

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MEDICAID AND MEDICAL ASSISTANCE
Statutory Authority: 31 **Delaware Code**, Section 512 (31 **Del.C.** §512)

PROPOSED

PUBLIC NOTICE

Long Term Care Medicaid

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the **Delaware Code**) and under the authority of Title 31 of the **Delaware Code**, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Medicaid and Medical Assistance (DMMA) is proposing to amend Title XIX Medicaid State Plan and existing rules in the Division of Social Services Manual (DSSM) to comply with the transfer of assets provisions mandated by the Deficit Reduction Act (DRA) of 2005 (Public Law 109-171).

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Policy and Program Development Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to 302-255-4425 (new fax number) by December 31, 2006.

The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

SUMMARY OF PROPOSED AMENDMENT

Statutory Authority

Deficit Reduction Act of 2005 (Public Law 109-171), enacted on February 8, 2006

Background

On February 8, 2006, the Deficit Reduction Act (DRA) of 2005 was signed into law. The DRA made changes to certain Medicaid eligibility provisions in Section 1917(c)(1)(B)(i) of Social Security Act affecting Long Term Care services and supports.

Summary of Proposals

The DRA contains a number of provisions necessitating changes to Delaware rules. This regulatory action incorporates the mandatory provisions as it relates to: 1) *Lengthening the Look-Back Period*; 2) *Change in the Look-Back Penalty Start Date*; and, 3) *Availability of Hardship Waivers*.

Revised and clarified policy and the fiscal impact for both changes are summarized as follows:

1) *Lengthening the Look-Back Period*

Current law requires states to review the assets of Medicaid applicants for a period of thirty-six months prior to application or sixty months if a trust is involved. This period is known as the "look back period", the period of time within which Medicaid reviews financial transactions of the applicant to determine whether any of those actions would result in Medicaid transfer of assets penalty. Applicants are prohibited from transferring resources during the look back period for less than fair market value.

Section 6011(a) of the DRA lengthens the look-back date to five years, or 60 months, for all income and assets disposed of by an individual.

The look back periods of 36 months for income and assets and 60 months for certain trusts would apply for income and assets disposed of prior to the enactment date.

The proposed amendment provides that for any transfer of assets made on or after the date of enactment of the DRA (February 8, 2006), the look-back period is 60 months.

2) *Change in Look-Back Penalty Start Date*

Under current law, the penalty period starts from the date of the transfer. Using the date of the transfer as the start date provides an opportunity for applicants to preserve assets because some or all of the

penalty period may occur while the applicant was not paying privately for long term care.

Section 6011(b) of the DRA changes the start date of the ineligibility period for all transfers made on or after the date of enactment to the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for Medicaid and would otherwise be receiving institutional level of care based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any period of ineligibility as a result of an asset transfer policy.

For transfers of assets made on or after the date February 8, 2006, the beginning date of penalty is based on the later of the (1) date of transfer or (2) the eligibility date for Long Term Care services. For transfers before February 8, 2006, the beginning date of penalty is the month that the transfer occurred.

3) *Availability of Hardship Waivers*

To protect beneficiaries from unintended consequences of the asset transfer penalties, current law requires states to establish procedures for not imposing penalties on persons who can show that a penalty would impose an undue hardship.

Section 6011(d) of the DRA adds criteria for the application of the hardship waiver provisions. This section also includes notice requirements as to the possibility for a hardship waiver and the availability of a process by which an applicant for a hardship waiver may appeal an adverse determination of an application. Section 6011(e) also allows the facility in which the institutionalized individual resides to file an application on behalf of the individual.

For transfers made on or after February 8, 2006, the waiver process must provide for notice to recipients that an undue hardship exception exists; a timely process for determining whether an undue hardship waiver will be granted; and a process under which an adverse determination can be appealed. In addition, long-term care providers may file an undue hardship waiver on behalf of the individual with the consent of the individual or the personal representative of the individual.

The provisions of these amendments are subject to approval by the Centers for Medicare and Medicaid Services (CMS).

DMMA PROPOSED REGULATION #06-52a

NEW:

Title XIX, Transfer of Assets for Less Than Fair Market Value Made on or After February 2, 2006

SUPPLEMENT 9b TO ATTACHMENT 2.6-A

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STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT
State/Territory: DELAWARE

TRANSFER OF ASSETS

1917 (c) **FOR TRANSFERS OF ASSETS FOR LESS THAN FAIR MARKET VALUE MADE ON OR AFTER FEBRUARY 8, 2006**, the agency provides for the denial of certain Medicaid services.

1. Institutionalized individuals are denied coverage of certain Medicaid services upon disposing of assets for less than fair market value on or after the look-back date.

The agency does not provide medical assistance coverage for institutionalized individuals for the following services:

Nursing facility services;

Nursing facility level of care provided in a medical institution;

Home and community-based services under a 1915(c) or (d) waiver.

2. Non-institutionalized individuals:

- ☒ The agency applies these provisions to the following non-institutionalized eligibility groups. These groups can be no more restrictive than those set forth in section 1905(a) of the Social Security Act:

Home and Community Based Services waivers under 1915(c)

The agency withholds payment to non-institutionalized individuals for the following services:

Home health services (section 1905(a)(7));

Home and community care for functionally disabled elderly adults (section 1905(a)(22));

Personal care services furnished to individuals who are not inpatients in certain medical institutions, as recognized under agency law and specified in section 1905(a)(24).

- ___ The following other long-term care services for which payment for medical assistance is otherwise made under the agency plan:___

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SUPPLEMENT 9b TO ATTACHMENT 2.6-A
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STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT
State/Territory: DELAWARE

TRANSFER OF ASSETS

3. Penalty Date--The beginning date of each penalty period imposed for an uncompensated transfer of assets is the later of:

- the first day of a month during or after which assets have been transferred for less than fair market value;

- ☒ The State uses the first day of the month in which the assets were transferred

- ___ The State uses the first day of the month after the month in which the assets were transferred
or

- the date on which the individual is eligible for medical assistance under the State plan and is receiving institutional level care services described in paragraphs 1 and 2 that, were it not for the imposition of the penalty period, would be covered by Medicaid;

AND

which does not occur during any other period of ineligibility for services by reason of a transfer of assets penalty.

4. Penalty Period - Institutionalized Individuals--

In determining the penalty for an institutionalized individual, the agency uses:

☒ the average monthly cost to a private patient of nursing facility services in the State at the time of application;

☐ the average monthly cost to a private patient of nursing facility services in the community in which the individual is institutionalized at the time of application.

5. Penalty Period - Non-institutionalized Individuals--

The agency imposes a penalty period determined by using the same method as is used for an institutionalized individual; including the use of the average monthly cost of nursing facility services;

☐ imposes a shorter penalty period than would be imposed for institutionalized individuals, as outlined below:

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STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT
State/Territory:DELAWARE

TRANSFER OF ASSETS

6. Penalty period for amounts of transfer less than cost of nursing facility care-

☐ Where the amount of the transfer is less than the monthly cost of nursing facility care, the agency imposes a penalty for less than a full month, based on the option selected in item 4.

☒ The state adds together all transfers for less than fair market value made during the look-back period in more than one month and calculates a single period of ineligibility that begins on the earliest date that would otherwise apply if the transfer had been made in a single lump sum.

7. Penalty periods - transfer by a spouse that results in a penalty period for the individual--

- (a) The agency apportions any existing penalty period between the spouses using the method outlined below, provided the spouse is eligible for Medicaid. A penalty can be assessed against the spouse, and some portion of the penalty against the individual remains.
- (b) If one spouse is no longer subject to a penalty, the remaining penalty period must be served by the remaining spouse.

8. Treatment of a transfer of income—

When income has been transferred as a lump sum, the agency will calculate the penalty period on the lump sum value.

When a stream of income or the right to a stream of income has been transferred, the agency will impose a penalty period for each income payment.

- ☐ For transfers of individual income payments, the agency will impose partial month penalty periods using the methodology selected in 6. above.
- ☒ For transfers of the right to an income stream, the agency will base the penalty period on the combined actuarial value of all payments transferred.

SUPPLEMENT 9b TO ATTACHMENT 2.6-A
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STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT
State/Territory: DELAWARE
TRANSFER OF ASSETS

9. Imposition of a penalty would work an undue hardship--

The agency does not impose a penalty for transferring assets for less than fair market value in any case in which the agency determines that such imposition would work an undue hardship. The agency will use the following criteria in making undue hardship determinations:

Application of a transfer of assets penalty would deprive the individual:

- (a) Of medical care such that the individual's health or life would be endangered; or
- (b) Of food, clothing, shelter, or other necessities of life.

10. Procedures for Undue Hardship Waivers

The agency has established a process under which hardship waivers may be requested that provides for:

- (a) Notice to a recipient subject to a penalty that an undue hardship exception exists;

- (b) A timely process for determining whether an undue hardship waiver will be granted; and
- (c) A process, which is described in the notice, under which an adverse determination can be appealed.

These procedures shall permit the facility in which the institutionalized individual is residing to file an undue hardship waiver application on behalf of the individual with the consent of the individual or the individual's personal representative.

11. Bed Hold Waivers For Hardship Applicants

The agency provides that while an application for an undue hardship waiver is pending in the case of an individual who is a resident of a nursing facility:

_____ Payments to the nursing facility to hold the bed for the individual will be made for a period not to exceed _____ days (may not be greater than 30).

DMMA PROPOSED REGULATION #06-52b REVISIONS:

20350.2.1Look-Back Date

The look-back date is the earliest date on which a penalty for transferring assets for less than fair market value can be assessed. Penalties can be assessed for transfers which take place on or after the look-back date.

Penalties cannot be assessed for transfers which take place prior to the look-back date. ~~The look-back date varies for individuals transferring assets involving trusts.~~ See Section 20350.2.3 Look-back period for transfer of assets involving trusts.

For long term care applications filed on or after ~~10/1/93~~ 2/8/06 and assets transferred on or after ~~8/11/93~~ 2/8/06, the look-back date is ~~36~~ 60 months prior to the baseline date. The baseline date is the first date as of which the individual was:

institutionalized; AND
has applied for medical assistance under the state plan.

~~For long term care applications filed prior to 10/1/93 or for assets transferred on or before 8/10/93, the look back date for uncompensated transfers (including trusts) is 30 months.~~

When an individual applies for Medicaid more than once (for example, he or she applies for Medicaid, is denied eligibility because of excess resources, and applies again 6 months later), the look-back date is ~~36~~ 60 months prior to the baseline date. The baseline date is the first date (first time) the individual has applied for long term care Medicaid. Each individual has only one look-back date, regardless of the number of periods of institutionalization, applications for Medicaid, periods of eligibility, or transfers of assets. All transfers of assets after that date fall within the look-back period.

20350.2.2Look-Back Period

The look-back period is the period that begins with the look-back date and ends with the baseline date. ~~This can~~

~~be 36 or 60 months, depending on what kind of trust was involved. The look-back period~~ It is the period of time prior to the baseline date (see above) during which a previous transfer of assets for less than fair market value can be penalized. It is important to remember that transfers which occur after the baseline date are also subject to penalty if they are made for less than fair market value.

~~The 36 month look back period does not become fully effective until August 11, 1996. Prior to that date, a 36 month look back period would actually begin at some time before the date transfers are covered by these new rules. Since the 36 month look back period is effective for transfers made on or after August 11, 1993, any transfers made before that date are treated under the rules in effect prior to OBRA 93. Thus, the look back period is phased in over the 36 month period ending August 11, 1996. Effective 2/8/06, the date of the DRA enactment, the look-back period was extended from 36 months to 60 months. Any applications received on or after 2/8/06 will be subject to a 60 month look-back period.~~

20350.2.3Look-Back Period for Transfers of Assets Involving Trusts

When an individual establishes a revocable trust and a portion is disbursed to someone else and not for the benefit of the grantor, that portion is treated as a transfer of assets. For a revocable trust, the transfer is considered to take place on the date upon which the payment to someone other than the grantor was made.

When an individual establishes an irrevocable trust in which all or a portion of the trust cannot be disbursed to or on behalf of the individual, that portion (the portion that is unavailable) is treated as a transfer of assets. For an irrevocable trust, the transfer is considered to have been made as of the date the trust was established or, if later, the date upon which payment to the grantor was foreclosed.

Whenever a portion of a trust is treated as a transfer (as described above), the look-back period is 60 months.

When a trust is irrevocable but some or all of the trust can be disbursed to or for the benefit of the individual (the portion that could be made available to the individual), the look-back period applying to disbursements made from this portion to another person is ~~36~~ 60 months. Effective 2/8/06, the date of the DRA enactment, all trusts will be subject to a 60 month look-back period.

When an individual places assets into an irrevocable trust and can still benefit from those assets, the amount transferred is equal to any of those assets which are paid out for a purpose other than to or for the benefit of the individual. When an individual places assets in an irrevocable trust and can no longer benefit from some or all of those assets, that unavailable portion is considered as a transfer. The value of these assets is not reduced by any payments from the trust which may be made from these unavailable assets as a later date.

(Break In Continuity of Sections)

20350.3Penalty Period and Penalty Date

The penalty period is a period of ineligibility for long-term care Medicaid services that is imposed when an individual makes a transfer of assets for less than fair market value. Under OBRA 93 there is no maximum limit on the penalty period for assets transferred after 8/10/93. The length of the penalty period is based on the value of the assets transferred and the cost of nursing facility care. The penalty period cannot exceed 30 months for assets transferred on or before 8/10/93.

The penalty date is the beginning date of each penalty period that is imposed for an uncompensated transfer. The penalty date for all individuals who transfer assets is the first day of the month in which the asset was transferred, provided that date does not occur during an existing penalty period. When a transfer takes place during an existing penalty period, whether imposed under the pre-OBRA 93 or post-OBRA 93 rules, a new penalty period cannot begin until the existing penalty period has expired.

The penalty period for an institutionalized individual is equal to:

- the total, cumulative uncompensated value of all assets transferred by the individual or spouse on or after the look-back date

divided by

- the average monthly cost to a private patient for nursing facility services at the time of application.

The resulting figure is the number of months the applicant will be ineligible for Medicaid.

In figuring periods of ineligibility, count full months only, regardless of the date in a month a transfer actually occurs. A full month is counted at the beginning of a period of ineligibility. That is, a period of ineligibility begins with the first day of the month in which a transfer has occurred. For example, if an individual has made a transfer on September 28, the period of ineligibility begins on September 1. If a calculation of the penalty period results in a partial month, round the days down to the end of the preceding month. For example, from a September 28 transfer, round down to make August the last month in the period. However, do not round a month up to the end of the month in which the transfer occurred. For example, do not round September 28 up to include the whole month of September.

20350.3.1 Penalty Period for assets transferred on or after 2/8/06

Section 6011(b) for the Deficit Reduction Act amends section 1917(c)(1)(D) of the Act to change the start date of the penalty period, which is the period during which an individual is ineligible for Medicaid payment for long term care services because of a transfer of assets for less than fair market value.

The ineligibility period will begin with the LATER of:

- The month during which assets have been transferred for less than fair market value; or
- The date on which the individual is eligible for medical assistance under the State plan and is receiving institutional level of care services (based on an approved application for such services) that, were it not for the imposition of the penalty period, would be covered by Medicaid.

The penalty period cannot begin until the expiration of any existing period of ineligibility. The penalty period will continue to run for the number of days determined by dividing the total value of assets transferred within the look back period by the State's average daily cost to a private patient of a nursing facility services in the State. Once the penalty period is imposed, it will not be interrupted, but will continue to run even if the individual stops receiving institutional level of care.

For non-institutionalized individuals, the penalty date will not begin until the individual is receiving an institutional level of care.

Upon imposition of a period of ineligibility for long-term care level services because of an asset transfer, applicants/recipients will be notified of the right to request an undue hardship waiver. In addition, long-term care providers may file an undue hardship waiver on behalf of the individual with the consent of the individual or the personal representative of the individual. See DSSM 20400.1.12.1.

For example: An individual transferred an asset in May 1993, for which a penalty of 12 months was imposed. The individual transfers another asset in October 1993, to which another 12 month penalty applies. Because the second transfer took place within the first 12 month penalty period, the second penalty period cannot begin until the first period expires, on April 30, 1994. The first penalty period would run from May 1, 1993 through April 30, 1994. The second penalty period would run from May 1, 1994, through April 30, 1995.

(Break In Continuity of Sections)

20350.9Treatment of Income as an Asset

Under OBRA 93, income, in addition to resources, is defined as an asset for transfer (and trust) purposes. Where an individual's income is given or assigned in some manner to another person, this is considered a transfer of assets for less than fair market value.

In determining whether income has been transferred, do not scrutinize an individual's spending habits during the ~~36 or~~ 60 month look-back period. Absent evidence to the contrary, assume that ordinary household income was legitimately spent on the normal costs of daily living.

Attempt to determine whether the individual has transferred lump sum payments actually received in a month. Such payments, while counted as income in the month received for eligibility purposes, are counted as resources in the following month if they are retained. Therefore, disposal of such lump sum payments before they can be counted as resources could constitute an uncompensated transfer of assets.

Also, attempt to determine whether amounts of regularly scheduled income have been transferred. Normally, such a transfer takes the form of a transfer of the right to receive income. For example, a private pension may be diverted to a trust, and no longer be paid to the individual. An exception to the transfer of assets penalty for diverted income is a transfer into a Miller trust.

Explore the possibility of a transfer of income based on information given on the Medicaid application and through active questioning of the individual concerning sources of income, income levels in the past versus present, direct questions about giving income to others, etc.

When an individual has transferred income, or the right to income, a penalty for that transfer must be imposed. If a single lump sum is transferred (for example, a stock dividend check is given to another person in the month in which it is received by the individual), the penalty period is calculated on the basis of the value of the lump sum payment.

When a stream of income, or the right to a stream of income (such as a pension) is transferred, calculate the penalty period based on a determination of the total amount of income expected to be transferred during the individual's life based on an actuarial projection of the individual's life expectancy. Calculate the penalty period on the basis of the projected total income.

To make this determination, use the life expectancy tables, compiled from information published by the Office of the Actuary of the Social Security Administration.

See 20350.9 Life Expectancy Tables.

(Break In Continuity of Sections)

20350.12Transfer of Assets Procedures

If an individual and/or couple alleges selling, giving away or otherwise transferring any non-excluded assets within the ~~30, 36 or~~ 60 months preceding the date of application, take the following steps:

1. Ascertain and document the FMV of the asset.
2. Ascertain and document the amount of compensation received by the individual and/or couple for the transfer.
3. Calculate the uncompensated value, if any.

If the asset was transferred at FMV, process the application as usual.

If the asset was transferred at less than FMV, explain to the applicant that an amendment to the Social Security Act

requires that the Division of Medicaid and Medical Assistance (DMMA) presume, when assets are sold or given away at less than FMV, that the transaction was made for the purpose of establishing Medicaid eligibility. The difference between the amount received for the transfer and the FMV is counted as being available to meet the needs of the individual for a period after the date of disposal.

Explain that the law requires that DMMA presume the transfer to be for the purpose of establishing Medicaid eligibility unless the individual can demonstrate that:

- 1.) the individual intended to dispose of the assets either at fair market value or for other valuable consideration; or
- 2.) the assets were transferred exclusively for a purpose other than to qualify for Medicaid.

If the applicant does not wish to rebut the presumption, she/he will be ineligible for Medicaid for a specified period.

(Break In Continuity of Sections)

20400.5 Irrevocable Trusts

An irrevocable trust is a trust that cannot in anyway, be legally revoked by the grantor.

20400.5.1 Treatment of Two Types of Irrevocable Trusts

Irrevocable trusts are treated differently based on whether payment can or cannot be made for the benefit of the individual.

20400.5.1.1 Irrevocable Trust States Payment Can Be Made To Or For The Benefit Of The Individual

When the terms of an irrevocable trust state that payment can be made to or for the benefit of the individual from any part or all of the trust, the payments made are considered income. Any part of the trust or payment that could be paid for the benefit of the individual is treated as an available resource.

When the terms of an irrevocable trust state that payment can be made to or for the benefit of the individual from any part or all of the trust, and the payment is not used for the benefit of the individual, the payment is treated as a transfer of assets. In this type of situation, the look-back period is ~~36~~ 60 months.

20400.5.1.2 Irrevocable Trust States Payments Cannot Under Any Circumstances Be Made To Or For The Benefit Of The Individual

When all or a portion of the principal or income on the principal of the trust cannot be paid to the individual or for the benefit of the individual, all of these payments are treated as a transfer of assets for less than fair market value. The date of transfer is the date the trust was established or, if later, the date on which payment to the individual was actually barred. When determining the value of the portion of the trust that cannot be paid to the individual, do not subtract from the trust the value of any payments made. If the trustee or the grantor adds funds to the trust after the date of transfer, these added funds are considered to be a new transfer of assets. The transfer date for these additional funds is the date that the new funds were placed in the trust. (Note, when determining the penalty period: if a previous penalty period is still in effect, the new penalty period cannot begin until the previous penalty period has expired.) Under this type of trust the look-back period is **60 months**.

10 DE Reg. 955 (12/01/06) (Prop.)