EXHIBIT 36C—HCFA Streimer Letter

HCFA CLARIFIES TREATMENT OF TRUSTS

The rules relating to the lookback periods and penalties involving trusts have been a source of uncertainty for elder law attorneys. Dana Rozansky, an attorney in the law office of Thomas D. Begley, Jr. (Begley, Begley & Fendrick, Moorestown, New Jersey), recently contacted the Health Care Financing Administration (HCFA) for clarification of HCFA's position. Following is the agency's response.

Department of Health & Human Services
Health Care Financing Administration
7500 Security Boulevard
Baltimore MD 21244-1850

25 February 1998

Dana E. Rozansky
Begley, Begley & Fendrick
40 East Main Street, P.O. Box 827
Moorestown, New Jersey 08057

Dear Ms. Rozansky:

I am responding to your letter requesting confirmation of your understanding of certain aspects concerning treatment of trusts under Medicaid. The specific items you mentioned, with our comments, are as follows.

1. Assets in a revocable trust are considered available as if no transfer of assets has taken place.

   This is correct. Assets placed in a revocable trust are not treated as a transfer of assets for less than fair market value, but rather are considered available resources.

2. Transfers from a revocable trust to individuals other than the trust beneficiary are considered to be transfers to a trust subject to a 5-year lookback period.

   Transfers from a revocable trust to or for the benefit of someone other than the trust beneficiary is [sic] subject to a 5-year lookback period. However, such transfers are not a transfer to a trust unless the funds are actually transferred to another trust. Any transfer to another individual that does not involve placing the funds in another trust is simply a transfer of assets for less than fair market value.

3. Transfers to an irrevocable trust have a 5-year lookback.

   This is not correct. Transfers to an irrevocable trust can be subject to a 5-year lookback period, but only to the extent that after transfer to the trust some portion, or all, of the funds cannot, in any way, be made available to the trust beneficiary. Only the portion of the funds which cannot be made available to the beneficiary is subject to the 5-year lookback. Any portion of funds placed in an irrevocable trust that can be made available to the beneficiary is treated as countable income or resources, as appropriate. Any portion of those funds transferred from the trust to or for the benefit of someone other than the beneficiary is treated as a transfer of assets subject to a standard 3-year lookback period.

4. Transfers from an irrevocable trust to individuals other than the beneficiary incurs [sic] no additional penalties. (No double jeopardy.)

   This is only partially correct. As explained in 3. above, a transfer to or for the benefit of someone other than the beneficiary from a portion of an irrevocable trust which can be made available to the beneficiary is subject to a 3-year lookback period, and thus a transfer penalty. This is not "double jeopardy" because no transfer penalty was imposed on the funds when they were placed in the trust. However, where assets in a trust cannot be made available to the beneficiary, transfer of those assets to or for the benefit of someone other than the beneficiary does not incur a separate transfer penalty. Any penalty would have been assessed when the funds were placed in the trust.

5. Transfers to an irrevocable trust with a retained income only interests [sic] are considered available only to the extent of the income earned. Otherwise, the assets are considered to have been transferred with a 5-year lookback period.

   This is correct.

6. Where assets in an irrevocable trust can be distributed to the beneficiary but are transferred to someone else, the lookback for the transfer is 36 months.

   This is correct.

I hope this information is useful to you. If you have any questions, please contact Roy Trudel of my staff at 410-786-3417.

Sincerely,

Robert A. Streimer
Director, Disabled and Elderly Health Programs Group
Center for Medicaid and State Operations