DEPARTMENT OF HEALTH & HUMAN SERVICES
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CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR MEDICAID & CHIP SERVICES

SMD# 14-005

May 30, 2014

Re: United States v. Windsor and Non-MAGI Populations

Dear State Health Official:

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. Because Section 3 of DOMA no longer controls the definition of marriage or spouse under the federal framework for state Medicaid and Children's Health Insurance Programs (CHIP), DOMA is no longer a bar to states recognizing same-sex marriages in Medicaid and CHIP. The Centers for Medicare & Medicaid Services (CMS) issued guidance on September 27, 2013 regarding marriage recognition for populations whose eligibility is determined on the basis of modified adjusted gross income (MAGI) (available at http://www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO-13-006.pdf).

The purpose of this further guidance is to advise you of the implications of the Windsor decision for populations such as the elderly and people with disabilities whose eligibility for Medicaid is not determined on the basis of MAGI methodologies.

As explained in more detail below, the marriage recognition policy announced in our September 2013 guidance also will apply to non-MAGI populations. Thus, for populations whose Medicaid eligibility is determined using Supplemental Security Income (SSI) methodologies (but who are not necessarily eligible for SSI), while we believe that it is appropriate to recognize same-sex marriages that were celebrated in accordance with the laws of any state, territory, or foreign jurisdiction in which they took place, in view of the unique federal-state relationship that characterizes the Medicaid and CHIP programs, states may apply their own laws in deciding whether a couple is lawfully married.

However, in most states, Medicaid eligibility is still mandatory for all SSI recipients, including those in same-sex marriages, as explained more fully later in this guidance. This policy applies for eligibility purposes as well as for other purposes in the administration of the Medicaid program, such as spousal impoverishment, post-eligibility treatment-of-income, asset transfers, and estate recovery rules to the extent such rules can be applied under the state's laws. Once a state elects its marriage recognition policy, that election shall apply consistently across the program (i.e., for both eligibility and post-eligibility purposes). However, as noted below, states have flexibility under previously announced policy to apply undue hardship waivers for all Medicaid recipients, regardless of sexual orientation, with respect to the application of liens, transfers of assets, and estate recovery rules.

Background

The Affordable Care Act created an eligibility framework designed to maximize consistency in income determinations among Medicaid, CHIP, and Marketplace plans in order to maximize coverage of individuals eligible for coverage through federal health care programs. Therefore, CMS considered such consistency when articulating our post-Windsor marriage recognition policies. Following the Windsor decision, the Internal Revenue Service (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 premium tax credit (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 same-sex couples 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 lives 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. Subsequently, CCIIO Marketplace guidance (available at: http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/marketplace-guidance-on-irs-2013-17.pdf), clarified that eligibility determinations by a Marketplace with respect to advance premium tax credits (APTCs) and cost-sharing reductions (CSRs) 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. Thus, Marketplace rules will treat same-sex spouses in the same manner as opposite-sex spouses and, therefore, eligibility rules with respect to advance payments of the APTC and CSR will do the same.

In our September 27, 2013 guidance we explained that, in view of the unique federal-state relationship that characterizes the Medicaid and CHIP programs, we interpreted section 1902(e)(14)(G) of the Social Security Act (the Act), which incorporates section 36B(d)(2) of the Internal Revenue Code, 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, even though both the IRS and the Marketplace have 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. That is, CMS is permitting states and territories to adopt a different same-sex marriage recognition policy than the IRS and the Marketplace if their laws do not recognize same-sex marriages. Under this approach, with respect to Medicaid and CHIP eligibility determinations for populations whose income is determined on the basis of MAGI, 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.

As described in more detail below, we are now applying the same guidance to an individual whose financial eligibility for Medicaid is not determined using MAGI rules but rather is based on the methodologies applied by the Social Security Administration (SSA) in determining eligibility for SSI.

Non-MAGI Based Eligibility Determinations

Longstanding CMS policy has permitted states to define marriage in accordance with state law for purposes of determining financial eligibility and the extent of benefits for aged, blind and disabled populations. Under the Windsor decision, states also have the authority to recognize same-sex marriages valid in the jurisdiction where the marriage was entered into. Therefore, CMS is issuing this guidance to affirm that state Medicaid agencies will have the same discretion in determining eligibility of individuals in same-sex marriages whose eligibility is based on SSI methodologies as they do for similarly situated individuals whose eligibility is based on MAGI, as expressed in our September 27, 2013 letter. Thus, the approach described in our September 27, 2013 guidance applies to non-MAGI as well as MAGI populations. For both MAGI and non-MAGI populations, while we believe that it is appropriate to recognize same-sex marriages that were celebrated in accordance with the laws of any state, territory, or foreign jurisdiction, in view of the unique federal-state relationship that characterizes the Medicaid and CHIP programs, states may apply their own laws in deciding whether a couple is lawfully married. However, as detailed below, in states in which Medicaid eligibility is directly tied to receipt of SSI, Medicaid eligibility remains mandatory for *all* SSI recipients, including any who are in same-sex marriages and are deemed married in their SSI eligibility determinations based on SSI's post-Windsor policy.[1]

As we explained in our previous guidance, 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, such as 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).

[1] SSA's initial post-Windsor guidance instructs SSA field offices to treat individuals in a same-sex marriage as married for SSI eligibility purposes if they are legally married under the laws of the state where the SSI claimant and his or her same-sex spouse have their permanent home. In one situation – when an SSI claimant or the SSI claimant's same-sex spouse is receiving Title II spousal benefits based on the other spouse's earnings record – SSI's guidance also requires that an SSI claimant in a same-sex marriage be treated as married for SSI eligibility purposes even if the individual and his or her spouse are living in a state that does not afford legal recognition to such marriages. The SSA's Policy Operations Manual System (POMS) guidance, GN 00210.800 Same-Sex Marriages - Supplemental Security Income, published on January 9, 2014, is available at: https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210800. SSA has not yet provided the entirety of its post-Windsor guidance, and it has instructed field offices to hold claims, appeals, and post-eligibility actions for situations not covered by its instructions until it publishes additional instructions in its POMS.

In general, under the Medicaid statute, for purposes of determining Medicaid eligibility for aged, blind and disabled individuals, states are to apply SSI income and resource methodologies, consistent with sections 1902(a)(17) and 1902(r)(2) of the Act. Except as these issues relate to determining eligibility for SSI itself, however, states have generally been permitted to make their own determinations about family composition and marital relationships that differ from the relevant SSI rules. *See, e.g.*, Memorandum from Director, Center for Medicaid and State Operations, to Regional Administrator, *Re: Medicaid Eligibility – Policy Governing Family Size in Determining Eligibility for Qualified Medicaid Beneficiaries and Specified Low Income Beneficiaries* (Oct. 2, 1997, available at: https://www.medicaid.gov/sites/default/files/2019-12/medicaid-eligibilty-memo.pdf); State Medicaid Manual § 3260.1 (defining "spouse" for purpose of spousal impoverishment rules as follows:
"Person legally married to another under state law. *Depending on State law, this definition may be more restrictive than that used under the SSI program which uses a definition of couples that is very close to the definition of 'common law marriage' which is no longer recognized in most states*." (Emphasis provided.)). Consistent with that approach, this guidance clarifies that states may adopt a definition of "spouse" for purposes of Medicaid determinations that is based on the laws of the state in which the same-sex couple resides and is applying for or receiving Medicaid, and may, in addition, recognize marriages valid in the jurisdiction of celebration regardless of whether such marriages are generally recognized under state law.

However, it should be noted that, 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 and so-called criteria states – Medicaid eligibility remains mandatory for *all* SSI recipients, including any who are in same-sex marriages and are deemed married in their SSI eligibility determinations based on SSI's post-Windsor policy. Additionally, so-called 209(b) states, which are not required to extend Medicaid to SSI recipients but must exclude SSI payments from an applicant's countable income, must continue to exclude such payments in the income-eligibility determinations of applicants seeking eligibility on the basis of being aged, blind, or disabled, regardless of whether the applicant was deemed by SSA to be married by application of SSA's post-Windsor policy in the determination of his or her SSI eligibility. However, if the Medicaid applicant in a same-sex marriage in a 209(b) state is an SSI recipient and was deemed married in the individual's SSI determination, the state may nevertheless make its own determination of the individual's marital status in determining such individual's Medicaid eligibility, consistent with the discretion described above.

Although the approach described here affirms that states have choice in defining their marriage recognition policy for non-MAGI as well as MAGI populations, as SSA issues further policy, we will examine whether it has implications for SSI-related populations and will provide additional guidance as needed.

Other "Spousal" Relationships in Medicaid

To promote efficient administration of the Medicaid program, this guidance will apply to other instances in which states must determine spousal relationships, such as spousal impoverishment, post-eligibility treatment-of-income, asset transfers, and estate recovery rules. While states have flexibility to decide whether or not to recognize same-sex marriages, we note that if a state treats a couple as married for eligibility purposes, the state must treat the couple as married for post-eligibility purposes as well to the extent it is possible in light of the state's treatment of the

couple under state law. However, this guidance is not intended to in any way alter the guidance we provided states in our June 10, 2011 guidance to State Medicaid Directors (available at http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SMD11-006.pdf) detailing the state plan flexibility available to states to recognize an undue hardship for all Medicaid recipients, regardless of sexual orientation, with respect to the application of liens, transfers of assets, and estate recovery rules. In other words, a state may opt not to recognize a same sex marriage but nonetheless apply certain protections on the grounds that to do otherwise would impose an undue hardship.

With respect to recognition of same-sex marital relationships for purposes of the provision of home and community-based services (HCBS) benefits, we note that this guidance applies to any provisions of the statute or regulations related to waivers under 1915(c), state plan home and community-based services under 1915(i), Community First Choice benefits under 1915(k), or home and community-based services provided under 1115 demonstrations, that reference spouses or family members. States with questions about how this guidance would apply in the administration of their HCBS programs can consult with CMS staff.

Finally, for some types of Medicaid providers, the Medicare conditions of participation are applicable. Compliance with these conditions of participation, even when reviewed by state survey agencies, must be assessed using Medicare policies with respect to recognition of same-sex marital relationships.

Civil Unions and Domestic Partnerships

As we noted, in our September 27, 2013 guidance, 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. That said, where a state 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 Gene Coffey at 410-786-2234 (gene.coffey@cms.hhs.gov), or your SOTA team lead.

Sincerely,

/s/

Cindy Mann
Director

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