS

The HHS has broad authority and discretion to design an actuarially sound benefit plan, establish the premiums, and develop the structural and operating rules for the program.³¹

3. Premiums³²

Premiums will be the exclusive source of funding for the CLASS program.

- (a) *In general:* HHS shall establish monthly premiums based on administrative costs and an actuarial analysis of the 75-year costs of the program to ensure solvency for that 75-year period.
- (b) *Nominal premiums:* Low-income individuals and full-time students who are working can enroll in the program and pay a nominal monthly premium of \$5, with annual increases based on a percentage increase in the consumer price index (“CPI”).

²⁹ *Id.* at § 3203(a)(3).

³⁰ *Id.* at § 3201.

³¹ *See generally* CLASS Act, *supra* note 1, at Subtit. XXXII, §§ 3202 - 3210.

³² *Id.* at § 3203(a)(1)(A)(i)-(ii), (b)(1)–(3).

(c) *Adjusted premiums:* Premiums may be adjusted based on the projected solvency of the program from year to year, with a full re-evaluation of the program 10 years after implementation. Low income individuals, full-time students, and individuals over age 65 who have paid premiums for 20 years and who are not actively employed will be exempt from any premium increases.

(d) *No underwriting requirements:* Premiums will be based on the age of the applicant. Medical conditions cannot be used to establish or influence the monthly premium or prevent enrollment in the program.

4. Benefits

(a) *Benefit triggers:*³³ An individual is entitled to benefits if a licensed health care practitioner certifies the individual has a functional limitation expected to last at least 90 days. The functional limitation must fall within any one of the following categories:

(i) the individual is unable to perform the minimum number of activities of daily living (“ADL”) from a list of 6 identified ADLs, such as bathing, dressing or eating;

(ii) the individual needs substantial supervision due to cognitive impairment that includes threats to health and safety of the individual; or

(iii) the individual has a level of functional limitation (as will be defined by the HHS regulations) similar to clauses (i) or (ii) above.

(b) *Cash benefits:*³⁴ An eligible beneficiary is entitled to receive cash benefits in the amount of not less than an average of \$50 per day, based on a sliding scale tied to an assessment of an individual’s current and expected future functional impairment. This amount will be adjusted in subsequent years by the percentage increase in the CPI.

Benefits, when payable, will be paid on a daily or weekly into a “Life Independence Account” established for each eligible beneficiary. The Account will be electronically accessed through use of a debit card. The beneficiary must maintain an accounting of services purchased with CLASS benefits. There is no aggregate or lifetime benefit limit, and benefits will be payable for as long as an individual remains eligible for benefits.

The cash benefits may be used to purchase nonmedical services and support that the beneficiary needs to maintain his or her independence at home or in another residential setting of choice, including but not limited to home modifications, assistive technology, accessible transportation, homemaker services, home care aides, nursing support, and assistance with decision-making for medical or surgical treatment, such as advance directives, living wills, and durable power of attorney for health care.

³³ *Id.* at § 3203(a)(1)(C).

³⁴ *Id.* at § 3203(a)(1)(D), §3205(b), (c).

CLASS cash benefits may be coordinated with any supplemental coverage purchased through an Exchange established under the Patient Protection and Affordable Care Act.

CLASS cash benefits received by a Medicaid beneficiary cannot supplant or replace Medicaid or any other federally funded program that provides health care benefits or assistance. Medicaid beneficiaries in an institutional setting will be allowed to keep 5% of their daily or weekly CLASS cash benefit in addition to their monthly needs allowance provided under Medicaid. The remainder will be applied to the facility's cost of their care. Medicaid beneficiaries enrolled in PACE or those receiving home and community based services under Medicaid can keep 50% of the daily or weekly CLASS cash benefits with the remainder applied to the cost of their care. No state claim for federal matching funds can be made.

A state may receive the remaining 50 percent of the CLASS benefits from Medicaid beneficiaries receiving home and community services if the state satisfies certain conditions and requirements and offers at a minimum, case management services, personal care services, habilitation services, and respite care under a federal section 1115 waiver of the Social Security Act or state plan amendment.³⁵

(c) *Advocacy Services:*³⁶ HHS will be required to enter into agreements with the designated Protection and Advocacy System³⁷ in each state to provide advocacy services for eligible beneficiaries. Each beneficiary will be assigned an advocacy counselor who will provide information concerning access to services, the appeals process, and annual recertification requirements.

(d) *Advice and Assistance Counseling:*³⁸ HHS will be required to enter into agreements with public and private entities to provide advice and assistance counseling. Such entities are required to assign an advice and assistance counselor as requested by an eligible beneficiary to provide information on accessing and coordinating services, information about eligibility for other services and benefits, service and support plans, and assistive technology.

Counselors will also assist with decision-making about medical care, advance directives and other written instructions concerning medical care, and any other services HHS requires by regulation. These entities will be required to give active enrollees and beneficiaries a list of available service providers that meet their needs and disclose any financial interest the entity may have had in any of the recommended providers.

³⁵ *Id.* at § 3205(c)(1)(D)(ii)(II).

³⁶ *Id.* at § 3205(d).

³⁷ Advocacy, Inc. is the designated Protection and Advocacy System for the State of Texas. *See* Advocacy, Incorporated, *The Origins and Protections and Advocacy and Client Assistance Programs*, available at <http://www.advocayinc.org/G%.cfm>. It is a private, non-profit organization with unique federal authority and funding. *Id.* State Protection and Advocacy Systems were established by Congress because of the public outcry over abuse and neglect of persons with disabilities living in institutions. *Id.*

³⁸ CLASS Act, *supra* note 1, at Subtit. XXXII, § 3205(e),(h).

HHS will establish procedures to ensure that all entities that provide assistance for beneficiaries will comply with certain requirements that foster the best interests of the beneficiaries, have operating procedures to avoid or minimize conflicts of interest between the entity and an active enrollee or beneficiary, make all information about services and potential resources available, and assist the beneficiary in obtaining desired services from any provider selected by the beneficiary. These entities will be required to report the number of active enrollees and beneficiaries they assist by age, disability, and services received from them or any other entity.

5. Benefit Eligibility and Assessment³⁹

Enrollees must apply for receipt of CLASS benefits. HHS will establish an Eligibility Assessment System to provide eligibility assessments and develop an “expedited nationally equitable eligibility determination process” to determine whether an active enrollee is eligible for cash benefits, the degree of the enrollee’s impairment, and the amount of benefit that will be paid. HHS will issue regulations to include procedures for appeals and redetermination processes. Presumptive eligibility is given to active enrollees who have applied for the maximum cash benefit, are receiving long-term care services in an institutional setting, and are discharged or preparing to discharge within 60 days of becoming eligible for benefits.

Entities selected to perform the eligibility determination process are required to have operating procedures to avoid or minimize conflicts of interest between that entity and an active enrollee or beneficiary; to make available all information about services and potential resources; and assist the beneficiary in obtaining desired services from any provider. These entities must report the number of active enrollees and beneficiaries they assist by age, disability, and the services received from them or any other entity.

6. Program Enrollment, Disenrollment and Re-enrollment⁴⁰

Enrollment is automatic through a payroll deduction system for active workers age 18 and older who receive taxable wages. Individuals are allowed to opt out, and employers can opt not to participate. Alternate enrollment will be available for the self-employed, for those with more than one employer, or for those whose employers elect not to participate.

Before benefits can be claimed, an individual must have paid premiums for enrollment in the program for at least 60 months and have been actively employed for at least 3 of the first 5 years of enrollment in the program under the same standards used by the Social Security Administration to qualify for a quarter of coverage under the Social Security rules for retirement or disability. There is no provision for non-working spouses or other non-working individuals to enroll.

³⁹ *Id.* at § 3205(a).

⁴⁰ *Id.* at § 3204.

Individuals may re-enroll if they initially waived enrollment. HHS will establish an open enrollment period during which time individuals may re-enroll in the program. Moreover, individuals may elect to disenroll from the program during the annual disenrollment period to be established by HHS.

8. Two Advisory Bodies to HHS

Two advisory bodies will advise HHS on certain aspects of the program, including the CLASS Independence Benefit Plan, the solvency of the CLASS Independence Fund, and the ongoing operations of the program.

(a) *Independence Advisory Council (“IAC”)*:⁴¹ The IAC will be composed of 15 non-federally employed individuals who represent stakeholders in the program and will be appointed by the President for overlapping 3-year terms. HHS will submit 3 actuarially sound benefit plans to the IAC for its recommendations, and HHS will then consider the IAC’s proposal before designating one benefit plan as the CLASS Independence Benefit Plan (“Plan”), no later than the October 1, 2012 deadline to issue final regulations.

Moreover, the IAC will also advise HHS on the general policy of the program, the financial solvency of the program, and the regulations concerning the benefit package.

(b) *Board of Trustees*:⁴² The Board will be composed of agency officials and bipartisan members of the public and will be appointed by the President for a term of 4 years. The Board oversees and reports to Congress on the operations and financial status of the CLASS Independence Fund (“Fund”), and reviews and makes recommendations to policies and management of the Fund.

9. Tax Treatment of the CLASS Act Program⁴³

For purposes of the Internal Revenue Code of 1986, the CLASS program shall be treated in the same manner as a qualified long-term care insurance contract for qualified long-term care insurance services.

Policy Implications

Over 10 million Americans, who experience some degree of functional limitation—whether physical or cognitive or both—currently need long-term services and supports to assist them in life’s daily activities.⁴⁴ These individuals and their families will benefit the most from the provisions in the CLASS Act. As the U.S. population ages, the number of individuals needing long-term care services and community living assistance support will

⁴¹ *Id.* at § 3207.

⁴² *Id.* at § 3206(c).

⁴³ *Id.* at § 3210.

⁴⁴ *Health Care Reform and The Class Act, supra* note 16.

increase substantially.⁴⁵ This will lead to an unprecedented demand for qualified caregivers, community assistive and support services, and specifically, the necessary funding source to pay for these services.

Conclusion

The CLASS Act offers a new approach to financing some of the costs of long-term care services and establishes the basic framework for the regulatory details to be ironed out by HHS. Until HHS issues its regulations, there will likely be speculation about whether people will participate in the program. Moreover, there will likely be continued discussion about the premiums required and the modifications needed to ensure success and solvency of the program.

Like any insurance program, the success or failure of the program will depend on the balance between those enrolled in the program and those using the benefits. There must be enough healthy people in the pool of enrollees to offset the number of people who will use the benefits and enough premiums paid and collected to maintain the solvency of the program.

Health Law Perspectives (July 2010)

Health Law & Policy Institute

University of Houston Law Center

<http://www.law.uh.edu/healthlaw/perspectives/homepage.asp>

The opinions, beliefs and viewpoints expressed by the various Health Law Perspectives authors on this web site do not necessarily reflect the opinions, beliefs, viewpoints, or official policies of the Health Law & Policy Institute and do not constitute legal advice. The Health Law & Policy Institute is part of the University of Houston Law Center. It is guided by an advisory board consisting of leading academicians, health law practitioners, representatives of area institutions, and public officials. A primary mission of the Institute is to provide policy analysis for members of the Texas Legislature and health and human service agencies in state government.

⁴⁵ *Id.*