Roderick L. Bremby
Commissioner

STATE OF CONNECTICUT

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MEMORANDUM

To: Individuals Who Commented on the Proposed Regulation Regarding the Deficit Reduction Act of 2005 (Reg. # 14-01)

From: Roderick L. Bremby, Commissioner RLB
Department of Social Services
55 Farmington Avenue.
Hartford, CT 06106

Date: December 9, 2015

Re: Responses to Public Comment

Attached are the responses by the Department of Social Services (the "Department") to comments received from the public concerning the above-referenced proposed regulation. Notice of Intent for the proposed regulation was published on the Secretary of State's website on October 29, 2014.

Enclosed is a copy of the proposed regulation with revisions based on the comments received.

The Department anticipates submitting the proposed regulation to the Legislative Regulation Review Committee by March 1, 2016.

DRA COMMENTS – SUMMARY

Transfers Not Resulting in a Penalty/Return of a Transferred Asset/Start Date of the Penalty Period – 3029.10 H

COMMENT: The Department received a number of comments concerning adjusting the start date of a penalty period, instead of the end date of a penalty period, when a transferred asset is returned. Commenters claimed that the end date of the penalty period should be adjusted, not the start date. In support of their claim, commenters asserted that the proposed regulation fails to comply with, or is not authorized by, federal law; is inconsistent with letters from the Centers for Medicare and Medicaid Services ("CMS") on the subject; and improperly delays the start of the penalty period for client's applying for home care benefits.

RESPONSE: The proposed regulation accurately reflects federal and state law and comports with guidance from CMS. 42 USC 1396p(c)(1)(D)(ii) provides that, in the case of a transfer after February 8, 2006, the start date of a period of ineligibility is "the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) **based on an approved application for such care but for the application of the penalty period**" (emphasis added).

> 42 USC 1396p(c)(1)(E)(i) provides that, with respect to an institutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall be equal to --
>
> (I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(i), divided by
> (II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.

The Department interprets this language to mean that the penalty period commences as of the date that the Medicaid program would pay for the individual's long- term care services, but for the application of the penalty period. 42 USC 1396p(c)(1)(D)(ii) requires that an individual formally apply for Medicaid and be otherwise eligible for the payment of long term care services under the Medicaid program, but for the application of the penalty period.

The Department's interpretation is reasonable and is supported by CMS guidance. In a letter to State Medicaid Directors (copy attached as Exhibit A), Dennis

G. Smith, Director, CMS Baltimore, advised that "[u]nder the DRA, the start date of the penalty period is the first day of a month (or at State option the first day of the following month) in which the asset was transferred, or the date on which the individual is eligible for medical assistance under the State plan and is receiving institutionalized level of care services that, were it not for the imposition of the penalty period, would be covered by Medicaid whichever is later." (emphasis in original). (Exhibit A). (See also Letter from Richard R. McGreal, Associate Regional Administrator, CMS Boston, dated October 28, 2010 [copy attached as Exhibit B] ["The DRA enacted revisions to § 1917(c) that postponed the start date of the penalty period from the date of transfer to a later date when the individual would both be receiving long-term care services but for the imposition of the penalty period. ... The DRA adjusted the start date of the penalty period, not the start date of Medicaid eligibility."] ; Letter Richard R. McGreal, Associate Regional Administrator, CMS Boston, dated December 16, 2010 [copy attached as Exhibit C] ["The DRA postponed the start date of the penalty period from the date of transfer to a later date when the individual would both be receiving long-term care services and have become eligible for Medicaid but for the imposition of the penalty period."]).

For individuals residing in nursing facilities, the penalty commences on the date that Medicaid would otherwise pay for institutional care under an approved application for Medicaid, but for the application of the penalty. For individuals applying for home and community based services under a Medicaid waiver, the penalty commences on the date that the Department would have approved the payment of the services under an approved application, but for the application of the penalty period.

The Department's position concerning adjusting the start date of the penalty is consistent with, and support by, state law. Section 17b-261a (d)(2) of the Connecticut General Statutes provides, in relevant part, that "[i]f any transferred asset is returned to the transferor, the Department of Social Services shall adjust the penalty period to the extent permitted by federal law, **provided the ending date of the penalty period as originally determined by the department shall not change**." (emphasis added)

In sum, adjusting the start date of the penalty, and not the end date, when a transferred asset is returned is required by federal law, is supported by CMS guidance, and is mandated by state statute. The Department, therefore, does not agree to make the change requested by the commenters.

Treatment of Home/Non-Home Property -- UPM 4030.20 D.1.c. & 4030.20 E.2.

COMMENT: Per 4030.20 D.1.c., the home retains its status as an excluded asset if an individual enters a long term care facility if a sibling of the individual is living in the home, is (1) a *joint owner* of the home and (2) was residing in the home for at least one year before the individual entered the LTCF. The use of the term "joint owner" is erroneous. 4030.20 D.1.c.1 must be amended so that the language is consistent with the provisions regarding transferring home property to a sibling (42 USC 1396p(c)(2)(A)(iii) & UPM 3029.10 A.1.d.) and disallowance of the State's lien when a sibling lives in the home (42 USC 1396p(a)(2)(C)). 4030.20 D.1.c.(1) should read "has an equity interest in the home." (Attorney Spurlin)

RESPONSE: This Department agrees to make the requested change to accurately reflects the language in 42 USC 1396p(a)(2)(C), which provides that "[n]o lien may be imposed under paragraph (1)(B) on such individual's home if – . . . "a sibling of such individual (who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution)."

COMMENT: The Department received several comments that 4030.20 E.2 should exempt an individual's home equity interest in excess of $750K if a sibling of the individual lives in the home, is a joint owner of the home and resided in the home for at least one year before the individual entered a long term care facility. (Attorney Spurlin; Attorney Todisco; Attorney Boorman, CTNAELA, Attorney Fisher o/b/o Alzheimer's Assoc. CT Chapter)

RESPONSE: The Department disagrees. 42 U.S.C. 1396p(f)(1)(A), (B), provides that, "[n]otwithstanding any other provision of this subchapter and subject to subparagraphs (B) and (C) of this paragraph and paragraph (2), in determining eligibility for assistance of an individual for medical assistance with respect to nursing facility services or other long-term care services, the individual shall not be eligible for such assistance if the individual's equity interest in the individual's home" exceeds $500.000 or, at the state's election $750,000.

Paragraph (2) provides that paragraph (1) "shall not apply with respect to an individual if—

(A) the spouse of such individual, or
(B) such individual's child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI) is blind or permanently and totally disabled, or (with respect to States which are not eligible to

participate in such program) is blind or disabled as defined in section 1382c of this title, is lawfully residing in the individual's home. "

There is no exemption for a sibling of the individual who is living in the home.

Post-Eligibility Transfers Made by the Institutionalized Individual's Spouse – UPM 3029.15 E.1.c.

COMMENTS: The Department received several comments concerning the imposition of a penalty period if the spouse of an institutionalized individual transfers certain assets (proceeds of home equity loan, reverse mortgage, etc., but not the proceeds from the sale of the home should the spouse sell the home) after the individual's Medicaid eligibility is approved. The commenters asserted that the proposed regulation's treatment of the enumerated assets conflicted with Medicaid law (42 USC 1396 r-5 [c]), is administratively unworkable and impracticable, and is not required by the DRA. (Attorney Boorman, CTNAELA, Attorney Fisher o/b/o Alzheimer's Assoc. CT Chapter, Attorney Todisco, Attorney Lewendon). Commenters questioned the wisdom of penalizing transfers from the proceeds of a home equity loan while not penalizing a transfer made from a sale, and asked what abuses DSS sought to address and what DSS sought to accomplish by the proposed regulation.

Commenters noted that the proceeds from home equity loan and reverse mortgage are not the same as the home, and that DSS has never suggested that a community spouse may not sell the home, move to an apartment or assisted living facility, and at some future time make gifts which may have derived from the sale of the home. (Attorney Davis, Attorney Boorman, CTNAELA)

A commenter, conceding that letters from CMS allow states to elect to consider certain post-eligibility transfers by the community spouse, remarked that DSS is not required to follow this approach. (Attorney Boorman, CTNAELA).

Two commentators referenced a CMS letters from Ronald Preston, Associated Regional Manager, to Brian Barreira, dated April 5, 2000, (copy attached as Exhibit D) in which CMS take the position opposite to DSS. According to the commenters, DSS has not provided a sound policy reason for taking a different course, even if permitted. (Attorney Davis, Attorney Boorman)

Commenters pointed out that, in addition to the proposed regulation conflicting with 42 USC 1396 r-5 (c), in the May 7, 2009 report issued by the Legislative Commissioner's Office ("LCO") concerning the proposed regulation when it was previously submitted to the Legislative Regulations Review Committee, the LCO concluded that the proposed policy is not explicitly required by the DRA and that CMS does not require the policy. The commenters opined that the proposed regulation will force community spouses to stay in homes they cannot afford for fear that their spouse will be disqualified for transferring assets. (Attorney Stillman, Attorney Todisco, CTNAELA, Attorney Fisher o/b/o Alzheimer's Assoc. CT Chapter)

One commenter opined that the proposed would have a chilling effect on those who assumed that Congress passed the 42 USC 1396 r-5 (c) to provide some financial protection to community spouses. (Attorney Shorr)

A commenter stated that many years ago the CMS Regional Office disapproved UPM 3029.15 E.1.b. (penalizing the transfer of a home by the community spouse after the eligibility determination) based on a conflict with federal law but the policy has remained in effect. The commenter asserted that DSS should rescind 3029.15 E.1.b. so the post-eligibility transfer of the home by the community spouse is not prohibited and that 3029.15 E.1.c. is an extension of the policy prohibiting the transfer of the home. (Attorney Lewendon)

One commenter stated that assuming, for argument's sake, DSS can elect to penalize an individual whose spouse has withdrawn funds from home equity and gifted the funds to a third party, the decision whether to elect to implement the policy is a poor public policy decision. If DSS is not convinced that the policy is not a good public policy decision, the decision whether to adopt the policy should be made by the legislature and not by DSS. DSS should submit to the General Assembly proposed legislation which would give DSS the authority to adopt the proposed policy. The public should debate whether the choice is sound public policy and the elected representatives should make that decision. (Attorney Lewendon)

Three commenters stated that a cross-reference to transfers by a community spouse which do not result in a penalty is required. (Attorney Stillman, Attorney Todisco, Attorney Boorman)

RESPONSE: CMS has advised states that the transfer of home equity loan proceeds is subject to a penalty. Also, CMS has advised states that a transfer made by a community spouse, including a transfer made after the institutionalized spouse becomes eligible for Medicaid, may result in a penalty. See letter from Thomas E. Hamilton, Director, Disabled and Elderly Health Programs Group, CMS Baltimore (attached as Exhibit E).

The Department has consistently regarded the transfer of the community spouse's home as a potentially disqualifying transfer that could affect the institutionalized spouse's eligibility for Medicaid payment of long term care services. The Department's position reflects a public policy that encourages retention of the property by the community spouse. As the value of any home is equivalent to its equity, the Department's position is that it is logical to regard transfers of home equity as equivalent to transfers of the home itself. The Department's decision to elect to penalize post-eligibility the transfer of home equity loan proceeds is consistent with the Department's long-standing treatment of post-eligibility home transfers by the community spouse as a potentially disqualifying transfer.

The Department is the sole state agency designated to determine eligibility for Medicaid and other public assistance (Conn. Gen. Stat. § 17b-261b [a]). The Commissioner of Social Services is authorized to adopt regulations "as are necessary to to implement the purposes of the department as established by statute." Conn. Gen. Stat. § 17b-3 (a)(2).

Contrary to comments received, the Department's position is not contrary to federal law. 42 USC 1936r-5(c)(4) provides that, "[d]uring the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse."

> The term "resources" as used in 42 USC 1936r-5(c)(5) does not include—
>
> (A) resources excluded under subsection (a) or (d) of section 1382bof this title, and
> (B) resources that would be excluded under section 1382b (a)(2)(A) of this title but for the limitation on total value described in such section."

The home is specifically excluded in this definition of "resources," per 42 U.S.C. 1382b(a)(1).

Also, the proposed regulation is required by state law. Section 17b-261l of the Connecticut General Statutes provides, in relevant part: The Commissioner of Social Services shall amend the Medicaid state plan to require that funds derived from equity in home property through a reverse annuity mortgage loan or other home equity conversion loan are not treated as income or assets for the purpose of qualifying for benefits under the Medicaid program, provided (1) such funds are held in an account that does not contain any other funds, and (2) the Medicaid recipient does not transfer such funds to another person for less than fair market value.

Accordingly, the Department's position, as reflected in the proposed regulation, is consistent with, and not contrary to, federal law and required by state law.

COMMENT: A cross-reference to transfers by a community spouse which do not result in a penalty is required. (Attorney Stillman, Attorney Todisco, Attorney Boorman)

RESPONSE: The commenters did not explain the basis for their comment that a cross-reference was required and the Department is unaware of any such requirement.

COMMENT: The proposed regulation is not "driven at all by any part of the [DRA]." There is no requirement in federal law that DSS adopt this policy. (Attorney Lewendon)

RESPONSE: The Department does not agree with the comment. Each provision of the proposed regulations is necessary to conform the Department's policy to the requirements of both the federal Medicaid program and the Deficit Reduction Act of 2006. The Department is required by the DRA to apply the changes specifically required by the DRA effective February 8, 2006. Other changes, required by the federal Medicaid program, or to give effect to the DRA, are effective April 1, 2007.

Transfers of Assets – Transfers Attributable To Spouse – 3029.05 D.2.

COMMENT: 3029.05 D.2. uses the phrase *"or similar arrangement"* -- this phrase is too vague and should be deleted. Although the phrase appears in the United States Code (42 USC 1396p (c)(3), its purpose is to enable states to be specific about what property arrangements in that state equate to an interest held in common whereby, under state property law, the interest of the other owner can be attributed to the individual seeking eligibility. A purpose of promulgating regulations is to create the necessary practical specificity about the particular policies and procedures that will apply. DSS should either delete the term "or similar arrangement" or specifically enumerate what these "similar arrangements" are. (CTNAELA)

COMMENT: The phrase *"tenancy in common"* should be deleted because the pro-rata share of the tenant in common is a discreet interest under CT property law, and as with any other property interest, transfer of this is covered by other sections. (CTNAELA)

RESPONSE: 42 USC 1396p (c)(3) provides: "For purposes of this subsection, in the case of an asset held by an individual in common with another person or person in a joint tenancy, tenancy in common, or similar arrangement, the asset (or the affected portion of such asset) shall be considered to be transferred by such individual when any action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset. The proposed regulation follows 42 USC 1396p(c)(3).

The Department is unable to contemplate every possible property arrangement that may arise and 42 USC 1396p(c)(3) recognizes that inability. No change, therefore, will be made to the proposed regulation.

Transfer of Assets -- Compensation – 3029.30 A.2.

COMMENT: There is no requirement in federal law that there be a written "legally enforceable agreement" in existence in order for compensation received by an individual prior to the making of a transfer of assets to be counted. Oral contracts are enforceable. It is possible that services would be provided but the transfer would not occur until a later date. An individual should be able to demonstrate the existence of an oral agreement or arrangement whereby services were provided but that a transfer would not occur until a later date. This section should provide that a legally enforceable agreement may be written or oral. (Attorney Schorr, Attorney Todisco, Attorney Boorman, CTNAELA, Attorney Fisher o/b/o Alzheimer's Assoc. CT Chapter)

RESPONSE: The proposed regulation does not require that an agreement be in writing to be legally enforceable. The Department reviews the validity of all agreements, including those reportedly made orally, to determine if the agreement is legally enforceable under state law.

Treatment of Assets – Loans – 4030.40

COMMENT: 4030.40 B. should cross-reference 3029 to mirror 4030.40 A. so transfers under paragraph B. are evaluated under 3029. (Attorney Todisco; Attorney Boorman, CTNAELA)

RESPONSE: The Department agrees and will update 4030.40B to cross reference 3029.

Transfer of Assets – Purchase of Mortgage Note, Loan or Installment Contract – 3029.14 F.

COMMENT: This section was not referenced in the NOI as one of the UPM sections that was either being added or amended. (Attorney Todisco; Attorney Boorman, CTNAELA)

RESPONSE: This section was inadvertently omitted from the Notice of Intent ("NOI"). It was included in the proposed regulation that was provided to individuals who requested copies of it so people were on notice that it was included as part of the proposed regulation.

COMMENT: 3029.14 F. should be deleted because it is duplicative of the 4030.50 A.2. (Attorney Todisco)

RESPONSE: 3029.14 F. and 4030.50 A.2. are not duplicative. 3029.14 F. concerns counting as income payments derived from a mortgage note, loan, installment contractor or similar financial instrument; 4030.50 concerns treating as an asset the right to receive income from a mortgage note, loan, installment and similar instrument.

COMMENT: During negotiations with the CBA Elder Law Section and others, DSS agreed to add a cross-reference to 4030.50 at the end of this section. Section 4030.50 permits an applicant to demonstrate that the income from a mortgage note, loan, installment contract and similar financial instruments cannot be sold. The cross-reference is not included. (Attorney Boorman, CTNAELA; Attorney Fisher o/b/o Alzheimer's Assoc. CT Chapter)

RESPONSE: The Department agrees to add a cross-reference to 4030.50.

COMMENT: During negotiations with the CBA and others, DSS agreed to remove 3029.14 F. which describes the income stream from a mortgage note or similar instrument as an asset. Section 4030.50 A.3., however, references an income stream being an asset. If income from these instruments is treated as an asset, individuals will be required to attempt to sell the instruments at severely discounted prices, assuming a buyer can be found, to maintain eligibility for programs such as the home care program. Once sold, the income will not be available; assets will be depleted quicker; and individuals will have no choice but to enter a nursing home once they have exhausted their assets. (Attorney Todisco)

RESPONSE: The comment mischaracterizes 3029.14 F. The provision concerns counting as income the individual payments received from a mortgage note, loan, installment contract or similar financial instrument. Regarding the comment concerning 4030.50 A.3., although individuals are required to attempt to sell payment streams from mortgage notes, loans, installment contracts and other financial instruments, the Department evaluates purchase offers and will allow an individual to retain a payment stream if, after a cost-benefit analysis, it is fiscally prudent to allow the individual to retain the payment stream.

The Department disagrees with the comment that individuals will be required to sell the payment streams at a deeply-discounted prices. As discussed above, each purchase offer is evaluated and individuals may be allowed to retain the payment stream if the value of retaining the payment stream outweighs the value of the purchase offer. Additionally, the Department's experience is that companies that purchase income payment streams offer fair and equitable purchase prices and not deeply-discounted prices.

Transfer of Assets – Purchase of Mortgage Note, Loan, Installment Contract – 3029.14 C.1.

COMMENT: 3029.14 C.1. should be corrected to read "disbursed" instead of "dispersed." (CTNAELA)

RESPONSE: The Department will make the requested correction.

Treatment of Assets – Mortgage Notes, Loans and Installment Contracts – 4030.50 A.3.

COMMENT: There is no authority in the DRA for treating the income stream from a mortgage note or similar instrument as an asset and the section should be deleted. (Attorney Todisco)

RESPONSE: Federal law requires that the department count as a resource liquid assets that an individual or the individual's spouse owns and could convert to cash to be used for the individual's support and maintenance. If an individual or the individual's spouse has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. 42 U.S.C. § 1382b (exclusions from resourses); 20 C.F.R. § 416.1201 (a) (1), (b).

COMMENT: The introductory paragraph should parallel, and be consistent with, the introductory paragraph to 4030.47 and should read: "Mortgage notes, loans installment contracts and similar financial instruments [must be] **are** evaluated as both an asset representing an investment and as income that the beneficiary may receive on a regular basis (cross reference: 5050, Treatment of Specific Types)." (Attorney Boorman, CTNAELA, Attorney Todisco)

RESPONSE: The Department's position is that the words "must be" is a clearer directive to eligibility staff. Accordingly, 4030.47 will be amended to conform with 4030.50 A.3. The introductory paragraph of 4030.50 states "must be" and the Department will change the introductory paragraph of 4030.47 to "must be" instead of "are."

COMMENT: Although 4030.50 A.3. provides that an applicant can demonstrate that a mortgage note, loan, installment contract and similar financial instrument and the income derived therefrom cannot be sold, there are no standards published that will be used by DSS to determine if such instrument cannot be sold. Until such standards are published, the proposed regulation is incomplete. At meetings with DSS over the past several years, the CBA Elder Law Section and other interested parties advised DSS that companies such as Peachtree and JG Wentworth stopped issuing letters stating that there is no market for an income stream. DSS must publish standards which an applicant will be required to meet to demonstrate that there is no secondary market for such instruments. (Attorney Boorman, Attorney Fisher o/b/o Alzheimer's Assoc. CT Chapter)

RESPONSE: Mortgage notes, installment contracts and loan notes are financial instruments that generate income for individuals. These streams of income may be sold. Accordingly, since federal Medicaid law requires that states count as resources all of an individual's income and assets.

The Department retains the right to review all efforts to sell these income streams and determine, based on the circumstances and information presented, whether a bona fide effort has been made.

Treatment of Assets – Annuities – 4030.47

COMMENT: This section was not referenced in the NOI as one of the sections being amended or added. (Attorney Todisco; Attorney Boorman, CTNAELA)

RESPONSE: This section was inadvertently omitted from the Notice of Intent ("NOI"). Nevertheless, it was included in the copy of the proposed regulation provided to individuals who requested copies of the proposed regulation.

Treatment of Assets – Trusts in SNAP – 4030.80 E.1.b.(1)

COMMENT: No basis exists to restrict who may serve as a trustee; there is no reason why a trustee can only be "a court, or an institution, corporation or organization not under the direction or ownership of the assistance unit." An attorney or any other individual should be able to serve as a trustee provided that individual is not under the direction or ownership of the assistance unit. (Attorney Todisco)

RESPONSE: The Department is not amending this provision as part of the proposed regulation. The subsection pertains to SNAP and is not a change required by, or to give effect to, the DRA. Accordingly, no change may be made in response to the comment.

Treatment of Assets – Transfers Involving Trusts, Exceptions – 3029.11 D.1.b.

COMMENT: 4030.80 E.1.b.(1) omits the word "sole" before the word "benefit." The paragraph should read: "the trust is established for the ***sole*** benefit of such individual ...." (Attorney Todisco)

RESPONSE: The Department agrees to make the change to conform the section to Medicaid law.

Treatment of Assets – Trusts – 4030.80

COMMENT: 4030.80 A.5. provides that a ***"trust includes any legal instrument or device like a trust, <u>such as an annuity.</u>"*** Annuities, however, are specifically covered under other sections (3029.03, 3029.12 & 4030.47) so this creates confusion, and the reference to annuities should be removed. Additionally, federal law (42 USC 1396p(d)(6)[DRA Title VI, Ch.2 § 6012]) allows the states to treat annuities as a trust only if, and to the extent that, the Secretary of Health and Human Services may specify, and then they must be treated in such manner as the Secretary may specify. (CTNAELA)

RESPONSE: The Department will amend 4030.80 A.5. to read: "The term 'trust' includes any legal instrument or device similar to a trust, such as an annuity as specified by the Secretary of Health and Human Services."

COMMENT: 4030.80 D.3. provides that DSS evaluates trusts ***"regardless of why the trust was established."*** This clause should be removed because it contradicts federal law which requires that states consider whether the purpose of a transfer is exclusively for reasons other than qualifying. 42 USC 1396p (c)(2) provides that "[a]n individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that – (C) a satisfactory showing is made to the State (in accordance with regulations promulgated by the Secretary) that – (ii) the assets were transferred **exclusively for a purpose** other than to qualify for medical assistance[.]"

Denying an applicant the opportunity to prove that the purpose was exclusively other than to qualify is a denial of due process. This section is not new, but the section should be amended to comply with federal law. (Attorney Stepian o/b/o CTNAELA – oral testimony)

This clause also contradicts 3028.15 – Transfers Made Exclusively For Reasons Other Than Qualifying. The provision in 4030.80 D.7. that DSS waives the policies described in paragraph D. if it is determined that the application of such policies would create an undue hardship (References 3028.25 & 3029.25) is not sufficient to correct this error. Hardship is a separate provision of the US Code (42 USC 1396p (c)(2)(D)). (CTNAELA)

RESPONSE: UPM 3028.15 is used only in regard to transfers made prior to February 8, 2006.

The policy language in 4030.80D3 mirrors the language written in 42 USC 1936p(d)(2)(C)(i), "Subject to paragraph (4), this subsection shall apply without regard to—

(i) the purposes for which a trust is established…"

COMMENT: The trust sections of the UPM are silent on some of the other criteria expressed in the federal statute. For instance, federal law does not treat the individual as ineligible "if a satisfactory showing is made to the State … that the individual <u>intended</u> to dispose of the assets at fair market value, or for other valuable consideration." 42 USC 1396p (c)(2)(C)(ii). This silence excludes the opportunity to prove these criteria, also a denial of due process. (CTNAELA – Attorney Stepian oral testimony)

RESPONSE: Subsection (d) of 42 USC 1936p addresses the "[t]reatment of trust amounts." It is not a transfer-of-asset provision. The language in 42 USC 1396p(d)(C)(i) specifically provides that, except for paragraph (4)(special needs trusts), subsection (d) **shall apply without regard to—**

(i) the purposes for which a trust is established,
(ii) whether the trustees have or exercise any discretion under the trust,
(iii) any restrictions on when or whether distributions may be made from the trust, or
(iv) any restrictions on the use of distributions from the trust."

(emphasis added)

The comment above pertains to subsection (c) of 42 USC 1396p, which addresses transfers of non-trust assets, in which case the individual's purpose in disposing of the assets may be relevant to the imposition of a penalty period. Subsection (d)(2) is specific to trusts and expressly provides that the transfer of assets rules apply regardless of the purpose for which the trust is established. The proposed regulation accurately reflects federal law with regard to trust assets.

Transfers of Assets – Transfers Involving Trusts – 3029.11

COMMENT: 3029.11 A.1. uses the phrase ***"or similar asset"*** – this is too vague and should be stricken. Also, "asset" does not fit the context. *Federal law states "any **legal instrument or device** that is similar to a trust."* A purpose of promulgating regulations is to create the necessary practical specificity about the particular policies and procedures that will apply. DSS should either strike the term "or similar asset" or specifically enumerate what it this means. (CTNAELA)

RESPONSE: This policy accurately reflects the Federal law. 42 USC 1936p(d)(6) provides: "The term "trust" includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary specifies." It is impossible for the Department to know about and list every instrument or device that would be "similar to a trust." Accordingly, this allows the Department to review all instruments or devices that are being used by individuals to determine whether, even though the instrument or device may not be called a trust, its characteristics are such that it should be treated as a trust.

EXHIBIT A

Elena
Cohen
Atty

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop C2-21-15
Baltimore, Maryland 21244-1850

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

Center for Medicaid and State Operations

Dear State Medicaid Director:

This is one of a series of letters that provide guidance on the implementation of the Deficit Reduction Act of 2005 (DRA); P.L. 109-171. This legislation makes a number of changes in the rules related to eligibility and benefits in the Medicaid program. This letter provides information for States regarding implementation of new rules related to transfers of assets, including rules affecting the look-back period, the period of ineligibility, and undue hardship.

These changes are described briefly below and are discussed in detail in an enclosure to this letter. The changes modify portions of the federal Medicaid statute (Section 1917(c) of the Act) related to transfers of assets. Many provisions of the statute are not changed by DRA. In implementing the DRA, States should note that unless specifically amended, existing law will govern transfers of assets, and prior policy guidance issued by CMS is applicable.

Look-Back Period

Under current law, States must deny coverage of certain Medicaid services to otherwise eligible institutionalized individuals who transfer, or whose spouses transfer, assets for less than fair market value within the look-back period. States may elect to deny coverage for certain other services for noninstitutionalized individuals who transfer (or whose spouses transfer) assets for less than fair market value within the look-back period. Previously the look-back period was 36 months, with a 60 month look-back period for transfers involving certain trusts. Under DRA, the look-back period is extended to 60 months for all transfers of assets for less than fair market value.

Start Date of Penalty Period

Previously, the start date of the penalty period was the first day of the month in which the asset was transferred, or at State option, the first day of the month following the month of transfer. Under DRA, the start date of the penalty period is the first day of a month (or at State option the first day of the following month) in which the asset was transferred, or the date on which the individual is eligible for medical assistance under the State plan and is receiving institutional level of care services that, were it not for the imposition of the penalty period, would be covered by Medicaid whichever is later. The penalty period cannot begin until the end of any existing penalty period.

Partial Month Transfers

Prior to the enactment of DRA, States had the option to impose a penalty period for asset transfers made within the look-back period that are less than the State's average payment for nursing facility care, or to impose no penalty period. Under DRA, States are now prohibited from "rounding down" or disregarding any fractional period of ineligibility. However, DRA also gives States new authority, in cases where individuals or their spouses have made multiple fractional asset transfers for less than fair market value in more than one month, to add together all such transfers during the look-back period and begin the penalty period on the earliest date that would otherwise apply if the transfer had been made in a lump sum.

Undue Hardship Provisions

Current law requires States to establish procedures to determine whether denial of Medicaid coverage based on transfers of assets would work an undue hardship and, if so, to waive the period of ineligibility. Under DRA, specific criteria governing the determination of hardship are listed, and States must adhere to additional requirements for providing notice to applicants/recipients. In addition, DRA provides that the facility in which the institutionalized individual is residing may file an undue hardship waiver application on behalf of the individual, with the individual's consent. Finally, DRA provides specific authority to States to make bed hold payments to nursing facilities for a period of time not to exceed 30 days while an application for an undue hardship waiver is pending.

Effective Date

The changes made in DRA are effective for transfers of assets made on or after the date of enactment, February 8, 2006. However, the date by which States must implement the provisions relating to partial month transfers ONLY may be extended if the Secretary of Health and Human Services determines that the State Medicaid plan requires State legislation in order for the plan to meet the additional requirements imposed by these amendments.

If your State requires such legislation, please submit a letter so stating to your CMS Regional Office. The letter should include the date the State will begin implementing the statutory provisions of the DRA relating to partial month transfers. For States with annual legislative sessions, this date must be no later than the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that begins after February 8, 2006. For States with biannual legislative sessions, this date must also be no later than the first day of the first calendar quarter beginning after the close of the first regular session of the legislature that begins after February 8, 2006.

I have enclosed a more detailed explanation of the above DRA provisions.

If you have any questions, please contact Ginni Hain of my staff at 410-786-6036, or e-mail Ginni.Hain@cms.hhs.gov.

We look forward to working with you as you implement this legislation.

Sincerely,

Dennis G. Smith
Director

Enclosure

cc:

CMS Regional Administrators

CMS Associate Regional Administrators
for Medicaid and State Operations

Martha Roherty
Director, Health Policy Unit
American Public Human Services Association

Joy Wilson
Director, Health Committee
National Conference of State Legislatures

Matt Salo
Director of Health Legislation
National Governors Association

Jacalyn Bryan Carden
Director of Policy and Programs
Association of State and Territorial Health Officials

EXHIBIT B

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
JFK Federal Building, Government Center
Room 2275
Boston, Massachusetts 02203

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

Division of Medicaid and Children's Health Operations / Boston Regional Office

October 28, 2010

Michael P. Starkowski, Commissioner
Department of Social Services
25 Sigourney Street
Hartford, Connecticut 06106

Dear Commissioner Starkowski:

This letter is in response to your written request of July 13, 2009 and follow-up communications with State officials for informal, written interpretive guidance on the State's treatment of partial returns with respect to the application of a penalty period for a disqualifying transfer of assets pursuant to §1917(c) of the Social Security Act (the Act). Specifically, in your July 2009 letter you have requested confirmation of "the requirement in the State Medicaid Manual that returned assets must be counted as having been available from the date of the transfer". The Department of Social Services (DSS) issued proposed regulations to implement certain provisions of the Deficit Reduction Act of 2005 (DRA) (Public Law 109-171, Feb. 8, 2006), which regulations were rejected by the General Assembly's Legislative Regulation Review Committee (LRRC). The LRRC believed the proposed regulations to be in violation of Federal law, and the State has requested CMS review.

The State's proposed regulation at UPM §3029.10(H)(4) addresses the partial return of assets ("partial cure") where the individual has made a disqualifying transfer pursuant to §1917(c). In reviewing both this proposed regulation and the LRRC's assessment, one must keep in mind that the CMS State Medicaid Manual (SMM) §3258.10, on which the State's proposed regulation is at least partially predicated, pre-dates the DRA and was written at a time when it was permissible to run out a penalty period prior to applying for Medicaid. The penalty period pre-DRA (under OBRA 1993) typically began at the date of transfer, pursuant to §1917(c)(1)(D). This start date did not take into account whether the individual was receiving long-term care services, or whether the individual was even eligible for Medicaid at the time of transfer.

The DRA enacted revisions to §1917(c) that postponed the start date of the penalty period from the date of transfer to a later date when the individual would both be receiving long-term care services and have become eligible for Medicaid, where Medicaid would be paying for long-term care services but for the imposition of the penalty period. The DRA did not address the issue of availability of the returned funds. The DRA adjusted the start date of the penalty period, not the start date of Medicaid eligibility. It would be inappropriate to read these older SMM provisions in combination with the

DRA in such a way that the State would have the option of starting a new, later penalty period based on an adjustment to the individual's eligibility determination. This is, in effect, what we believe could potentially result from the State's proposed regulation.

<u>Proposed State Regulation at UPM §3029.10(H)(4)</u>

A significant problem with the State's proposed approach is the treatment of the returned partial assets as available to the individual from the date of transfer to the date of return, and potentially to a later date when a non-disqualifying disposition occurs. This appears to result in the start of a new, later penalty period. A State is allowed to adjust the original penalty period in response to a partial return of assets, but is not allowed to adjust the individual's eligibility, thereby nullifying the original penalty period and beginning a new, later penalty period.

In addition, the proposed approach could result in an adjusted penalty period whose endpoint is later than that of the original penalty period, depending on when the assets were returned. Essentially, the later the partial return is made during the original penalty period, the longer the extension of ineligibility for long-term care services, where the start date of the now-reduced penalty period is postponed until the date of return with no consideration of the amount of assets that have been returned. Under some circumstances this could result in the extension of the expiration date beyond that of the original penalty period had the assets not been returned. This result is not permissible.

Example: Assume a 10-month penalty period is calculated for a post-DRA transfer, running from September 1, 2010 through June 30, 2011, based on a disqualifying transfer of $60,000 and an average monthly private pay nursing facility cost of $6,000. Medicaid eligibility for long-term care services would begin July 1, 2011.

- A partial return of $30,000 (50% of the assets) is made in October 2010. The returned assets are considered to be available for September-October (2 months), with a new reduced penalty period of 5 months (50%) running from November 1, 2010-March 30, 2011, resulting in 7 months of ineligibility. Medicaid eligibility for long-term care services would begin April 1, 2011.
- A partial return of $30,000 (50% of the assets) is made in April 2011. The returned assets are considered to be available for September-April (8 months), with a new reduced penalty period of 5 months (50%) running from May 1-September 30, 2011, resulting in 13 months of ineligibility. Medicaid eligibility for long-term care services would begin October 1, 2011, three months later than the original expiration date.

There are some alternative approaches to managing partial cures that we believe would be permissible under current Federal law, but which do not include extending the original expiration date. CMS is not advocating any particular approach, but is merely advising on the permissibility under current Federal law and Federal guidelines. The State must determine which approach is both permissible and aligned with the intent and goals of the State's Medicaid program.

Alternative Approaches to Partial Cures

One permissible alternative would be for the State to choose not to recognize these partial returns and simply continue the penalty period uninterrupted and unaltered from the original calculation, absent full cure.

State counsel has inquired whether revising DSS policy in this manner would constitute a more restrictive eligibility rule for the purposes of the enhanced Federal Medical Assistance Percentage (FMAP) available under the American Recovery and Reinvestment Act of 2009 (ARRA) (Public Law 111-5, Feb. 17, 2009). It has been CMS policy that such a change in a State's transfer of assets policy implicates Medicaid payment for services, but not the individual's underlying Medicaid eligibility. Medicaid payment is still available for covered services that are not subject to the penalty. Thus, revising the State's asset transfer policy in the manner described would not be within the definition of a more restrictive eligibility rule for purposes of enhanced FMAP under ARRA.

A second permissible alternative would be to shorten the original penalty period from the back end so that the period ends sooner, which approach is often referred to as the "reverse half a loaf" strategy. In this approach to our example above, the return of 50% of the assets would result in a penalty period shortened by 50% at the back end, regardless of when during the original penalty period the assets were returned, moving the expiration date to the end of January 2011 (instead of the end of June 2011) with Medicaid eligibility for long-term care services beginning February 1, 2011. The now-reduced penalty period would run for five (5) months, beginning on the same date of September 1, 2010.

Even if the State elects the first option and continues the original penalty period until its original expiration date, we think the State can perhaps achieve the goal of its proposed regulation by allowing the institutionalized individual to use the partially returned assets to pay his/her unpaid nursing home bill beginning with the start of the original penalty period instead of considering the institutionalized individual prospectively ineligible for Medicaid by reason of the partially returned assets, which presumably will exceed the State's resource standard. Such an approach, essentially crediting the unpaid nursing home bill from the beginning of the penalty period against the amount of the partially returned assets, would create some incentive for securing at least a partial return of the transferred assets even if a full return is not possible.

Multiple transfers and returns

The DRA created a new §1917(c)(1)(H) of the Act giving States the option to combine multiple fractional disqualifying transfers in more than one month into a single period of ineligibility instead of applying multiple sequential penalty periods. This builds upon long-established CMS policy of allowing States to combine multiple transfers, whether in amounts less than the monthly State average payment for nursing facility care (SAPSNF) or in greater amounts, to calculate a single penalty period to ensure that penalty periods do not overlap. Connecticut has adopted the policy of aggregating multiple transfers for the purpose of calculating a single penalty period.

Our understanding is that the argument has been presented to the State that a return of one or a few of those separate transfers constitutes a full cure of each individual transfer, eliminating the penalty period associated with each particular individual transfer. As the argument goes, this would result in the penalty period ending sooner, leaving the individual with some returned assets with which to pay the nursing home bill while the penalty period is running.

Since under statute and elected policy option Connecticut combines multiple transfers to calculate a single, aggregated penalty period based on the "total, cumulative uncompensated value of all assets transferred", it follows that the State must treat the described individual asset return as a partial cure only, since some of the aggregated amount remains outstanding. The aggregated amount transferred stays aggregated upon return. Therefore we would support the State's position that a return of less than all of those separate transfers would constitute a partial cure of the aggregated transferred amount, and would not effect a full cure of any portion thereof.

<u>Undue Hardship Provisions at UPM §3029.25(B)</u>

A second question was posed in your July 2009 letter regarding the legality of DSS' retaining the pre-DRA undue hardship provisions for the purpose of implementing the DRA. Although we understand that this additional DSS regulation is of concern to DSS and to the LRRC, our discussions with State officials have stressed the time-sensitive nature of the above-described regulation regarding the impact of a partial cure on the penalty period, and not the State's interpretation of the undue hardship provisions of the DRA. We have chosen to review only the first regulation at UPM §3029.10, given the restrictive time frame under which the State is operating, and to review the undue hardship provisions at a later time.

We hope this information is helpful to you. If you have any questions regarding this response, please contact Marie Montemagno at 617-565-1227 (Marie.Montemagno@cms.hhs.gov) or Julie McCarthy at 617-565-1244 (Julie.McCarthy@cms.hhs.gov).

Sincerely,

Richard R. McGreal

Richard R. McGreal
Associate Regional Administrator

cc: Claudette Beaulieu, Deputy Commissioner
Brenda Parrella, Director, DSS – OLCRAH
Mark Schaefer, Director, Medical Care Administration
Marc Shok, Adult Services Program Manager
Hugh Barber, Assistant Attorney General
Roy Trudel, CMS – Baltimore, MD

November 5, 2010

Richard R. McGreal
Associate Regional Administrator
Department of Health and Human Services
Centers for Medicare & Medicaid Services
JFK Federal Building, Government Center
Room 2275
Boston, Massachusetts 02203

Dear Mr. McGreal:

Thank you for your letter, dated October 28, 2010, in which you provided guidance concerning our treatment of partial returns with respect to the application of a penalty period for a disqualifying transfer of assets pursuant to section 1917(c) of the Social Security Act. We appreciate your presenting possible alternative approaches and now have a specific follow-up question, which we are asking you to please answer, in writing, as quickly as possible so that we may decide how to proceed.

We understand from your letter that CMS has concerns about the potential consequences of the State adjusting the original penalty period in response to a partial return of assets. Specifically, you explain that, because application of the State's proposed regulation could result in an adjusted penalty period whose endpoint is later than the original penalty period, this approach is not permissible under federal law and guidelines.

In response to your letter, the Department is now considering adopting the first alternative approach you mention in your letter, which is to not recognize partial returns at all. Absent a return of all of the assets, the penalty period would continue uninterrupted and unaltered from the original calculation.

But prior to adopting this approach, we need confirmation from CMS that we may continue to rely on that portion of section 3258.10 of the CMS State Medicaid Manual ("SMM") which requires us, for the purpose of determining eligibility, to count those returned assets as having been available to the individual from the date of the transfer and not simply from the date the assets are returned.

The relevant portion of section 3528.10 is in paragraph 3, which addresses the return of all of the assets that were transferred for less than fair market value. After explaining that no penalty may be assessed when all of the transferred assets are returned, this paragraph states the following:

> However, such an adjustment does not necessarily mean that benefits must be paid on behalf of the individual. Return of the assets in question to the individual leaves the individual with assets *which must be counted in determining eligibility during the retroactive period.* Counting those assets as available may result in the individual being ineligible for Medicaid *for some or all of the retroactive period,* (because of excess income/resources) as well as for a period of time after the assets are returned.

CMS SMM, section 3528.10, paragraph 3 (emphasis added).

As you note in your letter, the Deficit Reduction Act of 2005 (DRA) "did not address the issue of availability of the returned funds," and did not adjust the start date of Medicaid eligibility. Consequently, it appears to us that this paragraph of the SMM continues to accurately represent CMS's position that, when all of the assets are returned, the penalty is vacated, but we must count the returned assets as having been available from the date the transfer is made. This would be consistent with the provisions of OBRA'83 relating to eligibility and availability of assets, which remain in place today.

We are very eager to hear from you as soon as possible so that we may make decisions about how to proceed. If at all possible, we would appreciate a written response to this letter within one week's time.

Thank you very much for you assistance. If you have any questions of if you would like additional information, please contact Marc Shok at 860-424-5246 or Marc.Shok @ct.gov.

Sincerely,

Claudette Beaulieu
Deputy Commissioner

Cc: Michael P. Starkowski, Commissioner
Brenda Parrella, Director, DSS, Office of Legal Counsel
Marc Shok, Adult Services Program Manager
Hugh Barber, Assistant Attorney General
Roy Trudel, CMS- Baltimore
Marie Montemagno, CMS – Boston
Julie McCarthy, CMS-Boston

EXHIBIT C

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
JFK Federal Building, Government Center
Room 2275
Boston, Massachusetts 02203

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

Division of Medicaid and Children's Health Operations / Boston Regional Office

December 16, 2010

Claudette Beaulieu, Deputy Commissioner
Department of Social Services
25 Sigourney Street
Hartford, CT 06106-5033

Dear Deputy Commissioner Beaulieu:

This letter is in response to your letter of November 5, 2010, and Commissioner Starkowski's follow up letter of November 23, 2010, requesting additional clarification on the State's application of a penalty period for a disqualifying transfer of assets pursuant to §1917(c) of the Social Security Act. Specifically, you have asked whether the State is required under the State Medicaid Manual (SMM) §3528.10, for the purpose of determining eligibility, to count those fully returned assets as having been available to the individual from the date of transfer, and not from the date of return.

As noted in our October 28, 2010 letter to Commissioner Starkowski, §3528.10 of the SMM pre-dates the Deficit Reduction Act of 2005 (DRA) (Public Law 109.171). The penalty period pre-DRA (under OBRA 1993) typically began at the date of transfer, pursuant to §1917(c)(1)(D) of the Act. The DRA postponed the start date of the penalty period from the date of transfer to a later date when the individual would both be receiving long-term care services and have become eligible for Medicaid but for the imposition of the penalty period. The DRA did not address the issue of availability of the returned funds. This section of the SMM has not been revised due to the DRA, and therefore does not address the current, post-DRA circumstances. Consequently, this section of the SMM does not apply to this situation.

CMS has not developed any formal guidance on this issue post-DRA. In the absence of formal CMS guidance a State may adopt any reasonable methodology for considering the availability of returned assets for the purposes of Medicaid eligibility. We do believe that the State is not required to count the fully returned assets as having been available to the individual from the date of transfer. Section 3528.10 provided for the erasure of a penalty period under pre-DRA rules when penalties began at the time of transfer. Such is no longer the case under the DRA.

You might also note that under the notice and fair hearing regulations at 42 CFR 431, Subpart E a State agency is required to provide advance notice of any adverse action to a Medicaid recipient. Under 42 CFR 431.211, this notice must be mailed at least ten (10) days before the date of adverse action, except as otherwise permitted in the circumstances set out in §431.213 and §431.214. Under 42 CFR 431.220, the individual generally would have a right to a hearing to challenge the proposed action. The State agency's treatment of the returned assets should factor in the need to comply with these requirements.

We hope this is helpful to you in developing your policies. If you have any questions about this letter, please contact Marie Montemagno at 617-565-1227 (Marie.Montemagno@cms.hhs.gov) or Julie McCarthy at 617-565-1244 (Julie.McCarthy@cms.hhs.gov).

Sincerely,

Richard R. McGreal

Richard R. McGreal
Associate Regional Administrator

cc: Michael P. Starkowski, Commissioner, DSS
Brenda Parella, Director, DSS, Office of Legal Counsel
Mark Schaefer, Director, Medical Care Administration, DSS
Marc Shok, Adult Services Program Manager, DSS
Hugh Barber, Assistant Attorney General
Roy Trudel, CMS – Baltimore, MD

EXHIBIT D

APR-02-01 03:44 PM ATTY BRIAN BARREIRA 1 508 746 5746 P.02

DEPARTMENT OF HEALTH & HUMAN SERVICES

HEALTH CARE FINANCING ADMINISTRATION

Division of Medicaid and State Operations

Region I
JFK Federal Building
Government Center
Boston, MA 02203

April 5, 2000

Brian E. Barreira, Attorney-At-Law
225 Water Street
Suite 212
Plymouth, Massachusetts 02360

Dear Mr. Barreira

This is in reply to your letter concerning transfer of assets by community spouses. You advised us that it is the position of the Division of Medical Assistance (DMA) that the post-eligibility transfer made by community spouses causes Medicaid disqualification. Thus, you requested that we notify DMA of its need to come into compliance with Federal law.

Under the transfer of assets provisions in §1917(c) of the Social Security Act (the Act), transfers between spouses are exempt from any transfer penalty. Under the spousal impoverishment provisions of §1924 of the Act, once eligibility is determined, the resources of the community spouse are no longer considered available to the institutionalized spouse. Thus, after the month in which an institutionalized spouse is determined eligible for Medicaid, any resources belonging to the community spouse are solely the property of that spouse. That is, the community spouse can do whatever he or she wants to with them.

We will be writing a letter to Mark F. Reynolds, Acting Commissioner, DMA, advising him that State policy needs to be revised to be consistent with Federal requirements. We appreciate your interest in the Medicaid program and for bringing this matter to our attention.

Please contact Allen Bryan if you have any questions. He can be reached at (617) 565-1246

Sincerely yours,

Ronald Preston

Ronald Preston
Associate Regional Administrator

EXHIBIT E

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-26-12
Baltimore, Maryland 21244-1850

CENTERS for MEDICARE & MEDICAID SERVICES

Center for Medicaid and State Operations

Roy W. Fredericks, Manager
Estate Administration and
Personal Injury Liens Units
Department of Human Services
Senior and Disabled Services Division
Estate Administration Unit
P.O. Box 14021
Salem, OR 97309-9913

Dear Mr. Fredericks:

This is in response to your letter to Linda Miles of our Seattle Regional Office requesting that the Centers for Medicare and Medicaid Services (CMS) research and comment on two Medicaid eligibility issues you believe have a direct impact on the estate recovery program. Your letter was referred to this office for reply.

Your first issue is whether an individual who receives a lump sum payment from a home equity loan can give that payment away during the month it is received, and continue to receive Medicaid services if they are under the resource level the following month. You are seeing instances where an individual has obtained a home equity loan and then given the proceeds their children. Upon the individual's death the property is so encumbered by the outstanding loan that there is no equity remaining against which to pursue a Medicaid estate recovery claim. You argue that since a person cannot give away a home without incurring a transfer penalty, a person should not be able to effectively give away the equity in the home without incurring a penalty.

Your second issue concerns treatment of the income stream received from a reverse mortgage. You understand that in the past CMS has taken the position that a monthly income stream received from a reverse mortgage is not countable as income for eligibility purposes, and thus a person who gives away such an income stream cannot be subjected to penalty under the transfer of assets provisions. You ask if this is still CMS' position on this issue.

As you requested, we have researched the issues you discuss and the bases for the applicable CMS policies concerning these issues. Based on our research, we believe the practices you describe could, in fact, be subject to penalty under the Medicaid transfers of assets for less than fair market value provisions.

In both of the situations you describe, the funds received by the individual are considered to be the proceeds of a loan. Under the rules of the Supplemental Security Income (SSI) program, which form the basis for determining Medicaid eligibility for the aged, blind and disabled, the proceeds of a loan are not considered to be income to the individual (see regulations at 20 CFR 416.1103(f)).

Section 1917(e)(1) of the Act defines "assets" for transfer purposes as including both income and resources. Section 1917(e)(2) essentially provides that for transfer purposes the rules of the SSI program must be used in determining what is or is not "income". Section 1917(e)(5) establishes the same requirement with regard to resources. Items that would not be considered by the Social Security Administration (SSA) to be income or resources under the SSI program are not subject to Medicaid's transfer of assets penalty.

As noted earlier, the proceeds from either a home equity loan or a reverse mortgage are not income under SSI. If the funds in question are given away in the month in which they are received, they also would not be counted towards the $2,000 resource limit because under the first of the month rule, SSI does not count income as a resource unless it is retained until the first moment of the month following the month it was received (see regulations at 20 CFR 416.1207(d)). Because the proceeds from the loans in question are not income, and in the circumstances you describe would not exist as countable resources in the month following the month of receipt, CMS has held that transferring the proceeds could not be penalized under the Medicaid transfers of assets provisions since they never meet the statutory definition of "assets" for transfer penalty purposes.

However, discussions with SSA central office staff have brought to light a facet of SSI rules concerning treatment of income and resources of which we were previously unaware. Even though SSI does not count the proceeds of a loan as income, they may nevertheless be considered a resource under SSI rules. A resource is cash or anything a person owns and could convert to cash to use for his or her support and maintenance. If the person has the right, authority or power to liquidate the property, it is considered a resource (20 CFR 416.1201). When a person receives cash or property, the person is assumed to have the right and authority to use or liquidate the cash or property immediately upon receipt. In determining eligibility, SSI will not count these funds against the $2,000 SSI resource limit unless they are retained through the first day of the following month. Nevertheless, even though SSI may not actually count them in determining eligibility, SSI considers the funds to be a resource, as SSI defines that term, in the month of receipt.

In the case of the proceeds of a loan, SSA staff confirms that SSI would apply the same basic principle. While the proceeds are not income, they meet the definition of a resource the moment they are received. This becomes pertinent in the context of SSI's own transfer of resources provisions. Under those provisions, even if cash or property would be not counted towards the $2,000 resource limit in the month of transfer, SSI considers a transfer or resources to have occurred if the transferred item met the definition of a resource in the month it was transferred. Thus, the cash proceeds of a loan would meet the definition of a resource in the month when the cash was received, and transferring that cash in the same month would be considered a transfer of resources.

This is set forth in SSI operating instructions at POMS section SI 01150.001.b.5., which discusses the treatment of transferred inheritances. As explained in that section, while an inheritance would not be counted toward the resource limit in the month it is received, it still meets the definition of a resource in that month. Thus, transfer of an inheritance in the month it is received is considered to be a transfer of resources. If the inheritance was transferred for less than fair market value, SSI would impose a penalty under its transfer of resources provisions.

While the POMS section cited above specifically addresses the treatment of inheritances, SSA staff confirms that the same principle would apply to any cash or property that meets the definition of a resource in the month it is transferred, including the proceeds of a loan. Thus, if an individual received funds from a home equity loan or funds from a reverse mortgage and transferred those funds in the month of receipt, SSI would treat the transfer as a transfer of resources. If the individual did not receive adequate compensation for the transfer, SSI would impose a penalty for transferring resources for less than fair market value.

This approach is equally valid if applied to transfers for less than fair market value under Medicaid. As explained previously, sections 1917(e)(2) and (5) require that for Medicaid transfer of assets purposes, the rules of the SSI program concerning what is or is not income or resources apply. While the proceeds from a home equity loan or a reverse mortgage are not considered income under SSI, they would meet the regulatory definition of a resource in the month of receipt (see 20 CFR 416.1207(a)). Therefore, if the proceeds are transferred in the month of receipt without adequate compensation, a transfer of resources for less than fair market value has been made, and would be subject to penalty under the Medicaid transfer of assets provisions.

I hope this information is useful to you.

Sincerely,

Thomas E. Hamilton
Director
Disabled and Elderly Health Programs Group

cc: Regional Administrator
Regions I – X
Attn: Associate Regional Administrator
Division of Medicaid and State Operations

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DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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Center for Medicaid and State Operations

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MAY 15 2003

Dennis G. Mille
Phillips & Mille Co., L.P.A.
7530 Lucerne Drive – Suite 200
Middleburg Heights, Ohio 44130-6557

Dear Mr. Mille:

This is in response to your letter concerning Ohio's treatment of post-eligibility transfers of assets by a community spouse under its Medicaid program. I apologize for the delay in my reply; however, we found we needed to resolve several policy issues before we could give you a substantive response.

The situation about which you are concerned involves a community spouse who owns a home in the form of a Transfer on Death Deed. Such a deed allows an individual to own a home and designate a beneficiary to receive the home upon the death of the owner without going through probate. In two cases with which you are familiar, ownership of a home by the community spouse was transferred via a Transfer on Death Deed to someone other than the institutionalized spouse. In both cases administrative appeals decisions held that the properties in question passing to someone other than the institutionalized spouse constituted an improper transfer of assets for less than fair market value, rendering the institutionalized spouse ineligible for Medicaid payment for nursing home services.

You disagree with Ohio's decisions in these cases, citing specific Federal statutory provisions which, you believe, prohibit the State from imposing a penalty on the institutionalized spouse under these circumstances. You also cite a letter from the Center for Medicare and Medicaid Services' (CMS) Boston Regional Office, which indicates that post-eligibility transfers of resources by a community spouse do not render the institutionalized spouse ineligible for Medicaid nursing home care payment. You ask that we instruct the Ohio Medicaid program to come into compliance with what you believe are the requirements of Federal law.

As explained in the letter you cite from our Boston Regional Office, CMS policy on this subject has been that once eligibility has been determined for the institutionalized spouse, assets belonging to the community spouse are no longer considered available to the institutionalized spouse. Thus, the community spouse can transfer those resources to a third party without a transfer penalty being incurred by the spouse in the institution.

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However, because of questions about our policy we have reexamined this issue. We now believe the statute can be interpreted to support both our expressed policy as briefly described above, as well as an approach such as Ohio is using. Further, based on the Supreme Court decision in the case of Wisconsin v. Blumer, No.00-952 WL 236700 (February 20, 2002), States have the option of deciding which of these two policies they wish to follow.

The Wisconsin v. Blumer Supreme Court decision held that it is appropriate for the Secretary of the U.S. Department of Health and Human Services (DHHS) to leave to the States the interpretation of a provision of the statute, when the statute does not clearly or unambiguously require a particular reading of the provision in question. In this particular matter, the provision of the statute that can be considered ambiguous, and therefore open to interpretation by the State, is section 1924(c)(4) of the Social Security Act (the Act).

Section 1924(c)(4) states that, during the continuous period in which an institutionalized individual is in an institution and after the month in which he or she is determined to be eligible, no resources of the community spouse "shall be deemed available" to the institutionalized spouse. However, the statute does not specify what "deemed available" means in this context.

CMS policy on post-eligibility transfers by community spouses has been based on an interpretation of "deemed available", which holds that penalizing a transfer of resources by a community spouse has the effect of treating those resources as being constructively available to the institutionalized spouse since that spouse could be deprived of coverage for nursing home care if the community spouse transfers the resources in question for less than fair market value. Thus, penalizing a post-eligibility transfer by a community spouse would violate the requirement that the community spouse's resources are not "deemed available" to the institutionalized spouse once eligibility has been determined.

We believe the above policy is a supportable interpretation of "deemed available", and as such can be adopted by States if they choose to do so. However, we believe there is another, equally supportable interpretation of "deemed available" which States can elect to adopt. Under this interpretation, a State could interpret section 1924(c)(4) as addressing the availability of resources as part of the redetermination process after the institutionalized spouse's initial eligibility determination. In other words, "deemed available" could be read as meaning the Supplemental Security Income (SSI) process of deeming resources from an ineligible spouse to an eligible spouse.

Under this interpretation, a State would be basing the imposition of a penalty for a post-eligibility transfer by a community spouse on the requirements of section 1917(c)(1) of the Act. This section requires States to impose a penalty if an institutionalized individual or the individual's spouse transfers assets for less than fair market value. Under section 1917(e)(1), "assets" include all income and resources belonging to the individual or the

5

individual's spouse. Thus, a community spouse's transfer of resources, whether the resources belong to the spouse or the institutionalized individual, can be imputed to the institutionalized individual, and can be subject to penalty.

In the context of a post-eligibility transfer by a community spouse, these provisions taken together would allow a State to impose a penalty without making a determination that the transferred resources were actually "available" to the spouse in the institution. Rather, imposition of a transfer penalty would be based on section 1917(e)(1) language requiring States to impose a penalty when assets (as defined in section 1917(e)(1)) are transferred by the individual or the individual's spouse.

In summary, we believe that by adopting the latter interpretation of "deemed available", Ohio can impose a penalty for post-eligibility transfers of resources by a community spouse. We would note that if Ohio imposes penalties for such transfers, it must do so for all applicable cases. Also, all other requirements for imposing transfer of assets penalties must be met. For example, the State cannot impose a penalty the length of which is at variance with the requirements for the length of a penalty period in section 1917(c)(1)(D) of the Act. Also, statutory exemptions from imposing a transfer penalty would apply, if appropriate.

I hope this information is useful to you. Please be aware that Ohio has reviewed and concurs with our response to your letter.

Sincerely,

Thomas E. Hamilton

Thomas E. Hamilton
Director
Disabled and Elderly Health Programs Group

cc: Fred Elig, Chief
Consumer Access and Eligibility Section
Bureau of Consumer and Program Support
33^{rd} Floor
30 East Broad Street
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Regional Administrator
Regions I – X
Attn: Associate Regional Administrator
Division of Medicaid and State Operations

6

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

Center for Medicaid and State Operations
7500 Security Boulevard
Baltimore, MD 21244-1850

FROM: Director
Disabled and Elderly Health Programs Group

SUBJECT: Policy Clarification - Interrelationship Between Transfer of Assets and Spousal Impoverishment (Your Memorandum Dated 5/24/01)

TO: Associate Regional Administrator
Division of Medicaid and State Operations
Region VI - Dallas

This is in response to the subject memorandum requesting a clarification of policy with regard to the interrelationship between the transfer of assets provisions at section 1917(c) of the Act and those under the spousal impoverishment provisions at section 1924(f)(1) of the Act. The specific issue is whether a state (in this case Texas) can prohibit a community spouse from transferring assets previously and validly transferred to him or her by the institutionalized spouse for a certain period of time.

Under section 1917(c)(2)(B) of the Act, assets can be transferred from one spouse to another, or from one spouse to a third party for the sole benefit of the other spouse, without incurring a penalty for transferring assets for less than fair market value. Under section 1924(f)(1) of the Act, a similar provision allows an institutionalized spouse to transfer resources with value up to the community spouse resource allowance to, or for the sole benefit of, the community spouse without incurring a transfer penalty. Section 1924(f)(1) also provides that this transfer should be made as soon as possible after the institutionalized spouse is determined eligible for Medicaid.

Texas allows for the transfer of resources from an institutionalized spouse to the community spouse in accordance with the cited spousal impoverishment provision. When such a transfer is made, Texas further requires that the transfer be completed within one year of the initial eligibility determination. However, the State has encountered a number of cases in which, as soon as the transfer to the community spouse is completed, the community spouse transfers the assets to a third party for less than fair market value.

In an effort to prevent such post-eligibility determination transfers by the community spouse, Texas has promulgated a rule which provides that if the community spouse transfers the assets in question within one year of the initial eligibility determination, the transfer will not be considered a valid transfer between spouses, and thus will be subject to penalty. Texas' rationale is that the requirements for the spouse-to-spouse transfer not to be penalized are not met by virtue of the almost immediate transfer by the community spouse. You believe the State's interpretation of the applicable provisions of the statute is reasonable, but you ask us for our opinion concerning the State's policy.

Our guidance on this subject has been that once eligibility has been determined for the institutionalized spouse, assets belonging to the community spouse are no longer considered available to the institutionalized spouse. Thus, the community spouse can transfer those resources to a third party without a transfer penalty being incurred by the spouse in the institution. This would be contrary to Texas' policy of imposing a transfer penalty when the community spouse transfers his or her assets within one year of the eligibility determination.

However, after careful consideration of the arguments raised in your memorandum, and after consulting our Office of the General Counsel (OGC), we now believe the Medicaid statute can be interpreted to support both our expressed policy as briefly described above, and an approach such as the policy Texas is using. Further, based on the recent Supreme Court decision is the case of Wisconsin v. Blumer, No. 00-952, 2002 WL 236700 (February 20, 2002), states have the option of deciding which of these two policies they want to follow.

The Wisconsin v. Blumer Supreme Court decision held that it is appropriate for the Secretary to leave to the states the interpretation of a provision of the statute when the statute does not clearly or unambiguously require a particular reading of the provision in question. In the matter discussed in this memorandum, the provision of the statute that can be considered ambiguous, and therefore open to interpretation by states, is section 1924(c)(4) of the Act.

Section 1924(c)(4) states that, during the continuous period in which an institutionalized individual is in an institution and after the month in which he or she is determined to be eligible, no resources of the community spouse "shall be deemed available" to the institutionalized spouse. However, the statute does not specify what "deemed available" means in this context.

Our guidance on post-eligibility transfers by community spouses has been based on an interpretation of "deemed available" which holds that penalizing a transfer of resources by a community spouse has the effect of treating those resources as being constructively available to the institutionalized spouse since that spouse could be deprived of coverage for nursing home care if the community spouse transfers the resources in question for less than fair market value. Thus, penalizing a post-eligibility transfer by a community spouse would violate the requirement that the community spouse's resources are not "deemed available" to the institutionalized spouse once eligibility has been determined.

We believe the above policy is a supportable interpretation of "deemed available", and as such can be adopted by states if they choose to do so. However, we believe there is another, equally supportable interpretation of "deemed available" which states can elect to adopt. Under this interpretation, a state could interpret section 1924(c)(4) as addressing the availability of resources as part of the redetermination process after the institutionalized spouse's initial eligibility determination. In other words, "deemed available" could be read as meaning the Supplemental Security Income (SSI) process of deeming resources from an ineligible spouse to an eligible spouse.

Under this interpretation a state would be basing the imposition of a penalty for a post-eligibility transfer by a community spouse on the requirements of section 1917(c)(1) of the Act. This section requires states to impose a penalty if an institutionalized individual or the individual's spouse transfers assets for less than fair market value. Under section 1917(e)(1), "assets" include all income and resources belonging the individual or the individual's spouse. Thus, a community spouse's transfer of resources, whether the resources belong to the spouse or the institutionalized individual, can be imputed to the institutionalized individual and can be subject to penalty.

In the context of a post-eligibility transfer by a community spouse, these provisions taken together would allow a state to impose a penalty without making a determination that the transferred resources were actually "available" to the spouse in the institution. Rather, imposition of a transfer penalty would be based in the section 1917(c)(1) language requiring states to impose a penalty when assets (as defined in section 1917(e)(1)) are transferred by the individual <u>or</u> the individual's spouse.

In summary, we believe that by adopting the latter interpretation of "deemed available" Texas can impose a penalty for post-eligibility transfers of resources by a community spouse. We would note that if Texas imposes penalties for such transfers, it must do so consistently in all applicable cases. Also, all other requirements for imposing transfer penalties must be met. For example, the State cannot impose a penalty the length of which is at variance with the requirements for the length of a penalty period in section 1917(c)(1)(D) of the Act. Also, statutory exemptions from imposing a transfer penalty would apply if appropriate.

If you have any questions, please contact Roy Trudel of my staff at 410-786-3417.

Thomas E. Hamilton

cc: Regional Administrator
Regions I-X
Attn: Associate Regional Administrator
Division of Medicaid and State Operations