0384 RESOURCE TRANSFERS

0384.05 LEGAL BASIS

REV:12/2000

The Omnibus Budget Reconciliation Act (OBRA) of 1993 provides a penalty for institutionalized individuals who on or after 8/11/93, transfer or have transferred assets for less than fair market value. Asset transfers are examined for potential penalty when the transfer took place within thirty six (36) months prior to or anytime after the date the individual was both institutionalized and applied for MA.

Under OBRA provisions, trusts and/or portions of trusts established on or after 8/11/93 are in some cases treated as a transfer of assets and subject to a penalty. Asset transfers involving a trust are examined for potential penalty when the transfer took place within sixty (60) months prior to or anytime after the date the individual was both institutionalized and applied for MA. In the event that application of the transfer rules and the trust rules result in an individual being subject to a transfer penalty twice for actions involving the same resource, the trust rules supersede the transfer rules in determining eligibility.(See Section 0382 for detailed information about Trusts.)

The penalty is a period of RESTRICTED MA ELIGIBILITY during which payment for Long Term Care Services is denied. Long Term Care Services include nursing facility services, Intermediate Care Facility Services for the Mentally Retarded, administratively necessary days in a hospital, and home and community based waiver services.

The Medicare Catastrophic Coverage Act of 1988 provides a penalty for institutionalized individuals who transferred resources for less than fair market value prior to 8/11/93. The maximum penalty period for resources transferred for less than fair market value prior to 8/11/93 is 30 months.

0384.10 IND INELIG FOR NF PAYMENT

REV:12/2000

Unless exempt, transfers of assets (income and resources) made for less than fair market value by an institutionalized individual (or the community spouse - if made prior to the establishment of the applicant's MA/LTC eligibility) are subject to a penalty if the transfer was made:

- o within thirty six (36) months immediately prior to or anytime after the date the individual was both institutionalized AND applied for MA; (This time period is referred to as the look-back period.) OR,

- o if the transfer involves a trust, within a sixty (60) month look back period immediately prior to or anytime after the date the individual was both institutionalized AND applied for MA.

If the individual has multiple periods of institutionalization and/or applications, the look back period starts with the first date on which the individual was both institutionalized and applied for MA.

The PENALTY is a period of INELIGIBILITY FOR PAYMENT OF LONG TERM CARE SERVICES for an otherwise eligible individual.

For calculations of penalty periods, see section 0384.20.

For exempt transfers and exceptions to penalty periods, see section 0384.35.

0384.15 RESOURCE TRANSFER DEFINITIONS

REV:03/2004

For purposes of evaluating transfers of assets, the following definitions apply:

- o INSTITUTIONALIZED INDIVIDUAL

  An inpatient of a Nursing Facility, an inpatient of a medical institution for whom payment is based on a level of care provided in a NF, an inpatient of an ICF for the Mentally Retarded, and/or a home and community based waiver recipient.

- o ASSETS

  All income and resources of the individual or the individual's spouse that would be countable in the determination of Medical Assistance eligibility for an SSI-related individual; and,

  The home (and associated land) of an institutionalized individual.

  This includes any income and resources to which the individual or his/her spouse is entitled but does not receive because of action taken by:
  - * the individual or his/her spouse;
  - * a person, including a court or administrative body, with legal authority to act in place of the individual or his/her spouse; or
  - * any person, including any court or administrative body, acting at the direction or upon the request of the individual or his/her spouse.

- o TRANSFER

  The conveyance of right, title, or interest in either real or personal property from one person to another by sale, gift, or other process.

  The gift or assignment of income from one person to another. Disposal of a lump sum payment before it can be counted as a resource can be an example of a transfer of income.

Transfers made by an individual include transfers made by:

* the individual;
* his/her spouse;
* any person, including a court or administrative body, with legal authority to act on behalf of the individual or his/her spouse; or,
* any person, including a court or administrative body, acting at the direction or upon the request of the individual or his/her spouse.

o COMPENSATION/CONSIDERATION

All real and/or personal property (money, food, shelter, services, stocks, bonds, etc.) that is received by an applicant/recipient pursuant to a binding contract in exchange for an asset either prior to, at the time of, or after the transfer.

o FAIR MARKET VALUE (FMV)

The amount for which the property (real and personal) can be expected to sell on the open market in the geographic area involved and under existing economic conditions at the time of transfer.

o UNCOMPENSATED VALUE (UV)

The equity value (fair market value less any outstanding loans, mortgages or other encumbrances) minus the value of any compensation /consideration received by the applicant/recipient in exchange for the asset.

o LONG TERM CARE SERVICES

Services provided to individuals in Nursing Facilities, Intermediate Care Facilities for the Mentally Retarded, as an inpatient in a medical institution for whom payment is based on a level of care provided in a NF, and under Home and Community Based Waivers and Administratively Necessary Days.

o PENALTY PERIOD

The period of time during which payment for Long Term Care services is denied. The number of months in a penalty period (P) is equal to the total uncompensated value (UV) of prohibited transfers made by the institutionalized individual (or spouse if made prior to establishment of individual's MA/LTC eligibility) during the 36 month period immediately prior to the date of institutionalization (or if later the date of MA application) divided by the average monthly cost of a private patient in a NF at the time of application.

$$P = UV/C$$

- o PROHIBITED TRANSFER

  Transfer of an asset for less than fair market value by an individual (or spouse if made prior to establishment of individual's MA/LTC eligibility) which was made within thirty-six (36) months (or sixty (60) months for some transfers involving trusts) prior to or anytime after the date the individual was both institutionalized and applied for MA.

- O FOR THE SOLE BENEFIT OF

  A transfer is considered to be for the sole benefit of a spouse, blind or disabled child, or a blind or disabled individual, when the transfer is established using a written agreement that legally binds the parties and clearly expresses that the transfer is for the spouse, blind or disabled child, or blind or disabled individual only, and that no one else can benefit from the assets transferred. Without this agreement, a transfer cannot be determined to be for the sole benefit of the individual.

0384.20 PENALTY PERIOD FOR PAYMENT OF LTC SERVICES

REV:03/2006

0384.20 PENALTY PERIOD FOR PAYMENT OF LTC SERVICES REV:03/2006

The penalty for an otherwise eligible institutionalized individual who transfers assets for less than fair market value is a period of INELIGIBILITY FOR PAYMENT OF LONG TERM CARE SERVICES. The following provisions apply in determining the penalty period for a prohibited transfer:

o THE PENALTY PERIOD FOR A PROHIBITED TRANSFER

To calculate the penalty period (P) for a prohibited transfer, divide the amount of the uncompensated value (UV) of the transfer by the average monthly cost (C) for private payment in a nursing facility.

$$P = UV/C$$

Currently, the average monthly cost for private payment in a nursing facility is $6,826 per month.

When more than one prohibited transfer occurs during the same month, the uncompensated values of all prohibited transfers made during the month are totaled, then divided by the average monthly private payment for an individual in a nursing facility.

The penalty period begins on the first day of the month in which the transfer was made and runs continuously from the penalty date regardless of whether the individual remains in or leaves the institution (or waiver program). Thus, if an individual leaves the NF, the penalty period nevertheless continues until the end of the calculated period.

Penalty periods are imposed for full months only; penalty periods of less than one month are not imposed.

There is no maximum length to the penalty period. However, no penalty is imposed for resources transferred more than 36 months (60 months for transfers involving trusts) prior to the date the individual was both institutionalized and applied for MA.

EXAMPLE 1:

As a token of her love and affection, Mrs. Jones gives $12,000 to each of her ten grandchildren in January. She enters a nursing facility in March and applies for MA in December of the same year.

Since the transfers were uncompensated and were made within 36 months prior to the date of MA application (which in this case is later than the date of institutionalization), a penalty period applies. The total uncompensated value of all prohibited transfers made in the month is $120,000.

That amount is divided by the average monthly cost of NF services, $6,826, to arrive at the length of the penalty period.

120,000/6,826 = 17.58 = 17 full months

The penalty period is eighteen (17) months.

It begins on January 1st, the first of the month in which transfer was made. It continues for a total of eighteen (17) full months.

EXAMPLE 2:

Mrs. Swanson transfers her home with a fair market value of $300,000 to her sister (who lives with her but has no equity position in the home) for no consideration on January 31, 2003.

On November 1, 2003 she enters a NF and applies for MA.

The transfer occurred within thirty six (36) months of the date Mrs. Swanson was both institutionalized and applied for MA, and it was made for less than fair market value. The penalty period is calculated by dividing the amount of the uncompensated transfer ($300,000) by the average monthly cost of NF services ($6,826).

$300,000/6,826 = 43.95 = 43 full months

The penalty period is forty-three (43) months.

It begins on January 1, 2003, the first of the month in which transfer was made and continues through July 30, 2006.

EXAMPLE 3:

Mr. Edwards makes an uncompensated transfer of $300,000 to his nephew on January 1, 1998. In January 2000, he is admitted to a nursing facility. On February 2, 2001 he applies for MA.

No penalty period applies. The transfer for less than fair market value was made more than 36 months prior to the date of MA application.

O MULTIPLE TRANSFERS WITH OVERLAPPING PENALTY PERIODS

When assets have been transferred in amounts and/or frequency that make the calculated penalty periods overlap, a single penalty period is imposed. This penalty period begins on the first of the month in which the first prohibited transfer was made and is calculated as follows:

FIRST, add the total of the uncompensated value of all assets transferred;

THEN, divide the sum by the average private pay cost of NF care.

THIS PRODUCES a single penalty period that begins on the first day of the month in which the first transfer was made.

EXAMPLE:

Mr. Smith transfers $14,000 in January, $14,000 in February and $14,000 in March, all uncompensated. In April of the same year he enters a NF and applies for MA.

Since all were uncompensated and made within 36 months prior to the date Mr. Smith was both institutionalized and applied for MA, a penalty applies for each transfer.

Calculated as separate transfers, the penalty period for the first transfer would be (14,000/6,826 = 2.05 months = 2 full months) two months, January and February. Likewise the penalty period for the second would be February and March; and for the third, March and April.

Because the penalty periods overlap when calculated separately, a single penalty period must be re-calculated by adding the uncompensated value of all three transfers ($42,000) and dividing that total by the average private pay NF cost ($6,826).

42,000/6,826 = 6.15 = 6 full months

This yields a single penalty period of six (6) months, which runs from January 1st (the first of the month in which the first prohibited transfer occurred), and continues for six (6) months, through June 30th.

O MULTIPLE TRANSFERS WITH NO OVERLAPPING PENALTY PERIODS

When multiple prohibited transfers are made in such a way that penalty periods do not overlap, each transfer is treated as a separate event with its own penalty period. Each separate penalty period is calculated by dividing the total amount of the uncompensated value of the transfer by the average monthly NF cost for a private patient.

Each separate penalty period begins on the first of the month in which transfer occurred.

EXAMPLE:

Mrs. Roland transfers $7,000 in January, $14,000 in March, and $21,000 in June, all uncompensated. She enters a NF and applies for MA on July 1st of the same year.

Since all transfers were uncompensated and made within 36 months of the date Mrs. Roland was both institutionalized and applied for MA, a penalty period applies for each transfer.

Each separate penalty period is obtained by dividing the amount of the uncompensated value (UV) of the transfer by the average monthly cost of private NF care (C). Assuming an average monthly cost of $6,826, the penalty period for the first transfer is (7,000/6,826 = 1.03 = 1) one full month. It begins on the first of the month in which transfer was made, January 1st and continues until the end of the month, January 31st. The second penalty period is two months (14,000/6,826 = 2.05 = 2), beginning on the first of March and continuing until the end of April. The third penalty period is three months (21,000/6,826 = 3.08 = 3), beginning on the first of June and continuing until the end of August.

Eligibility for payment of LTC services is denied for the months of July and August.

O TRANSFERS BY THE SPOUSE

When a transfer by the spouse results in a penalty period for the institutionalized individual, and the spouse later becomes institutionalized and applies for MA payment of long term care services, the penalty period remaining is apportioned equally between the spouses. If both spouses are institutionalized in the same month the period of ineligibility is divided equally between them. When one spouse is no longer subject to a penalty, any remaining penalty is then imposed on the remaining institutionalized individual.

O TRANSFERS OF INCOME

When lump sum income is transferred (e.g., a stock dividend check is given to another person in the month in which it is received by the individual), a penalty period is calculated based on the value of the lump sum payment and the date transfer was made.

When a stream of income has been transferred, a penalty period is calculated for each income payment that is periodically transferred.

When the right to a stream of income is transferred, a penalty period is calculated based on the total amount of income expected to be transferred during the individual's lifetime, based on life-expectancy tables established by the Social Security Administration's Office of the Actuary.

0384.35 EXCEPTIONS TO PERIOD OF INELIG

REV:12/2000

A penalty period is not imposed when:

- o The asset was transferred for fair market value;
- o The transferred resource was the individual's HOME and title to the home was transferred to:
  - the individual's spouse;
  - a child of the individual who is under the age of

21, or is blind, or permanently and totally disabled (as evidenced by receipt of SSI or RSDI benefits, or as defined in Section 0352.15);

- a sibling of the individual who has an equity interest in the home and who resided in the home for at least one year immediately prior to the institutionalization of the individual;

- a son or daughter of the individual who:

  * was residing in the home for at least two years prior to the parent's institutionalization; and,

  * can demonstrate that s/he provided care to the parent which prevented the parent from entering an institution for the two year period.

o The asset (other than a home, see above) was transferred to:

  - the spouse, or to another for the sole benefit of the spouse, or from the spouse to another for the sole benefit of the spouse;

  - the individual's child who is blind or permanently and totally disabled, or to another for the sole benefit of such child, or to a trust established for the sole benefit of such child;

  - a trust established for the sole benefit of an individual who is under the age of 65 and permanently and totally disabled (as defined in Section 0352.15);

o The individual can prove his/her intention was to receive fair market value or other valuable compensation/consideration;

o The individual can prove the transfer was exclusively for some purpose other than to qualify for Medical Assistance;

o Denial of payment for LTC services would work an undue hardship;

o The asset is returned to the individual.

0384.40 RESPONSIBILITIES

REV:12/2000

Field staff responsibilities pertaining to transfer of assets are the following:

FIRST

The agency representative is responsible to explain the policy on transferred assets and how it may affect eligibility for nursing facility payment, and assist the applicant in determining what documentation is relevant and how such documentation is generally obtained.

SECOND

Exceptions to the penalty period which involve transfer of an individual's home to his/her spouse, child under 21, or blind or disabled child are referred with relevant documentation to the casework supervisor for review.

All other exceptions should be referred to the Long Term Care Administrator or his designee, who will consult with the Legal Counsel as necessary.

Any and all documents relative to the transferred resource and its fair market value, such as bills of sale, deeds, purchasing agreements, and compensation received must be provided by the applicant as a part of the application process.

THIRD

Transfers of assets for less than FMV are presumed to be for the purpose of establishing eligibility for nursing facility payment. The applicant can rebut the presumption by making a satisfactory showing that the transfer was for some other purpose.

If the applicant/recipient wishes to rebut the presumption, the agency representative shall explain that it is the applicant/recipient's responsibility to make a satisfactory showing that the assets were transferred exclusively (i.e., only) for some other reason. The information furnished by the applicant/recipient should cover, but need not be limited to, the following factors:

- The purpose for transferring the asset;
- The attempts to dispose of the asset for FMV;
- The reasons for accepting less than FMV;
- The applicant/recipient's relationship, if any, to the person(s) to whom the asset was transferred;

The applicant/recipient should be assisted in obtaining information to rebut the presumption when necessary; however, the burden of proof rests with the applicant/recipient.

FOURTH

Once the LTC Administrator determines that an asset was transferred for less than fair market value and the resultant uncompensated value, the agency representative will determine the period of ineligibility for nursing facility payment.

FIFTH

The agency representative is responsible to inform the applicant of the outcome of the review conducted by LTC Administrator, and the period of ineligibility, if any. The individual must be notified of the decisions, and his/her right to appeal.

SIXTH

If the individual is either eligible for Medical Assistance or pending spenddown, but is determined to have a period of ineligibility for payment of LTC services due to the transfer, the penalty period information is recorded on the InRHODES Transfer Panel. Eligibility or pending spenddown status for Medical Assistance is approved, and the case is transferred to the appropriate MA unit.

The responsibilities of the LTC Administrator are:

FIRST

Determine the fair market value (FMV) of the transferred asset based on the documentation forwarded by field staff.

SECOND

Determine the uncompensated value, if any, by subtracting the value of any compensation/consideration received from the equity value.

THIRD

Evaluate the individual's rebuttal of the agency's presumption that resources were transferred in order to become eligible for nursing facility payments, and consult with the Office of Legal Counsel, as necessary.

FOURTH

Evaluate claims of undue hardship.

0384.45 REBUT OF PRESUMP OF PROH TRANS

REV:12/2000

An individual may rebut the agency's presumption that assets were transferred in order to become eligible for nursing facility payments.

The presence of one or more factors may indicate that the asset was transferred exclusively for some purpose other than establishing eligibility for nursing facility payments.

These factors are:

- A traumatic onset (e.g. traffic accident) of disability or blindness after transfer of the resource.

  If the applicant/recipient states that AFTER the transfer s(he) experienced a traumatic onset of disability which could not have been foreseen at the time of transfer, and which resulted in the inability to provide for his/her own support, consider the applicant's/recipient's age, medical history, and medical condition at the time of transfer as well as his/her financial situation. Was the applicant/recipient in good health at the time of the transfer and spending a minimal amount on medically related costs such as insurance, routine doctor visits, etc.? Did the applicant/recipient have sufficient income and/or resources to meet his/her medical needs, as well as basic living expenses, as they existed at the time of the transfer and as they could be foreseen over the next 36 months?

  The applicant/recipient may submit whatever medical documentation s(he) wishes to substantiate his/her claim.

- Inability to dispose of the asset for fair market value.

  The applicant/recipient must provide evidence of attempts to dispose of the asset for fair market value, as well as evidence to support the value at which the asset was disposed.

- Diagnosis of previously undetected disabling condition;

- Unexpected loss of other resources (including deemed resources) which would have precluded MA eligibility;

- Unexpected loss of income (including deemed income) which would have precluded MA eligibility;

- Total countable resources that would have been below the resource limit at all times from the month of transfer through the present month even if the transferred resource had been retained;

- Court-ordered transfer.

0384.45.05 Claims of Undue Hardship

REV:12/2000

A transfer penalty shall be waived if imposition of the penalty would cause the individual undue hardship. The entire penalty period or a portion of the penalty period shall be waived when:

1) Imposition of the penalty period would deprive the individual of medical care to the extent that his/her life or health would be endangered or would deprive the individual of food, shelter, clothing or other necessities of life; AND

2) All appropriate attempts to retrieve the transferred asset have been exhausted; AND

3) The nursing facility has notified the individual of its intent to initiate discharge or the agency providing essential services under a home and community based waiver has notified the individual of its intent to discontinue such services for reasons of non-payment; AND

4) No less costly non-institutional alternative is available to meet the individual's needs.

Undue hardship does not exist when application of the transfer provisions merely causes inconvenience or restricts lifestyle but would not put him/her at risk of serious deprivation.

When eligibility for payment of long term care services has been denied due to imposition of a transfer of assets penalty, the individual may claim undue hardship. The individual must submit a written request and any supporting documentation. A request for consideration of undue hardship does not limit the individual's right to appeal a denial of eligibility for reasons other than hardship.

Claims of undue hardship are forwarded to the Long Term Care Administrator for evaluation. The LTC Administrator may instruct the agency representative to obtain documentation from the individual which can include but not be limited to the following:

- A statement from the attorney, if one was involved;

- Verification of medical insurance coverage and statements from medical providers relative to usage not covered by said insurance;

- A statement from the transferee relative to his/her financial position;

- Resource documents such as a deed, bank book, etc. to verify the existence and structure of the jointly held resource;

- A statement from the other owner(s) of the jointly held resource relative to the reason for and circumstances of the transfer.

The LTC Administrator, in consultation with the Office of Legal Counsel, determines whether undue hardship applies. Written notification of the Department's decision regarding undue hardship, along with appeal rights, is provided to the individual within sixty (60) days of the Department's receipt of the request.

0384.45.10 Example of Rebuttal

REV:06/1994

Edward Johnson owned a farm free and clear. Mr. Johnson and his son had farmed the property for a number of years. Age 58 and healthy, Mr. Johnson decided to seek another line of work. He transferred one-half interest in the farm to his son in October 1989. The Fair Market Value at the time of the one-half interest was $120,000. In April of 1990, Mr. Johnson was injured in an auto accident, and became institutionalized.

He applied for Medical Assistance, and was found eligible, but ineligible for payment of the institutional care services. He submitted evidence substantiating the circumstances. Upon review of the rebuttal material, it was established that the resource transfer was exclusively for a purpose other than to qualify for Medical Assistance. He became eligible for payment of his institutional care.

0384.50 SSI RECIPIENTS

REV:06/1994

Resource transfers do not impact Medical Assistance or SSI eligibility determinations. Individuals may be eligible for Medical Assistance-only or SSI and Medical Assistance while at home or while in an institution, without regard to resource transfers.

However, once institutionalized, all Medical Assistance recipients are subject to the policies contained in this section regarding resource transfers.

The Social Security Administration (SSA) questions SSI recipients regarding transferred resources at the time of application and redetermination for SSI benefits. SSA maintains a record of those SSI recipients who have transferred resources which is transmitted to the Long Term Care Unit at Central Office on a regular basis.

This LTC Unit in turn sends the information to the appropriate LTC field office.

Prior to authorizing a vendor payment to a nursing facility, the Long Term Care field office screens the list of alleged transferrers to ascertain that the individual in question has not disclosed a resource transfer to SSA. In the event that this screening indicates that the applicant has transferred a resource, the case is referred to the LTC/AS district office for review and evaluation of the impact of the transfer on eligibility for nursing facility payment.