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D. OBRA-93 and DRA-2005 TRANSFER POLICY

Section 13611 of the Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66), herein referred to as OBRA-93, amended Section 1917 (c)(1) of the Social Security Act to revise transfer of assets policy previously described in the Medicare Catastrophic Coverage Act (MCCA) of 1988 (P.L. 100-360). Assets disposed of on or before the enactment of OBRA-93, which was August 10, 1993, will be evaluated under MCCA policy. Assets disposed of on or after August 11, 1993 will be evaluated under policy mandated by OBRA-93 and described below. Policy will remain the same except where Deficit Reduction Act (DRA) changes are indicated.

1. Definitions (Applicable to Transfers & Trusts)

OBRA-93 added and amended the following definitions of terms used in conjunction with transfer and trust policy.

a. Individual -- As used in this instruction, the term "individual" includes the individual himself or herself, as well as:

- The individual's spouse, where the spouse is acting in the place of or on behalf of the individual;
- A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; and
- Any person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

b. Spouse -- This is a person who is considered legally married to an individual under the laws of Mississippi.

c. Assets -- For purposes of this section, assets include all income and resources of the individual and of the individual's spouse. This includes income or resources which the individual or the individual's spouse is entitled to but does not receive because of any action by:

- The individual or the individual's spouse;
- A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or
- Any person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

For purposes of this section, the term "assets an individual or spouse is entitled to" includes assets to which the individual is entitled or would be entitled if action had not been taken to avoid receiving the assets.

The following are examples of actions which would cause income or resources not to be received:

- Irrevocably waiving pension income;
- Waiving the right to receive an inheritance;
- Not accepting or accessing injury settlements;
- Tort settlements which are diverted by the defendant into a trust or similar device to be held for the benefit of an individual who is a plaintiff; and

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- Refusal to take legal action to obtain a court ordered payment that is not being paid, such as child support or alimony.

The specific circumstances of each case must be examined before deciding whether an uncompensated transfer occurred.

d. Resources -- For purposes of this section, the definition of resources is the same definition used by the Supplemental Security Income (SSI) program, except that the home is not excluded for institutionalized individuals. In determining whether a transfer of assets or a trust involves an SSI-countable resource, use those resource exclusions and disregards used by the SSI program, except for the exclusion of the home for institutionalized individuals.

e. Income -- For purposes of this section, the definition of income is the same definition used by the SSI program. In determining whether a transfer of assets involves SSI-countable income, take into account those income exclusions and disregards used by the SSI program.

f. For the Sole Benefit of -- A transfer is considered to be for the sole benefit of a spouse, blind or disabled child, or a disabled individual if the transfer is arranged in such a way that no individual or entity except the spouse, blind or disabled child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.

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Similarly, a trust is considered to be established for the sole benefit of a spouse, blind or disabled child, or disabled individual if the trust benefits no one but that individual, whether at the time the trust is established or any time in the future. However, the trust may provide for reasonable compensation for a trustee or trustees to manage the trust, as well as for reasonable costs associated with investing or otherwise managing the funds or property in the trust.

A transfer, transfer instrument, or trust that provides for funds or property to pass to a beneficiary who is not the spouse, blind or disabled child, or disabled individual is not considered to be established for the sole benefit of one of these individuals. In order for a transfer or trust to be considered to be for the sole benefit of one of these individuals, the instrument or document must provide for the spending of the funds involved for the benefit of the individual on a basis that is actuarially sound based on the life expectancy of the individual involved. When the instrument or document does not so provide, any potential exemption from penalty or consideration for eligibility purposes is void.

An exception to this requirement exists for trusts discussed in "Exemptions to Treatment of Trusts." Under these exceptions, the trust instrument must provide that any funds remaining in the trust upon the death of the individual must go to the Division of Medicaid, up to the amount of Medicaid benefits paid on the individual's behalf. When these exceptions require that the trust be for the sole benefit of an individual, the restriction discussed in the previous paragraph does not apply when the trust instrument designates the Division of Medicaid as the recipient of funds from the trust. Also, the trust may provide for disbursal of funds to other beneficiaries, provided the trust does not permit such disbursals until the State's claim is satisfied.

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2. Transfer Penalty Definitions

Under the transfer of assets provisions in Section 1917(c) of the Act, as amended by OBRA 1993, coverage of certain Medicaid services to otherwise eligible institutionalized individuals who transfer (or whose spouses transfer) assets for less than fair market value must be denied. The following definitions apply to transfers of assets.

a. Fair Market Value -- Fair market value is an estimate of the value of an asset, if sold at the prevailing price at the time it was actually transferred. Value is based on criteria used in appraising the value of assets for the purpose of determining Medicaid eligibility.

Note: For an asset to be considered transferred for fair market value or to be considered to be transferred for valuable consideration, the compensation received for the asset must be in a tangible form with intrinsic value. A transfer for love and consideration, for example, is not considered a transfer for fair market value. Also, while relatives and family members legitimately can be paid for care they provide to the individual, Medicaid presumes that services provided for free at the time were intended to be provided without compensation. Thus, a transfer to a relative for care provided for free in the past is a transfer of assets for less than fair market value. However, an individual can rebut this presumption with tangible evidence that is acceptable, such as a written repayment schedule agreed to at the time services were provided.

b. Valuable Consideration -- Valuable consideration means that an individual receives in exchange for his or her right or interest in an asset some act, object, service, or other benefit which has a tangible and/or intrinsic value to the individual that is roughly equivalent to or greater than the value of the transferred asset.

c. Uncompensated Value -- The uncompensated value is the difference between the fair market at the time of transfer (less any outstanding loans, mortgages, or other encumbrances on the asset) and the amount received for the asset.

d. Institutionalized Individual -- An institutionalized individual is an individual who is:

- An inpatient in a nursing facility;
- An inpatient in a medical institution for whom payment is based on a level of care provided in a nursing facility; or
- An inpatient in an ICF-MR facility

3. Effective Date of OBRA-93 Transfer Policy

This section applies to all transfers which are made on or after August 11, 1993. Transfers made before August 11, 1993, are treated under policy in effect prior to OBRA-93. While this section applies to transfers made on or after August 11, 1993, penalties for transfers for less than fair market value under OBRA-93, cannot be applied to services provided before October 1, 1993. Instead, for the period prior to October 1, 1993, apply pre-OBRA-1993 rules regarding transfers of assets to transfers made on or after August 11, 1993, and before October 1, 1993.

4. Effective Date of DRA-2005 Transfer Policy

The effective date of all DRA changes is February 8, 2006. Assets disposed of on or after February 8, 2006 will be evaluated under OBRA-93 except for the changes mandated by DRA-2005. DRA changes will be indicated for each section.

5. Individuals To Whom Transfer of Assets Applies

Apply these provisions when an institutionalized individual or the individual's spouse disposes of assets for less than fair market value on or after the look-back date explained below.

For purposes of this section, assets transferred by a parent, guardian, court or administrative body, or anyone acting in place of or on behalf of or at the request or direction of the individual or spouse, are considered to be transferred by the individual or spouse.

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6. Look Back Period

The look-back period for transfers other than transfers to a trust is a date that is 36 months from the date the individual both is an institutionalized individual and has applied for Medicaid.

For example:

12/94 - enters nursing facility
02/95 - applies & 36 month look-back begins
11/94 - transfer occurs & penalty begins

The look-back period for assets transferred into certain trusts is 60 months from the date an individual is both institutionalized and has applied for Medicaid. This means that the transfer of assets penalty can apply to the total value of assets placed in a trust (subject to evaluation of trust policy) within 60 months from the time the trust is established and the individual enters an institution and applies for Medicaid.

NOTE: The 36 month look-back period described above does not become fully effective until August 11, 1996. Prior to that date, a 36 month look-back period actually begins at some time before the date transfers are covered by these rules. While the 36 month look-back period is effective for transfers made on or after August 11, 1993, any transfers actually made before that date are treated under the rules described in pre OBRA-93 policy. Thus, the look back period is phased in over the 36 month period ending August 11, 1996.

Effective February 8, 2006, DRA-2005 changed the look back period to 5 years (60 months). Transfers made prior to February 8, 2006, will be evaluated using the 3 year look back period. The 5 year look back period will be phased in over the 60 month period ending February 8, 2011.

7. Multiple Periods of Institutionalization and Multiple Applications

When an individual has multiple periods of institutionalization or has made multiple applications for Medicaid (unless the application was withdrawn), the look-back date is based on a baseline date that is the first date upon which the individual has both applied for Medicaid and is institutionalized. Each individual has only one look-back date, regardless of the number of periods of institutionalization, applications for Medicaid (the exception is a withdrawn application), periods of eligibility or transfers of assets.

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8. Effective Date of Penalty

The date of the penalty period is the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this policy.

Effective February 8, 2006, the date of the penalty will begin with the later of:

- The first day of a 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 based on all factors of eligibility being met and is receiving institutional level of care services (based on approved application for such services) that, were it not for the imposition of the penalty period would be covered by Medicaid.

For applications on or after 2-8-06, the penalty will begin the month that Long Term Care services are requested if the individual is otherwise eligible for Medicaid. If an individual is already eligible for Long Term Care Services and a transfer of assets is discovered, the penalty will begin the month of the transfer.

9. Penalty Period

The number of months of ineligibility for an institutionalized individual shall be equal to:

a. the total, cumulative uncompensated value (UV) of all assets transferred by the individual (or individual's spouse) on or after the look back period divided by:

b. the average monthly cost to a private pay patient nursing facility services in Mississippi. The current average private rate is $4600 effective 02-08-06. From 03/01/03 – 02/07/06, the average private rate was $3100. From 04/01/99 – 02/28/03, the average private rate was $2600. From 10/01/93 - 03/31/99, the average private rate was $2000. When the amount of the transfer is less than the average monthly cost of nursing facility care, a penalty is imposed for less than a full month. Rounding down or otherwise disregarding any fractional part of an ineligibility period when determining the penalty period is not allowed effective 02/08/06. The average daily per

diem rate of $151 is used in determining the partial month penalty period.

10. Determining the Period of Ineligibility- Penalty Periods Overlap

All countable transfers occurring during the look-back period are totaled and the penalty period determined by dividing the total UV by the private pay rate. The first month of the transfer penalty period is the month in which the first countable transfer occurred. Transfers that occur after a penalty period is in effect are added in full to the end of the penalty period currently in effect. There is no limit on the number of months a transfer penalty can be imposed. The penalty period is always determined by the total UV calculated during the look back period.

11. Determining the Period of Ineligibility- Penalty Periods Do Not Overlap

When multiple transfers are made so that the penalty periods for each do not overlap, treat each transfer as a separate event with it's own penalty period. Exception: Consecutive trans- or transfers that occur on a regular basis must be calculated together. For example, an individual gave a relative $5,199.00 in April and $5,199.00 in May. The two gifts are added together and divided by $2,600 causing a 3 month penalty for April, May and June.

12. Treatment of Income As Asset

Income, in addition to resources, is considered to be an asset for transfer (and trust) purposes. Thus, when an individual's income is given or assigned in some manner to another person, such a gift or assignment can be considered a transfer of assets for less than fair market value.

In determining whether income has been transferred, do not attempt to ascertain in detail the individual's spending habits during the 36 or 60 month look-back period. Absent some reason to believe otherwise, assume that ordinary household income was legitimately spent on the normal costs of daily living.

However, you should 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 were retained. 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 or lump sum payments, which the individual would otherwise have received, 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 paid to the individual.

When a single lump sum is transferred (e.g., 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, (i.e., income received in a regular basis, such as a pension) or the right to a stream of income is transferred, calculate the penalty period as you would for a single lump sum. Using this method, a penalty period is imposed for each income payment. When the transfer involves a right to income (as opposed to periodic transfers of income the individual owns) make 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, and calculate the penalty on the basis of the projected total income.

13. Transfer Penalty for Jointly Held Assets

In the case of an asset held by an individual in common with another person or persons 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.

Under this provision, merely placing another person's name on an account or asset as a joint owner might not constitute a transfer of assets subject, of course, to the specific circumstances of the situation. In such a situation, the individual may still possess ownership rights to the account or asset and thus have the right to withdraw all of the funds in the account or possess the asset at any time. Thus, the account or asset is still considered to belong to the individual.

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However, actual withdrawal of funds from the account or removal of the asset by the other person removes the funds or property from the control of the individual and so constitutes a transfer of assets. Also, if placing another person's name on the account or asset actually limits the individual's right to sell or otherwise dispose of the asset (e.g., the addition of another person's name requires that the person agree to the sale or disposal of the asset where no such agreement was necessary before), such placement constitutes a transfer of assets.

Use regular Medicaid rules to determine what portion of a jointly held asset is presumed to belong to an applicant or recipient. This portion is subject to a transfer penalty if it is withdrawn by a joint owner.

14. Exceptions to Transfers of Home Property

The transfer penalty will not apply to the transfer of home property by an institutionalized individual to the following family members of such individual:

a. The individual's spouse or child under age 21 or a disabled or blind adult child; or

b. a sibling who is part owner of the home who lived in the home for one (1) year before the individual entered a nursing facility; or

c. a child who lived in the home for up to two (2) years before the individual entered a nursing facility and provided care to the individual which permitted the individual to remain at home.

15. Exceptions to Transfers of Non-Home Property

The transfer penalty will not apply to the transfer of any type of non-home asset in the following situations:

a. Assets transferred to the individual's spouse or to another for the sole benefit of the individual's spouse;

b. Assets transferred from the individual's spouse to another for the sole benefit of the individual's spouse;

c. Assets transferred to the individual's child under age 21 or a disabled or blind adult child;

d. Assets transferred to a trust established solely for the benefit of a disabled individual under 65 years of age.

In determining whether an asset was transferred for the sole benefit or a spouse, child, or disabled individual, ensure that the transfer was accomplished via a written instrument of transfer (e.g., a trust document) which legally binds the parties to a specified course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer. A transfer without such a document cannot be said to have been made for the sole benefit of the spouse, child, or disabled individual, since there is no way to establish, without a document, that only the specified individuals will benefit from the transfer.

16. Additional Exceptions (Acceptable Rebuttals)

An individual shall not be ineligible for medical assistance if a satisfactory showing is made to the Division of Medicaid that:

1. the individual intended to dispose of the assets either at fair market value or for other valuable consideration;
2. the assets were transferred exclusively for a purpose other than to qualify for medical assistance;
3. all assets transferred for less than fair market value have been returned to the individual; or
4. the Division of Medicaid determines that denial of eligibility would work an undue hardship on the individual.

17. Undue Hardship

Undue hardship means depriving the individual of medical care such that the individual's health or life would be endangered, or of food, or clothing, shelter, or other necessities of life such that the individual would be at risk of serious deprivation. Undue hardship does not exist when the application of a transfer penalty merely causes an individual or individual's family member(s) inconvenience or restricts their lifestyle. Undue hardship does not exist when the individual transferred the assets to the community spouse

and the community spouse refuses to cooperate in making the resource available to the individual. Hardship will not be found if the resource was transferred to a person who was handling the financial affairs of the client or to the spouse or children of a person handling the financial affairs of the client unless the client demonstrates that payments cannot be obtained from the funds of the person who handled the financial affairs to pay for long-term care services.

Undue hardship also exists when a client has exhausted all legal action to have transferred assets that caused a penalty period returned to the client.

Undue hardship does not exist when application of the transfer of assets provisions merely causes the individual inconvenience or when such application might restrict his or her lifestyle but would not put him/her at risk of serious deprivation.

Each case situation must be reviewed individually to determine if undue hardship exists. Generally, this provision is limited to financially and medically needy individuals with no possible means of recovering the asset(s) transferred.

Effective February 8, 2006, an undue hardship waiver may be requested by the facility in which the person resides on behalf of the individual if the facility has the individual's consent, or their personal representative's consent. The hardship waiver is for the recipient not the hardship of the facility.

18. Transfers of Assets & Spousal Impoverishment Provisions

Section 1924 of the Act sets forth the requirements for treatment of income and resources where there is an individual in a medical institution with a spouse still living in the community. This section of the Act provides for apportioning income and resources between the institutional spouse and the community spouse so that the community spouse does not become impoverished because the individual is in a medical institution.

The exceptions to the transfer of assets penalties regarding interspousal transfers and transfers to a third party for the sole

benefit of a spouse apply even under the spousal impoverishment provisions. Thus, the institutional spouse can transfer unlimited assets to the community spouse or to a third party for the sole benefit of the community spouse.

When transfers between spouses are involved, the unlimited transfer exception should have little effect on the eligibility determination, primarily because resources belonging to both spouses are combined in determining eligibility for the institutionalized spouse. Thus, resources transferred to a community spouse are still to be considered available to the institutionalized spouse for eligibility purposes.

The exception for transfers to a third party for the sole benefit of the spouse may have greater impact on eligibility because resources may potentially be placed beyond the reach of either spouse and thus can not be counted for eligibility purposes. However, for the exception to be applicable, the definition of what is for the sole benefit of the spouse must be fully met. This definition is fairly restrictive, in that it requires that any funds transferred be spent for the benefit of the spouse within a time-frame actuarially commensurate with the spouse's life expectancy. If this requirement is not met, the exemption is void, and a transfer to a third party may then be subject to a transfer penalty.

19. Notice of Transfer of Resources

The client will be notified via DOM-322, Notice of Transfer of Assets, regarding countable transfers and the penalty period. The notice will allow the client or representative 10 present evidence to show that the transfer should not count. Evidence should include a written rebuttal plus any pertinent documentary evidence. If no rebuttal is offered, the penalty will be applied and the appropriate adverse action notice issued to deny or terminate payment of nursing home services only. The individual remains eligible for all other Medicaid services if the transfer penalty is the only factor of ineligibility. If the individual is ineligible on other factors as as well as the transfer, the application or case must be denied or terminated.

Note: Notice to the client via DOM-322 is required whenever a transfer is being charged. This is true even if the penalty period is expired and the action to be taken is an improper payment. DOM-322 must be issued prior to submitting an improper payment in order to allow the client the chance to rebut the transfer.

20. Rebuttal Process

Written rebuttals along with the Regional Office decision regarding acceptability are to be submitted to the Area Supervisor prior to issuing final notice to the client. The material submitted to State Office should include the rebuttal, a copy of DOM-322 issued to the client, and a summary of the circumstances surrounding the transfer. The Area Supervisor will issue a memorandum to the Regional Office explaining the final decision on the transfer.

21. Return of a Transferred Resource

If a transferred resource is returned to or if compensation is received by the institutionalized individual, the UV is no longer an issue or is reduced as of the date of the return. The resource or compensation is evaluated according to normal resource rules in the month of the return. Any portion of a transferred resource that is not returned continues to count as UV which means the penalty period must be re-evaluated.

22. Recalculation of a Penalty Period

A penalty period must be recalculated from the month a portion of the resource is returned or additional compensation is received.

23. Transfer Penalty Involving SSI Months

The transfer penalty can be imposed during months that an individual receives SSI or is SSI eligible in a nursing home. Notices for SSI eligibles must not be sent verifying eligibility for nursing facility services until the possibility of any transfers have been developed.