

***CMCS Informational Bulletin***

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Center for Medicaid and CHIP Services

**SUBJECT: Sunset of Section 2404 of the Affordable Care Act, Relating to the Spousal Impoverishment Rules for Certain Home and Community-Based Services Applicants and Recipients**

The purpose of this CMCS Informational Bulletin is to provide information to state Medicaid agencies on the impact of the sunset of section 2404 of the Affordable Care Act (“Protection for Recipients of Home and Community-Based Services Against Spousal Impoverishment”). Section 2404 of the Affordable Care Act (ACA) mandated that, for the five year period beginning January 1, 2014, states apply the rules of section 1924 of the Social Security Act (the Act) to married individuals seeking Medicaid coverage of home and community-based services (HCBS) under several authorities. This provision will expire on December 31, 2018.

**Background**

Section 1924 of the Act requires the use of special financial eligibility rules, generally referred to as the “spousal impoverishment” rules, for certain married Medicaid applicants and beneficiaries who need or receive long-term services and supports (LTSS). The spousal impoverishment rules apply to married individuals who meet the definition of an “institutionalized spouse” in section 1924(h)(1) of the Act during eligibility determinations, redeterminations and when calculating the post-eligibility treatment of income.

The definition of an “institutionalized spouse” in section 1924(h)(1) of the Act includes all married individuals actually in institutions, and, at state option, married individuals in the optional eligibility group for people who generally are not otherwise eligible for Medicaid, but who have an institutional level of need and meet the coverage and targeting requirements of an approved 1915(c) waiver. This group is referred to as the “217” group, after its regulatory citation at 42 C.F.R. §435.217. In other words, states historically have been required to apply spousal impoverishment rules to married institutionalized applicants and recipients, and had the option to apply those rules to HCBS applicants and recipients in the 217 group. States that chose to apply this option to the underlying determination of eligibility for the 217 group had a second choice as to whether or not to treat married HCBS recipients in the 217 group as institutionalized for purposes the post-eligibility treatment of income (PETI) rules.

Section 2404 of the ACA temporarily modified the definition of an “institutionalized spouse.” Specifically, it substituted, for the five-year period beginning January 1, 2014, the definition of an institutionalized spouse in section 1924(h)(1) of the Act with a definition that includes, in

addition to all married individuals living in institutions, all married individuals who are eligible for medical assistance for HCBS authorized under subsection (c), (i), or (k) of section 1915, or a comparable package of HCBS under section 1115 of the Act. Under this revised definition, states have been required to apply the spousal impoverishment eligibility and, for the 217 group, the PETI rules in section 1924 of the Act to all married individuals who are eligible for HCBS under these authorities. CMS issued guidance to states on the implementation of section 2404 of the ACA (“Affordable Care Act’s Amendments to the Spousal Impoverishment Statute,” State Medicaid Director Letter #15-001 ACA #32) (SMDL #15-001).

The five-year effective period of section 2404 of the ACA will expire on December 31, 2018. If section 2404 of the ACA were to be extended past December 31, 2018, without other modification of its terms, states should continue to follow the guidance provided in SMDL #15-001. If section 2404 of the ACA is extended past December 31, 2018, but with a modification of its terms, CMS will provide guidance to states on the new terms. If section 2404 is not extended, however, the definition of an institutionalized spouse in section 1924(h)(1) would return to the status quo ante, in which the spousal impoverishment rules will be limited to married individuals in medical institutions and, at state option, married individuals seeking eligibility in the 217 group. Below we provide further information on the impact of the sunset of section 2404 of the ACA.

### **Eligibility Determinations**

Beginning January 1, 2019, states will return to applying the standard financial eligibility rules in determining eligibility for married individuals no longer treated as an “institutionalized spouse.” The reversion to the standard eligibility rules will apply both to new married applicants seeking coverage of HCBS as well as to current beneficiaries who are either receiving HCBS or on a waiting list to receive HCBS under a section 1915(c) waiver.<sup>1</sup> Specifically, effective January 1, 2019, states will need to take the following actions with respect to all married individuals receiving or seeking HCBS who are no longer treated as an “institutionalized spouse” under section 1924 of the Act:

- (1) Redetermine all impacted individuals’ eligibility without applying the spousal impoverishment rules, consistent with regulations at 42 CFR 435.916;
- (2) Recalculate PETI for all individuals in the 217 group in states that do not elect to apply the spousal impoverishment PETI rules after December 31, 2018 (see below for more information); and
- (3) Stop applying the spousal impoverishment rules to new married applicants no longer included in the definition of institutionalized spouse.

All married individuals who have met the definition of an “institutionalized spouse” based exclusively on their eligibility for 1915(i) or (k) services would no longer be included in the

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<sup>1</sup> States should of course continue screening for HCBS-related needs where having such need is an underlying eligibility requirement, such as for the 217 eligibility group and the eligibility group described at 42 C.F.R. §435.219 (“Individuals receiving State plan home and community-based service”), or where they may have operationalized the screening of HCBS needs during Medicaid eligibility determinations. But states will not have a responsibility to determine HCBS-related needs that is connected to section 2404 of the ACA, if its terms expire.

definition. Additionally, married individuals who have met the definition of an “institutionalized spouse” based on their eligibility for 1915(c) services but who were enrolled in eligibility groups other than the 217 group would also be excluded from the definition. Married individuals receiving or seeking HCBS through either 1115 waivers or the 217 group in 1915(c) waivers may or may not continue to be included in the definition of “institutionalized spouse” once section 2404 of the ACA expires, depending on the election made by the state discussed below.

### **State Election for Spouses Receiving or Seeking Coverage of HCBS in a Section 1915(c) Waiver Under the 217 Group**

When section 2404 of the ACA expires, states will again have the option to include, or not to include, in the definition of an “institutionalized spouse,” married individuals eligible or seeking eligibility under the 217 group. The state’s election will determine whether all married individuals receiving or seeking HCBS under the 217 group who currently are treated as an institutionalized spouse will be impacted by the expiration of section 2404 of the ACA, or whether married individuals who are applying or eligible for coverage under the 217 group will be exempt from the change. States that elect to include married individuals seeking eligibility under the 217 group in the definition of “institutionalized spouse” for purposes of applying the spousal impoverishment rules in determining their financial eligibility also will need to decide whether or not to treat married individuals enrolled in the 217 group as institutionalized for purposes of the PETI rules.

Since section 2404 of the ACA went into effect, CMS has asked states to indicate in their 1915(c) waiver applications and renewals whether or not they intended to apply the spousal impoverishment rules in determining eligibility for the 217 group if section 2404 were to expire, and, if so, whether they intended to apply the spousal impoverishment PETI rules to married individuals in the 217 group as well. States should verify the elections they previously made in their 1915(c) waivers. States wanting to modify their election may do so by submitting a waiver amendment.

### **Extension of spousal impoverishment protections for other HCBS recipients through section 1115 demonstration authority**

States that wish to continue application of the spousal impoverishment rules to married individuals eligible for HCBS under a section 1915(c) waiver, but who are not covered under the 217 group, and/or to married individuals eligible for HCBS authorized under section 1915(i) or (k) of the Act, can apply for a section 1115 demonstration project, or to amend an existing demonstration project, to do so. States can request section 1115 expenditure authority to continue Medicaid coverage for some or all of these affected individuals who would otherwise not be eligible. As with all section 1115 demonstration projects, CMS will work with the state to ensure that the demonstration is budget neutral.

### **Provision of HCBS under existing section 1115 demonstration projects**

The expiration of section 2404 of the ACA similarly may impact married individuals receiving HCBS under a section 1115 demonstration project in a state. States should check the terms of their section 1115 waivers to determine whether the spousal impoverishment rules will continue

to apply to married individuals receiving HCBS under those waivers. States may request an amendment to their demonstration project if desired.

### **Technical Assistance**

CMS is available for further technical assistance on this matter. If you have any questions about the spousal impoverishment rules, please contact Gene Coffey at 410-786-2234, or [Gene.Coffey@cms.hhs.gov](mailto:Gene.Coffey@cms.hhs.gov). States interested in pursuing section 1115 authority to extend application of the spousal impoverishment rules should contact Judith Cash at [Judith.Cash@cms.hhs.gov](mailto:Judith.Cash@cms.hhs.gov). CMS will work with interested states to expedite approval of the needed waiver authority.