

## INITIAL STATEMENT OF REASONS

Title XIX of the Social Security Act (SSA) provides for the federal Medicaid program, administered in California by the California Department of Health Care Services (Department), as the California Medical Assistance (“Medi-Cal”) Program. The Medi-Cal program provides qualified low-income persons (primarily families with children and the aged, blind, or disabled) with health care services. Under the authority of federal and state statutes and regulations, each state adopts regulations to: 1) establish eligibility standards; 2) determine the type, amount, duration, and scope of services; 3) set the rate of payment for services; and 4) administer the program.

The Estate Recovery (ER) program was established in 1981 as a part of the Medi-Cal program. The ER program is one of several controls adopted by Congress and the Legislature to mitigate Medi-Cal costs. State law was amended in 1994 to respond to federal legislation (Omnibus Budget Reconciliation Act of 1993), which changed individual state ER programs from permissive to mandatory, requiring recovery from the estates of deceased Medi-Cal beneficiaries. Title 42 United States Code (USC) section 1396p and Welfare and Institutions (W&I) Code section 14009.5 require the Department to seek recovery from the estates of deceased Medi-Cal beneficiaries, or from any recipient of the decedent’s property by distribution or survival, for services the decedent received on or after age 55, including nursing facility services, home and community-based services, and related hospital and prescription drug services. The Department’s ER claim is limited to the value of the decedent’s assets or the amount of Medi-Cal paid services received by the decedent, whichever is less. Funds recovered through the ER program are returned to federal and state general funds, which finance the provision of benefits to eligible Medi-Cal beneficiaries.

In accordance with W&I Code section 14009.5(b) and Title 42 USC section 1396p(b), the ER program may not claim under the following circumstances. These exemptions/deferrals include:

- During the lifetime of a surviving spouse. However, upon the death of the surviving spouse, the Department shall make a claim against the surviving spouse’s estate, or against any recipient of property from the surviving spouse obtained by distribution or survival, for either the amount paid by Medi-Cal for services to the predeceased spouse or the value of the predeceased spouse’s assets received by the surviving spouse, whichever is less.
- When the deceased beneficiary is survived by a child under age 21 or by a child of any age who is blind or disabled within the meaning of Title 42 USC section 1382c.
- When the decedent was under age 55 when Medi-Cal services were received, unless the decedent was an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution.

Pursuant to California Code of Regulations (CCR), title 22, section 50963, a dependent, heir, or survivor may apply for a waiver of an ER claim if he or she believes that

payment of the claim would result in a substantial hardship. The heir(s) may choose to pay an ER claim using the assets of the estate or choose to apply for a substantial hardship waiver. The Department initiates collection activities in those cases where an heir does not meet the specified exemptions or substantial hardship criteria and/or where all opportunities for appeal have been exhausted. The ER program works with the heir(s) to facilitate repayment, and often delays collection until assets have been liquidated, or arranges a repayment agreement and/or voluntary lien to allow repayment of an ER claim over a specified period of time, based on the heir's ability to pay.

Federal and state statutes, published court decisions, as described below, and Departmental policy modifications necessitate changes to CCR, title 22, Chapter 2.5, Third Party Liability, which includes ER provisions. By embodying the most current ER rules, the revisions to Chapter 2.5 will benefit those impacted by the ER program.

Effective January 2010, Section 115 of the Medicare Improvements for Patients and Providers Act (MIPPA) of 2008 (Pub. L. No. 110-275), requires states to exempt from ER Medicare cost-sharing benefits paid under Medicare Savings Programs (MSPs) per Title 42 USC section 1396p(b)(1)(B)(ii), for certain dual eligible groups age 55 and over.

Assembly Bill 205 (Chapter 421, Statutes of 2003) enacted Sections 297.5 and 299.2 of the Family Code, which adopted the California Domestic Partner Rights and Responsibilities Act (DPA) of 2003. The DPA affords a registered domestic partner (RDP) and two persons of the same sex having a validly formed legal union in another jurisdiction, other than a marriage, the same rights, protections, benefits, responsibilities, obligations, and duties that California law affords to a married man and woman. The intent of the DPA is to move California closer to securing the guarantee of inalienable rights, including liberty, privacy, and equality, for all persons as provided by Sections 1 and 7 of Article I of the California Constitution. Ensuring equal protection of the law is also consistent with the intent of Senate Bill 54, described below.

Senate Bill 54 (Chapter 625, Statutes of 2009) amended Section 308 of the Family Code to afford two persons of the same sex who marry outside California the same rights, protections, benefits, responsibilities, obligations, and duties that California law affords to a married man and woman.

On June 16, 2008, the California Supreme court, in *In re Marriage Cases* (2008) 43 Cal.4th 757, legalized same-sex marriage. On November 4, 2008, voters approved Proposition 8, reversing the June 16, 2008 decision, making same-sex marriage illegal in California. Proposition 8 took effect on November 5, 2008. However, the California Supreme Court in *Strauss vs. Horton* (2009) 46 Cal.4th 364 affirmed the validity of same-sex marriages created in this state from June 16, 2008 through November 4, 2008. On February 7, 2012, the [federal] Ninth Circuit Court of Appeals in the case of *Perry vs. Brown* (9<sup>th</sup> Cir. 2013) 725 F.3d 1140, ruled Proposition 8 to be unconstitutional. The case was appealed to the U.S. Supreme Court (*Hollingsworth vs. Perry* (2013) 570 U.S. 12-144). On June 26, 2013, the U.S. Supreme Court ruled that the proponents of Proposition 8 had no right to appeal and therefore, upheld the original

ruling finding Proposition 8 to be unconstitutional and same-sex marriage legal in California.

Section 3 of the *Defense of Marriage Act (DOMA)*, which defined “marriage” and “spouse” as excluding same-sex partners, was ruled to be unconstitutional in *United States vs. Windsor* (2013) 570 U.S. 12-307. The U.S. Supreme Court found that section 3 of *DOMA* violated due process and equal protection principles applicable to the federal government.

The principles set forth in these family law statutes and court decisions apply when both partners are alive; thus, the same principles apply under ER processes when one partner dies.

The proposed ER regulations will benefit persons in validly formed partnerships by preventing discrimination and promoting fairness and equality, while creating transparency by requiring the submission of documentation to prove identity and relationship status. Based on current law, the proposed ER regulations authorize deferral of the claim for surviving spouses of both opposite-sex and same-sex marriages, as well as surviving persons of registered domestic partnerships and same-sex legal unions, other than marriage.

W&I Code sections 10725 and 14124.5 authorize the Director of the Department to adopt, amend, or repeal regulations as necessary to carry out the purposes and intent of the statutes governing the Medi-Cal program. CCR, title 22, sections 50960 – 50966 were originally adopted to implement, interpret, and make specific ER activities for the Medi-Cal program in accordance with state and federal law. This regulatory action proposes to amend CCR, title 22, sections 50961, 50962, and 50963. These sections specifically address ER activities related to estate claims and substantial hardship criteria.

In amending these ER regulations, Department staff collaborated with subject matter experts and other state and federal entities. As a result of those efforts, the proposed amendments were designed to enhance the efficiency, effectiveness, and equity of the ER program, and to provide the public with a clear understanding of ER processes.

The specific purpose and rationale for the proposed amendments are as follows:

#### **Amend Section 50961. Estate Claims.**

In subsection (c), “In-Home Support Services” was corrected to read “In-Home Supportive Services” as a non-substantive change. A comma is included under subsection (c) after the term “co-payments” as a non-substantive change for correct punctuation.

In addition, subsection (c) specifies that Medi-Cal payments related to MSPs are excluded from the Department’s ER claim for certain dual eligible groups. Section

2602(f) of the Patient Protection and Affordable Care Act (PPACA) of 2010 (Pub. L. No. 111-148) defines dual eligible groups, which includes Qualified Medicare Beneficiaries (QMBs), Specified Low-Income Medicare Beneficiaries (SLMBs), Qualifying Individuals, Qualified Disabled and Working Individuals, QMB Plus (QMB with full Medicaid benefits), and SLMB Plus (SLMB with full Medicaid benefits). Effective January 2010, Section 115 of the MIPPA of 2008 (Pub. L. No 110-275), requires states to exempt Medicare cost-sharing benefits paid under MSPs from ER claims, per Title 42 USC section 1396p(b)(1)(B)(ii), for certain dual eligible groups age 55 and over. Benefits not related to MSPs are subject to ER. Amendments proposed to subsection (c) are consistent with State Plan Amendment TN No. 10-009, Section 4.17, page 53a-1, (effective October 1, 2010).

Subsection (d) makes non-substantive amendments including adding the phrase “An exemption from or deferral of.” The portion of this phrase “or deferral of” is included to clarify that an exemption from a claim is only until the death of a surviving spouse, as specified under Subsection (d)(2). The phrase “shall provide an exemption of the claim” is replaced with “claim exists.” Subsection (d) clarifies when an exemption exists and is consistent with provisions proposed under Sections 50963(b) and (c).

Subsection (d)(2) is amended to require a surviving spouse to provide the Department with proof of identity and proof of marriage to the deceased spouse at the time of death. This proof is to be submitted to, and approved by, the Department; therefore, a cross-reference to Section 50966(a), which specifies the Department’s address, is included for convenience. The spouse’s name, social security number, and date of birth must be provided to verify identity and to prevent fraud against the Medi-Cal program. The requirement to submit proof/verification of identity under this subsection is consistent with provisions proposed under Sections 50963(b)(2) and (c)(2), as described below.

Subsection (d)(4) makes a non-substantive amendment, changing the “F” in “Federal” to lower case because this term is not part of the “Title” of the Social Security Act.

Proposed subsection (f) specifies that the Department shall defer collection of an entire ER claim during the lifetime of a surviving person, as specified in subsections (b) and (c) of Section 50963, who qualifies for a waiver due to a substantial hardship. A cross-reference to these subsections is provided for convenience. While W&I Code section 14009.5(b)(2)(A) affords a surviving spouse an exemption from/deferral of the Department’s ER claim during the lifetime of the surviving spouse, the language in subsection (f) of Section 50961 clearly establishes an equivalent ER claim deferral for a RDP and a survivor of a same-sex legal union, other than a marriage.

Federal law does not recognize RDPs as a legal union and therefore, does not afford the surviving partner the same rights, protections, benefits, responsibilities, obligations, and duties that California law affords to a surviving spouse. Thus, subsection (f) and the provisions referenced in Sections 50963(b) and (c) are based on state law, including equal protection of the law as guaranteed by the California Constitution, and on published court decisions, which are further described under Section 50963, below.

These laws and court decisions apply when both partners of these unions are alive; likewise, the provisions would also apply to ER processes when one partner dies.

Because federal law does not recognize RDPs, proposed subsection (f) and Sections 50963(b) and (c) instead reflect guidance offered by the Centers for Medicare & Medicaid Services (CMS) regarding state options and flexibilities in the application of Medicaid liens and ER for same-sex partners, as specified in State Medicaid Director Letters (SMDLs), including SMDL #06-018 dated July 27, 2006 (<http://www.cms.gov/smdl/downloads/SMD072706b.pdf>) and SMDL #11-006 dated June 10, 2011 (<http://www.theconsumervoice.org/sites/default/files/advocate/action-center/Same-Sex-Partners-SMD-6-10-11-2.pdf>).

Proposed subsection (f) clarifies that the Department shall assert its claim, in accordance with Section 50961, upon the death of the surviving person who had qualified for a substantial hardship waiver pursuant to Sections 50963(b) and (c). This requirement is consistent with existing provisions in W&I Code section 14009.5(b)(2)(A) applicable to surviving spouses.

States are required by Title 42 USC section 1396p(b)(3)(A) to establish procedures for waiving an ER claim when it would create an undue hardship for the deceased Medicaid recipient's heirs. CMS provided guidance on undue hardship determinations in the State Medicaid Manual (SMM), Part 3--Eligibility, Section 3810, page 3-9-7 (<http://www.cms.gov/transmittals/downloads/R75SM3.pdf>), dated January 11, 2001, and by SMDL #06-018 dated July 27, 2006, emphasizing that states have considerable flexibility in determining when an undue hardship (referred to in Section 50963 as a "substantial hardship") exists. Under this federal allowance of discretion and in compliance with state law, including the California Constitution and published court decisions, proposed subsection (f), with the cross-reference to Sections 50963(b) and (c), utilizes the substantial hardship process to establish equivalent claim deferral protection for a RDP and a survivor of a same-sex legal union, other than a marriage.

Subsection (g) includes a non-substantive amendment replacing the phrase "an estate" with the term "its" for consistency with the use of this term throughout the regulations.

Proposed non-substantive amendments re-designate previous subsections (f) through (l) to (g) through (m).

### **Amend Section 50962. Notification.**

Subsection (c)(3) updates the effective date of the Application for Hardship Waiver, form DHCS 6195, from (8/07) to (5-11) due to proposed amendments.

The "Application for Hardship Waiver, form (5-11)," herein referred to as "DHCS 6195 (5-11)," is part of the Notice of Medi-Cal Claim for Reimbursement Package, which is provided by the Department to a Medi-Cal beneficiary's heir(s), designated power of attorney or informant. The DHCS 6195 (5-11) is the means by which an applicant can

demonstrate that enforcement of the Department's claim would result in a substantial hardship. The purpose of the application is to ascertain whether the applicant meets established regulatory criteria to qualify for a waiver of his or her proportionate share of the Department's claim. As described above, federal law and the SMM require the Department, as the single state agency designated to administer the Medi-Cal program, to establish procedures and standards for waiving ER when enforcement of a claim would cause an undue hardship. The information requested in this form provides for a financial assessment of the applicant that is used to determine whether any hardship criteria apply and to prevent fraud against the Medi-Cal program. The DHCS 6195 (5-11) does not apply to a request for substantial hardship pursuant to Sections 50963(b) or (c).

As a result of the structure and appearance of the form, the existing (8/07) version is repealed in its entirety and is replaced with a newly adopted (5-11) version. The only amendments on the (5-11) version that differ from the (8/07) version are described below. All other provisions remain the same.

The following amendments are based on the California DPA of 2003 (Fam. Code, §§ 297.5, 299.2), which requires that RDPs be afforded the same rights, protections, benefits, responsibilities, obligations, and duties that California law affords to a married man and woman. Family Code section 299.2 specifies that a legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, shall be recognized as a valid domestic partnership in California. Thus, the amendments to the form only reflect RDPs since this phrase represents both types of unions in California.

- Page 1 of 6, B. APPLICANT'S NAME (First, Middle, Last), Lines 5 and 7 — The phrase “/Registered Domestic Partner's” is included following the term “Spouse” and the apostrophe on “Spouse” is deleted.
- Page 3 of 6, E. APPLICANT'S MONTHLY INCOME — The phrase “/Registered Domestic Partner's” is included before the phrase “Net Pay.”
- Minor non-substantive amendments are also included for spacing consistency, parallel construction, and accurate grammar.

#### **Amend Section 50963. Substantial Hardship Criteria.**

Subsection (a) updates the effective date of the DHCS 6195 form (8/07) to (5-11), for the reasons described under Section 50962, above.

Also, under subsection (a), the term “criteria” replaces the term “factors” because “criteria” is used in Title 42 USC section 1396p(b)(3)(A), which requires states to establish procedures for waiving an ER claim based upon undue hardship criteria. The Merriam Webster Dictionary located at <http://www.merriam-webster.com/dictionary/criteria>, defines the term “criteria” as “a standard on which a judgment or decision may be based,” and better captures the intent of subsections (a)(1) through (6).

As mentioned above regarding Section 50961(f), and as further specified in subsections (b) and (c) of Section 50963, below, surviving persons of RDPs and same-sex legal unions, other than a marriage, who qualify for a substantial hardship waiver are afforded an ER claim deferral equivalent to the claim exemption/deferral afforded to a surviving spouse as specified in Section 50961(d)(2). Similarly, at the death of a surviving person described in subsections (b) and (c) of Section 50963, the Department shall, consistent with existing provisions in W&I Code section 14009.5(b)(2)(A) applicable to surviving spouses, assert its claim against the estate of the surviving person, in accordance with Sections 50961(a), (b) and (c).

Proposed subsection (b) is added to specify that a substantial hardship exists during the lifetime of a surviving RDP (collection of the entire claim will be deferred), upon submission/approval of specified documentation. This provision is in accordance with Family Code section 297.5, Sections 1 and 7 of Article I of the California Constitution, and published court decisions entitled *In re Marriage Cases* (2008) 43 Cal.4th 757 and *Hollingsworth vs. Perry* (2013) 570 U.S 12-144, which afford a RDP the same rights, protections, benefits, responsibilities, obligations, and duties that California law affords to a married man and woman.

Subsection (b) specifies that deferral of the claim is contingent upon submission to, and approval by, the Department of proof of identity and the validity of the RDP relationship at the time of death. Since this proof is to be submitted to the Department, a cross-reference to Section 50966(a), which specifies the Department's address, is included for convenience. The RDP relationship must be verified through a copy of the "Declaration of Domestic Partnership" document filed with the Secretary of State, which would prove the legality of the relationship and the right to request a deferral of the ER claim. This document can be found at <http://www.sos.ca.gov/dpreistry/>. The RDP's name, social security number, and date of birth must be provided to verify identity and to prevent fraud against the Medi-Cal program. The requirement to submit proof/verification of identity under this subsection is consistent with the provisions proposed under Section 50961(d)(2).

Proposed subsection (c) is added to specify that, upon submission/approval of specified documentation, a substantial hardship exists (collection of the entire claim will be deferred) during the lifetime of a surviving person of a legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction and is recognized as a valid domestic partnership in this state. This provision is in accordance with Family Code sections 297.5 and 299.2, Sections 1 and 7 of Article I of the California Constitution, and published court decisions in *In re Marriage Cases* (2008) 43 Cal.4th 757 and *Hollingsworth vs. Perry* (2013) 570 U.S. 12-144, which afford these individuals the same rights, protections, benefits, responsibilities, obligations, and duties that California law affords to a married man and woman.

Subsection (c) specifies that deferral of the claim is contingent upon submission to, and approval by, the Department of proof of identity and the validity of the legal union at the time of death. Since this proof is to be submitted to the Department, a cross-reference

to Section 50966(a), which specifies the Department's address, is included for convenience. The legal union must be verified through a copy of a filed document that is substantially equivalent to the "Declaration of Domestic Partnership." This document would prove the legality of the relationship and the right to request a deferral of the claim. The name, social security number, and date of birth of the surviving partner of the legal union must be provided to verify identity and to prevent fraud against the Medi-Cal program. The requirement to submit proof/verification of identity under this subsection is consistent with the provisions proposed under Section 50961(d)(2).

In addition, under Section 50963, proposed non-substantive amendments have been made to re-designate previous subsections (b) through (f) to (d) through (h).

Subsection (f), as re-designated, includes an amendment to remove the phrase "within 90 days of the application's submission." The hardship waiver application process can be lengthy and requires review by several state entities. The reason for eliminating this language is to allow sufficient time to process a hardship waiver application. Deletion of this phrase causes no harm to applicants because the Department cannot pursue collection of the applicant's proportionate share of a claim while determination of a hardship waiver application is pending, as specified in the newly re-designated Section 50961(g).

#### Materials Relied Upon

1. State Medicaid Director Letter (SMDL) No. 06-018  
CMS published SMDL No. 06-018, dated July 27, 2006, which clarified the implementation of the Deficit Reduction Act (DRA) of 2005 (Pub.L.109-171), including several rules relating to Medi-Cal eligibility and benefits. Sections 6011 and 6016 of the DRA addressed undue hardship, clarifying that states have significant flexibility in determining whether an undue hardship exists.
2. SMDL No. 11-006  
CMS provided SMDL No. 11-006, dated June 10, 2011, addressing "existing options and flexibilities" regarding the application of ER to RDPs.. CMS believes that states may adopt their own criteria regarding the treatment of RDPs.
3. State Medicaid Manual (SMM), Section 3810, p. 3-9-7  
SMM, Part 3--Eligibility, Section 3810, page 3-9-7, dated January 11, 2001, provides guidance on criteria for an undue hardship and instructs that states are to describe the criteria in their State Plan.
4. State Plan Amendment (SPA) TN No. 10-009, Section 4.17, page 53a-1  
SPA TN No. 10-009, Section 4.17, page 53a-1 (effective October 1, 2010), provides guidance for adjustments or recoveries pertaining to "Limitations on ER- Medicare Cost-Sharing".

## STATEMENTS OF DETERMINATION

### A. ALTERNATIVES CONSIDERED

The Department has determined that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which this action is proposed, or would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. ER provisions are found in CCR, title 22, Chapter 2.5, Third Party Liability. Using this regulatory proposal to make amendments to the ER process is the most effective and convenient way to provide current information directly to those impacted by the ER program.

### B. LOCAL MANDATE DETERMINATION

The Department has determined that the proposed regulations would not impose a mandate on local agencies or school districts, nor any reimbursement cost required by Part 7 (commencing with section 17500) of Division 4 of the Government Code.

### C. ECONOMIC IMPACT ANALYSIS/ASSESSMENT

The Department has made an initial determination that the proposed regulations would not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

The Department has determined that the proposed regulations would not significantly affect the following:

1. The creation or elimination of jobs within the State of California.
2. The creation of new businesses or the elimination of existing businesses within the State of California.
3. The expansion of businesses currently doing business within the State of California.

#### Impact on Jobs and Businesses

Medi-Cal is a public health program that provides health care services for low-income individuals who choose to enroll and participate in the program. This proposed regulatory action supports the ER program, which is a mechanism to control Medi-Cal costs. The ER process includes recoupment of funds from the estates of deceased Medi-Cal beneficiaries or from recipients of the decedent's property. Funds recovered through the ER program are equally distributed between the state and federal government to help subsidize the Medi-Cal program. The proposed regulations affect only those individuals who are subject to the ER process. Therefore, these regulations would have no economic impact to jobs or businesses in the State of California.

### Benefits of the Proposed Regulation

The Department has determined that the proposed regulations would not specifically affect worker safety or the state's environment. However, the regulatory proposal will benefit the health and welfare of California residents by supporting the continuation of the Medi-Cal program and the vital health care services that are offered to qualified individuals, which is in part achievable due to California's ER program. This regulatory proposal ensures the proper and efficient administration of the ER program, in accordance with federal and state law. The proposal promotes fairness and equality to all persons, including persons in validly formed partnerships, while creating transparency by requiring, as part of a substantial hardship waiver request, the submission of documentation to prove identification and relationship status.

### D. EFFECT ON SMALL BUSINESSES

The Department has determined that the proposed regulations would not affect small businesses because small businesses are not required to comply with or enforce the proposed regulations, nor would any benefit or detriment be derived from enforcement.

### E. HOUSING COSTS DETERMINATION

The Department has determined that the proposed regulations would have no impact on housing costs.