

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MEDICAID AND MEDICAL ASSISTANCE
Statutory Authority: 31 **Delaware Code**, Section 512 (31 **Del.C.** §512)

FINAL

20350.4 Multiple Transfers

ORDER

Nature of the Proceedings:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance initiated proceedings to amend the Title XIX Medicaid State Plan and existing rules in the Division of Social Services Manual (DSSM) to comply with the transfer of assets provisions mandated by the Deficit Reduction Act (DRA) of 2005 (Public Law 109-171). The Department's proceedings to amend its regulations were initiated pursuant to 29 Delaware Code Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the January 2007 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by January 31, 2007 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

Summary of Proposed Amendment

Statutory Authority

Deficit Reduction Act of 2005 (Public Law 109-171), enacted on February 8, 2006

Background

On February 8, 2006, the Deficit Reduction Act (DRA) of 2005 was signed into law. The DRA made changes to certain Medicaid eligibility provisions in Section 1917(c)(1)(B)(i) of Social Security Act affecting Long Term Care services and supports.

Summary of Proposals

The DRA contains a number of provisions necessitating changes to Delaware rules. This regulatory action incorporates the mandatory provisions as it relates to: 1) *Requirement to Impose Partial Months of Ineligibility*; and 2) *Authority for States to Accumulate Multiple Transfers into One Penalty Period*.

Revised and clarified policy changes are summarized as follows:

1) **Requirement to Impose Partial Months of Ineligibility**

Prior to enactment of the DRA, States had the option to impose penalty periods for transfers in a month that were less than the State's average monthly cost to a private patient of nursing facility services in the State, or to impose no penalty period for such "partial month" transfers. Additionally, some States elected not to impose a penalty for transfers made within a month that were under a certain threshold e.g., \$500. In States that elected to impose no penalty period for such partial month transfers, individuals were able to transfer amounts less than the average monthly cost of nursing facility services in successive months, but never incur a penalty.

To address this, section **6016(a)** of the DRA amended section 1917(c)(1)(E) of the Act, to add a new subsection (iv) that prohibits a State from rounding down or otherwise disregarding any fractional period of ineligibility. The result is that States are now required to impose penalty periods even in the case of smaller asset transfers, where the period of ineligibility would be less than a full month. In imposing penalties on such transfers, if the calculation of the penalty period produces a fractional amount, the penalty must include a partial month disqualification based upon the relationship between that fractional amount and the monthly nursing home rate used to calculate the

penalty period.

2) Authority for States to Accumulate Multiple Transfers into One Penalty Period

While the DRA prohibits States from rounding down or disregarding fractional periods of ineligibility, it does give States the option to combine multiple transfers for less than fair market value in more than one month and impose a single period of ineligibility, rather than applying multiple penalty periods. This flexibility is the result of a new subsection (H), added to section 1917(c)(1) of the Act by section **6016(b)** of the DRA. Under subsection (H), States may treat the total, cumulative value of all uncompensated transfers made within the look-back period as a single transfer and calculate a single period of ineligibility, which would begin on the earliest date applicable under section 1917(c)(1)(D).

States must include information about whether they elect to combine multiple fractional transfers into a single transfer in their State Medicaid Plans.

The provisions of these amendments are subject to approval by the Centers for Medicare and Medicaid Services (CMS).

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE

The Delaware Health Care Facilities Association (DHCFA) and, the State Council for Persons with Disabilities (SCPD) offered the following comments summarized below. DMMA has considered each comment and responds as follows.

DHCFA

With regard to the proposals outlined above, and any previous proposals or future proposals, we ask that clarification be provided on how these will impact the current “Millers Trust” provisions currently in use in Delaware. As you may know individuals who are over income have been able to create a Miller’s Trust where the income that puts them over the qualifying income threshold can be deposited making them eligible to qualify for Medical Assistance for Long Term Care. We are unclear as to how the DRA will affect the Miller Trust and ask for consideration of this issue. We look forward to having an opportunity to discuss our concerns about the proposed regulations with all interested parties.

Agency Response: The regulations cited do not impact Miller Trusts in any way.

SCPD

DMMA proposes to adopt some discrete changes to its transfer of assets standard. The amendments are designed to achieve conformity with the attached Section 6016(a)(b) of the Deficit Reduction Act of 2005. Background is provided in both the “Summary of Proposals” section of the regulations and the attached analysis of DRA Section 6016(a)(b) from the National Health Law Program (NHLP). SCPD does not have any objection to adoption of the proposed regulation based on the following analysis.

First, states are no longer allowed to “round down” or disregard fractional periods of ineligibility. The NHLP analysis provides the following example of the effect of the DRA in this context:

For example, if an individual makes an \$11,000 transfer for less than fair market value during the look back period in a state with a \$4,000 average monthly cost of nursing facility care, the resulting quotient is 2.75. Under the old rule, some states simply “rounded down” the penalty to two months, disregarding the remaining .75 (roughly three weeks) of the quotient. However, states must now impose the fractional period of ineligibility.

Second, for ease of administration, states must combine multiple fractional transfers and treat them in a single transfer. The NHLP analysis provides the following illustration:

Assume an individual in a state whose average monthly cost of nursing home care is \$4,000 makes a

\$3,000 transfer in each of four consecutive months during the look-back period. Without combining the transfers, the state would have to impose four different penalty periods of .75 months ($\$3,000 \div \$4,000 = .75$). By combining them, the state may simply impose a penalty of three months ($\$3,000 \times 4 = \$12,000$; $\$12,000 \div \$4,000 = 3$).

Agency Response: DMMA appreciates your comment.

Findings of Fact:

The Department finds that the proposed changes as set forth in the January 2007 Register of Regulations should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Title XIX Medicaid State Plan and existing rules in the Division of Social Services Manual regarding the transfer of assets provisions mandated by the Deficit Reduction Act (DRA) of 2005 (Public Law 109-171) relating to the requirement to impose partial months of ineligibility and authority for States to accumulate multiple transfers into one penalty period is adopted and shall be final effective March 10, 2007.

Vincent P. Meconi, Secretary, DHSS, February 15, 2007

DMMA FINAL ORDER REGULATION #07-13 REVISIONS:

20350.4 Multiple Transfers

OBRA 93 provides that the penalty period will be 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). When assets are transferred at different times, use the following methods for calculating the penalty periods. This policy applies to assets that were transferred on or after 2/8/06 and applications that were filed on or after 4/1/06.

20350.4.1 Transfers Made So That Penalty Periods Overlap

When assets have been transferred in amounts and/or frequency that would make the calculated penalty periods overlap, add together the value of all assets transferred to calculate a single penalty period. ~~The single penalty period will begin on the first day of the month in which the first transfer was made.~~ Fractional periods of ineligibility shall not be rounded down or otherwise disregarded when determining the penalty for a transfer of assets.

~~20350.4.2 Transfers Made So That Penalty Periods Would Not Overlap~~

~~When multiple transfers are made in such a way that the penalty periods for each would not overlap, treat each transfer as a separate event, with its own penalty period.~~

10 DE Reg. 1117 (01/01/07)

10 DE Reg. 1439 (03/01/07) (Final)