DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
JFK Federal Building, Government Center
Room 2275
Boston, Massachusetts 02203

Division of Medicaid and Children's Health Operations / Boston Regional Office

October 28, 2010

Michael P. Starkowski, Commissioner
Department of Social Services
25 Sigourney Street
Hartford, Connecticut 06106

Dear Commissioner Starkowski:

This letter is in response to your written request of July 13, 2009 and follow-up communications with State officials for informal, written interpretive guidance on the State's treatment of partial returns with respect to the application of a penalty period for a disqualifying transfer of assets pursuant to §1917(c) of the Social Security Act (the Act). Specifically, in your July 2009 letter you have requested confirmation of "the requirement in the State Medicaid Manual that returned assets must be counted as having been available from the date of the transfer". The Department of Social Services (DSS) issued proposed regulations to implement certain provisions of the Deficit Reduction Act of 2005 (DRA) (Public Law 109-171, Feb. 8, 2006), which regulations were rejected by the General Assembly's Legislative Regulation Review Committee (LRRC). The LRRC believed the proposed regulations to be in violation of Federal law, and the State has requested CMS review.

The State's proposed regulation at UPM §3029.10(H)(4) addresses the partial return of assets ("partial cure") where the individual has made a disqualifying transfer pursuant to §1917(c). In reviewing both this proposed regulation and the LRRC's assessment, one must keep in mind that the CMS State Medicaid Manual (SMM) §3258.10, on which the State's proposed regulation is at least partially predicated, pre-dates the DRA and was written at a time when it was permissible to run out a penalty period prior to applying for Medicaid. The penalty period pre-DRA (under OBRA 1993) typically began at the date of transfer, pursuant to §1917(c)(1)(D). This start date did not take into account whether the individual was receiving long-term care services, or whether the individual was even eligible for Medicaid at the time of transfer.

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 and have become eligible for Medicaid, where Medicaid would be paying for long-term care services but for the imposition of the penalty period. The DRA did not address the issue of availability of the returned funds. The DRA adjusted the start date of the penalty period, not the start date of Medicaid eligibility. It would be inappropriate to read these older SMM provisions in combination with the

DRA in such a way that the State would have the option of starting a new, later penalty period based on an adjustment to the individual's eligibility determination. This is, in effect, what we believe could potentially result from the State's proposed regulation.

Proposed State Regulation at UPM §3029.10(H)(4)

A significant problem with the State's proposed approach is the treatment of the returned partial assets as available to the individual from the date of transfer to the date of return, and potentially to a later date when a non-disqualifying disposition occurs. This appears to result in the start of a new, later penalty period. A State is allowed to adjust the original penalty period in response to a partial return of assets, but is not allowed to adjust the individual's eligibility, thereby nullifying the original penalty period and beginning a new, later penalty period.

In addition, the proposed approach could result in an adjusted penalty period whose endpoint is later than that of the original penalty period, depending on when the assets were returned. Essentially, the later the partial return is made during the original penalty period, the longer the extension of ineligibility for long-term care services, where the start date of the now-reduced penalty period is postponed until the date of return with no consideration of the amount of assets that have been returned. Under some circumstances this could result in the extension of the expiration date beyond that of the original penalty period had the assets not been returned. This result is not permissible.

Example: Assume a 10-month penalty period is calculated for a post-DRA transfer, running from September 1, 2010 through June 30, 2011, based on a disqualifying transfer of $60,000 and an average monthly private pay nursing facility cost of $6,000. Medicaid eligibility for long-term care services would begin July 1, 2011.

- A partial return of $30,000 (50% of the assets) is made in October 2010. The returned assets are considered to be available for September-October (2 months), with a new reduced penalty period of 5 months (50%) running from November 1, 2010-March 30, 2011, resulting in 7 months of ineligibility. Medicaid eligibility for long-term care services would begin April 1, 2011.
- A partial return of $30,000 (50% of the assets) is made in April 2011. The returned assets are considered to be available for September-April (8 months), with a new reduced penalty period of 5 months (50%) running from May 1-September 30, 2011, resulting in 13 months of ineligibility. Medicaid eligibility for long-term care services would begin October 1, 2011, three months later than the original expiration date.

There are some alternative approaches to managing partial cures that we believe would be permissible under current Federal law, but which do not include extending the original expiration date. CMS is not advocating any particular approach, but is merely advising on the permissibility under current Federal law and Federal guidelines. The State must determine which approach is both permissible and aligned with the intent and goals of the State's Medicaid program.

Alternative Approaches to Partial Cures

One permissible alternative would be for the State to choose not to recognize these partial returns and simply continue the penalty period uninterrupted and unaltered from the original calculation, absent full cure.

State counsel has inquired whether revising DSS policy in this manner would constitute a more restrictive eligibility rule for the purposes of the enhanced Federal Medical Assistance Percentage (FMAP) available under the American Recovery and Reinvestment Act of 2009 (ARRA) (Public Law 111-5, Feb. 17, 2009). It has been CMS policy that such a change in a State's transfer of assets policy implicates Medicaid payment for services, but not the individual's underlying Medicaid eligibility. Medicaid payment is still available for covered services that are not subject to the penalty. Thus, revising the State's asset transfer policy in the manner described would not be within the definition of a more restrictive eligibility rule for purposes of enhanced FMAP under ARRA.

A second permissible alternative would be to shorten the original penalty period from the back end so that the period ends sooner, which approach is often referred to as the "reverse half a loaf" strategy. In this approach to our example above, the return of 50% of the assets would result in a penalty period shortened by 50% at the back end, regardless of when during the original penalty period the assets were returned, moving the expiration date to the end of January 2011 (instead of the end of June 2011) with Medicaid eligibility for long-term care services beginning February 1, 2011. The now-reduced penalty period would run for five (5) months, beginning on the same date of September 1, 2010.

Even if the State elects the first option and continues the original penalty period until its original expiration date, we think the State can perhaps achieve the goal of its proposed regulation by allowing the institutionalized individual to use the partially returned assets to pay his/her unpaid nursing home bill beginning with the start of the original penalty period instead of considering the institutionalized individual prospectively ineligible for Medicaid by reason of the partially returned assets, which presumably will exceed the State's resource standard. Such an approach, essentially crediting the unpaid nursing home bill from the beginning of the penalty period against the amount of the partially returned assets, would create some incentive for securing at least a partial return of the transferred assets even if a full return is not possible.

Multiple transfers and returns

The DRA created a new §1917(c)(1)(H) of the Act giving States the option to combine multiple fractional disqualifying transfers in more than one month into a single period of ineligibility instead of applying multiple sequential penalty periods. This builds upon long-established CMS policy of allowing States to combine multiple transfers, whether in amounts less than the monthly State average payment for nursing facility care (SAPSNF) or in greater amounts, to calculate a single penalty period to ensure that penalty periods do not overlap. Connecticut has adopted the policy of aggregating multiple transfers for the purpose of calculating a single penalty period.

Our understanding is that the argument has been presented to the State that a return of one or a few of those separate transfers constitutes a full cure of each individual transfer, eliminating the penalty period associated with each particular individual transfer. As the argument goes, this would result in the penalty period ending sooner, leaving the individual with some returned assets with which to pay the nursing home bill while the penalty period is running.

Since under statute and elected policy option Connecticut combines multiple transfers to calculate a single, aggregated penalty period based on the "total, cumulative uncompensated value of all assets transferred", it follows that the State must treat the described individual asset return as a partial cure only, since some of the aggregated amount remains outstanding. The aggregated amount transferred stays aggregated upon return. Therefore we would support the State's position that a return of less than all of those separate transfers would constitute a partial cure of the aggregated transferred amount, and would not effect a full cure of any portion thereof.

Undue Hardship Provisions at UPM §3029.25(B)

A second question was posed in your July 2009 letter regarding the legality of DSS' retaining the pre-DRA undue hardship provisions for the purpose of implementing the DRA. Although we understand that this additional DSS regulation is of concern to DSS and to the LRRC, our discussions with State officials have stressed the time-sensitive nature of the above-described regulation regarding the impact of a partial cure on the penalty period, and not the State's interpretation of the undue hardship provisions of the DRA. We have chosen to review only the first regulation at UPM §3029.10, given the restrictive time frame under which the State is operating, and to review the undue hardship provisions at a later time.

We hope this information is helpful to you. If you have any questions regarding this response, please contact Marie Montemagno at 617-565-1227 (Marie.Montemagno@cms.hhs.gov) or Julie McCarthy at 617-565-1244 (Julie.McCarthy@cms.hhs.gov).

Sincerely,

Richard R. McGreal
Associate Regional Administrator

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