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**Date:** September 27, 2013

**From:** Gary Cohen, CMS Deputy Administrator and Director  
Center for Consumer Information and Insurance Oversight

**Subject:** Guidance on Internal Revenue Ruling 2013-17 and Eligibility for Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions

**Purpose and Scope**

On June 26, 2013, in United States v. Windsor, 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013), the Supreme Court held section 3 of the Defense of Marriage Act (DOMA), which prohibited federal recognition of same-sex marriages, unconstitutional. In light of this holding, on August 29, 2013, the Internal Revenue Service (IRS) issued Internal Revenue Ruling 2013-17 (Ruling) (available at <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf>). The Ruling provides that:

(1) For Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term “marriage” includes such a marriage between individuals of the same sex.

(2) For Federal tax purposes, the Internal Revenue Service adopts a general rule recognizing a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages.

(3) For Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” do not include individuals (whether of the opposite sex or the same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state, and the term “marriage” does not include such formal relationships.

The Ruling further provides that, “[f]or purposes of this ruling, the term ‘state’ means any domestic or foreign jurisdiction having the legal authority to sanction marriages.”

This guidance is intended to advise Health Insurance Marketplaces (also known as Affordable Insurance Exchanges) on the impact of the Ruling with respect to eligibility for advance payments of the premium tax credit and cost-sharing reductions.

### **Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions**

Starting in 2014, advance payments of the premium tax credit and cost-sharing reductions will help individuals and families lower the costs of their monthly premiums and out-of-pocket costs for health insurance coverage purchased through a Marketplace. While premium tax credits are available following the close of the tax year, Marketplaces determine eligibility for advance payments of the premium tax credit and cost-sharing reductions such that they are available to individuals and families during the relevant coverage year. Eligibility determinations by a Marketplace for advance payments of the premium tax credit and cost-sharing reductions are tied by statute to eligibility rules for the premium tax credit provided in section 36B of the Internal Revenue Code (Code), which the IRS has implemented through regulations and guidance.<sup>1</sup>

In light of the Ruling, the eligibility rules with respect to premium tax credits under Code section 36B treat same-sex spouses in the same manner as opposite-sex spouses. As such, a premium tax credit is available to an otherwise eligible taxpayer with a spouse, including an otherwise eligible taxpayer with a same-sex spouse regardless of where the taxpayer resides, only if the taxpayer and his or her spouse file a joint return for the taxable year.<sup>2</sup> Thus, for both premium tax credits and advance payments of the premium tax credit and cost-sharing reductions, the family size of the taxpayer must include his or her spouse, and, therefore, the household income of the taxpayer must include the modified adjusted gross income of his or her spouse.<sup>3</sup>

We note that, because the eligibility rules with respect to premium tax credits and cost-sharing reductions treat same-sex spouses in the same manner as opposite-sex spouses, and, as set forth in concurrent CMS guidance, states may opt not to recognize same-sex marriages for purposes of Medicaid and the Children's Health Insurance Program (CHIP), a narrow benefit eligibility gap could arise in states that do not recognize same-sex marriages for purposes of Medicaid and CHIP. We are currently considering this issue. As part of that consideration, we will consult with the states.

### **Implementation**

The Federally-facilitated Marketplace (FFM) will be prepared to implement the Ruling as it pertains to advance payments of the premium tax credit and cost-sharing reductions starting on October 1, 2013, when open enrollment begins, with respect to married couples that attest that they expect to file a joint tax return for the 2014 tax year.

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<sup>1</sup> §§ 1412(a)(1) and 1402(f)(1) of the Affordable Care Act. Under section 1412(a)(1) of the Affordable Care Act, advance payments of the premium tax credit are made on behalf of eligible individuals with respect to "the premium tax credit allowable under section 36B of the [Code]." And, under section 1402(f)(1) of the Affordable Care Act, any term used in the cost-sharing reduction provision that is also used in Code section 36B "shall have the same meaning given such term by such section."

<sup>2</sup> § 36B(c)(1)(C) of the Code.

<sup>3</sup> §§ 36B(d)(1) and 36B(d)(2)(A)(ii) of the Code.

We recognize that State-based Marketplaces may be unable to adjust systems to reflect the Ruling and this guidance by October 1, 2013. State-based Marketplaces must implement this guidance as soon as reasonably practicable, and must implement interim workarounds where reasonably practicable.

We appreciate the ongoing partnership with State-based Marketplaces to ensure the effective implementation of the Affordable Care Act. We will provide State-based Marketplaces with any additional guidance regarding the Supreme Court's decision and the Marketplaces. We note that CMS is contemporaneously issuing guidance regarding the impact of the Supreme Court's decision on Medicaid and the Children's Health Insurance Program. Please feel free to contact your CCIIO State Officer with any questions regarding this guidance.