

## MORE WINDSOR GUIDANCE FROM CMS ON SAME SEX SPOUSES AND MEDICAID

One-year after the Supreme Court's landmark decision in United States v. Windsor,<sup>1</sup> the Centers for Medicare and Medicaid Services (CMS) continues to release guidance on same-sex marriages and Medicare and Medicaid. CMS recently issued a letter to state Medicaid Directors<sup>2</sup> with guidance on the implication of the decision for non-MAGI Medicaid populations.<sup>3</sup> The guidance gives states the discretion to apply either the IRS' marriage recognition policy, which recognizes any marriage that is valid in the jurisdiction of celebration, or the state's own marriage recognition law when determining whether a couple is lawfully married for purposes of Medicaid eligibility. The guidance is consistent with CMS policy that the agency had previously announced for MAGI Medicaid financial determinations.<sup>4</sup>

States will be revising their Medicaid policies in light of the CMS guidance. The guidance also assists same-sex couples and their advocate in understanding how marriage can either positively or negatively affect their ability to access Medicaid benefits.<sup>5</sup>

### **Guidance to State Medicaid Agencies**

In determining financial eligibility for non-MAGI Medicaid, a state Medicaid agency has the option to follow the IRS policy (the "place of celebration" rule) that recognizes same-sex marriages that are valid in the jurisdiction where the marriage was celebrated, even if they would not be recognized in the state where the couple resides.

The guidance, however, notes the "unique federal-state relationship" that characterizes Medicaid, and also gives states that do not recognize same-sex marriage the option of applying the more restrictive state law to non-MAGI Medicaid determinations.

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<sup>1</sup> United States v. Windsor, 570 U.S. , 133 S. Ct. 2675 (2013).

<sup>2</sup> State Medicaid Director Letter #14-005, available at [www.medicaid.gov/Federal-Policy-Guidance/Downloads/SMD-14-005.pdf](http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/SMD-14-005.pdf).

<sup>3</sup> Non-MAGI Medicaid generally encompasses individuals being determined eligible for Medicaid under the aged, blind and disabled eligibility category, as well as individuals being evaluated for an eligibility category that covers long-term services and supports needs not covered under MAGI-eligibility. MAGI (modified adjusted gross income) is the basis for determining both Medicaid and CHIP eligibility for children, pregnant women, parents and adults enrolled in the new eligibility group created by the Affordable Care Act.

<sup>4</sup> See State Health Official Letter # 13-006 (Sept. 27, 2013), available at <http://www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO-13-006.pdf>.

<sup>5</sup> In Medicaid, the impact of marriage recognition can depend on the couple's income and the distribution of that income between spouses. This contrasts with the impact of marriage recognition on Medicare benefits, which is more frequently positive. For information on post-Windsor Medicare policy, see <http://blog.sageusa.org/blog/2014/06/medicare-the-windsor-decision-where-do-we-stand-.html>.

### **Special Guidance Regarding Individuals Who Qualify for SSI**

The guidance also discusses specific policy for individuals whose Medicaid eligibility is linked to their receipt of Supplemental Security Insurance (SSI). CMS clarifies how its policy will work in three types of Medicaid states: Section 1643 states,<sup>6</sup> “criteria” states,<sup>7</sup> and 209(b) states.<sup>8</sup>

**1634 States:** The thirty-three Section 1634 states, including the District of Columbia, delegate their Medicaid eligibility determination for SSI recipients to the Social Security Administration. Here, any individual who qualifies for SSI is eligible for and automatically receives Medicaid.

- Guidance: 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.

**“Criteria” States:** The seven “criteria” states use SSI *criteria* to determine financial eligibility for Medicaid; however, the state Medicaid agency makes the eligibility determination, based on the SSI criteria.

- Guidance: 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.

**209(b) States:** The eleven Section 209(b) states are not required to extend Medicaid to SSI recipients and may use more restrictive methodology than SSI. They are required to exclude SSI payments from an applicant’s income determination.

- Guidance: These states must continue to exclude SSI 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. The state may, however, makes its own determination of the individual’s marital status in determining Medicaid eligibility.

### **Application to post-eligibility determinations**

States are required to apply their Medicaid marriage recognition policy consistently to other spousal relationships in Medicaid including spousal impoverishment, post-eligibility treatment of income, asset transfers, and estate recovery rules. CMS reminded states, however, that even if they do not recognize same-sex marriages, they can still extend protections to same-sex spouses under the state plan

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<sup>6</sup> Alabama, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>7</sup> Alaska, Idaho, Kansas, Nebraska, Nevada, Oregon, Utah, and the Northern Mariana Islands

<sup>8</sup> Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, and Virginia.

flexibility for undue hardship discussed in a 2011 State Medicaid Director letter.<sup>9</sup> CMS further clarified that the guidance and the requirement for consistency apply to references to spouses or family members in waivers under 1915(c), state plan home and community-based services under 1915(i), Community First Choice benefits under 1915(k), and home and community-based services provided under 1115 demonstrations.

### **Civil Unions and Domestic Partnerships**

While the IRS and Medicaid and CHIP statutes do not recognize civil unions or domestic partnerships, if a state recognizes either as marriage, then the state may recognize these unions for purposes of Medicaid eligibility.

### **Timing**

CMS urged the states to implement the new guidance as soon as reasonably practicable.

### **Learn More!**

This guidance is one part of the federal government's implementation of the Windsor decision. To better understand what recent guidance from the Social Security Administration and CMS means for same-sex couples, save the date for upcoming NSCLC webinars. On July 22 and 23, NSCLC will host a two-part Windsor implementation series. Services and Advocacy for GLBT Elders (SAGE) will co-present on the July 23 webinar on Medicare and Medicaid. For background information on Social Security, Medicare, Medicaid and the demise of DOMA, see NSCLC's presentation, <http://www.nsclc.org/wp-content/uploads/2013/08/Demise-of-DOMA-8.20.13.pdf>.

### **Save the Date!**

On July 23 at 2:00 p.m. Eastern, attorneys from NSCLC and Services and Advocacy for GLBT Elders (SAGE) will present a webinar on *OneYear After DOMA: An Update on Medicare and Medicaid and the Impact for Same Sex Couples*.

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<sup>9</sup> State Medicaid Director Letter #11-0006, available at <http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SMD11-006.pdf>.