Q & A
Deference to Proposed Federal Regulations[1]

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Q: Our office is involved in a dispute with the state over its implementation of the Medicaid program. We have found support for our position in rules recently proposed by the Centers for Medicare and Medicaid Services (CMS) or its parent agency, the U.S. Department of Health and Human Services. These rules have not yet been published as a final regulation. If we decide to file a lawsuit to compel the state to comply with the federal Medicaid Act, will the court give the agency interpretations any deference?

A: The court should give these guidance documents some deference, depending on their circumstances, but it will likely not treat them as having the force of law.

Background on levels of deference

The Supreme Court established standards for according deference to various types of federal agency interpretations of federal statutes. In *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Court articulated a two-step inquiry for judicial review of federal agency regulations. First, the court must determine whether Congress has spoken to the specific issue. If so, the congressional statement will displace administrative interpretation. However, if Congress has not spoken to the point or if its statements are ambiguous, the court must defer to the administrative interpretation as long as it is "reasonable." *Id.* at 844-45; *see also* "The Chevron Two-

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Step," YouTube. 4 May 2014. Web. 15 May 2014 (video explaining *Chevron* deference through song and dance).

Subsequently, the Court took steps to narrow *Chevron*'s application. For example, in *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), the Court refused to apply *Chevron* to an agency opinion letter, finding that "[i]nterpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Id.* at 587. *Christensen* held these types of agency interpretations are "entitled to respect," but only to the extent they have the power to persuade. *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). This type of deference is called "*Skidmore* deference" based on the 1944 decision in *Skidmore v. Swift & Co*., which said the weight to be accorded to an administrative interpretation in a particular case "will depend upon the thoroughness evident in its consideration, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140.

Most recently, in *U.S. v. Mead Corporation*, the Court discussed the circumstances for applying *Chevron* or *Skidmore* deference. 533 U.S. 218 (2001). At issue in *Mead* was a "tariff ruling letter" authorized by regulation but not subjected to formal rulemaking. Tariff ruling letters also are formally binding only upon the particular entity to which they are issued. The United States Customs Service argued that the letter at issue was entitled to *Chevron* deference. The eight-member majority rejected this position, holding instead that *Chevron* deference is limited to agency interpretations where "it appears that Congress delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation was promulgated in the exercise of that authority." *Id.* at 226-27. Applying this standard, the Court found no evidence of congressional intent for the agency's tariff ruling letter to carry *Chevron*'s "force of law." *Id.* at 231-36. Instead, the Court determined the tariff ruling was entitled to "some deference" under the "practical criteria" of *Skidmore*. *Id.* at 235.

In most cases, courts have given *Chevron* deference to finally adopted Medicaid regulations. *See, e.g., Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs*., 444 F.3d 991 (8th Cir. 2006); *Rolland v. Romney,* 318 F.3d 42 (1st Cir. 2003). Generally, however, the interpretations found in CMS's sub-regulatory guidance receive less deferential treatment. In the case of CMS' State Medicaid Manual, courts have mostly found *Skidmore* deference appropriate. *See, e.g., Katie A. v. Los Angeles County*, 481 F.3d 1150 (9th Cir. 2007) (*Skidmore* deference for State Medicaid Manual*)*; *S.D. ex rel. Dickson v. Hood,* 391 F.3d 581 (5th Cir. 2004) (same); *Indiana Family and Social Services Admin. v. Thompson*, 286 F.3d 476 (7th Cir. 2002) (same). The results in cases involving Dear State Medicaid Director letters have been more mixed, but consistently require some degree of deference. *See, e.g., Caremark, Inc. v. Goetz*, 480

F.3d 779 (6th Cir. 2007) *(Skidmore* deference for Dear State Medicaid Director letter); *Rabin v. Wilson-Coker*, 362 F.3d 190, 197 (2d Cir. 2004) (Dear State Medicaid Director letters are entitled to "some significant measure of deference"). Most courts agree that CMS approval of Medicaid State Plan Amendments are due *Chevron* deference but generally give approval of Medicaid waivers less deference. *See, e.g., West Virginia v. Thompson*, 475 F.3d 204 (4th Cir. 2007) (*Chevron* deference for state plan approval); *Visiting Nurse Ass'n of North Shore, Inc. v. Bullen,* 93 F.3d 997 (1st Cir. 1996) (same); *Harris v. Olszewski,* 442 F.3d 456 (6th Cir. 2006) (same); *Bryson v. Shumway*, 308 F.3d 79 (1st Cir. 2002) (*Skidmore* deference for approval of waiver).

Deference due proposed regulations

The Supreme Court first considered the level of deference owed to proposed regulations in the *Blumer case*. *Wisconsin Dept. of Health and Family Servs. v. Blumer*, 534 U.S. 473 (2002). There, the Secretary of Health & Human Services had issued proposed regulations that "preliminarily determined" that the Medicaid spousal impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988 gave states the authority to determine whether to look first at income or resources. *Id.* at 497. A Medicaid applicant challenged Wisconsin's "income first" rule, as inconsistent with the statute. *Id.* at 478. The Court, after determining that the statute was ambiguous, took note that the Secretary had proposed rules that would explicitly permit states to adopt an "income first" rule like Wisconsin's. *Id.* at 497. Noting that the Secretary has "significant expertise" and "broad authority" when it comes to Medicaid, the Court found that the Secretary's proposed rule "warrant[ed] respectful consideration," and upheld Wisconsin's rule. *Id.* (*citing Thomas Jefferson Univ*, 512 U. S.; *Schweiker v. Gray Panthers*, 453 U. S. 34 (1981)).

The *Blumer* decision resolved a Circuit split by overruling *sub silencio* a line of cases involving proposed IRS regulations that held that "proposed regulations are entitled to no deference until final." *Matter of Appletree Markets, Inc.,* 19 F.3d 969, 973 (5th Cir. 1994); *see also, e.g., LeCroy Research Systems Corp. v. United States*, 751 F.2d 123, 127 (2d Cir. 1984); *Tedori v. United States*, 211 F.3d 488, 492 (9th Cir. 2000); *Oakley v. City of Longmont*, 890 F.2d 1128, 1130 (10th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990). That line of cases stood in contrast with the approaches taken by other Circuits, which took a more deferential view of proposed IRS regulations. *See e.g., Gaskell v. Harvard Co-op. Soc*., 3 F.3d 495, 500 (1st Cir. 1993) (proposed IRS regulations are not authoritative, but are persuasive); *Lutheran Hosp. of Indiana, Inc. v. Bus. Men's Assur. Co. of Am*., 51 F.3d 1308, 1313 (7th Cir. 1995) (applying proposed IRS regulations to interpret statutory intent); *Lincoln Gen. Hosp. v. Blue Cross/Blue Shield of Nebraska*, 963 F.2d 1136, 1142 (8th Cir. 1992) (finding proposed IRS regulations to represent "the regular practice" of the agency).

The *Blumer* decision seems, in some respects, to be a product of its particular circumstances. There, the proposed rule was published on September 7, 2001 with comments due in November 2001, but the Secretary delayed issuing final regulations because he had not received all comments on the proposal due to "disruptions of the Nation's postal system in October and November 2001." *Blumer*, 534 U.S at 485 n.6. Moreover, CMS had consistently interpreted the statute with the policy put forth in the proposed rule in a Regional Dear State Medicaid Director Letter. *Id.* at 497. But the Court reached the same result six years later when considering rules proposed by DOJ involving immigration enforcement. *Dada v. Mukasey*, 554 U.S. 1, 20 (2008) ("Although not binding in the present case, the DOJ's proposed interpretation of the statutory and regulatory scheme . . . warrants respectful consideration.") (citations omitted).

While neither *Blumer* nor *Dada* invokes *Skidmore* deference per se, both cases cite *United States v. Mead Corp*., 533 U.S. 218 (2001), a case that applied *Skidmore* deference to a tariff classification ruling by the United States Customs Service. *Id.* at 221. Thus, an agency interpretation contained in a proposed rule "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance. . . . depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944).

Post-*Blumer* and *Dada* cases on deference to proposed regulations

Following *Blumer* and *Dada*, few courts have considered how much deference to give a proposed Medicaid rule. In one recent case, the District Court for the Western District of New York considered a proposed rule defining the scope of "home health services" to be provided in Medicaid pursuant to 42 U.S.C. 1396a(a)(10)(D). *Davis v. Shah*, No.12-CV-6134 CJS, 2013 WL 6451176 at *6 (W.D.N.Y. Dec. 9, 2013). The court there determined that the proposed rule warranted respectful consideration, but since neither party in the case argued against deferring to the proposed rule, the court did not analyze the reasons why deference was appropriate in that case and simply applied the rule. *Id.* at *10. In another recent case, the Middle District of Florida determined that a proposed rule that purportedly allowed Medicaid providers to refer patients to business entities in which they had a financial interest was not due deference insofar as it "conflicts with the plain language of the statute conferring legislative authority." *United States v. All Children's Health Sys., Inc.,* No. 8:11-CV-01687-T-27, 2013 WL 6054803 (M.D. Fla. Nov. 15, 2013). One Court, the District Court for the District of Arizona, accorded the highest level of deference—*Chevron* deference—to a CMS interpretation of the Medicaid rate statute when it was set out in *both* a proposed rule *and* several Supreme Court briefs. *Arizona Hosp. & Healthcare Ass'n v. Betlach*, 865 F. Supp. 2d 984, 992 (D. Ariz. 2012).

Cases involving deference to proposed regulations outside of the Medicaid context have also mostly found *Skidmore* deference appropriate. *See, e.g., S. Utah Wilderness Alliance v. Bureau of Land Mgmt*., 425 F.3d 735, 760 (10th Cir. 2005) (giving *Skidmore* deference to proposed BLM regulations); *Markham v. Salina Concrete Products, Inc.*, No. 10-1104-JTM, 2010 WL 5093769 at *3 n.2 (D. Kan. Dec. 8, 2010) (noting that proposed EEOC regulations, though not binding on the court, "still provide guidance to interpreting the ADA amendments"). *But see Powell v. Dallas Morning News L.P.,* 776 F. Supp. 2d 240, 263 (N.D. Tex. 2011) *aff'd* 486 F. App'x 469 (5th Cir. 2012) (holding that proposed EEOC regulations were due no deference until they were adopted as final, and in the alternative applying the proposed regulations to the case at bar). In these cases, courts have deferred to a proposed rule when the particular statutory provision that the proposed rule interprets is ambiguous, or that the statute delegates authority to the agency to fill gaps. *See United States v. Mead Corp*., 533 U.S. 218, 228-29 (2001); *ADVO, Inc. v. C.I.R*., No. 17247-10, 2013 WL 5762924 at *13 (T.C. Oct. 24, 2013) (where Internal Revenue Code delegated authority to Secretary of Treasury to issue regulations on subject at hand, deference to language in the preamble to a proposed Treasury rule is appropriate); *cf.* If the proposed regulation passes this first hurdle, court have given deference to proposed rules according "to the degree of the agency's care, its consistency, . . . and relative expertness, and to the persuasiveness of the agency's position." *Id.* at 228 (citations omitted); *Blumer,* 534 U.S at 497.

Applying *Skidmore* deference to proposed Medicaid rules

Deference to proposed rules will often be warranted in the Medicaid context for the same reasons that courts defer to other agency guidance, since Medicaid is a "complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citations omitted); *Blumer,* 534 U.S at 497.

To persuade a court to defer to a proposed Medicaid rule, plaintiffs will need to convince the court that the proposed rule is a valid and persuasive interpretation of statute. *See, e.g., Lopes v. Dep't of Soc. Servs.*, 696 F.3d 180, 188 (2d Cir. 2012) (deference to interpretation embodied in sub-regulatory guidance warranted when CMS's "interpretation coheres with the policy goals of Medicaid"); *Maryland Dep't of Health & Mental Hygiene v. Centers For Medicare & Medicaid Servs.,* 542 F.3d 424, 436 (4th Cir. 2008) (deference to SPA denial due where "CMS's traditional interpretation . . . is reasonable in light of Congress' expressed policy . . . as well as the clear purpose of the Medicaid statute"); *Caremark, Inc. v. Goetz*, 480 F.3d 779, 787 (6th Cir. 2007) (giving deference when CMS's interpretation set forth in a fact sheet was "highly persuasive and entirely consistent with federal . . . statutory and regulatory Medicaid frameworks"); *Indiana Family*, 286 F.3d at 482 (deference to interpretation in State Medicaid Manual is

appropriate where CMS's interpretation is consistent with "[c]ommon sense"). *Cf. S. Utah Wilderness Alliance*, 425 F.3d at 760 (little deference due to proposed BLM regulations when they "were blocked by a vote of Congress").

Plaintiffs will also be more likely to convince a court to defer to a proposed Medicaid rule when it has been carefully crafted by drawing on CMS's expertise in a subject particularly within its expertise. For example, in *Indiana Family*, the Seventh Circuit found that deference to CMS's interpretation of statute governing enhanced funding for certain administrative expenses related to processing Medicaid claims set out in the State Medicaid Manual was appropriate because "[t]he Secretary has a familiarity, expertise, and institutional memory concerning the intricacies of Medicaid processing systems and funding standards that we cannot rival." 286 F.3d at 482; *see also, e.g., Cmty. Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 138 (2d Cir. 2002) (holding that CMS approval of a state plan governing reimbursement procedures is owed some degree of deference, noting that "[w]e take care not lightly to disrupt the informed judgments of those who must labor daily in the minefield of often arcane policy, especially given the substantive complexities of the Medicaid statute"). *Cf. Rabin*, 362 F.3d at 198 (finding that little deference if any was appropriate for interpretation of transitional medical assistance provisions in the State Medicaid Manual when "we cannot say with confidence that CMS's interpretation came about as the result of a reasoned process[and i]n fact, CMS labels its interpretation as 'tentative'").

Finally, a court should be more likely to defer to a proposed Medicaid rule when the proposed rule is consistent with other CMS interpretations, or reflects a long-standing interpretation. Thus the Ninth Circuit refused to defer to a DOJ proposed rule purporting to interpret provisions of the ADA when "DOJ's interpretation in a notice of proposed rulemaking. . . is unpersuasive" because it conflicted with other agency interpretations of the statute. *Arizona ex rel. Goddard v. Harkins Amusement Enterprises, Inc*., 603 F.3d 666, 674 (9th Cir. 2010); *Boose v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 587 F.3d 997, 1005 (9th Cir. 2009) (holding that, where proposed DOT regulations conflict with existing regulations, "[u]ntil the Secretary formally promulgates the proposed regulations, TriMet is not required to follow them"); *S. Utah Wilderness Alliance*, 425 F.3d at 760 (little deference due to proposed BLM regulations when "the agency has shifted its position on this issue at least three times"); *Cuyahoga Metro. Hous. Auth. v. United States*, 65 Fed. Cl. 534, 551 (Fed. Cl. 2005) ("[A]ny claim to deference [to proposed HUD rules] here is severely diminished . . . because [HUD] has periodically shifted its position, employing at least three different formulations within the last twenty years."). *C.f., e.g., Sai Kwan Wong v. Doar*, 571 F.3d 247, 262 (2d Cir. 2009) (in considering State Medicaid Manual provision governing special needs trusts, noting that "[w]e give substantial weight to an agency's construction of a statute that it is charged with enforcing, particularly when the construction is contemporaneous with the

enactment of the statute, and longstanding") (citations omitted); *Cmty. Health Ctr.*, 311 F.3d at 139 (noting that, where HHS had issued letters consistent with its interpretation embodied in the State Medicaid Manual, "the apparent consistency of HHS's approach also adds weight to its position"); *Cmty. Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 798 (9th Cir. 2003) (deference to interpretation in Provider Reimbursement Manual is appropriate when "the Secretary enforced the policy to which he asks us to defer throughout the relevant period").

Conclusion

Advocates can use proposed Medicaid rules to bolster their litigation position. While courts most likely will not treat proposed rules as having the force of law, they can have significant persuasive power. Proposed rules will be most persuasive when they are promulgated pursuant to CMS's statutory authority, and when they are a reasonable interpretation of the Medicaid statute, draw on the agency's expertise, and reflect a consistently-held CMS position.