DRA COMMENTS – SUMMARY

Transfers Not Resulting in a Penalty/Return of a Transferred Asset/Start Date of the Penalty Period – 3029.10 H

COMMENT: The Department received a number of comments concerning adjusting the start date of a penalty period, instead of the end date of a penalty period, when a transferred asset is returned. Commenters claimed that the end date of the penalty period should be adjusted, not the start date. In support of their claim, commenters asserted that the proposed regulation fails to comply with, or is not authorized by, federal law; is inconsistent with letters from the Centers for Medicare and Medicaid Services ("CMS") on the subject; and improperly delays the start of the penalty period for client's applying for home care benefits.

RESPONSE: The proposed regulation accurately reflects federal and state law and comports with guidance from CMS. 42 USC 1396p(c)(1)(D)(ii) provides that, in the case of a transfer after February 8, 2006, the start date of a period of ineligibility is "the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) **based on an approved application for such care but for the application of the penalty period**" (emphasis added).

> 42 USC 1396p(c)(1)(E)(i) provides that, with respect to an institutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall be equal to --
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> (I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(i), divided by
> (II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.

The Department interprets this language to mean that the penalty period commences as of the date that the Medicaid program would pay for the individual's long- term care services, but for the application of the penalty period. 42 USC 1396p(c)(1)(D)(ii) requires that an individual formally apply for Medicaid and be otherwise eligible for the payment of long term care services under the Medicaid program, but for the application of the penalty period.

The Department's interpretation is reasonable and is supported by CMS guidance. In a letter to State Medicaid Directors (copy attached as Exhibit A), Dennis

G. Smith, Director, CMS Baltimore, advised that "[u]nder the DRA, the start date of the penalty period is the first day of a month (or at State option the first day of the following month) in which the asset was transferred, or the date on which the individual is eligible for medical assistance under the State plan and is receiving institutionalized level of care services that, were it not for the imposition of the penalty period, would be covered by Medicaid whichever is later." (emphasis in original). (Exhibit A). (See also Letter from Richard R. McGreal, Associate Regional Administrator, CMS Boston, dated October 28, 2010 [copy attached as Exhibit B] ["The DRA enacted revisions to § 1917(c) that postponed the start date of the penalty period from the date of transfer to a later date when the individual would both be receiving long-term care services but for the imposition of the penalty period. ... The DRA adjusted the start date of the penalty period, not the start date of Medicaid eligibility."] ; Letter Richard R. McGreal, Associate Regional Administrator, CMS Boston, dated December 16, 2010 [copy attached as Exhibit C] ["The DRA postponed the start date of the penalty period from the date of transfer to a later date when the individual would both be receiving long-term care services and have become eligible for Medicaid but for the imposition of the penalty period."]).

For individuals residing in nursing facilities, the penalty commences on the date that Medicaid would otherwise pay for institutional care under an approved application for Medicaid, but for the application of the penalty. For individuals applying for home and community based services under a Medicaid waiver, the penalty commences on the date that the Department would have approved the payment of the services under an approved application, but for the application of the penalty period.

The Department's position concerning adjusting the start date of the penalty is consistent with, and support by, state law. Section 17b-261a (d)(2) of the Connecticut General Statutes provides, in relevant part, that "[i]f any transferred asset is returned to the transferor, the Department of Social Services shall adjust the penalty period to the extent permitted by federal law, **provided the ending date of the penalty period as originally determined by the department shall not change**." (emphasis added)

In sum, adjusting the start date of the penalty, and not the end date, when a transferred asset is returned is required by federal law, is supported by CMS guidance, and is mandated by state statute. The Department, therefore, does not agree to make the change requested by the commenters.

Treatment of Home/Non-Home Property -- UPM 4030.20 D.1.c. & 4030.20 E.2.

COMMENT: Per 4030.20 D.1.c., the home retains its status as an excluded asset if an individual enters a long term care facility if a sibling of the individual is living in the home, is (1) a *joint owner* of the home and (2) was residing in the home for at least one year before the individual entered the LTCF. The use of the term "joint owner" is erroneous. 4030.20 D.1.c.1 must be amended so that the language is consistent with the provisions regarding transferring home property to a sibling (42 USC 1396p(c)(2)(A)(iii) & UPM 3029.10 A.1.d.) and disallowance of the State's lien when a sibling lives in the home (42 USC 1396p(a)(2)(C)). 4030.20 D.1.c.(1) should read "has an equity interest in the home." (Attorney Spurlin)

RESPONSE: This Department agrees to make the requested change to accurately reflects the language in 42 USC 1396p(a)(2)(C), which provides that "[n]o lien may be imposed under paragraph (1)(B) on such individual's home if – . . . "a sibling of such individual (who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution)."

COMMENT: The Department received several comments that 4030.20 E.2 should exempt an individual's home equity interest in excess of $750K if a sibling of the individual lives in the home, is a joint owner of the home and resided in the home for at least one year before the individual entered a long term care facility. (Attorney Spurlin; Attorney Todisco; Attorney Boorman, CTNAELA, Attorney Fisher o/b/o Alzheimer's Assoc. CT Chapter)

RESPONSE: The Department disagrees. 42 U.S.C. 1396p(f)(1)(A), (B), provides that, "[n]otwithstanding any other provision of this subchapter and subject to subparagraphs (B) and (C) of this paragraph and paragraph (2), in determining eligibility for assistance of an individual for medical assistance with respect to nursing facility services or other long-term care services, the individual shall not be eligible for such assistance if the individual's equity interest in the individual's home" exceeds $500.000 or, at the state's election $750,000.

Paragraph (2) provides that paragraph (1) "shall not apply with respect to an individual if—

(A) the spouse of such individual, or
(B) such individual's child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI) is blind or permanently and totally disabled, or (with respect to States which are not eligible to

participate in such program) is blind or disabled as defined in section 1382c of this title, is lawfully residing in the individual's home. "

There is no exemption for a sibling of the individual who is living in the home.

Post-Eligibility Transfers Made by the Institutionalized Individual's Spouse – UPM 3029.15 E.1.c.

COMMENTS: The Department received several comments concerning the imposition of a penalty period if the spouse of an institutionalized individual transfers certain assets (proceeds of home equity loan, reverse mortgage, etc., but not the proceeds from the sale of the home should the spouse sell the home) after the individual's Medicaid eligibility is approved. The commenters asserted that the proposed regulation's treatment of the enumerated assets conflicted with Medicaid law (42 USC 1396 r-5 [c]), is administratively unworkable and impracticable, and is not required by the DRA. (Attorney Boorman, CTNAELA, Attorney Fisher o/b/o Alzheimer's Assoc. CT Chapter, Attorney Todisco, Attorney Lewendon). Commenters questioned the wisdom of penalizing transfers from the proceeds of a home equity loan while not penalizing a transfer made from a sale, and asked what abuses DSS sought to address and what DSS sought to accomplish by the proposed regulation.

Commenters noted that the proceeds from home equity loan and reverse mortgage are not the same as the home, and that DSS has never suggested that a community spouse may not sell the home, move to an apartment or assisted living facility, and at some future time make gifts which may have derived from the sale of the home. (Attorney Davis, Attorney Boorman, CTNAELA)

A commenter, conceding that letters from CMS allow states to elect to consider certain post-eligibility transfers by the community spouse, remarked that DSS is not required to follow this approach. (Attorney Boorman, CTNAELA).

Two commentators referenced a CMS letters from Ronald Preston, Associated Regional Manager, to Brian Barreira, dated April 5, 2000, (copy attached as Exhibit D) in which CMS take the position opposite to DSS. According to the commenters, DSS has not provided a sound policy reason for taking a different course, even if permitted. (Attorney Davis, Attorney Boorman)

Commenters pointed out that, in addition to the proposed regulation conflicting with 42 USC 1396 r-5 (c), in the May 7, 2009 report issued by the Legislative Commissioner's Office ("LCO") concerning the proposed regulation when it was previously submitted to the Legislative Regulations Review Committee, the LCO concluded that the proposed policy is not explicitly required by the DRA and that CMS does not require the policy. The commenters opined that the proposed regulation will force community spouses to stay in homes they cannot afford for fear that their spouse will be disqualified for transferring assets. (Attorney Stillman, Attorney Todisco, CTNAELA, Attorney Fisher o/b/o Alzheimer's Assoc. CT Chapter)

One commenter opined that the proposed would have a chilling effect on those who assumed that Congress passed the 42 USC 1396 r-5 (c) to provide some financial protection to community spouses. (Attorney Shorr)

A commenter stated that many years ago the CMS Regional Office disapproved UPM 3029.15 E.1.b. (penalizing the transfer of a home by the community spouse after the eligibility determination) based on a conflict with federal law but the policy has remained in effect. The commenter asserted that DSS should rescind 3029.15 E.1.b. so the post-eligibility transfer of the home by the community spouse is not prohibited and that 3029.15 E.1.c. is an extension of the policy prohibiting the transfer of the home. (Attorney Lewendon)

One commenter stated that assuming, for argument's sake, DSS can elect to penalize an individual whose spouse has withdrawn funds from home equity and gifted the funds to a third party, the decision whether to elect to implement the policy is a poor public policy decision. If DSS is not convinced that the policy is not a good public policy decision, the decision whether to adopt the policy should be made by the legislature and not by DSS. DSS should submit to the General Assembly proposed legislation which would give DSS the authority to adopt the proposed policy. The public should debate whether the choice is sound public policy and the elected representatives should make that decision. (Attorney Lewendon)

Three commenters stated that a cross-reference to transfers by a community spouse which do not result in a penalty is required. (Attorney Stillman, Attorney Todisco, Attorney Boorman)

RESPONSE: CMS has advised states that the transfer of home equity loan proceeds is subject to a penalty. Also, CMS has advised states that a transfer made by a community spouse, including a transfer made after the institutionalized spouse becomes eligible for Medicaid, may result in a penalty. See letter from Thomas E. Hamilton, Director, Disabled and Elderly Health Programs Group, CMS Baltimore (attached as Exhibit E).

The Department has consistently regarded the transfer of the community spouse's home as a potentially disqualifying transfer that could affect the institutionalized spouse's eligibility for Medicaid payment of long term care services. The Department's position reflects a public policy that encourages retention of the property by the community spouse. As the value of any home is equivalent to its equity, the Department's position is that it is logical to regard transfers of home equity as equivalent to transfers of the home itself. The Department's decision to elect to penalize post-eligibility the transfer of home equity loan proceeds is consistent with the Department's long-standing treatment of post-eligibility home transfers by the community spouse as a potentially disqualifying transfer.

The Department is the sole state agency designated to determine eligibility for Medicaid and other public assistance (Conn. Gen. Stat. § 17b-261b [a]). The Commissioner of Social Services is authorized to adopt regulations "as are necessary to to implement the purposes of the department as established by statute." Conn. Gen. Stat. § 17b-3 (a)(2).

Contrary to comments received, the Department's position is not contrary to federal law. 42 USC 1936r-5(c)(4) provides that, "[d]uring the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse."

> The term "resources" as used in 42 USC 1936r-5(c)(5) does not include—
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> (A) resources excluded under subsection (a) or (d) of section 1382bof this title, and
> (B) resources that would be excluded under section 1382b (a)(2)(A) of this title but for the limitation on total value described in such section."

The home is specifically excluded in this definition of "resources," per 42 U.S.C. 1382b(a)(1).

Also, the proposed regulation is required by state law. Section 17b-261l of the Connecticut General Statutes provides, in relevant part: The Commissioner of Social Services shall amend the Medicaid state plan to require that funds derived from equity in home property through a reverse annuity mortgage loan or other home equity conversion loan are not treated as income or assets for the purpose of qualifying for benefits under the Medicaid program, provided (1) such funds are held in an account that does not contain any other funds, and (2) the Medicaid recipient does not transfer such funds to another person for less than fair market value.

Accordingly, the Department's position, as reflected in the proposed regulation, is consistent with, and not contrary to, federal law and required by state law.

COMMENT: A cross-reference to transfers by a community spouse which do not result in a penalty is required. (Attorney Stillman, Attorney Todisco, Attorney Boorman)

RESPONSE: The commenters did not explain the basis for their comment that a cross-reference was required and the Department is unaware of any such requirement.

COMMENT: The proposed regulation is not "driven at all by any part of the [DRA]." There is no requirement in federal law that DSS adopt this policy. (Attorney Lewendon)

RESPONSE: The Department does not agree with the comment. Each provision of the proposed regulations is necessary to conform the Department's policy to the requirements of both the federal Medicaid program and the Deficit Reduction Act of 2006. The Department is required by the DRA to apply the changes specifically required by the DRA effective February 8, 2006. Other changes, required by the federal Medicaid program, or to give effect to the DRA, are effective April 1, 2007.

Transfers of Assets – Transfers Attributable To Spouse – 3029.05 D.2.

COMMENT: 3029.05 D.2. uses the phrase *"or similar arrangement"* -- this phrase is too vague and should be deleted. Although the phrase appears in the United States Code (42 USC 1396p (c)(3), its purpose is to enable states to be specific about what property arrangements in that state equate to an interest held in common whereby, under state property law, the interest of the other owner can be attributed to the individual seeking eligibility. A purpose of promulgating regulations is to create the necessary practical specificity about the particular policies and procedures that will apply. DSS should either delete the term "or similar arrangement" or specifically enumerate what these "similar arrangements" are. (CTNAELA)

COMMENT: The phrase *"tenancy in common"* should be deleted because the pro-rata share of the tenant in common is a discreet interest under CT property law, and as with any other property interest, transfer of this is covered by other sections. (CTNAELA)

RESPONSE: 42 USC 1396p (c)(3) provides: "For purposes of this subsection, in the case of an asset held by an individual in common with another person or person in a joint tenancy, tenancy in common, or similar arrangement, the asset (or the affected portion of such asset) shall be considered to be transferred by such individual when any action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset. The proposed regulation follows 42 USC 1396p(c)(3).

The Department is unable to contemplate every possible property arrangement that may arise and 42 USC 1396p(c)(3) recognizes that inability. No change, therefore, will be made to the proposed regulation.

Transfer of Assets -- Compensation – 3029.30 A.2.

COMMENT: There is no requirement in federal law that there be a written "legally enforceable agreement" in existence in order for compensation received by an individual prior to the making of a transfer of assets to be counted. Oral contracts are enforceable. It is possible that services would be provided but the transfer would not occur until a later date. An individual should be able to demonstrate the existence of an oral agreement or arrangement whereby services were provided but that a transfer would not occur until a later date. This section should provide that a legally enforceable agreement may be written or oral. (Attorney Schorr, Attorney Todisco, Attorney Boorman, CTNAELA, Attorney Fisher o/b/o Alzheimer's Assoc. CT Chapter)

RESPONSE: The proposed regulation does not require that an agreement be in writing to be legally enforceable. The Department reviews the validity of all agreements, including those reportedly made orally, to determine if the agreement is legally enforceable under state law.

Treatment of Assets – Loans – 4030.40

COMMENT: 4030.40 B. should cross-reference 3029 to mirror 4030.40 A. so transfers under paragraph B. are evaluated under 3029. (Attorney Todisco; Attorney Boorman, CTNAELA)

RESPONSE: The Department agrees and will update 4030.40B to cross reference 3029.

Transfer of Assets – Purchase of Mortgage Note, Loan or Installment Contract – 3029.14 F.

COMMENT: This section was not referenced in the NOI as one of the UPM sections that was either being added or amended. (Attorney Todisco; Attorney Boorman, CTNAELA)

RESPONSE: This section was inadvertently omitted from the Notice of Intent ("NOI"). It was included in the proposed regulation that was provided to individuals who requested copies of it so people were on notice that it was included as part of the proposed regulation.

COMMENT: 3029.14 F. should be deleted because it is duplicative of the 4030.50 A.2. (Attorney Todisco)

RESPONSE: 3029.14 F. and 4030.50 A.2. are not duplicative. 3029.14 F. concerns counting as income payments derived from a mortgage note, loan, installment contractor or similar financial instrument; 4030.50 concerns treating as an asset the right to receive income from a mortgage note, loan, installment and similar instrument.

COMMENT: During negotiations with the CBA Elder Law Section and others, DSS agreed to add a cross-reference to 4030.50 at the end of this section. Section 4030.50 permits an applicant to demonstrate that the income from a mortgage note, loan, installment contract and similar financial instruments cannot be sold. The cross-reference is not included. (Attorney Boorman, CTNAELA; Attorney Fisher o/b/o Alzheimer's Assoc. CT Chapter)

RESPONSE: The Department agrees to add a cross-reference to 4030.50.

COMMENT: During negotiations with the CBA and others, DSS agreed to remove 3029.14 F. which describes the income stream from a mortgage note or similar instrument as an asset. Section 4030.50 A.3., however, references an income stream being an asset. If income from these instruments is treated as an asset, individuals will be required to attempt to sell the instruments at severely discounted prices, assuming a buyer can be found, to maintain eligibility for programs such as the home care program. Once sold, the income will not be available; assets will be depleted quicker; and individuals will have no choice but to enter a nursing home once they have exhausted their assets. (Attorney Todisco)

RESPONSE: The comment mischaracterizes 3029.14 F. The provision concerns counting as income the individual payments received from a mortgage note, loan, installment contract or similar financial instrument. Regarding the comment concerning 4030.50 A.3., although individuals are required to attempt to sell payment streams from mortgage notes, loans, installment contracts and other financial instruments, the Department evaluates purchase offers and will allow an individual to retain a payment stream if, after a cost-benefit analysis, it is fiscally prudent to allow the individual to retain the payment stream.

The Department disagrees with the comment that individuals will be required to sell the payment streams at a deeply-discounted prices. As discussed above, each purchase offer is evaluated and individuals may be allowed to retain the payment stream if the value of retaining the payment stream outweighs the value of the purchase offer. Additionally, the Department's experience is that companies that purchase income payment streams offer fair and equitable purchase prices and not deeply-discounted prices.

Transfer of Assets – Purchase of Mortgage Note, Loan, Installment Contract – 3029.14 C.1.

COMMENT: 3029.14 C.1. should be corrected to read "disbursed" instead of "dispersed." (CTNAELA)

RESPONSE: The Department will make the requested correction.

Treatment of Assets – Mortgage Notes, Loans and Installment Contracts – 4030.50 A.3.

COMMENT: There is no authority in the DRA for treating the income stream from a mortgage note or similar instrument as an asset and the section should be deleted. (Attorney Todisco)

RESPONSE: Federal law requires that the department count as a resource liquid assets that an individual or the individual's spouse owns and could convert to cash to be used for the individual's support and maintenance. If an individual or the individual's spouse has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. 42 U.S.C. § 1382b (exclusions from resourses); 20 C.F.R. § 416.1201 (a) (1), (b).

COMMENT: The introductory paragraph should parallel, and be consistent with, the introductory paragraph to 4030.47 and should read: "Mortgage notes, loans installment contracts and similar financial instruments [must be] **are** evaluated as both an asset representing an investment and as income that the beneficiary may receive on a regular basis (cross reference: 5050, Treatment of Specific Types)." (Attorney Boorman, CTNAELA, Attorney Todisco)

RESPONSE: The Department's position is that the words "must be" is a clearer directive to eligibility staff. Accordingly, 4030.47 will be amended to conform with 4030.50 A.3. The introductory paragraph of 4030.50 states "must be" and the Department will change the introductory paragraph of 4030.47 to "must be" instead of "are."

COMMENT: Although 4030.50 A.3. provides that an applicant can demonstrate that a mortgage note, loan, installment contract and similar financial instrument and the income derived therefrom cannot be sold, there are no standards published that will be used by DSS to determine if such instrument cannot be sold. Until such standards are published, the proposed regulation is incomplete. At meetings with DSS over the past several years, the CBA Elder Law Section and other interested parties advised DSS that companies such as Peachtree and JG Wentworth stopped issuing letters stating that there is no market for an income stream. DSS must publish standards which an applicant will be required to meet to demonstrate that there is no secondary market for such instruments. (Attorney Boorman, Attorney Fisher o/b/o Alzheimer's Assoc. CT Chapter)

RESPONSE: Mortgage notes, installment contracts and loan notes are financial instruments that generate income for individuals. These streams of income may be sold. Accordingly, since federal Medicaid law requires that states count as resources all of an individual's income and assets.

The Department retains the right to review all efforts to sell these income streams and determine, based on the circumstances and information presented, whether a bona fide effort has been made.

Treatment of Assets – Annuities – 4030.47

COMMENT: This section was not referenced in the NOI as one of the sections being amended or added. (Attorney Todisco; Attorney Boorman, CTNAELA)

RESPONSE: This section was inadvertently omitted from the Notice of Intent ("NOI"). Nevertheless, it was included in the copy of the proposed regulation provided to individuals who requested copies of the proposed regulation.

Treatment of Assets – Trusts in SNAP – 4030.80 E.1.b.(1)

COMMENT: No basis exists to restrict who may serve as a trustee; there is no reason why a trustee can only be "a court, or an institution, corporation or organization not under the direction or ownership of the assistance unit." An attorney or any other individual should be able to serve as a trustee provided that individual is not under the direction or ownership of the assistance unit. (Attorney Todisco)

RESPONSE: The Department is not amending this provision as part of the proposed regulation. The subsection pertains to SNAP and is not a change required by, or to give effect to, the DRA. Accordingly, no change may be made in response to the comment.

Treatment of Assets – Transfers Involving Trusts, Exceptions – 3029.11 D.1.b.

COMMENT: 4030.80 E.1.b.(1) omits the word "sole" before the word "benefit." The paragraph should read: "the trust is established for the ***sole*** benefit of such individual ...." (Attorney Todisco)

RESPONSE: The Department agrees to make the change to conform the section to Medicaid law.

Treatment of Assets – Trusts – 4030.80

COMMENT: 4030.80 A.5. provides that a ***"trust includes any legal instrument or device like a trust, <u>such as an annuity.</u>"*** Annuities, however, are specifically covered under other sections (3029.03, 3029.12 & 4030.47) so this creates confusion, and the reference to annuities should be removed. Additionally, federal law (42 USC 1396p(d)(6)[DRA Title VI, Ch.2 § 6012]) allows the states to treat annuities as a trust only if, and to the extent that, the Secretary of Health and Human Services may specify, and then they must be treated in such manner as the Secretary may specify. (CTNAELA)

RESPONSE: The Department will amend 4030.80 A.5. to read: "The term 'trust' includes any legal instrument or device similar to a trust, such as an annuity as specified by the Secretary of Health and Human Services."

COMMENT: 4030.80 D.3. provides that DSS evaluates trusts ***"regardless of why the trust was established."*** This clause should be removed because it contradicts federal law which requires that states consider whether the purpose of a transfer is exclusively for reasons other than qualifying. 42 USC 1396p (c)(2) provides that "[a]n individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that – (C) a satisfactory showing is made to the State (in accordance with regulations promulgated by the Secretary) that – (ii) the assets were transferred **exclusively for a purpose** other than to qualify for medical assistance[.]"

Denying an applicant the opportunity to prove that the purpose was exclusively other than to qualify is a denial of due process. This section is not new, but the section should be amended to comply with federal law. (Attorney Stepian o/b/o CTNAELA – oral testimony)

This clause also contradicts 3028.15 – Transfers Made Exclusively For Reasons Other Than Qualifying. The provision in 4030.80 D.7. that DSS waives the policies described in paragraph D. if it is determined that the application of such policies would create an undue hardship (References 3028.25 & 3029.25) is not sufficient to correct this error. Hardship is a separate provision of the US Code (42 USC 1396p (c)(2)(D)). (CTNAELA)

RESPONSE: UPM 3028.15 is used only in regard to transfers made prior to February 8, 2006.

The policy language in 4030.80D3 mirrors the language written in 42 USC 1936p(d)(2)(C)(i), "Subject to paragraph (4), this subsection shall apply without regard to—

(i) the purposes for which a trust is established…"

COMMENT: The trust sections of the UPM are silent on some of the other criteria expressed in the federal statute. For instance, federal law does not treat the individual as ineligible "if a satisfactory showing is made to the State … that the individual <u>intended</u> to dispose of the assets at fair market value, or for other valuable consideration." 42 USC 1396p (c)(2)(C)(ii). This silence excludes the opportunity to prove these criteria, also a denial of due process. (CTNAELA – Attorney Stepian oral testimony)

RESPONSE: Subsection (d) of 42 USC 1936p addresses the "[t]reatment of trust amounts." It is not a transfer-of-asset provision. The language in 42 USC 1396p(d)(C)(i) specifically provides that, except for paragraph (4)(special needs trusts), subsection (d) **shall apply without regard to—**

(i) the purposes for which a trust is established,
(ii) whether the trustees have or exercise any discretion under the trust,
(iii) any restrictions on when or whether distributions may be made from the trust, or
(iv) any restrictions on the use of distributions from the trust."

(emphasis added)

The comment above pertains to subsection (c) of 42 USC 1396p, which addresses transfers of non-trust assets, in which case the individual's purpose in disposing of the assets may be relevant to the imposition of a penalty period. Subsection (d)(2) is specific to trusts and expressly provides that the transfer of assets rules apply regardless of the purpose for which the trust is established. The proposed regulation accurately reflects federal law with regard to trust assets.

Transfers of Assets – Transfers Involving Trusts – 3029.11

COMMENT: 3029.11 A.1. uses the phrase ***"or similar asset"*** – this is too vague and should be stricken. Also, "asset" does not fit the context. *Federal law states "any **legal instrument or device** that is similar to a trust."* A purpose of promulgating regulations is to create the necessary practical specificity about the particular policies and procedures that will apply. DSS should either strike the term "or similar asset" or specifically enumerate what it this means. (CTNAELA)

RESPONSE: This policy accurately reflects the Federal law. 42 USC 1936p(d)(6) provides: "The term "trust" includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary specifies." It is impossible for the Department to know about and list every instrument or device that would be "similar to a trust." Accordingly, this allows the Department to review all instruments or devices that are being used by individuals to determine whether, even though the instrument or device may not be called a trust, its characteristics are such that it should be treated as a trust.