

**CMS Proposes Conflicting Requirements on Long-Term Care Facilities:
Agency Punts on Regulatory Clarity Leaving Patient Protection in the Cold**

In the Matter of)
Medicare and Medicaid Program;)
Revisions to Certain Patient's Rights;) Docket Number: CMS-3302-P
Conditions of Participation and)
Conditions for Coverage)
Proposed Rule)

January 2015

The Center for Regulatory Effectiveness

1601 Connecticut Avenue, NW

Washington, DC 20009

202.265.2383

www.TheCRE.com

**CMS Proposes Conflicting Requirements on Long-Term Care Facilities:
Agency Punts on Regulatory Clarity Leaving Patient Protection in the Cold**

Conclusion

CMS's proposed rule,¹ if finalized as drafted, would create a conflict for Long-Term Care ("LTC") facility operators. The conflict would be between CMS's proposed new regulatory requirements for LTC facilities and the exercise by some state Medicaid programs of their CMS-granted authority that permits the programs to not recognize same-sex marriages.

At issue is whether or not CMS is requiring LTC facility operators in states that do not recognize same-sex marriages to provide Medicaid's federal "spousal impoverishment"² financial protections to the same-sex spouses of beneficiaries.

CMS needs to resolve the conflict by clearly stating whether or not it is requiring LTC facility operators to provide Medicaid's spousal impoverishment protections to the same-sex spouses of beneficiaries residing in states that do not recognize same-sex marriages.

The Conflict between CMS's Proposed Rule and CMS's Medicaid Guidance Letters

CMS's proposed additional language to 42 CFR § 483.10(a)(4) states, in part, that

The same-sex spouse of a resident must be afforded treatment equal to that afforded to an opposite-sex spouse if the marriage was valid in the jurisdiction in which it was celebrated.

It appears from CMS's proposal that LTC facility operators would be required to provide residents with same-sex spouses the same spousal impoverishment financial protections that are available to residents with opposite-sex spouses even if the LTC facility is located in a state which does not recognize same-sex marriages.

CMS's proposal, however, suggests that its final rule may exclude the spousal impoverishment protections from the federal spousal rights that same-sex spouses are permitted to enjoy irrespective of where in the US they reside. Specifically, the proposed rule notes that the agency issued two *Windsor*-related guidance letters to state health officials regarding "the implications of the *Windsor* decision for state flexibility regarding the recognition of same-sex marriages in determining eligibility for Medicaid and the Children's Health Insurance Program (CHIP)." These CMS guidance letters explicitly grant permission to state Medicaid programs to ignore the marriage licenses of same-sex couples.

¹ 79 Fed. Reg. 73873-8.

² 42 U.S.C. 1396r-5 - Treatment of income and resources for certain institutionalized spouses.

Center for Regulatory Effectiveness

For example, the CMS guidance letter of May 30, 2014 “affirms that states have choice in defining their marriage recognition policy for non-MAGI as well as MAGI populations...”³ Similarly, the CMS guidance letter also explains that “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...”⁴

CMS’s proposed rule, therefore, is simultaneously

- 1) Guaranteeing that same-sex spouses be treated the same as opposite-sex spouses, and
- 2) Voiding the guarantee by permitting states which do not recognize same-sex marriages to define away the marriages of gay Medicaid beneficiaries thus potentially dissolving the right of their spouses to receive Medicaid’s spousal impoverishment protections.

The CMS proposed rule attempts to explain the contradiction by stating “that Medicaid eligibility and CoP/CfC policies addressed in this proposed rule are administered by different statutes and are administered by state Medicaid agencies and CMS, respectively....” The note that different statutes are administered by different authorities does nothing to resolve the contradiction since CMS created the contradiction by giving state Medicaid agencies permission to define away the marriage licenses of same-sex married couples.

Medicaid’s spousal impoverishment protections make a substantial financial difference to beneficiaries and their families. A Department of Health and Human Services policy brief explains that, prior to the creation of the spousal impoverishment protections in 1988, the spouses of Medicaid beneficiaries “typically elderly women with little or no income of their own -- faced poverty and a radical reduction in their standard of living before their spouses living in a nursing home could qualify for Medicaid.”⁵

Because (1) the financial protection provided by the spousal impoverishment protections for the spouses of LTC facility residents is significant and (2) an increasing number of gay couples are getting married, CMS’s decision on whether LTC facility operators are required to provide the spousal impoverishment protections to Medicaid beneficiaries whose marriages are not recognized in their state of residence has material financial implications for the LTC facilities and, where applicable, the investors in those facilities, as well as for the beneficiaries and their families.

Unless LTC facility operators are clearly instructed by CMS as to whether or not they are required to provide the spousal impoverishment protections to the spouses of all Medicaid LTC facility residents, irrespective of whether a state Medicaid program recognizes same-sex marriages, the issue would likely be decided in court with LTC facility operators at risk of litigation no matter what course of action they take.

³ CMS Letter to State Health Officials, SMD# 14-005, May 30, 2014, p. 4, found at <http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/SMD-14-005.pdf>.

⁴ Id.

⁵ HHS, “Spouses of Medicaid Long-Term Care Recipients,” April 2005, <http://aspe.hhs.gov/daltcp/reports/spouses.htm>.

Center for Regulatory Effectiveness

In short, CMS's contradictory instructions on same-sex marriage recognition, requiring LTC facility operators to honor all marriages valid in the jurisdiction they were celebrated in while simultaneously permitting state Medicaid programs to deny that same-sex marriages exist, creates confusion and financial uncertainty for current and future Medicaid beneficiaries and their families and threatens to expose LTC facility operators to wasteful litigation which would drive up the cost of long-term care for everyone.

Background/About CRE

The conflict created by between CMS's post-*Windsor* marriage equality regulatory policy and CMS's guidance to state Medicaid programs was first reported by *Inside Health Policy* in October 2013.⁶ Subsequently, the Center for Regulatory Effectiveness, a regulatory watchdog established by former senior career officials from the White House Office of Management and Budget,⁷ filed a Request for Correction under the Data Quality Act seeking correction of CMS's contradictory policies.⁸ Although CRE received a letter from a senior CMS official about the filing,⁹ the agency has not processed and responded to the Request for Correction.

⁶ John Wilkerson, "CMS Applies Same-Sex Couple Policy to Exchanges, But Not Medicaid," *Inside Health Policy*, October 2, 2013.

⁷ For more information about CRE, please see http://www.thecre.com/oira/?page_id=8.

⁸ See, CRE Request for Correction, May 26, 2014, <http://thecre.com/pdf/MarriageEquality.MedicaidRequestForCorrection.26May2014.pdf>

⁹ See, Cynthia Mann letter to CRE of June 17, 2014, [http://thecre.com/pdf/Cynthia Mann Letter to CRE 6-17-2014.pdf](http://thecre.com/pdf/Cynthia%20Mann%20Letter%20to%20CRE%206-17-2014.pdf).