

The Centers for Medicare & Medicaid Services Releases Proposed Rule Recognizing Same-Sex Marriages

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On December 12, 2014, Centers for Medicare & Medicaid Services (“CMS”) published a proposed rule in the Federal Register that amends federal regulations by revising certain definitions, conditions of participation for providers and conditions for coverage for suppliers to ensure same-sex spouses in legally valid marriages are recognized and granted equal rights in Medicare and Medicaid participating facilities.

CMS issued this proposed rule to ensure consistency with a 2013 Supreme Court case (*U.S. v. Windsor*, 570 U.S. 12 (2013)), which held Section 3 of the Defense of Marriage Act (“DOMA”) was unconstitutional (the “DOMA decision”). The ruling specifically struck down DOMA’s definition of marriage, which stated the word “marriage” in any Act of Congress, ruling, regulation or interpretation of any federal bureau or agency meant only a legal union between one man and one woman as husband and wife and the word “spouse” could only refer to an individual of the opposite sex who was a husband or wife.

Based on the DOMA decision, CMS conducted a thorough review of its Code of Federal Regulations for all Medicare and Medicaid provider and supplier types with a specific review of terms pertaining to spouses and/or spousal relationships that rely on state law for purposes of defining these terms. Based on its review, CMS concluded (i) numerous regulatory provisions currently support the denial of federal rights and privileges to same-sex spouses; (ii) failure to implement this proposed rule will be inconsistent with the DOMA decision; and (iii) failure to implement this proposed rule will not afford equal treatment to same-sex spouses in participating facilities whose marriages are lawfully recognized.

The proposed rule seeks to resolve these inequalities and apply to Medicare and Medicaid participating providers and suppliers where current regulations defer to state law in situations that implicate, or may implicate, a marital relationship by use of the terms “representative,” “spouse,” or any other similar term that may involve a spousal relationship. The new regulations proposed in the rule, if adopted, will govern whether or not the marriage is legally recognized in the state of residence where the individuals reside or whether the jurisdiction in which the health care provider or supplier is located recognizes same-sex marriages.

The proposed rule revises the following regulatory provisions for providers and suppliers:

- Ambulatory Surgical Centers. Conditions for Coverage – Patient Rights (42 C.F.R. §416.50).
- Hospice Care. Definitions (42 C.F.R. §418.3); Conditions of

Participation – Patient Rights (42 C.F.R. §52(b)(3)).

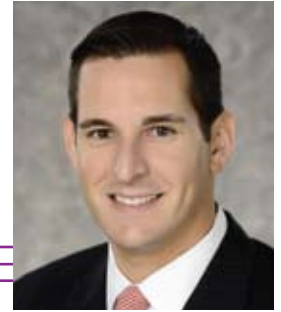
- Hospitals. Conditions of Participation – Patient Rights (42 C.F.R. §482.13); Conditions of Participation – Laboratory Services (42 C.F.R. §482.27).
- Long-Term Care (“LTC”) Facilities. Resident Rights (42 C.F.R. §483.10); Preadmission Screening and Resident Review Evaluation Criteria (42 C.F.R. §483.128).
- Community Mental Health Centers. Definitions (42 C.F.R. §485.902); Conditions of Participation (42 C.F.R. §485.910(b)(3)).

All of the new regulations proposed in the rule revise and/or add language requiring same-sex marriages that are valid in the jurisdiction in which they were celebrated be granted equal treatment to that afforded to opposite-sex marriages.

The proposed rule was open for public comment until February 10, 2015. CMS will review timely submitted comments before deciding whether to adopt the proposed rule.

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