DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-26-12
Baltimore, Maryland 21244-1850

SHO# 13-006

September 27, 2013

Re: United States v. Windsor

Dear State Health Official:
Dear State Medicaid Director:

On June 26, 2013, the Supreme Court, in United States v. Windsor, 570 U.S. __, 133 S. Ct. 2675 (2013), invalidated Section 3 of the Defense of Marriage Act (DOMA), which provided federal definitions of marriage and spouse that precluded federal recognition of same-sex marriages. The purpose of this guidance is to advise you of the implications of the Windsor decision for Medicaid and the Children's Health Insurance Program (CHIP). As discussed below, because Section 3 of DOMA no longer controls the definition of marriage or spouse under the federal framework for state Medicaid and CHIP programs, DOMA is no longer a bar to states recognizing same-sex marriages in Medicaid or CHIP.

Medicaid eligibility rules vary depending on the eligibility group. For certain Medicaid and CHIP populations, financial eligibility is determined using modified adjusted gross income (MAGI). Section 1902(e)(14)(G) of the Social Security Act (Act) incorporates the definition of MAGI provided in section 36B(d)(2) of the Internal Revenue Code. Consistent with the recent Internal Revenue Ruling issued by the Internal Revenue Service (IRS), we interpret section 1902(e)(14)(G), which incorporates section 36B(d)(2), to treat lawfully married couples as spouses for purposes of the MAGI calculation. For federal tax purposes, the IRS has adopted a policy that recognizes a same-sex marriage if it is valid in the state in which the couple resides or valid in the jurisdiction where the marriage was celebrated. The Department of Health and Human Services (HHS) has adopted this policy in other contexts, including in the Medicare program guidance "Impact of United States v. Windsor on Skilled Nursing Facility Benefits for Medicare Advantage Enrollees." To do so here would increase consistency among federal programs and would be consistent with the policy of HHS to treat same-sex marriages on the same terms as opposite-sex marriages, to the greatest extent possible. Therefore, as a general matter, for purposes of the Medicaid and CHIP programs, we believe that it is appropriate to recognize same-sex marriages that (1) are recognized by the state or territory in which the applicant or beneficiary resides, or (2) were celebrated in accordance with the laws of any state, territory, or foreign jurisdiction. However, in view of the unique federal-state relationship that characterizes the Medicaid and CHIP programs, we interpret section 1902(e)(14)(G), which incorporates section 36B(d)(2), to permit states and territories to apply their own choice-of-law rules in deciding what law governs the determination of whether a couple is lawfully married; that is, we are permitting states and territories to adopt a different same-sex marriage recognition

policy if they do not recognize same-sex marriages consistent with their laws. Under this approach, with respect to Medicaid and CHIP, a state is permitted and encouraged, but not required, to recognize same-sex couples who are legally married under the laws of the jurisdiction in which the marriage was celebrated as spouses for purposes of Medicaid and CHIP.

Notwithstanding the policy described above, for individuals whose financial eligibility for Medicaid is not determined using MAGI rules, financial eligibility is based on the methodologies applied by the Social Security Administration (SSA) in determining eligibility for Supplemental Security Income (SSI). Thus, the post-Windsor SSI marriage recognition policy that will be announced by the SSA will be relevant to SSI-related eligibility groups. The Centers for Medicare & Medicaid Services (CMS) will issue additional guidance once the SSA announces its post-Windsor SSI marriage recognition policy. Below, we provide some interim guidance pending the announcement by the SSA.

We note that, today, CMS is also releasing related policy guidance from the Center for Consumer Information and Insurance Oversight (CCIIO). That guidance (available at: http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/marketplace-guidance-on-irs-2013-17.pdf) acknowledges that the premium tax credit (PTC) eligibility rules under section 36B of the Internal Revenue Code will treat same-sex spouses in the same manner as opposite-sex spouses and that therefore eligibility rules with respect to advance payments of the premium tax credit (APTC) and cost-sharing reductions (CSR) will do the same.

Marital Considerations in Medicaid and CHIP

The marriage recognition policy described in this guidance applies to recognition of marriages throughout the Medicaid and CHIP programs. This guidance focuses in particular on the implications of this policy for eligibility for these programs and applies regardless of whether or not states have undertaken the new adult group eligibility expansion under the Affordable Care Act. Because Medicaid and CHIP eligibility policies are closely intertwined with income methodologies used by other programs – the methodologies used by the IRS for purposes of eligibility for the PTC, and the methodologies used by the SSA in determining eligibility for SSI – this guidance describes in particular the manner in which state Medicaid and CHIP eligibility decisions are affected by those methodologies.

MAGI-Based Eligibility Determinations

For coverage starting on or after January 1, 2014, eligibility determinations for most individuals under Medicaid and all individuals under CHIP will be based on MAGI and household income, as determined in accordance with section 1902(e)(14) of the Act, implemented in regulations at 42 CFR 435.603 and 457.315. Eligibility for APTC and CSR associated with enrollment in a qualified health plan through a Health Insurance Marketplace will also be determined using MAGI and household income, as those terms are defined in section 36B(d)(2) of the Internal Revenue Code, implemented in regulations at 26 CFR 1.36B. In order to create a seamless eligibility and enrollment system across insurance affordability programs, and for administrative simplification, the Affordable Care Act generally aligns the methodologies for determining income eligibility for Medicaid and CHIP with the methodologies for determining income eligibility for the PTC, as well as APTC and CSR.

Following the Windsor decision, the IRS, on August 29, 2013, issued Internal Revenue Ruling 2013-17 (Ruling), which interprets marriage-related terms in the Internal Revenue Code for federal tax purposes, including determination of a taxpayer's MAGI and household income for purposes of determining eligibility for the PTC. The Ruling provides that (1) same-sex couples who are lawfully married will be recognized as spouses for federal tax purposes; and (2) that a same-sex couple will be considered lawfully married so long as the marriage is valid under the laws of the jurisdiction where it was entered into, regardless of where the same-sex spouses live. As a result, a same-sex couple lawfully married in any jurisdiction will be permitted to file a joint federal tax return, regardless of whether the state in which the couple live recognizes same-sex marriages. This means that, under the Ruling, the IRS will treat same-sex spouses on the same terms as opposite-sex spouses for purposes of determining eligibility for the PTC.

As described in more detail in concurrent CCIIO Marketplace guidance, eligibility determinations by a Marketplace with respect to APTC and CSR are tied by statute to eligibility rules for the PTC under section 36B of the Internal Revenue Code, as implemented by the IRS through regulations and guidance. As discussed above, for federal tax purposes, these eligibility rules consider a couple to be lawfully married so long as the jurisdiction in which the marriage was celebrated or the state in which the couple reside recognizes the marriage as valid.

Consistency among PTC, APTC, CSR, Medicaid, and CHIP eligibility methodologies (with respect to MAGI-based eligibility groups) furthers program objectives, and it is important that there are no federal barriers to states adopting such a consistent approach. Thus, to promote coordination between PTC/APTC/CSR eligibility and Medicaid/CHIP eligibility for MAGI populations and to further the HHS policy of treating same-sex marriages on the same terms as opposite-sex marriages, to the greatest extent possible, we permit and encourage states to recognize same sex marriages that are valid in the jurisdiction where the marriage was celebrated. However, we interpret section 1902(e)(14)(G) to permit a state to choose not to recognize a same-sex marriage celebrated in another jurisdiction, if the state does not consider the couple to be married under its own laws. Under this approach, a state is permitted and encouraged, but not required, to recognize same-sex couples who are legally married under the law of the jurisdiction in which the marriage was celebrated as spouses for purposes of Medicaid and CHIP. States that do not recognize same-sex marriages are thus free to adopt a different marriage recognition policy for Medicaid and CHIP purposes.

We note that, because states may opt not to recognize same-sex marriages for purposes of Medicaid and CHIP, and because, as set forth in concurrent CCIIO Marketplace guidance, APTC/CSR eligibility methodology will follow PTC eligibility methodology, a narrow benefit eligibility gap could arise in states that do not recognize same-sex marriages. We are currently considering this issue. As part of that consideration, we will consult with the states.

Non-MAGI Based Eligibility Determinations

Some populations are excepted from application of MAGI-based methodologies in determining financial eligibility for Medicaid, including (1) individuals whose eligibility for Medicaid does not require a determination of income by the state Medicaid agency, including individuals eligible for, or deemed eligible for, SSI; individuals eligible for title IV-E federal foster care or adoption assistance or guardianship payments; and individuals screened as needing treatment for breast or cervical cancer under the Centers for Disease Control and Prevention breast and

cervical cancer early detection program; (2) individuals who are being determined eligible for Medicaid under an eligibility category for which being blind, disabled, or elderly is a condition of eligibility, and (3) individuals being evaluated for Medicaid eligibility under an eligibility category that covers long term care services and support (LTSS) needed by an individual, but which are not covered under a MAGI-based eligibility group for which the individual may be eligible. The exceptions to application of MAGI-based methodologies are codified at 42 CFR 435.603(j).

As noted above, SSA's post-Windsor SSI marriage policy is forthcoming. As such, while we are unable to provide comprehensive guidance for states relating to the impact of the Windsor decision on the Medicaid eligibility of MAGI-exempt populations at this time, we can remind states of some basic principles. First, when Medicaid eligibility is based on eligibility for another benefit program, states will not need to make any determination concerning marital status; Medicaid eligibility will continue to be based on the determination of eligibility for the applicable benefits. For example, in states in which Medicaid eligibility is directly tied to eligibility for SSI – i.e., in states that have an agreement with the SSA under section 1634 of the Act to determine Medicaid eligibility for SSI recipients (1634 states) as well as so-called criteria states –what matters to the state for purposes of determining an individual eligible for Medicaid is that the SSA has determined the individual eligible for SSI (whether it does or does not recognize a same-sex marriage in the course of doing so). Eligibility is derived based on receipt of SSI.

Second, in so-called 209(b) states, which exercise flexibility under section 1902(f) of the Act, mandatory eligibility for aged, blind, and disabled individuals is generally based on SSI eligibility rules, but is not directly tied to eligibility for SSI, because the state may apply one or more eligibility rules that is more restrictive than that applied by the SSA in determining SSI eligibility, so long as the more restrictive method was applied under the Medicaid state plan in effect on January 1, 1972. Once the SSA announces its post-Windsor SSI marriage recognition policy, CMS will provide additional guidance for 209(b) states.

Third, the Medicaid statute provides that, with respect to determining eligibility under other groups for aged, blind and disabled individuals, SSI methodologies will be applied, consistent with sections 1902(a)(17) and 1902(r)(2) of the Act. CMS will provide additional guidance on these optional SSI-related eligibility groups once the SSA announces its post-Windsor SSI marriage recognition policy.

Finally, eligibility for LTSS under Medicaid and the post-eligibility rules that apply in determining the amount of medical assistance available for LTSS may also be affected in some ways by SSA's post-Windsor SSI marriage recognition policy, and we will also provide additional guidance on this topic once the SSA announces its policy.

Civil Unions and Domestic Partnerships

There is no provision of the Medicaid and CHIP statutes that recognizes civil unions or domestic partnerships. Moreover, in IRS Revenue Ruling 2013-17, such relationships are not viewed as marriages for federal tax purposes, including for purposes of determination of MAGI. Consistent with this guidance, a marriage is recognized for Medicaid and CHIP purposes if (it is legally valid under applicable law. Thus, if a state or territory recognizes a civil union or

domestic partnership as a marriage, that marital status is recognized under the Medicaid and CHIP programs, consistent with this guidance.

Implementation Considerations

States may start recognizing same-sex marriages in the administration of their Medicaid and CHIP programs immediately. We understand, however, the operational challenges that they might face in doing so, given the necessary revisions to state systems and consumer materials. Thus, states must implement this guidance as soon as reasonably practicable and implement interim workarounds where reasonably possible. We will work with states to develop acceptable mitigation plans to achieve a reasonable timeframe for assuring compliance with this guidance.

CMS will provide state plan amendment preprints for Medicaid and CHIP, which states will be required to complete, indicating whether or not the state recognizes same-sex marriages for purposes of Medicaid and CHIP. Guidance on this process is forthcoming. States may implement their same-sex marriage recognition policy prior to submitting a state plan amendment to CMS.

If you have questions about this guidance, please contact either Sarah deLone at 410-786-0615 or Sarah.deLone2@cms.hhs.gov, or your SOTA state lead.

Sincerely,

/s/

Cindy Mann
Director

cc:

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