3257. TRANSFERS OF ASSETS AND TREATMENT OF TRUSTS

A. General.--Section 13611 of the Omnibus Budget Reconciliation Act of 1993 (OBRA 1993) amended §1917 of the Act by incorporating in §§1917(c) and (d) new requirements for treatment of transfers of assets for less than fair market value and for treatment of trusts. The following instructions apply only to transfers made and trusts established after the effective date explained in §3258.2. For transfers made and trusts established before that effective date, the old policies regarding treatment of trusts and transfers apply. See §§3215 and 3250 for instructions on the treatment of trusts established and transfers made before August 11, 1993.

B. Definitions.--The following definitions apply, as appropriate, to both transfers of assets and trusts:

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

- o The individual's spouse, where the spouse is acting in the place of or on behalf of the individual;

- o 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

- o Any person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

2. Spouse.--This is a person who is considered legally married to an individual under the laws of the State in which the individual is applying for or receiving Medicaid.

3. 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:

- o The individual or the individual's spouse;

- o 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

- o 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:

- o Irrevocably waiving pension income;

- o Waiving the right to receive an inheritance;

- o Not accepting or accessing injury settlements;

- o 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

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

However, failure to cause assets to be received does not entail a transfer of assets for less than fair market value in all instances. For example, the individual may not be able to afford to take the necessary action to obtain the assets. Or, the cost of obtaining the assets may be greater than the assets are worth, thus effectively rendering the assets worthless to the individual. Examine the specific circumstances of each case before making a decision whether an uncompensated asset transfer occurred.

4. 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.

In determining whether resources have been transferred for less than fair market value, you may not apply more liberal definitions of resources which you may be using under §1902(r)(2) of the Act. For transfer of assets purposes, if you are a 209(b) State, you cannot use more restrictive definitions of resources that you may have in your State plan.

However, in determining whether and how a trust is counted in determining eligibility, you may apply more liberal methodologies for resources which you may be using under §1902(r)(2) of the Act. For trust purposes, if you are a 209(b) State, you may use more restrictive definitions of resources that you may have in your State plan.

For noninstitutionalized individuals, the home remains an exempt resource.

5. 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.

You may not, for transfer of assets purposes, apply more liberal definitions of income that you may be using under §1902(r)(2) of the Act. If you are a 209(b) State, you cannot use more restrictive definitions of income that you may have in your State plan.

However, in determining whether and how a trust is counted in determining eligibility, you may apply more liberal methodologies for income which you may be using under §1902(r)(2) of the Act. Also, for trust purposes, if you are a 209(b) State, you may use more restrictive definitions of income that you may have in your State plan.

6. 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.

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, as defined by the State, 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. In defining what is reasonable compensation, consider the amount of time and effort involved in managing a trust of the size involved, as well as the prevailing rate of compensation, if any, for managing a trust of similar size and complexity.

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 §3259.7. 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 State, 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 State 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. Finally, "pooled" trusts may provide that the trust can retain a certain percentage of the funds in the trust account upon the death of the beneficiary.

3258. TRANSFERS OF ASSETS FOR LESS THAN FAIR MARKET VALUE

3258.1 General.--Under the transfer of assets provisions in §1917(c) of the Act, as amended by OBRA 1993, you 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. You may also choose to deny coverage for certain other services for noninstitutionalized individuals who transfer (or whose spouses transfer) assets for less than fair market value. The following instructions explain the specific circumstances and rules under which you must deny Medicaid services.

The provisions explained in these instructions apply to all States, including those using more restrictive eligibility criteria than are used by the SSI program, under §1902(f) of the Act. Thus, 209(b) States cannot apply periods of ineligibility due to a transfer of resources for less than fair market value except in accordance with these instructions.

A. Definitions.--The following definitions apply to transfers of assets.

1. 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 you use 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, HCFA 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 to the State. For example, you may require that a payback arrangement had been agreed to in writing at the time services were provided.

2. 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.

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

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

- o An inpatient in a nursing facility;
- o An inpatient in a medical institution for whom payment is based on a level of care provided in a nursing facility; or
- o A home and community-based services recipient described in §1902(a)(10)(A)(ii)(VI) of the Act. For purposes of this section, a medical institution includes an intermediate care facility for the mentally retarded (ICF/MR). (See 42 CFR 435.1009.)

5. Noninstitutionalized Individual.--A noninstitutionalized individual is an individual receiving any of the services described in §3258.8.

6. Nursing Facility Services.--Nursing facility services are services as described in the State Medicaid Plan as nursing facility services.

3258.2 Effective Date.--This section applies to all transfers which are made on or after August 11, 1993. Transfers made before August 11, 1993, are treated under the rules in §3250. While this section applies to transfers made on or after August 11, 1993, penalties for transfers for less than fair market value, as described in §3258.8, 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.

EXAMPLE: An individual who applies for Medicaid transfers an asset on September 1, 1993. The transfer is found to have been made for less than fair market value. As such, a penalty, as described in §3258.8, is assessed. Because the transfer occurred after August 11, 1993, the transfer is assessed under the new rules set forth in this section. However, because a penalty under OBRA 1993 rules cannot apply before October 1, 1993, the penalty assessed under OBRA 1993 in this case begins on October 1, 1993. Pre-OBRA 1993 rules are used to determine whether a penalty is assessed for the period between September 1 and October 1. On October 1, begin using the OBRA 1993 rules for the transfer described in this example.

3258.3 Individuals To Whom Transfer of Assets Provisions Apply.--You must 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 in §3258.4. You also have the option of applying this provision to noninstitutionalized individuals when those individuals or their spouses dispose of assets for less than fair market value.

See §3258 for definitions of institutionalized and noninstitutionalized individuals.

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.

For noninstitutionalized individuals, you have the option of applying these provisions. If you wish to apply these provisions to noninstitutionalized individuals, you have the further option of choosing the groups to which the provisions apply. You may apply them to all noninstitutionalized individuals, or to specific categorical groups. However, if you choose to apply these provisions only to some groups, the groups you choose must be recognized groups as listed in §1905(a) of the Act.

3258.4 Look-Back Date and Look-Back Period.--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, depending on whether they are institutionalized, and there are special rules for some trusts, as described in subsection E.

A. Institutionalized Individual.-- For an individual in an institution, the look-back date is 36 months prior to the baseline date. The baseline date is the first date as of which the individual was:

- o Institutionalized; and

- o Applied for medical assistance under the State plan.

When an individual is already a Medicaid recipient and becomes institutionalized, the baseline date is the date upon which both of the above conditions are met, that is, the first day of institutionalization.

B. Noninstitutionalized Individual.--For a noninstitutionalized individual, the look-back date is 36 months prior to the baseline date, which is the date the individual:

- o Applies for medical assistance under the State plan; or, if later,

- o The date on which the individual disposes of assets for less than fair market value.

C. Multiple Periods of Institutionalization and Multiple Applications.--When an individual has multiple periods of institutionalization or has made multiple applications for Medicaid (whether or not they are successful), 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. Similarly, if a noninstitutionalized individual has applied for Medicaid more than once and has made more than one transfer of assets, the baseline date is that date on which the individual has first applied for Medicaid or, if later, made the first transfer of assets for less than fair market value after applying. Thus, 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.

D. Look-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 whether certain kinds of trusts are involved. (See subsection E for look-back periods involving trusts.) The look-back period is the period of time prior to the baseline date during which a previous transfer of assets for less than fair market value can be penalized. However, it is important to note that transfers which occur after the baseline date are also subject to penalty if they are made for less than fair market value.

NOTE: The 36 month look-back periods described above do 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 §3250. Thus, the look-back period is phased in over the 36-month period ending August 11, 1996.

EXAMPLE 1: Institutionalized Individual

An individual is institutionalized on February 13, 1997. He/she applies for Medicaid on April 7, 1997. The look-back date is the date 36 months prior to the baseline date, when both initiating requirements are met, i.e., institutionalization and application for Medicaid. That date is April 7, 1997. Thus, the look-back date is April 7, 1994. The look-back period is from April 7, 1994, through April 7, 1997.

EXAMPLE 2: Institutionalized Individual

An individual is institutionalized on February 13, 1995. He/she applies for Medicaid on April 7, 1995. The look-back date is 36 months prior to April 7, 1995, or April 7, 1992. However, because the transfer provisions of OBRA 1993 apply only to transfers made on or after August 11, 1993, any transfers made prior to August 11, 1993, are treated under the rules in §3250.

EXAMPLE 3: Noninstitutionalized Individual

An individual applies for Medicaid on February 13, 1997. On April 7, 1997, he/she transfers an asset for less than fair market value. The look-back date in this case is April 7, 1994, 36 months prior to the baseline date on which he/she transferred the asset. If the asset had been transferred before February 13, 1997 (the date of application for Medicaid), the baseline date would have been February 13, 1997 (the date of application). The look-back period would begin February 13, 1994, and extend to February 13, 1997.

E. Look-Back Period for Transfers of Assets Involving Trusts.--When an individual establishes a revocable trust a portion of which is disbursed to someone other than the grantor or for the benefit of the grantor, that portion is treated as a transfer of assets for less than fair market value. 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 is treated as a transfer of assets for less than fair market value. When a portion of a trust is treated as a transfer, the look-back period discussed in subsection D is extended to 60 months from:

- o The date the individual applied for Medicaid and was institutionalized; or,

- o For a noninstitutionalized individual, the date the individual applied for Medicaid or, if later, the date the transfer was made.

When a trust is irrevocable but some or all of the trust can be disbursed to or for the benefit of the individual, the look-back period applying to disbursements which could be made to or for the individual but are made to another person or persons is 36 months.

When the trust is revocable, the transfer is considered to take place on the date upon which the payment to someone other than the grantor was made. If the trust is irrevocable, 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.

When an individual places assets into an irrevocable trust and can still benefit from those assets, the amount transferred is any of those assets which have been 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 of the trust is considered as transferred for less than fair market value. The value of these assets is not reduced by any payments from the trust which may be made from these unavailable assets at a later date.

See §§3259ff. for a discussion of treatment of trusts in determining eligibility for Medicaid.

See §3259.6 for rules which apply when assets which may involve a transfer of assets for less than fair market value are placed in a trust.

3258.5 Penalty Periods.--When an individual (or spouse) makes a transfer of assets for less than fair market value, payment for certain services received by the individual is denied for a specified period of time. However, the individual remains eligible for Medicaid and can have payment made for services not subject to penalty. (See §3258.8.) For example, an institutionalized individual who transfers assets for less than fair market value must be denied reimbursement for nursing facility services. However, he or she may still be eligible for reimbursement for physician's services, provided such services are not provided as part of the individual's nursing home care.

A. Penalty Date.--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 for less than fair market value is 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), provided that date does not occur during an existing penalty period. If an asset was transferred prior to the look-back date discussed in §3258.4, no penalty can be imposed for that transfer.

B. Penalty Period - General.--The penalty period is the period of time during which payment for specified services is denied. Unlike the penalty period under the rules discussed in §3250, which was limited to 30 months, the penalty period under the OBRA 1993 rules has no statutory limit. Rather, the length of the penalty period is based solely on the value of the assets transferred and the cost of nursing facility care.

C. Transfer of Assets Takes Place During Existing Penalty Period.--When a transfer for less than fair market value takes place during an existing penalty period, whether imposed under the pre-OBRA 1993 or post-OBRA 1993 rules, a new penalty period cannot begin until the existing penalty period has expired.

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 expires, on April 30, 1994. Thus, the first penalty period runs from May 1, 1993, through April 30, 1994, and the second runs from May 1, 1994, through April 30, 1995.

D. Restricted Coverage - Institutionalized Individual.--The penalty for an institutionalized individual consists of ineligibility for certain services for a period or periods of ineligibility that equal the number of months calculated by taking the total, cumulative uncompensated value of all assets transferred by the individual or spouse on or after the look-back date discussed in §3258.4, divided by the average monthly cost to a private patient of nursing facility services in the State at the time of application. As an alternative, the State may use the average monthly cost in the community in which the individual is institutionalized.

When the amount of the transfer is less than the monthly cost of nursing facility care, you have the option of not imposing a penalty or imposing a penalty for less than a full month. Under the latter option, the actual length of the penalty is based on the proportion of the State§s private nursing facility rate that was transferred. If you choose to impose penalties for less than a full month, you must impose such penalties in all cases where a partial month penalty applies.

When an individual makes a series of transfers, each of which is less than the private nursing facility rate for a month, you have the option of imposing no penalty or imposing a series of penalties, each for less than a full month.

E. Restricted Coverage - Noninstitutionalized Individual.--The penalty period for a noninstitutionalized individual is calculated using the same method that is used for an institutionalized individual, including use of the average monthly cost of nursing facility services. The penalty for a noninstitutionalized individual cannot exceed the number of months calculated using this method. However, you may impose shorter penalty periods if you wish to do so. Obtain HCFA approval for any shorter penalty period you choose to impose, including approval of the methodology you use to calculate the shorter penalty period. See subsection D for transfers which are less than the private monthly rate for nursing facility care.

F. Individual Has Penalty Period Both As Institutionalized And Noninstitutionalized Individual.--When an individual incurs separate penalty periods as both institutionalized and noninstitutionalized for the same transfer, the total penalty period cannot exceed the penalty period that is applicable under only one category. In other words, a penalty imposed during a period of institutionalization reduces a penalty imposed for the same transfer or transfers made during the period of noninstitutionalization and vice versa.

EXAMPLE: An institutionalized individual transfers assets for less than fair market value, thereby incurring a transfer penalty of 24 months. After 12 months have elapsed, the individual leaves the institution and returns home. Because the State imposes penalties on noninstitutionalized individuals for transfers for less than fair market value, the same 24 month penalty applies to the individual, even though he/she left the institution. However, because of the limits on total penalty described above, the individual incurs only the 12 month penalty remaining from the transfer which occurred while he/she was institutionalized.

G. Multiple Transfers - General.--OBRA 1993 provides that the number of months of restricted coverage discussed in subsections C and D is based on the total, cumulative uncompensated value of the assets transferred. When a single asset is transferred or a number of assets are transferred during the same month, the penalty period is calculated using the total value of the asset(s) divided by the average monthly cost of nursing facility care. When assets are transferred at different times, use the following methods for calculating the penalty periods.

H. Transfers Made So That Penalty Periods Overlap.--When assets have been transferred in amounts and/or frequency that make the calculated penalty periods overlap, add together the value of all assets transferred, and divide by the cost of nursing facility care. This produces a single penalty period which begins on the first day of the month in which the first transfer was made.

EXAMPLE: An individual transfers $10,000 in January, $10,000 in February, and $10,000 in March, all of which are uncompensated. Calculated individually, based on a nursing facility cost of $2,500 a month, the penalty for the first transfer is from January through April, the second is from February through May, and the third is from March through June. Because these periods overlap, calculate the penalty period by adding the transfers together (a total of $30,000) and dividing by the nursing home cost ($2,500). This yields a penalty period of 12 months, which runs from January 1 through December 31 of that year.

As an alternative, calculate the individual penalty periods, as above, and impose them sequentially. Thus, the penalty for the first transfer extends from January through April, the second extends from May through August, and the third extends from September through December. In this example, the result is the same regardless of the method used.

I. Transfers Made So That Penalty Periods Do Not Overlap.--When multiple transfers are made in such a way that the penalty periods for each do not overlap, treat each transfer as a separate event with its own penalty period.

EXAMPLE: An individual transfers $5,000 in January, $5,000 in May, and $5,000 in October, all of which are uncompensated. Assuming a State private nursing facility cost of $2,500 a month, the penalty periods for transfers are, respectively, January through February, May through June, and October through November.

If you wish to use other methodologies for determining penalty periods, you may do so, provided you obtain HCFA approval for those methods. However, any alternative method must adhere to the basic principles that:

o The total, cumulative uncompensated value of the asset or assets transferred is used to determine the length of the penalty period or periods;

o Penalty periods do not overlap, nor in any way run concurrently; and

o No penalty period can begin while a previous penalty period is in effect.

J. Transfer By a Spouse That Results in Penalty Period for the Individual.--When a spouse transfers an asset that results in a penalty for the individual, the penalty period must, in certain instances, be apportioned between the spouses. You must apportion the penalty when:

- o The spouse is eligible for Medicaid;
- o A penalty could, under normal circumstances, be assessed against the spouse, i.e., the spouse is institutionalized, or the State has elected to impose penalties on noninstitutionalized individuals; and
- o Some portion of the penalty against the individual remains at the time the above conditions are met.

When these conditions are met, you must apportion any existing penalty period between the spouses. You may use any reasonable methodology you wish to determine how the penalty is apportioned. However, the methodology you use must provide that the total penalty imposed on both spouses does not exceed the length of the penalty originally imposed on the individual.

EXAMPLE: Mr. Able enters a nursing facility and applies for Medicaid. Mrs. Able transfers an asset that results in a 36 month penalty against Mr. Able. Twelve months into the penalty period, Mrs. Able enters a nursing facility and becomes eligible for Medicaid. The penalty period against Mr. Able still has 24 months to run. Because Mrs. Able is now in a nursing facility, and a portion of the original penalty period remains, you must apportion the remaining 24 months of penalty between Mr. and Mrs. Able. You may apportion the remaining penalty period in any way you wish, provided that the total remaining penalty period assessed against both spouses does not exceed 24 months.

When, for some reason, one spouse is no longer subject to a penalty (e.g., the spouse no longer receives nursing facility services, or the spouse dies), the remaining penalty period applicable to both spouses must be served by the remaining spouse.

In the above example, assume the 24 month penalty period was apportioned equally between Mr. and Mrs. Able. After six months, Mr. Able leaves the nursing facility, but Mrs. Able remains. Because Mr. Able is no longer subject to the penalty, the remaining total penalty (12 months) must be imposed on Mrs. Able. If Mr. Able returns to the nursing facility before the end of the 12 month period, the remaining penalty is again apportioned between the two spouses.

K. Penalty Period When Individual Leaves Institution.--A penalty period imposed for a transfer of assets runs continuously from the first date of the penalty period (the penalty date), regardless of whether the individual remains in or leaves the institution (or waiver program). Thus, if the individual leaves the nursing facility, the penalty period nevertheless continues until the end of the calculated period.

3258.6 Treatment Of Income As Asset.--Under OBRA 1993, 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 be paid to the individual. You may raise questions on whether lump sums of income or the right to income have been transferred based on information given on the Medicaid application or through active questioning of the individual concerning sources of income, income levels in the past versus the present, direct questions about giving income to others, etc.

When you find that income or the right to income has been transferred, a penalty for that transfer must be imposed for institutionalized individuals (if no exceptions apply). In determining the length of the penalty period, you may use several methods of treating the income involved.

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 the amount of the payment is small enough that a full month's penalty does not result, you have the option of not imposing a penalty or, if you choose, applying the penalty for only part of the month.

EXAMPLE: A lump sum amount of $1,000 is transferred, but the State's private nursing facility rate is $2,000. You can either impose no penalty or apply a penalty for half of the month.

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, you can 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) you can, as an alternative, 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.

You may choose to use alternative methods for determining the length of the penalty period where income is transferred. However, you must obtain approval from HCFA for use of alternative methods.

3258.7 Treatment Of Jointly Owned Assets.--When an asset is held by an individual in common with another person or persons via joint tenancy, tenancy in common, joint ownership, or a similar arrangement, the asset (or affected portion of the asset) is considered to be transferred by the individual when any action is taken, either by the individual or any other person, that reduces or eliminates the individual's ownership or control of the 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. 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. However, you must also provide an opportunity for the owners to rebut the presumption of ownership. If either the applicant/recipient or the other person can establish to your satisfaction that the funds withdrawn were, in fact, the sole property of and contributed to the account by the other person, and thus did not belong to the applicant/recipient, withdrawal of those funds should not result in the imposition of a penalty.

3258.8 Penalties for Transfers of Assets for Less Than Fair Market Value.--When you find that assets have been transferred for less than fair market value, OBRA 1993 provides for specific penalties. These penalties involve the denial of reimbursement for certain services received by the individual. The specific services for which reimbursement must be withheld depend on the individual's situation.

A. Penalties For Institutionalized Individuals.--For institutionalized individuals, the services for which payment must be withheld are:

- o Nursing facility services, as defined in the State Medicaid Plan;
- o A level of care in any institution equivalent to that of nursing facility services; and
- o Home and community-based services provided under a waiver for individuals eligible for such services under §1915(c) or (d) of the Act.

B. Penalties for Noninstitutionalized Individuals.--For a noninstitutionalized individual, the services for which payment must be withheld are the following, not including those services described above:

- o Home health services, as described in §1905(a)(7) of the Act;
- o Home and community care (to the extent allowed and as defined in §1929 of the Act) for functionally disabled elderly adults (see §1905(a)(22) of the Act); and
- o Personal care services furnished to individuals who are not inpatients in certain medical institutions. (See §1905(a)(24) of the Act.)

At the option of the State, you may also withhold reimbursement for services provided to noninstitutionalized individuals for other long term care services for which medical assistance is otherwise available under the State plan to individuals requiring long term care. Such services might include, for example, private duty nursing. However, the specific services involved depend on your own State plan.

3258.9 Treatment of Certain Kinds of Transfers for Less Than Fair Market Value.--Certain financial transactions or purchases may constitute a transfer of assets for less than fair market value. Treat the following as described.

A. Life Estates.--Under a life estate, an individual who owns property transfers ownership of that property to another individual while retaining, for the rest of his or her life (or the life of another person), certain rights to that property. Generally, a life estate entitles the owner of the life estate (the grantor) to possess, use, and obtain profits from the property as long as he or she lives. However, actual ownership of the property has passed to another individual.

In a transaction involving a life estate, a transfer of assets is involved. This transfer is for less than fair market value whenever the value of the transferred asset is greater than the value of the rights conferred by the life estate.

In determining whether a penalty is assessed because of a life estate and how long that penalty should be, compute the value of the asset transferred and the value of the life estate, and calculate the difference between the two.

The value of the asset transferred is computed by using the regular Medicaid rules for determining the value of assets. To calculate the value of the life estate, use the life estate table below (from POMS SI 01140.120). Determine the value of the life estate by multiplying the current market value of the property by the life estate factor that corresponds to the grantor's age. The value of the life estate is then subtracted from the value of the asset transferred to determine the portion of the asset that was transferred for less than fair market value. Or, if only the value of the transferred portion is needed, multiply the current market value of the asset by the remainder factor.

EXAMPLE: Mrs. Able, age 65, owns a house with a small farm attached to it, worth $100,000 in total. She deeds the house and farm to her son but retains a life estate in the property. Under the terms of the life estate, Mrs. Able is entitled to live in the house for the rest of her life and to any produce, income, etc. generated by the farm. To determine the value of Mrs. Able's life estate, the current market value of the property ($100,000) is multiplied by a life estate factor corresponding to Mrs. Able§s age in the table (.67970), resulting in a life estate worth $67,970. The penalty is assessed for the difference between the value of the asset transferred ($100,000) and the value of the life estate ($67,790), or a penalty based on $32,030 of assets transferred for less than fair market value.

Some States allow life estates with powers, wherein the owner of the property creates a life estate for himself or herself, retaining the power to sell the property, with a remainder interest to someone else, e.g., a child. Since the life estate holder retains the power to sell the property, its value as a resource is its full equity value. In this situation, the individual has not transferred anything of value, because he or she can terminate the life estate at any time and restore full ownership to himself or herself. Instead, the full value of the asset in question is treated as a countable resource to the individual (assuming, of course, that it is not an otherwise excluded resource).

LIFE ESTATE AND REMAINDER INTEREST TABLE

(See 26 CFR 20.2031-7 and 49 FR Vol. 49 No. 93/5-11-84.)

AGE	LIFE ESTATE	REMAINDER	AGE	LIFE ESTATE	REMAINDER
0	.97188	.02812	35	.93868	.06132
1	.98988	.01012	36	.93460	.06540
2	.99017	.00983	37	.93026	.06974
3	.99008	.00992	38	.92567	.07433
4	.98981	.01019	39	.92083	.07917
5	.98938	.01062	40	.91571	.08429
6	.98884	.01116	41	.91030	.08970
7	.98822	.01178	42	.90457	.09543
8	.98748	.01252	43	.89855	.10145
9	.98663	.01337	44	.89221	.10779
10	.98565	.01435	45	.88558	.11442
11	.98453	.01547	46	.87863	.12137
12	.98329	.01671	47	.87137	.12863
13	.98198	.01802	48	.86374	.13626
14	.98066	.01934	49	.85578	.14422
15	.97937	.02063	50	.84743	.15257
16	.97815	.02185	51	.83674	.16126
17	.97700	.02300	52	.82969	.17031
18	.97590	.02410	53	.82028	.17972
19	.97480	.02520	54	.81054	.18946
20	.97365	.02635	55	.80046	.19954
21	.97245	.02755	56	.79006	.20994
22	.97120	.02880	57	.77931	.22069
23	.96986	.03014	58	.76822	.23178
24	.96841	.03159	59	.75675	.24325
25	.96678	.03322	60	.74491	.25509
26	.96495	.03505	61	.73267	.26733
27	.96290	.03710	62	.72002	.27998
28	.96062	.03938	63	.70696	.29304
29	.95813	.04187	64	.69352	.30648
30	.95543	.04457	65	.67970	.32030
31	.95254	.04746	66	.66551	.33449
32	.94942	.05058	67	.65098	.34902
33	.94608	.05392	68	.63610	.36390
34	.94250	.05750	69	.62086	.37914

LIFE ESTATE AND REMAINDER INTEREST TABLE (Cont.)

AGE	LIFE ESTATE	REMAINDER	AGE	LIFE ESTATE	REMAINDER
70	.60522	.39478	90	.28221	.71779
71	.58914	.41086	91	.26955	.73045
72	.57261	.42739	92	.25771	.74229
73	.55571	.44429	93	.24692	.75308
74	.53862	.46138	94	.23728	.76272
75	.52149	.47851	95	.22887	.77113
76	.50441	.49559	96	.22181	.77819
77	.48742	.51258	97	.21550	.78450
78	.47049	.52951	98	.21000	.79000
79	.45357	.54643	99	.20486	.79514
80	.43659	.56341	100	.19975	.80025
81	.41967	.58033	101	.19532	.80468
82	.40295	.59705	102	.19054	.80946
83	.38642	.61358	103	.18437	.81563
84	.36998	.63002	104	.17856	.82144
85	.35359	.64641	105	.16962	.83038
86	.33764	.66236	106	.15488	.84512
87	.32262	.67738	107	.13409	.86591
88	.30859	.69141	108	.10068	.89932
89	.29526	.70474	109	.04545	.95455

B. Annuities.--Section 1917(d)(6) of the Act provides that the term "trust" includes an annuity to the extent and in such manner as the Secretary specifies. This subsection describes how annuities are treated under the trust/transfer provisions.

When an individual purchases an annuity, he or she generally pays to the entity issuing the annuity (e.g., a bank or insurance company) a lump sum of money, in return for which he or she is promised regular payments of income in certain amounts. These payments may continue for a fixed period of time (for example, 10 years) or for as long as the individual (or another designated beneficiary) lives, thus creating an ongoing income stream. The annuity may or may not include a remainder clause under which, if the annuitant dies, the contracting entity converts whatever is remaining in the annuity into a lump sum and pays it to a designated beneficiary.

Annuities, although usually purchased in order to provide a source of income for retirement, are occasionally used to shelter assets so that individuals purchasing them can become eligible for Medicaid. In order to avoid penalizing annuities validly purchased as part of a retirement plan but to capture those annuities which abusively shelter assets, a determination must be made with regard to the ultimate purpose of the annuity (i.e., whether the purchase of the annuity constitutes a transfer of assets for less than fair market value). If the expected return on the annuity is commensurate with a reasonable estimate of the life expectancy of the beneficiary, the annuity can be deemed actuarially sound.

To make this determination, use the following life expectancy tables, compiled from information published by the Office of the Actuary of the Social Security Administration. The average number of years of expected life remaining for the individual must coincide with the life of the annuity. If the individual is not reasonably expected to live longer than the guarantee period of the annuity, the individual will not receive fair market value for the annuity based on the projected return. In this case, the annuity is not actuarially sound and a transfer of assets for less than fair market value has taken place, subjecting the individual to a penalty. The penalty is assessed based on a transfer of assets for less than fair market value that is considered to have occurred at the time the annuity was purchased.

For example, if a male at age 65 purchases a $10,000 annuity to be paid over the course of 10 years, his life expectancy according to the table is 14.96 years. Thus, the annuity is actuarially sound. However, if a male at age 80 purchases the same annuity for $10,000 to be paid over the course of 10 years, his life expectancy is only 6.98 years. Thus, a payout of the annuity for approximately 3 years is considered a transfer of assets for less than fair market value and that amount is subject to penalty.

LIFE EXPECTANCY TABLE - MALES

Age	Life Expectancy	Age	Life Expectancy	Age	Life Expectancy
0	71.80	40	35.05	80	6.98
1	71.53	41	34.15	81	6.59
2	70.58	42	33.26	82	6.21
3	69.62	43	32.37	83	5.85
4	68.65	44	31.49	84	5.51
5	67.67	45	30.61	85	5.19
6	66.69	46	29.74	86	4.89
7	65.71	47	28.88	87	4.61
8	64.73	48	28.02	88	4.34
9	63.74	49	27.17	89	4.09
10	62.75	50	26.32	90	3.86
11	61.76	51	25.48	91	3.64
12	60.78	52	24.65	92	3.43
13	59.79	53	23.82	93	3.24
14	58.82	54	23.01	94	3.06
15	57.85	55	22.21	95	2.90
16	56.91	56	21.43	96	2.74
17	55.97	57	20.66	97	2.60
18	55.05	58	19.90	98	2.47
19	54.13	59	19.15	99	2.34
20	53.21	60	18.42	100	2.22
21	52.29	61	17.70	101	2.11
22	51.38	62	16.99	102	1.99
23	50.46	63	16.30	103	1.89
24	49.55	64	15.62	104	1.78
25	48.63	65	14.96	105	1.68
26	47.72	66	14.32	106	1.59
27	46.80	67	13.70	107	1.50
28	45.88	68	13.09	108	1.41
29	44.97	69	12.50	109	1.33
30	44.06	70	11.92	110	1.25
31	43.15	71	11.35	111	1.17
32	42.24	72	10.80	112	1.10
33	41.33	73	10.27	113	1.02
34	40.23	74	9.27	114	0.96
35	39.52	75	9.24	115	0.89
36	38.62	76	8.76	116	0.83
37	37.73	77	8.29	117	0.77
38	36.83	78	7.83	118	0.71
39	35.94	79	7.40	119	0.66

LIFE EXPECTANCY TABLE - FEMALES

Age	Life Expectancy	Age	Life Expectancy	Age	Life Expectancy
0	78.79	40	40.61	80	9.11
1	78.42	41	39.66	81	8.58
2	77.48	42	38.72	82	8.06
3	76.51	43	37.78	83	7.56
4	75.54	44	36.85	84	7.08
5	74.56	45	35.92	85	6.63
6	73.57	46	35.00	86	6.20
7	72.59	47	34.08	87	5.79
8	71.60	48	33.17	88	5.41
9	70.61	49	32.27	89	5.05
10	69.62	50	31.37	90	4.71
11	68.63	51	30.48	91	4.40
12	67.64	52	29.60	92	4.11
13	66.65	53	28.72	93	3.84
14	65.67	54	27.86	94	3.59
15	64.68	55	27.00	95	3.36
16	63.71	56	26.15	96	3.16
17	62.74	57	25.31	97	2.97
18	61.77	58	24.48	98	2.80
19	60.80	59	23.67	99	2.64
20	59.83	60	22.86	100	2.48
21	58.86	61	22.06	101	2.34
22	57.89	62	21.27	102	2.20
23	56.92	63	20.49	103	2.06
24	55.95	64	19.72	104	1.93
25	54.98	65	18.96	105	1.81
26	54.02	66	18.21	106	1.69
27	53.05	67	17.48	107	1.58
28	52.08	68	16.76	108	1.48
29	51.12	69	16.04	109	1.38
30	50.15	70	15.35	110	1.28
31	49.19	71	14.66	111	1.19
32	48.23	72	13.99	112	1.10
33	47.27	73	13.33	113	1.02
34	46.31	74	12.68	114	0.96
35	45.35	75	12.05	115	0.89
36	44.40	76	11.43	116	0.83
37	43.45	77	10.83	117	0.77
38	42.50	78	10.24	118	0.71
39	41.55	79	9.67	119	0.66

3258.10 Exceptions to Application of Transfer of Assets Penalties.--There are a number of instances where, even if an asset is transferred for less than fair market value, the penalties discussed above do not apply. These exceptions are:

A. The asset transferred is the individual§s home, and title to the home is transferred to:

o The spouse of the individual;

o A child of the individual who is under age 21;

o A child who is blind or permanently and totally disabled as defined by a State program established under title XVI in States eligible to participate in such programs or blind or disabled as defined by the SSI program in all other States;

o The sibling of the individual who has an equity interest in the home and who has been residing in the home for a period of at least one year immediately before the date the individual becomes institutionalized; or

o A son or daughter of the individual (other than a child as described above) who was residing in the home for at least two years immediately before the date the individual becomes institutionalized, and who (as determined by the State) provided care to the individual which permitted the individual to reside at home, rather than in an institution or facility.

B. The assets were:

o Transferred to the individual§s spouse or to another for the sole benefit of the individual's spouse;

o Transferred from the individual§s spouse to another for the sole benefit of the individual's spouse;

o Transferred to the individual§s child, or to a trust (including a trust described in §3259.7) established solely for the benefit of the individual's child (The child must be blind or permanently and totally disabled, as defined by a State program established under title XVI, in States eligible to participate in such programs or blind or disabled as defined under SSI in all other States); or

o Transferred to a trust (including a trust as discussed in '3259.7) established for the sole benefit of an individual under 65 years of age who is disabled as defined under SSI.

1. For the Sole Benefit of.--See §3257 for a definition of the term "for the sole benefit of."

In determining whether an asset was transferred for the sole benefit of 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.

2. Blind or Disabled as Defined Under SSI Program.--When it is alleged that an asset was transferred to or for the benefit of an individual who is blind or totally and permanently disabled, you must determine that the individual in fact meets the definitions of blindness or disability used by the SSI program (which are currently the same definitions as under the title II program) or under the State plan programs established under title XVI or under the title II program. If the individual is receiving SSI benefits or is eligible for Medicaid as a result of blindness or disability, you can accept the determination of blindness or disability as valid evidence. However, if the individual is not receiving SSI and/or Medicaid, you must make a separate determination of blindness or disability. When such a determination is necessary, follow the procedures usually used in your State when an individual applies for Medicaid on the basis of blindness or disability. However, if you use more restrictive criteria under §1902(f) of the Act, you may not use a more restrictive definition of blindness or disability. Instead, you must use the definitions used by the SSI program.

C. In addition to the above, a penalty for transferring an asset for less than fair market value is not assessed if a satisfactory showing is made to the State that:

o The individual intended to dispose of the assets either at fair market value or for other valuable consideration;

o The assets were transferred exclusively for a purpose other than to qualify for Medicaid;

o All of the assets transferred for less than fair market value have been returned to the individual; or

o Imposition of a penalty would work an undue hardship.

Pending publication of regulations on transfers of assets that will provide guidelines on what is meant by the term "satisfactory showing," you must determine what constitutes a satisfactory showing in your State.

1. Intent to Dispose of Assets for Fair Market Value or for Other Valuable Consideration.--See §3258.1 for a definition of the term "valuable consideration." In determining whether an individual intended to dispose of an asset for fair market value or for other valuable consideration you should require that the individual establish, to your satisfaction, the circumstances which caused him or her to transfer the asset for less than fair market value. Verbal statements alone generally are not sufficient. Instead, require the individual to provide written evidence of attempts to dispose of the asset for fair market value, as well as evidence to support the value (if any) at which the asset was disposed.

2. Transfers Exclusively for a Purpose Other Than to Qualify for Medicaid.--Require the individual to establish, to your satisfaction, that the asset was transferred for a purpose other than to qualify for Medicaid. Verbal assurances that the individual was not considering Medicaid when the asset was disposed of are not sufficient. Rather, convincing evidence must be presented as to the specific purpose for which the asset was transferred.

In some instances, the individual may argue that the asset was not transferred to obtain Medicaid because the individual is already eligible for Medicaid. This may, in fact, be a valid argument. However, the validity of the argument must be determined on a case-by-case basis, based on the individual's specific circumstances. For example, while the individual may now be eligible for Medicaid, the asset in question (e.g., a home) might be counted as a resource in the future, thus compromising the individual's future eligibility. In such a situation, the argument that the individual was already eligible for Medicaid does not suffice.

3. All Assets Transferred for Less Than Fair Market Value Are Returned to the Individual.--When all assets transferred are returned to the individual, no penalty for transferring assets can be assessed. In this situation, you must ensure that any benefits due on behalf of the individual are, in fact, paid. When a penalty has been assessed and payment for services denied, a return of the assets requires a retroactive adjustment, including erasure of the penalty, back to the beginning of the penalty period.

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.

It is important to note that, to void imposition of a penalty, all of the assets in question or their fair market equivalent must be returned. If, for example, the asset was sold by the individual who received it, the full market value of the asset must be returned to the transferor, either in cash or another form acceptable to the State.

When only part of an asset or its equivalent value is returned, a penalty period can be modified but not eliminated. For example, if only half the value of the asset is returned, the penalty period can be reduced by one-half.

4. Imposition of Penalty Would Work Undue Hardship.--When application of the transfer of assets provisions discussed in these sections would work an undue hardship, those provisions do not apply. Unlike the policies applying to transfers made on or before August 10, 1993, which only required that you acknowledge that the statute included an undue hardship provision, under OBRA 1993 you must implement an undue hardship procedure for transfers of assets. Further, that procedure must be described in your Medicaid State Plan. You have considerable flexibility in implementing an undue hardship provision. However, your undue hardship procedure must meet the requirements discussed in subsection 5.

5. Undue Hardship Defined.--Undue hardship exists when application of the transfer of assets provisions would deprive the individual of medical care such that his/her health or his/her life would be endangered. Undue hardship also exists when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter, or other necessities of life.

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.

You have considerable flexibility in deciding the circumstances under which you will not impose penalties under the transfer of assets provisions because of undue hardship. For example, you can specify the criteria to be used in determining whether the individual's life or health would be endangered and whether application of a penalty would deprive the individual of food, clothing, or shelter. You can also specify the extent to which an individual must make an effort to recover assets transferred for less than fair market value. As a general rule, you have the flexibility to establish whatever criteria you believe are appropriate, as long as you adhere to the basic definition of undue hardship described above.

However, your undue hardship procedure must, at a minimum, provide for and discuss the following administrative requirements:

o Notice to recipients that an undue hardship exception exists;

o A timely process for determining whether an undue hardship waiver will be granted; and

o A process under which an adverse determination can be appealed.

3258.11 Transfers of Assets and Spousal Impoverishment Provisions.--Under §1917(c)(2)(B) of the Act, certain transfers of assets for less than fair market value are exempt from penalty. (See §3258.10 for a complete discussion of those exemptions.) Among those exemptions are transfers from an individual to a spouse, transfers from an individual to a third party for the sole benefit of a spouse, and transfers from a spouse to a third party for the sole benefit of the spouse.

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. (See §3260 for a complete discussion of the spousal impoverishment provisions.)

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 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 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 (see §3257) 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.

3259. TREATMENT OF TRUSTS

3259.1 General.--Under the trust provisions in §1917(d) of the Act, you must consider whether and to what extent a trust is counted in determining eligibility for Medicaid. The following instructions explain the rules under which trusts are considered. These instructions apply to eligibility determinations for all individuals, including cash assistance recipients and others who are otherwise automatically eligible and whose income and resources are not ordinarily measured against an independent Medicaid eligibility standard. Also, these instructions apply to post-eligibility determinations as well as eligibility determinations.

A. Definitions.--The following definitions apply to trusts.

1. Trust.--For purposes of this section, a trust is any arrangement in which a grantor transfers property to a trustee or trustees with the intention that it be held, managed, or administered by the trustee(s) for the benefit of the grantor or certain designated individuals (beneficiaries). The trust must be valid under State law and manifested by a valid trust instrument or agreement. A trustee holds a fiduciary responsibility to hold or manage the trust§s corpus and income for the benefit of the beneficiaries. The term "trust" also includes any legal instrument or device that is similar to a trust. It does not cover trusts established by will. Such trusts must be dealt with using applicable cash assistance program policies.

2. Legal Instrument or Device Similar to Trust.--This is any legal instrument, device, or arrangement which may not be called a trust under State law but which is similar to a trust. That is, it involves a grantor who transfers property to an individual or entity with fiduciary obligations (considered a trustee for purposes of this section). The grantor makes the transfer with the intention that it be held, managed, or administered by the individual or entity for the benefit of the grantor or others. This can include (but is not limited to) escrow accounts, investment accounts, pension funds, and other similar devices managed by an individual or entity with fiduciary obligations.

3. Trustee.--A trustee is any individual, individuals, or entity (such as an insurance company or bank) that manages a trust or similar device and has fiduciary responsibilities.

4. Grantor.--A grantor is any individual who creates a trust. For purposes of this section, the term "grantor" includes:

- o The individual;
- o The individual's spouse;
- o 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
- o A person, including a court or administrative body, acting at the direction or upon the request of the individual, or the individual's spouse.

5. Revocable Trust.-- A revocable trust is a trust which can under State law be revoked by the grantor. A trust which provides that the trust can only be modified or terminated by a court is considered to be a revocable trust,

since the grantor (or his/her representative) can petition the court to terminate the trust. Also, a trust which is called irrevocable but which terminates if some action is taken by the grantor is a revocable trust for purposes of this instruction. For example, a trust may require a trustee to terminate a trust and disburse the funds to the grantor if the grantor leaves a nursing facility and returns home. Such a trust is considered to be revocable.

6. Irrevocable Trust.--An irrevocable trust is a trust which cannot, in any way, be revoked by the grantor.

7. Beneficiary.--A beneficiary is any individual or individuals designated in the trust instrument as benefiting in some way from the trust, excluding the trustee or any other individual whose benefit consists only of reasonable fees or payments for managing or administering the trust. The beneficiary can be the grantor himself, another individual or individuals, or a combination of any of these parties.

8. Payment.--For purposes of this section a payment from a trust is any disbursal from the corpus of the trust or from income generated by the trust which benefits the party receiving it. A payment may include actual cash, as well as noncash or property disbursements, such as the right to use and occupy real property.

9. Annuity.--An annuity is a right to receive fixed, periodic payments, either for life or a term of years. See §3258.9.B for a discussion of how to treat annuities.

3259.2 Effective Date.--This section applies to all trusts established on or after August 11, 1993. However, the provisions in this instruction are effective December 13, 1994. For the period prior to this date, you may use any reasonable interpretations of the statute in dealing with trusts. Trusts established before August 11, 1993, are treated under the rules in §3215. Also, trusts established before August 11, 1993, but added to or otherwise augmented on or after that date are treated under the rules in §3215. (However, additions to an established trust on or after August 11, 1993, may be considered transfers of assets for less than fair market value under §§3258ff.) While this section applies to trusts established on or after August 11, 1993, you cannot deny eligibility for Medicaid or apply the rules under this section based on an individual creating a trust until October 1, 1993. For a trust established on or after August 11, 1993, but prior to October 1, 1993, apply pre-OBRA 1993 rules until October 1. On October 1, begin using the OBRA 1993 rules for treating trusts.

When the Secretary determines that your State requires enabling legislation (other than legislation to appropriate funds) to implement the trust provisions in §§3259ff, you may delay complying with the effective date of the statute (October 1, 1993). The compliance date can be delayed until after the close of the first regular legislative session that begins after August 10, 1993. It can be delayed until the first day of the first calendar quarter beginning after this session closes. In the case of a 2-year legislative session, each year is considered a separate regular session.

The statutory effective date of October 1, 1993, remains in effect even if a State is granted a delayed compliance date. However, no compliance action will be taken against a State which requires legislation to enact the trust provisions. Once enabling legislation is enacted, a State can choose whether to enforce the trust provisions retroactively.

To obtain a delayed compliance date, submit a written request to your HCFA regional office with an opinion from the State's Attorney General concerning the necessity of passing enabling legislation.

3259.3 Individuals to Whom Trust Provisions Apply.--This section applies to any individual who establishes a trust and who is an applicant for or recipient of Medicaid. An individual is considered to have established a trust if his or her assets (regardless of how little) were used to form part or all of the corpus of the trust and if any of the parties described as a grantor in §3259.1 established the trust, other than by will. (See also §3257 for a definition of individual as it is used in this section.)

3259.4 Individual's Assets Form Only Part of Trust.--When a trust corpus includes assets of another person or persons as well as assets of the individual, the rules in §§3259ff apply only to the portion of the trust attributable to the assets of the individual. Thus, in determining countable income and resources in the trust for eligibility and post-eligibility purposes, you must prorate any amounts of income and resources, based on the proportion of the individual§s assets in the trust to those of other persons.

3259.5 Application of Trust Provisions.--The rules set forth in this section apply to trusts without regard to:

- o The purpose for which the trust is established;
- o Whether the trustee(s), has or exercises any discretion under the trust;
- o Any restrictions on when or whether distributions can be made from the trust; or
- o Any restrictions on the use of distributions from the trust.

This means that any trust which meets the basic definition of a trust can be counted in determining eligibility for Medicaid. No clause or requirement in the trust, no matter how specifically it applies to Medicaid or other Federal or State programs (i.e., an exculpatory clause), precludes a trust from being considered under the rules in §§3259ff.

NOTE: While exculpatory clauses, use clauses, trustee discretion, and restrictions on distributions, etc., do not affect a trust's countability, they do have an impact on how the various components of specific trusts are treated. (See §3259.6 for a detailed discussion of how various types of trusts are treated.)

3259.6 Treatment of Trusts.--How a specific trust is counted for eligibility purposes depends on the characteristics of the trust. The following are the rules for counting various kinds of trusts.

A. Revocable Trust.--In the case of a revocable trust:

- o The entire corpus of the trust is counted as an available resource to the individual;

- o Any payments from the trust made to or for the benefit of the individual are counted as income to the individual (see §3257 for the definition of income);

- o Any payments from the trust which are not made to or for the benefit of the individual are considered assets disposed of for less than fair market value. (See §§3258ff. for the treatment of transfers of assets for less than fair market value.)

When a portion of a revocable trust is treated as a transfer of assets for less than fair market value, the look-back period described in §3258.4 is extended from the usual 36 months to 60 months. (See §3258.4 for how to determine the look-back period for transfers of assets for less than fair market value.)

EXAMPLE: Mr. Baker establishes a revocable trust with a corpus of $100,000 on March 1, 1994, enters a nursing facility on November 15, 1997, and applies for Medicaid on February 15, 1998. Under the terms of the trust, the trustee has complete discretion in disbursing funds from the trust. Each month, the trustee disburses $100 as an allowance to Mr. Baker and $500 to a property management firm for the upkeep of Mr. Baker's home. On June 15, 1994, the trustee gives $50,000 from the corpus to Mr. Baker's brother.

In this example, the $100 personal allowance and the $500 for upkeep of the house counts as income each month to Mr. Baker. Because the trust is revocable, the entire value of the corpus is considered a resource to Mr. Baker. Originally, this was $100,000. However, in June 1994, the trustee gave away $50,000. Thus, only the remaining $50,000 is countable as a resource to Mr. Baker.

However, the giveaway is treated as a transfer of assets for less than fair market value. When a trust is revocable, the look-back period for such transfers is 60 months rather than the usual 36 months. The look-back period in this case starts on February 15, 1993, (60 months prior to February 15, 1998, the date Mr. Baker was both in an institution and applied for Medicaid). Because the transfer occurred in June 1994, it falls within the look-back period. Thus, a penalty under the transfer of assets provisions is imposed, beginning June 1, 1994, (the beginning of the month in which the transfer occurred). This penalty, which is denial of payment for Mr. Baker's nursing home care, is based on the amount of the transfer ($50,000), divided by the State's average monthly cost of private nursing facility care. (See §3258ff. for the transfer of assets rules.)

B. Irrevocable Trust - Payment Can Be Made to Individual Under Terms of Trust.--In the case of an irrevocable trust, where there are any circumstances under which payment can be made to or for the benefit of the individual from all or a portion of the trust, the following rules apply to that portion:

o Payments from income or from the corpus made to or for the benefit of the individual are treated as income to the individual;

o Income on the corpus of the trust which could be paid to or for the benefit of the individual is treated as a resource available to the individual;

o The portion of the corpus that could be paid to or for the benefit of the individual is treated as a resource available to the individual; and

o Payments from income or from the corpus that are made but not to or for the benefit of the individual are treated as a transfer of assets for less than fair market value. (See §§3258ff. for treatment of transfers for less than fair market value.)

EXAMPLE: Use the same facts that were used in the previous example, but treat the trust as an irrevocable trust. The trustee has discretion to disburse the entire corpus of the trust and all income from the trust to anyone, including the grantor. The $100 personal allowance and $500 for home upkeep are income to Mr. Baker. The $50,000 left after the gift to Mr. Baker's brother is a countable resource to Mr. Baker, since there are circumstances under which payment of this amount could be made to Mr. Baker. The $50,000 gift to Mr. Baker's brother is treated as a transfer of assets for less than fair market value. However, the look-back period for this type of trust is only 36 months. (See §3258.4 for transfer look-back periods as they apply to trusts.) The transfer occurred outside of the look-back period. Thus, no penalty for transferring an asset for less than fair market value can be imposed.

C. Irrevocable Trust - Payments From All or Portion of Trust Cannot, Under Any Circumstances, Be Made to or for the Benefit of the Individual.--When all or a portion of the corpus or income on the corpus of a trust cannot be paid to the individual, treat all or any such portion or income as a transfer of assets for less than fair market value, per instructions in §§3258ff.

In treating these portions as a transfer of assets, the date of the transfer is considered to be:

o The date the trust was established; or,

o If later, the date on which payment to the individual was foreclosed.

In determining for transfer of assets purposes the value of the portion of the trust which cannot be paid to the individual, do not subtract from the value of the trust any payments made, for whatever purpose, after the date the trust was established or, if later, the date payment to the individual was foreclosed. If the trustee or the grantor adds funds to that portion of the trust after these dates, the addition of those funds is considered to be a new transfer of assets, effective on the date the funds are added to that portion of the trust.

Thus, in treating portions of a trust which cannot be paid to an individual, the value of the transferred amount is no less than its value on the date the trust is established or payment is foreclosed. When additional funds are added to this portion of the trust, those funds are treated as a new transfer of assets for less than fair market value.

When that portion of a trust which cannot be paid to an individual is treated as a transfer of assets for less than fair market value, the usual 36 month look-back period is extended to 60 months. (See §3258.4 for the look-back period for transfers of assets for less than fair market value.)

EXAMPLE: Use the same facts that are used in the examples in subsections A and B, except that the trustee is precluded by the trust from disbursing any of the corpus of the trust to or for the benefit of Mr. Baker. Again, the $100 and $500 (which come from income to the trust) count as income to Mr. Baker. Because none of the corpus can be disbursed to Mr. Baker, the entire value of the corpus at the time the trust was created ($100,000 in March 1994) is treated as a transfer of assets for less than fair market value.

As with the revocable trust discussed in subsection A, the date of transfer is within the 60 month look-back period that applies to portions of trusts that cannot be disbursed to or for the individual. Thus, a transfer of assets is considered to have occurred as of March 1, 1994. The fact that $50,000 was actually transferred out of the trust to Mr. Baker's brother does not alter the amount of the transfer upon which the penalty is based. That amount remains $100,000, even after the gift to Mr. Baker's brother.

If, at some point after establishing the trust, Mr. Baker places an additional $50,000 in the trust, none of which can be disbursed to him, that $50,000 is treated as an additional transfer of assets. The penalty period that applies to that $50,000 starts when those funds are placed in the trust, provided no penalty period from the previous transfer of $100,000 is still running. If a previous penalty period is still in effect, the new penalty period cannot begin until the previous penalty period has expired. (See §§3258ff. for transfers of assets for less than fair market value.)

Amounts are considered transferred as of the time the trust is first established or, if later, payment to the individual is foreclosed. Each time the individual places a new amount into the trust, payment to the individual from this new portion is foreclosed. It is this later date that determines when a transfer has occurred.

D. Payments Made From Revocable Or Irrevocable Trusts to or on Behalf of Individual.--Payments are considered to be made to the individual when any amount from the trust, including an amount from the corpus or income produced by the corpus, is paid directly to the individual or to someone acting on his/her behalf, e.g., a guardian or legal representative.

Payments made for the benefit of the individual are payments of any sort, including an amount from the corpus or income produced by the corpus, paid to another person or entity such that the individual derives some benefit from the payment. For example, such payments could include purchase of clothing or other items, such as a radio or television, for the individual. Also, such payments could include payment for services the individual may require, or care, whether medical or personal, that the individual may need. Payments to maintain a home are also payments for the benefit of the individual.

NOTE: A payment to or for the benefit of the individual is counted under this provision only if such a payment is ordinarily counted as income under the SSI program. For example, payments made on behalf of an individual for medical care are not counted in determining income eligibility under the SSI program. Thus, such payments are not counted as income under the trust provision.

E. Circumstances Under Which Payments Can or Cannot Be Made.--In determining whether payments can or cannot be made from a trust to or for an individual, take into account any restrictions on payments, such as use restrictions, exculpatory clauses, or limits on trustee discretion that may be included in the trust.

For example, if an irrevocable trust provides that the trustee can disburse only $1,000 to or for the individual out of a $20,000 trust, only the $1,000 is treated as a payment that could be made under the rules in subsection B. The remaining $19,000 is treated as an amount which cannot, under any circumstances, be paid to or for the benefit of the individual. On the other hand, if a trust contains $50,000 that the trustee can pay to the grantor only in the event that the grantor needs, for example, a heart transplant, this full amount is considered as payment that could be made under some circumstances, even though the likelihood of payment is remote. Similarly, if a payment cannot be made until some point in the distant future, it is still payment that can be made under some circumstances.

F. Placement of Excluded Assets in Trust.--Section 1917(e) of the Act provides that, for trust and transfer purposes, assets include both income and resources. Section 1917(e) of the Act further provides that income has the meaning given the term in §1612 of the Act and resources has the meaning given that term in §1613 of the Act. The only exception is that for institutionalized individuals, the home is not an excluded resource.

Thus, transferring an excluded asset (either income or a resource, with the exception of the home of an institutionalized individual) for less than fair market value does not result in a penalty under the transfer provisions because the excluded asset is not an asset for transfer purposes. Similarly, placement of an excluded asset in a trust does not change the excluded nature of that asset; it remains excluded. As noted in the previous paragraph, the only exception is the home of an institutionalized individual. Because §1917(e) of the Act provides that the home is not an excluded resource for institutionalized individuals, placement of the home of an institutionalized individual in a trust results in the home becoming a countable resource.

G. Use of Trust vs. Transfer Rules for Assets Placed in Trust.--When a nonexcluded asset is placed in a trust, a transfer of assets for less than fair market value generally takes place. An individual placing an asset in a trust generally gives up ownership of the asset to the trust. If the individual does not receive fair compensation in return, you can impose a penalty under the transfer of assets provisions.

However, the trust provisions contain specific requirements for treatment of assets placed in trusts. As discussed in subsections A through C, these requirements deal with counting assets placed in trusts as available income, available resources, and/or a transfer of assets for less than fair market value, depending on the circumstances of the particular trust. Application of the trust provisions, along with imposition of a penalty for the transfer of the assets into the trust, could result in the individual being penalized twice for actions involving the same asset.

To avoid such a double penalty, application of one provision must take precedence over application of the other provision. Because the trust provisions are more specific and detailed in their requirements for dealing with funds placed in a trust, the trust provisions are given precedence in dealing with assets placed in trusts. Deal with assets placed in trusts exclusively under the trust provisions (which, in some instances, require that trust assets be treated as a transfer of assets for less than fair market value).

3259.7 Exceptions to Treatment of Trusts Under Trust Provisions.--The rules concerning treatment of trusts set forth in §3259.6 do not apply to any of the following trusts, i.e., the trusts discussed below are treated differently in determining eligibility for Medicaid. Funds entering and leaving these trusts are generally treated according to the rules of the cash assistance programs, the State's more restrictive rules under §1902(f) of the Act, or more liberal rules under §1902(r)(2) of the Act, as appropriate.

As is noted in each exception below, one common feature of all of the excepted trusts is a requirement that the trust provide that upon the death of the individual, any funds remaining in the trust go to the State agency, up to the amount paid in Medicaid benefits on the individual's behalf. When an individual has resided in more than one State, the trust must provide that the funds remaining in the trust are distributed to each State in which the individual received Medicaid, based on the State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual's behalf. For example, if an individual received $20,000 in Medicaid benefits in one State and $10,000 in benefits in another State, the first State receives two-thirds of the amount remaining in the trust, and the second State receives one-third, up to the amount each State actually paid in Medicaid benefits.

A. Special Needs Trusts.--A trust containing the assets of an individual under age 65 who is disabled (as defined by the SSI program in §1614(a)(3) of the Act) and which is established for the sole benefit of the individual by a parent, grandparent, legal guardian of the individual, or a court is often referred to as a special needs trust. To qualify for an exception to the rules in this section, the trust must contain a provision stating that, upon the death of the individual, the State receives all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under your State Medicaid plan. In addition to the assets of the individual, the trust may also contain the assets of individuals other than the disabled individual.

When a trust is established for a disabled individual under age 65, the exception for the trust discussed above continues even after the individual becomes age 65. However, such a trust cannot be added to or otherwise augmented after the individual reaches age 65. Any such addition or augmentation after age 65 involves assets that were not the assets of an individual under age 65. Thus, those assets are not be subject to the exemption discussed in this section.

To qualify for this exception, the trust must be established for a disabled individual, as defined in §1614(a)(3) of the Act. When the individual in question is receiving either title II or SSI benefits as a disabled individual, accept the disability determination made for those programs. If the individual is not receiving those benefits, you must make a determination concerning the individual's disability. In making this determination, follow the normal procedures used in your State to make disability determinations for Medicaid purposes. If you are a 209(b) State, you must use the disability criteria of the SSI program, rather than any more restrictive criteria you may use under your State plan. The only exception to this requirement is if you had a more restrictive trust policy in general in 1972 than the policy described in §§3259ff. If so, you may use any more restrictive definition of disability which applied to that 1972 policy. If not, you must use the disability criteria of the SSI program.

NOTE: Establishment of a trust as described above does not constitute a transfer of assets for less than fair market value if the transfer is made into a trust established solely for the benefit of a disabled individual under age 65. However, if the trust is not solely for the benefit of the disabled person or if the disabled person is over age 65 transfer penalties may apply. (See §3258.10 for the exceptions to imposing penalties for certain transfers of assets.)

B. Pooled Trusts.--A pooled trust is a trust containing the assets of a disabled individual as defined by the SSI program in §1614(a)(3) of the Act, that meets the following conditions:

o The trust is established and managed by a non-profit association;

o A separate account is maintained for each beneficiary of the trust but for purposes of investment and management of funds the trust pools the funds in these accounts;

o Accounts in the trust are established solely for the benefit of disabled individuals by the individual, by the parent, grandparent, legal guardian of the individual, or by a court (see §3257 for a definition of the term "solely for the benefit of"); and

o To the extent that any amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State the amount remaining in the account up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under your State Medicaid plan. To meet this requirement, the trust must include a provision specifically providing for such payment.

To qualify as an excepted trust, the trust account must be established for a disabled individual, as defined in §1614(a)(3) of the Act. When the individual in question is receiving either title II or SSI benefits as a disabled individual, accept the disability determination made for those programs. If the individual is not receiving those benefits, you must make a determination concerning the individual's disability. In making this determination, follow the normal procedures used in your State to make disability determinations for Medicaid purposes. If you are a 209(b) State, you must use the disability criteria of the SSI program. The only exception to this requirement is if you had a more restrictive trust policy in general in 1972 than the policy described in this instruction. If so, you may use any more restrictive definition of disability which applied to that 1972 policy. If not, you must use the disability criteria of the SSI program.

NOTE: Establishing an account in the kind of trust described above may or may not constitute a transfer of assets for less than fair market value. For example, the transfer provisions exempt from a penalty trusts established solely for disabled individuals who are under age 65 or for an individual's disabled child. As a result, a special needs trust established for a disabled individual who is age 66 could be subject to a transfer penalty. (See §3258.10 for the exceptions to imposing penalties for certain transfers of assets.)

While trusts for the disabled (as well as Miller trusts described in subsection C) are exempt from treatment under the trust rules described in §3259.6, funds entering and leaving them are not necessarily exempt from treatment under the rules of the appropriate cash assistance program. The following are rules applicable to funds entering and leaving both kinds of exempt trusts for the disabled.

1. Trusts Established with Income.--While most trusts for the disabled are created using the individual's resources, some may be created using the individual's income, either solely or in conjunction with resources. When an exempt trust for a disabled individual is established using the individual's income (i.e., income considered to be received by the individual under the rules of the SSI program), the policies set forth in subsection C for treatment of income used to create Miller trusts apply.

NOTE: The following policies assume that the income placed in the trust is the individual's own income, placed in the trust after he or she receives it. When the right to income placed in the trust actually belongs to the trust and not the individual the income does not count under SSI rules as income received by the individual.

The policies pertaining to treatment of income belonging to the individual include:

- Not counting for eligibility purposes income before it is placed in the trust;

- Application of transfer of assets rules (where a transfer into trust for a disabled individual is not exempt from penalty under the exceptions to the transfer of assets rules explained in §3258.10);

- Application of post-eligibility treatment of income rules to income placed in the trust;

- Counting as income, per cash assistance rules, funds paid out of the trust to or for the benefit of the individual (This rule applies to any payment from an exempt trust, regardless of whether the trust is established using income, resources, or both.); and

- Spousal impoverishment provisions as they apply to exempt trusts.

For a detailed discussion of how these policies apply to income placed in an exempt trust for a disabled individual, see subsection C.

2. Trusts Established with Resources.--When an exempt trust is established for a disabled individual using resources either in whole or in part, those resources are treated as follows.

Resources placed in an exempt irrevocable trust for a disabled individual may or may not count as resources to the individual in determining eligibility, depending on the circumstances. Resources are counted as resources only during those months in which they are in the possession of the individual, up to but not including the month in which the resources are placed in the trust. Beginning with the month the resources are placed in the trust, they are exempt from being counted as resources to the individual.

Resources placed in an exempt trust for a disabled individual are subject to imposition of a penalty under the transfer of assets provisions unless the transfer is specifically exempt from penalty as explained in §3258.10 or unless the resources placed in the trust are used to benefit the individual, and the trust purchases items and services for the individual at fair market value. See subsection C for the rules concerning application of the transfer of assets provisions to assets placed in an exempt trust. These rules apply to both income and resources placed in the exempt trusts discussed in this section.

C. Miller-Type or Qualifying Income Trusts (QIT).--This type of trust, established for the benefit of an individual, meets the following requirements:

- o The trust is composed only of pension, Social Security, and other income to the individual, including accumulated interest in the trust; and

- o Upon the death of the individual, the State receives all amounts remaining in the trust, up to an amount equal to the total medical assistance paid on behalf of the individual under your State Medicaid plan. To qualify for this exception, the trust must include a provision to this effect.

NOTE: HCFA has interpreted §1917(d)(4)(B) of the Act as explained below to avoid reading it as a nullity. This interpretation applies to those situations in which an individual first receives income and then places it into a Miller trust. It does not apply to situations in which an individual has irrevocably transferred his or her right to receive income to the trust. Under SSI rules, this income is no longer considered to be the individual's income. As a result, a trust established with income the right to which has been transferred to the trust does not meet the requirements for exemption under this section, since the statute requires that a Miller trust be established using the income of the individual.

This type of trust is applicable in your State only if your State Medicaid plan provides Medicaid to individuals eligible under a special income level, as described in §1902(a)(10)(A)(ii)(V) of the Act but does not provide Medicaid for nursing facility services to the medically needy, who are described in §1902(a)(10)(C) of the Act.

To qualify for this exception, the trust must be composed only of income to the individual, from whatever source. The trust may contain accumulated income, i.e., income that has not been paid out of the trust. However, no resources, as defined by SSI, may be used to establish or augment the trust. Inclusion of resources voids this exception.

While Miller trusts (as well as the trusts for the disabled described in subsections A and B) are exempt from treatment under the trust rules described in §3259.6, funds entering and leaving them are not necessarily exempt from treatment under the rules of the appropriate cash assistance program. The following are rules applicable to funds entering and leaving Miller trusts.

1. Miller Trust Meets All Requirements for Exemption Under §1917(d)(4)(B) of the Act.-- When a trust meets all requirements for exemption, and is irrevocable, the corpus of the trust is exempt from being counted as available to the individual. A revocable trust is exempt under the Miller trust provisions. However, a revocable trust is counted under SSI rules as an available resource to the individual.

2. Income Placed In Miller Trust.-- Income placed in a trust that meets all of the requirements for exemption as a Miller trust meets the SSI definition of income but is not counted in determining the individual's eligibility for Medicaid. Thus, any income, including Social Security benefits, VA pensions, private pensions, etc., can be placed directly into a Miller trust by the recipient of those funds, without those funds adversely affecting the individual§s eligibility for Medicaid. Also, income generated by the trust which remains in the trust is not income to the individual.

3. Application of Transfer of Assets Provisions of OBRA 1993.--The transfer of assets provisions described in §§3258ff. apply to funds placed in a Miller trust. Under the transfer of assets provisions, income is considered to be an asset. In placing income in an irrevocable trust, including a Miller trust, an individual gives up direct access to and control over that income. Thus, placement of funds, including income, in a trust can be a transfer of assets for less than fair market value. As such, placing funds in a Miller trust normally subjects the individual to the penalties provided for under the transfer of assets provisions.

However, transfer of assets penalties do not apply to income placed in a Miller trust to the extent that the trust instrument provides that the income placed in the trust will, in turn, be paid out of the trust for medical care provided to the individual, including nursing home care and care under a home and community-based waiver. When such payments are made, the individual is considered to have received fair market value for the income placed in the trust, up to the amount actually paid for medical care provided to the individual and to the extent that the payments purchased care at fair market value.

Because of certain exemptions from the transfer of assets penalties, funds placed in a Miller trust can be transferred for the sole benefit of a spouse without incurring such penalties. This can include, among other things, payments by the trust for medical care for the community spouse. Section 1917(c)(2)(B) of the Act provides that transfer penalties do not apply to assets transferred to a spouse or to a third party for the sole benefit of the spouse. A trust could be considered a third party for purposes of this transfer exemption. For an individual to avoid the transfer penalty that results from a transfer of property to a trust, the trust must be drafted to require that this particular property can be used only for the benefit of the individual's spouse while the trust exists and that the trust cannot be terminated and distributed to any other individuals or entities for any other purpose.

When payments are made for the individual's medical care you must require that the payments be made at intervals specified by your State (e.g., every month or by the end of the month following the month the funds were placed in the trust). An individual cannot be considered to have received fair market value for funds placed in a trust until payments for some item or service are actually made. Thus, funds cannot be allowed to accumulate indefinitely in a Miller trust and still avoid transfer of assets penalties.

The individual is considered to have received fair market value for funds placed in a Miller trust for any other payments made from the trust which are for the benefit of the individual and which reflect fair payments for any items or services which were purchased. For example, funds placed in the trust can be used to pay the administrative fees of the trust, income tax owed by the trust, attorney's fees which the trust is obligated to pay (in proportion to whatever part of the trust benefits the individual), food or clothing for the individual, or mortgage payments for the individual's home.

When income placed in the trust exceeds the amount paid out of the trust for medical services or other items or services which benefit the individual, the excess income is subject to penalties under the transfer of assets provisions.

It is important to note that, although an individual may not be subject to a transfer penalty if funds he or she transferred to a trust are used by the trustee to make payments that provide fair market value to the individual, these payments from the trust may still count as income to the individual, as explained in subsection 4.

4. Treatment of Payments Made from Trust.--While Miller trusts are exempt from treatment under the trust provisions described in §3259.6, payments made from these trusts are still subject to the usual rules under the State Medicaid plan. In most States, these are the SSI rules. Any payments made from a Miller trust directly to the individual are counted as income to the individual, provided the individual could use the payments for food, clothing, or shelter for himself or herself. This rule applies whether or not the payments actually are used for these purposes, as long as there are no legal impediments which prevent the individual from using the payments this way.

Any payments made by the trustee to purchase something in kind for the individual also can count as income to the individual. In kind income includes actual food, clothing, or shelter, or something the individual can use to obtain one of these. For example, if the trustee makes a mortgage payment for the individual, that payment is a shelter expense and counts as income.

However, as another example, assume that the trust provides that $500 is paid each month toward the cost of the individual's nursing facility care. Under SSI policy, medical expenses paid on behalf of an individual are not counted as income to the individual. Thus, the $500 in this instance is not considered income.

5. Post-eligibility Treatment of Income.--All of the post-eligibility treatment of income rules in 42 CFR 435.725, 733, 735, and 832, as well as §1924 of the Act, apply in cases involving Miller trusts, as follows.

a. Income Not Placed in a Miller Trust.--Income retained by the individual (i.e., not placed in a Miller trust) is income to the individual, according to SSI policy. Thus, such income is subject to the post-eligibility rules.

b. Income Placed in a Miller Trust.--Income placed in a Miller trust is income for SSI purposes although it is not counted as available in determining Medicaid eligibility. Thus, such income is also subject to the post-eligibility rules.

Because income placed in a Miller trust is income as defined by SSI (although it is not counted for Medicaid eligibility purposes), all income placed in a Miller trust is combined with countable income not placed in the trust for post-eligibility purposes. For example, an individual with $2,000 a month in income retains $1,338 (the maximum currently permitted for eligibility under a special income level) and places the remaining $662 in a Miller trust. The entire $2,000 is income as defined by SSI, although only the $1,338 is counted as income for eligibility purposes. Thus, the $2,000 forms the basis for the post-eligibility computation.

Using the $2,000 as the individual's total income for post-eligibility purposes, the State deducts, as applicable:

- o A personal needs allowance;
- o Family maintenance allowances, including the spousal and family allowances provided for in §1924 of the Act;
- o An allowance for maintenance of a home, if such allowance is included in the State plan; and
- o Medical expenses not subject to third party payment.

The remainder is the amount by which the State reduces its payment to the medical institution or for home and community-based waiver services.

c. Payments Made From Miller Trust.--Payments made from a Miller trust to the individual may count for eligibility purposes as income to the individual under SSI rules. However, such payments are not subject to treatment under the post-eligibility rules. Post-eligibility has already been applied to all income entering the trust. Thus, there is no need to consider, for purposes of post-eligibility, payments made from the trust.

6. Miller Trust and Spousal Impoverishment.--As explained in subsection 5, funds placed in a Miller trust are subject to the post-eligibility treatment of income rules, including those applicable to spousal impoverishment in §1924 of the Act.

3259.8 Application of Trust Provisions Would Work Undue Hardship.--When application of the trust provisions discussed in §§3259ff would work an undue hardship those provisions do not apply. Unlike the policies applying to trusts established on or before August 10, 1993, which only required that you acknowledge that the statute included an undue hardship provision, under OBRA 1993 you must implement an undue hardship provision for trusts. Further, that policy must be described in your Medicaid State Plan. You have considerable flexibility in implementing an undue hardship provision. However, your undue hardship provision must meet the requirements discussed below.

A. Undue Hardship Defined.--Undue hardship exists when application of the trust provisions would deprive the individual of medical care such that his/her health or his/her life would be endangered. Undue hardship also exists when application of the trust provisions would deprive the individual of food, clothing, shelter, or other necessities of life.

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

B. Burial Trusts And Undue Hardship.--A burial trust is a trust established by an individual for the purpose of paying, at some point in the future, for the various expenses associated with the individual's funeral and burial. At your option, you may exempt a burial trust from treatment as a trust under the State's undue hardship policies provided the total value of the trust does not exceed an amount specified by the State. For example, you may choose to exempt from being counted as a trust under your undue hardship policies any burial trust that does not exceed $5,000 in value.

C. State Flexibility.--You have considerable flexibility in deciding the circumstances under which you will not count funds in trusts under the trust provisions because of undue hardship. For example, you may specify the criteria to be used in determining whether the individual's life or health would be endangered, and whether application of a penalty would deprive the individual of food, clothing, or shelter. You may also specify the extent to which an individual must make an effort to recover assets placed in a trust. As a general rule, you have the flexibility to establish whatever criteria you believe are appropriate, as long as you adhere to the basic definition of undue hardship described above.

However, your undue hardship provision must, at a minimum, provide for:

- o Notice to recipients that an undue hardship exception exists;
- o A timely process for determining whether an undue hardship waiver will be granted;
- o A process under which an adverse determination can be appealed.

Your undue hardship provision must discuss how you will meet these requirements.