THE 2018 ANNUAL SURVEY AND COMMENTARY OF POOLED TRUSTS AND PUBLIC BENEFITS

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Protecting the financial future of those with disabilities

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The 2018 Annual Survey and Commentary of Pooled Trusts and Public Benefits

By Neal A. Winston

The past year has given pooled trust advocates much to review. The long awaited revised SSI related trust POMS became effective April 30, 2018. The SSA trust review program is receiving considerable attention from the SSA Central Office in Baltimore, but trust review quality differs considerably region to region and within local offices. There has been administrative, legislative, and court actions involving age 65 and over transfers into pooled trusts, but little movement for consensus. ABLE Act accounts are becoming more widely used. Public housing eligibility relating to trusts is notable most for its lack of activity this past year.

The POMS revisions, principally for trust sections SI 01120.199 -.203, .225, .227., and ABLE income in SI 01130.740, have few outright policy changes other than expanding the travel reimbursement rules and specifically allowing a recipient 90 days to amend any previously approved trust if it does not meet current SSA interpretations of allowable terms. Highlights of clarifications of existing policy include “for the sole benefit” interpretation, allowed travel support, third party service providers, transfers to ABLE accounts, use of restricted prepaid credit cards, emphasizing rules involving reopenings and administrative finality of prior decisions, and reinforcement of current policy involving pooled trust precedents and pooled trust review.

The revised SSA trust review program is now in its fourth year. The SSA has designated an Associate Commissioner to provide particular attention to the trust review process, and the revised POMS emphasize standardized review procedures and clarifies the allowability or restrictions on certain distributions. Yet, the general consensus among advocates is that the SSA personnel responsible for pooled trust decisions can be unresponsive and inconsistent in certain regions and local offices. Adverse decisions typically end up counting the trust as a resource, causing lengthy periods of retroactive and current ineligibility before the issue is resolved, although the SSA Central Office has attempted to create continuity and improve determinations through regular tele-meetings with Regional Trust Leads.

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The ABLE Act is now in its third full year. Thirty-nine states have implemented ABLE programs, and more are imminent. The SSA ABLE policy has little effect on SSI income or resource eligibility, with only a couple of significant areas that could cause benefit reductions. The centers for Medicaid and Medicare Services (CMS) issued a letter in 2017 defining federal Medicaid policy as it relates to ABLE accounts\(^1\), notable for its similarity to SSI rules. It appears that from a federal perspective at least, the Medicaid program is generally following the SSI approach and is having limited effect on eligibility.

For Medicaid issues involving pooled trusts, the state and local Medicaid agencies rather than the federal agency are still the principal players. While pooled trusts are accepted in all states, the major contested pooled trust issues from state to state involve penalties for age 65 and over funding of a pooled trust. The trend appears to be headed in the direction of more states desiring that an age 65 and over transfer could be a penalizing action, but then have not developed or adopted policy or procedure as to whether or not the transfer constitutes a transfer for market value that would not cause a penalty.

This annual update is intended as a basic presentation for pooled trust administrators. While tied together by law and some court decisions, the SSI, Medicaid, subsidized housing, and Food Stamp programs operate relatively independently of each other, particularly involving interpretation of non-categorical eligibility and operations policy.

**SUPPLEMENTAL SECURITY INCOME**

New Trust POMS effective April 30, 2017\(^2\)

There are few surprises in the final version of the trust POMS that affect pooled trust administration. Based on long time representations of the SSA regarding intended clarifications and additions, and a draft copy of the intended changes circulated among advocates in the fall of

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\(^1\) See Appendix A, CMS letter September 7, 2017  
\(^2\) POMS SI 01120.200-.203
2016, the final version was consistent with the original draft. The changes were introduced in
the form of four online Transmittals\(^3\), and the principal points are:

- Clarifies SSA Regional Office procedures for establishment and administration of
  precedent determinations for pooled trusts\(^4\);

- Clarifies that once the SSA has approved a pooled trust master trust and joinder
  agreement, and no further amendments have been made to the trust or agreement, it will not be
  re-reviewed for trust compliance for individual beneficiary eligibility determinations or
  redeterminations\(^5\);

- If a trust or joinder agreement has been previously approved, and for any time period that
  there have not been any amendments, if the trust or agreement terms are subsequently
determined not to be in compliance with SSI policy for any reason, the recipient and pooled trust
will be given 90 days to amend the trust or agreement without terminating the individual’s
benefits or creating a retroactive period of ineligibility or overpayment. The 90 days grace
period can be extended for good cause. This policy change is an expansion of the prior policy
which only allowed the 90 day grace period a few limited reasons\(^6\);

- Adds instructions to include certain information in the manually prepared denial notices\(^7\);

- There are a number of clarifications and apparent expansions of prior policy relating to
  administration, funding, and allowable distributions as enumerated in the trust:

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\(^3\) SI 01120 TN 52, 04/30/2018, Identifying Resources; SI 01120 TN 53, 04/30/2018, Identifying Resources; SI 01120
  TN 51, 04/30/2018, Identifying Resources; SI 01120 TN 54, 04/30/2018, Identifying Resources

\(^4\) POMS SI 01120.202 A., C.

\(^5\) POMS SI 01120.202 A.

\(^6\) POMS SI 01120.201 K.

\(^7\) POMS SI 01120.202 A.1.g.
Sole Benefit Rule

- The “sole benefit” use of a trust asset definition has been clarified so that distributions can be made that “collaterally” benefit another party. For example, the trust can purchase a vehicle or furniture that may be used by other family members as long as the principal reason for the purchase was for the benefit of the beneficiary.

- Clarifies the policy involving the trust paying for travel expenses for a companion for a beneficiary by using a reasonableness test for companionship and the number of persons necessary to travel with the beneficiary. It also clarifies when a trust may pay for a trustee and others to travel to visit the beneficiary for a medical well-being check. Trust covered costs for companions may include family members or caretakers. For example, a severely physically disabled individual may require constant care with two caregiver companions;

- Clarifies that evidence of medical training or certification is not required for caregivers, family member or otherwise, who serve as a trust paid third party service provider. Reasonable compensation should not be questioned;

- Clarifies that a third-party can be a family member, non-family person, or an entity.

Use of Financial Cards

- Clarifies that a third party, including a family member, may be reimbursed for purchases made on the third party individual’s credit card, although ordinary income rules will apply to purchases of food or shelter related expenses;

- Establishes policy relating to use of an administrator managed limited prepaid purchase credit card used by the beneficiary such as True Link™, and the use of prepaid gift cards and certificates;

- Clarifies that trust distributions to a trust beneficiary’s personal debit card are the same as cash disbursements.

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8 POMS SI 01120.201 F.3.
9 POMS SI 01120.201 F. 3.a., b.
10 POMS SI 01120.201 F. 3.a.
11 POMS SI 01120.203 B.
12 POMS SI 01120.201 I.1.g.
13 POMS SI 01120.201 I.1.e.,f.
14 POMS SI 01120.201 I.f.
ABLE Accounts

• Clarifies that ABLE accounts are not considered to be trusts by the SSA, and not evaluated by the SSA other than for countability of certain distributions retained in the beneficiary’s personal account or gifting\(^\text{15}\);
• Clarifies that work, alimony, or child support funds directed to or voluntarily deposited in an ABLE account will be counted under regular SSI income rules\(^\text{16}\);
• Clarifies that a pooled trust can make allowable and non-countable distributions to an ABLE account as long as IRS established ABLE requirements are met\(^\text{17}\).

• Clarifies other administrative rules:
  • Emphasizes the requirements for reopening prior decisions, application of administrative finality, and the undue hardship waiver to be applied to decisions by the SSA\(^\text{18}\);
  • Instructions for field office technicians, trust reviewers, and regional trust leads related to the trust review process\(^\text{19}\);
  • The beneficiary must be disabled as defined by the Social Security Act at the time that the trust is created and funded\(^\text{20}\);
  • The trust may not limit or favor any particular state, nor limit the time periods in which benefits are received for Medicaid pay back provisions\(^\text{21}\);
  • SSI payments are non-assignable by law and SSI payments do not count as income for SSI purposes. Direct deposit to a trust account does not constitute an assignment of benefits\(^\text{22}\);
  • Assignment of payments by court orders is considered irrevocable\(^\text{23}\);
  • Clarifications regarding establishment of trust under tribal law and added Indian Gaming Regulatory Act (IGRA) procedures\(^\text{24}\);

\(^{15}\) POMS SI 01130.740
\(^{16}\) POMS SI 01130.740 C.1.a.
\(^{17}\) POMS SI 01120.201 I.h.
\(^{18}\) POMS SI 01120.202 A., et seq.
\(^{19}\) POMS SI 01120.200 K.
\(^{20}\) POMS SI 01120.203 B., C.
\(^{21}\) POMS SI 01120.203
\(^{22}\) POMS SI 01120.200 G.
\(^{23}\) POMS SI 01120.200 A.
• Treatment of assignment of Veterans Survivor Benefit Plans and direct deposits of SSI benefits to trusts\textsuperscript{25}.

• Previous Pooled Trust Policy \textbf{Not} Clarified or Changed
  • Effect of age 65 and over funding of a pooled trust;
  • Percentage amount of retention of funds by the pooled trust agency upon the death of the beneficiary.

\textbf{Specific Current Issues of Interest to Pooled Trust Administrators}

\textbf{Regional Office Precedents}

As an adjunct to the pooled trust review procedure, the SSA Central Office has required the regional offices to create a registry of internal precedents in which each pooled trust in the region is reviewed to determine if it meets the requirements to be a non-countable resource\textsuperscript{26}. The purpose is to create continuity of decision making involving different recipients who use the same pooled trust, and ease the workload of the reviewers so that the same pooled trust is not reviewed over and over for each individual case review. SSA personnel are admonished not to share the precedents with anybody outside of the agency under the reasoning that since the precedents can be revised by the agency at will, it would be difficult for the public to keep track of the latest precedent that applied to a particular pooled trust.

The pooled trust reviewer is instructed to review the most recent version of the pooled trust, but each time that the trust or joinder agreement is amended, a new precedent must be established for the amended version. This is particularly important to the individual case determination process because if an individual case review straddles several versions, then the time period of each must be individually analyzed and applied. Thus it is possible that a long individual case review time period might create an on-off-on eligibility situation.

\textsuperscript{24} POMS SI 01120.200 A., .201 A.
\textsuperscript{25} POMS SI 01120.201 J.
\textsuperscript{26} POMS SI 01120.202 C.
Regardless of the SSA determining that a pre-approved pooled trust or joinder agreement and individual case not meeting the current SSA requirements for the transfer into the trust or trust and joinder agreement to be a non-countable resource, the SSA principles of reopening limitations and administrative finality, and the 90 day amendment cure rule must be applied to each individual case. If an overpayment is determined, then the rules of overpayment waiver and undue hardship must also be considered by the agency.

Inaccessibility of SSA Regional Office Guidance
A major complaint among some pooled trust administrators and advocates is their inability to access a knowledgeable person with authority in a local or regional office to assist and provide guidance regarding a specific problem with a trust beneficiary or pooled trust administration. The POMS states that the Regional Trust Lead (RTL) establishes all pooled trust precedents in conjunction with regional counsel and reviews all determination appeals involving trusts. However, direct access to and even knowing the identity of these individuals is not publicly encouraged.

The agency has appointed an Associate Commissioner, Janet Walker, to oversee, manage, and improve the trust review process as part of her duties. While she and her staff have been known to personally intervene in individual cases that administrators and advocates have not been able to work out within a reasonable time period from normal local and regional office channels, the proper protocol is to start with the local office reviewer and work up the ladder for individual cases. For more general cases involving pooled trust and joinder agreement terms and multiple beneficiaries, the inquiry should go to the RTL in the regional office.

Assoc. Comm. Walker has suggested that the regional inquiry be made through the office of the SSA Regional Communications Directors, whose job it is to handle public inquiries. They should use their discretion to contact the right individual in the local or regional office to help resolve the problem, or at least provide an answer. A list of these Directors and their contact information can be found at https://www.ssa.gov/news/press/. A current list of is also attached as Appendix B. For cases in which all else fails, she has also invited administrators and advocates to contact her directly in Baltimore by email, Janet.Walker@ssa.gov.

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For The Benefit Of/On Behalf Of/For The Sole Benefit Of An Individual

Beginning in May 2012, the SSA has issued a series of POMS changes and clarifications that first limited and then expanded the rules involving trust reimbursement or payment of travel expenses of family members or other caregivers necessary to accompany a disabled beneficiary. If a pooled trust was found to have noncompliant terms with the new POMS, then at each individual beneficiary’s SSI redetermination, the transfer to the trust would become a countable and a disqualifying resource as long as the remaining principal exceeded the $2,000 individual resource limit. The SSA considered the mere existence of the term in a pooled trust to render the trust countable, regardless of whether or not the trust administrator had made a distribution that violated the policy.

The latest change clarification in POMS SI 01120.201 F. was issued under the April 30, 2018 revisions as follows:

1. General rule regarding trusts established for the sole benefit of an individual

Consider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at anytime for the remainder of the individual's life.

Do not consider a trust that allows for the trust corpus or income to be paid to, or for the benefit of, a beneficiary other than the SSI applicant or recipient as a trust established for the sole benefit of the applicant or recipient, except as provided in SI 01120.201F.3. and SI 01120.201F.4. in this section.

2. Trust established for the benefit of or on behalf of the individual

Consider a trust established for the benefit of the individual, and consider payments to be on behalf of, or to or for the benefit of the individual, if the trustee makes payments of any sort from the corpus or income of the trust to another person or entity such that the individual derives some benefit from the payment.

For example, such payments could be for the purchase of food or shelter or household goods and personal items that count as income. The payments could also be for services for medical or personal attendant care that the individual may need, which do not count as income.
NOTE: We evaluate these payments under regular income-counting rules. However, they do not have to meet the definition of income for SSI purposes to be considered made on behalf of, or to or for the benefit of, the individual.

If the trustee uses funds from a trust that is a resource to purchase durable items, such as a car or a house, the deed or title must show the individual (or the trust) as the owner of the item in the percentage that the funds represent the value of the item. Failure to do so may constitute evidence of a transfer of resources.

3. Explanation of the sole benefit role for third-party payments

Consider the following disbursements or distributions to be for the sole benefit of the trust beneficiary:

a. Payments to a third party that result in the receipt of goods or services by the trust beneficiary

• The key to evaluating this provision is that, when the trust makes a payment to a third party for goods or services, the goods or services must be for the primary benefit of the trust beneficiary. You should not read this so strictly as to prevent any collateral benefit to anyone else. For example, if the trust buys a house for the beneficiary to live in, that does not mean that no one else can live there, or if the trust purchases a television, that no one else can watch it. On the other hand, it would violate the sole benefit rule if the trust purchased a car for the beneficiary’s grandson to take her to her doctor’s appointments twice a month, but he was also driving it to work every day.

• Purchased goods that require registration or titling, for example a car or real property, must be titled or registered in the name of the beneficiary or the trust(ee) unless State law does not permit it. For example, State law may not allow a car to be registered to the beneficiary, or may require a co-owner, if the beneficiary is a minor or an individual without a valid driver’s license. Some State Medicaid agencies may permit a car to be titled in a third party’s name if the trustee holds a lien on the car. A lien guarantees that the trust receives the value of the car if it is sold and prevents the purchase from being considered a transfer of resources.

NOTE: Even if a person or entity other than the beneficiary or the trust(ee) is listed on the title of the purchased good, it must still be used for the sole benefit of the trust beneficiary.

• A third party service provider can be a family member, a non-family member, or a professional services company. The policy is the same for all.

• Payment for companion services can be a valid expense. For example, perhaps an Alzheimer’s patient cannot be left alone and requires a sitter, or the beneficiary needs someone to drive her to the store and assist her with grocery shopping. Family members may normally do some of these things without compensation,
but that does not prohibit the trust from paying for these services. Additionally, some incidental expenses for the companion can be payable. For example, if the trust pays a companion to take the beneficiary to a museum, the trust can pay for the admission of the companion to the museum, as this cost is part of providing the service. For payment of travel expenses for a companion, see SI 01120.201F.3.b. in this section.

- You should not request evidence of medical training or certification for family members who receive payment to provide care.

- Do not request income tax information or similar evidence from a service provider to establish a business relationship. If a family member service provider’s income is relevant to the beneficiary’s SSI eligibility or payment amount (for example, his or her income is part of the beneficiary’s deeming computation as a deemor or ineligible child), request normal evidence of wages per SI 00820.130.

NOTE: You should not routinely question the reasonableness of a service provider’s compensation. However, if there is a reason to question the reasonableness of the compensation, you should consider the time and effort involved in providing the services as well as the prevailing rate of compensation for similar services in the geographic area.

b. Payment of third party travel expenses to accompany the trust beneficiary and provide services or assistance that is necessary due to the trust beneficiary’s medical condition, disability, or age

Apply the following instructions in evaluating whether travel expenses are allowable and do not violate the sole-benefit rule:

- Travel expenses are transportation, lodging, and food.

- Providing services or assistance necessary due to the trust beneficiary’s age means that the beneficiary is a minor and cannot travel unaccompanied.

- Absent evidence to the contrary, accept a statement from the trustee that the service or assistance provided is necessary to permit the trust beneficiary to travel. Do not request a physician statement concerning medical necessity. You should not request evidence of medical training or certification for the person accompanying the trust beneficiary.

- Use a reasonableness test in evaluating the number of people the trust is paying to accompany the beneficiary. For example, it is reasonable for a trust to pay for other individuals, such as parents or caretakers, to accompany a disabled minor child on vacation to provide supervision and assistance. Travel without this support would not be possible. However, it would violate the sole benefit rule if
the trust paid for other individuals who are not providing services or assistance necessary for the beneficiary to travel.

NOTE: In this example, the fact that the parents or caretakers cannot afford to pay for their other children’s trip, or cannot leave them at home, is not a consideration relevant to the sole-benefit requirement.

c. Payment of third party travel expenses to visit a trust beneficiary. The following travel expenses to ensure the safety or medical well-being of the trust beneficiary are allowable and do not violate the sole-benefit rule:

- Travel for a service provider to oversee the trust beneficiary’s living arrangements when the beneficiary resides in an institution, nursing home, other long-term care facility (for example, group homes and assisted living facilities), or other supported living arrangements.

- Travel for a trustee, trust advisor named in the trust, or successor to exercise his or her fiduciary duties or to ensure the well-being of the beneficiary when the beneficiary does not reside in an institution.

NOTE: A third party can be a family member, non-family person, or another entity. If you have questions about whether a disbursement is permissible, please request assistance from your regional office.

90 Day Amendment Rules
At the time that the travel and other policy issues for allowable terms in a pooled trust were being “clarified” through review of pooled trusts, the agency developed a new policy of allowing a pooled trust 90 days to amend its prior nonconforming terms for a limited number of circumstances including null and void clauses in trust documents, management of pooled trusts by a nonprofit association, family travel reimbursement, and early termination provisions. The 90 day rule allowed the pooled (and individual) trust to be amended without causing a retroactive overpayment or having the trust asset become a countable resource.

Advocates requested that the agency change its policy so that the 90 day amendment rule be expanded to apply to all redeterminations and reopenings including all policy changes, policy clarifications, and previous erroneous determinations for previously reviewed trusts. The SSA responded favorably to this request, and the new POMS expands the 90 day amendment rule to

27 POMS SI 01120.201 F.3.
include all previously approved trusts regardless of the reason for the erroneous approval\textsuperscript{28}.

This means that if a previously reviewed trust is now found to be countable for any reason, and the trust was not otherwise changed after the review that would otherwise cause it to be countable, then the recipient will be given 90 days to make to amend the trust to bring it into current policy compliance. It is expected that even if the review causing countability does not require an amendment to bring the trust into compliance, such as a case in which a party lacked “legal authority” to fund the trust, the beneficiary will also be given 90 days in which to remedy the problem to bring it into compliance.

If the SSA was not previously informed that the trust existed and the trust was therefore not reviewed, then the 90 day amendment policy would not apply to the trust review. It might also not apply to amendments made subsequent to the last agency review of the pooled trust or joinder agreement if the subsequent amendment is the reason for the trust to be found to be countable. If the 90 day rule does not apply due to a previously unreviewed trust, then the existing rules for administrative finality and retroactive reopening of a prior decision might apply to determine retroactive countability. Those rules generally limit the reopening to two years, but the reopening period might be extended indefinitely by application of the “fraud” or “similar fault” provisions\textsuperscript{29}.

The 90 day amendment rule in POMS SI 01120.201.K. is as follows:

K. Post eligibility changes in trust resource status

If due to a change in policy, a policy clarification, or the reopening of a prior erroneous determination, a trust that was previously determined not to be a resource is determined to be a resource (or vice-versa), apply the following rules.

1. New trusts and trusts that have not been previously excepted under section 1917 (d)(4)(A)or (C) of the Act

A trust that either is newly formed or was not previously excepted from resource counting must meet all of the criteria set forth in SI 01120.199. through SI

\textsuperscript{28} POMS SI 01120.201 K.

\textsuperscript{29} POMS SI 04070.020 Fraud and Similar Fault – SSI This type of retroactive reopening might be applied to cases in which the SSA was purposely not informed that a trust existed or other type of intentional action by the recipient.
01120.203., SI 01120.225., and SI 01120.227. to be excepted under section 1917(d)(4)(A) or 1917(d)(4)(C). Do not except such a trust from resource counting unless the trust meets all of these requirements.

For a trust that was previously established, but is newly discovered, reopen the prior resource determination back to the trust establishment date, subject to the rules of administrative finality. For more information on SSI administrative finality, see SI 04070.001.

NOTE: Do not impose an overpayment unless you determine that the trust is countable.

2. Trusts that previously met the requirements to be excepted under section 1917(d)(4)(A) or (C) of the Act

A trust that was previously determined to be exempt from resource counting under section 1917(d)(4)(A) or 1917(d)(4)(C) shall continue to be excepted from resource counting, provided the trust is amended to conform with the policy requirements within 90 days. That 90-day period begins on the day SSA informs the recipient or representative payee that the trust contains provisions that must be amended in order to continue qualifying for the exception under section 1917(d)(4)(A) or (C).

a. Existing situations prior to 04/27/18

Prior to 04/27/18, there were only four instances where you could offer a 90-day amendment period:

• Early Termination Provisions and Trusts (SI 01120.199.);

• Sole Benefit Requirement and Third Party Travel Expenses (SI 01120.201F.2. in this section);

• Pooled Trusts Management Provisions (SI 01120.225.); and

• Null and Void Clauses in Trusts Documents (SI 01120.227.).

Continue to apply these policies, where applicable.

b. Situations on or after 04/27/18

Effective 04/27/18, if due to a change in policy, a policy clarification, or the reopening of a prior erroneous trust determination, a trust that was previously determined to be exempt from resource counting under Section 1917(d)(4)(A) or (C) is determined to be a resource, offer a 90-day amendment period.
c. During the 90-day period

Diary the case for follow up in 90 days. Do not count a previously excepted trust as a resource, and do not impose an overpayment, pending possible amendment within the 90-day period.

d. Good cause extension

We permit each previously excepted trust only one 90-day amendment period. However, you may grant an extension request to the 90-day amendment period for good cause if the recipient requests it and provides evidence that the disqualifying issue cannot be resolved within the 90-day period: for example, if a court must amend the trust and there is a wait to get on the court docket. Document in the file the grant of an extension, the time allowed, and the reason. Diary (or tickle) the case for follow-up.

e. End of the 90-day amendment period

If the trust is amended to be policy-compliant within the 90-day period (plus any extension), the trust continues to be excepted from resource counting.

If the trust still fails to meet the policy requirements after the expiration of the 90-day amendment period (plus any extension), begin counting the trust as a resource under normal resource counting rules. The trust principal becomes a countable resource beginning with the later of (1) the date when the policy change or clarification first affects the resource determination or (2) the earliest date as of which the prior determination or decision is reopened and revised.

NOTE: All trust determinations made at the end of the 90-day amendment period are subject to the rules of administrative finality.30

**ABLE ACT**

The Achieving a Better Life Experience (ABLE) Act is now almost four years old, and the SSA, USDA, and CMS have all issued rules, regulations, and guidance regarding the effect of the accounts and distributions on SSI, SNAP, and Medicaid benefits respectively. Only the federal department of Housing and Urban Development (HUD) has not issued formal guidance, although regional administrators have issued opinion letters, and it is probable that some state

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30 POMS SI 01120.201 K.
and local housing programs using HUD funds and rules have informally adopted asset, income, and distribution rules in their programs.

The Social Security Administration issued its rules involving the accounts and SSI eligibility. The Centers for Medicare and Medicaid Services (CMS) issued guidelines for treatment of ABLE accounts as related to basic eligibility, distributions, and estate recovery. Generally, the interpretive guidelines issued by the SSI program are similar to Medicaid. The SNAP regulations have also been finalized. There are now a total of 38 states with ABLE programs.

Account fees and rules vary. Most states allow accounts to be opened by an individual from any state and can be set up remotely online. Additional up to date information can be obtained from the ABLE National Resource Center, Washington DC.

If there is an outside source for funding for an ABLE account, including from a d4C pooled trust, the beneficiary will have up to $15,000 (in 2018) more in funds in addition to SSI benefits to live on each year which will not cause the one-third reduction in SSI benefits caused by third party or trust payments for in-kind support and maintenance (ISM) if carefully distributed. The d4C transfer procedure into an ABLE account without income or resource counting has now been officially sanctioned by the SSA under the new POMS.

Special Needs Trusts and ABLE accounts differ in certain aspects as to how a public benefits agency treats the manner in which funds are received and distributed. While the federal and state Medicaid agencies generally follow rules similar to SSI, specific federal Medicaid guidance is limited to the September 2017 CMS letter copied in Appendix A. The SSA has specifically clarified the following:

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31 POMS SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts
32 CMS Letter SMD# 17-002 dated September 7, 2017, RE: Implications of the ABLE Act for State Medicaid Programs, attached as Appendix A.
35 (202) 296-2040 info@ablenrc.org
• The IRS will allow alimony and child support to be deposited directly into an ABLE account as long as total annual deposits do not exceed the annual limit. However, the SSA will count deposit of alimony and child support into an ABLE account as income, unlike court ordered deposits of child support and alimony into a pooled trust36. SSI countability of child support or alimony as income can be avoided by first depositing it by court order into a pooled trust, and then transferring it into the ABLE account.

• Earned income will count as income under the usual SSI earned income rules, even if the earnings are deposited into the ABLE account.

• Structured settlement payments from a litigation settlement going into an ABLE account will count as SSI income. However, those payments will not count as income if deposited into an SNT which then transfers the funds into the ABLE account.

• Any qualified disability expense of any amount will have no effect whatsoever on SSI eligibility.

• As long as distribution of “housing expense” QDEs or non-QDEs in addition to other countable resources does not remain in the individual’s personal account and total more than $2,000 the following month, the SSI beneficiary could effectively use the ABLE account as a way to enhance its standard of living for any purpose without affecting SSI eligibility.

• Although a consideration, the income tax and penalty for improper distributions imposed by the IRS could be relatively negligible for smaller accounts. The 10% withdrawal penalty is only levied on the income or appreciation portion of the account that is distributed.

36POMS SI 01120.201.J.1.d.
Although the Medicaid requirements for pooled trusts are generally controlled by federal law under 42 U.S.C. 1396p(d)(4)(C) and HCFA 64 through the Baltimore Medicaid policy Central Office section of the Center for Medicare and Medicaid Services (CMS), the state legislatures and Medicaid agencies have been the moving forces involved in interpretations of OBRA ’93 as it relates to (d)(4) trusts and Medicaid eligibility.

While discussed in the Lewis case as an undecided federal law question, it is still very much a state option as to whether or not an individual age 65 or over can fund a pooled trust without the state imposing a transfer penalty for long term care Medicaid eligibility. The federal statute is written in such a way that while it clearly states that funds transferred into a pooled trust by an individual age 65 or over are not ever countable as a resource against Medicaid eligibility, it is less clear that the transfer into the trust will not create a period of ineligibility unless the individual receives “fair market value” in return for the transfer.

There is also variability among the states as to the amount that may be retained by the pooled trust upon the death of the beneficiary, even though that question was clearly resolved in Lewis in favor of an unlimited amount of the total, at least for the 3rd Circuit.

Age 65 and Over Transfers Into a Pooled Trust and Retention in Pooled Trust Upon Death of Beneficiary

Minnesota Attorney Laurie Hanson’s 2018 annual report is as follows: Eighteen states (AK, AL, AR, CA, DE, FL, IA, IN, KY, MA, MD, MT, OH, OK, RI, TN, WI, and WV) do not have penalties for post-64 transfers. Twenty six states (AZ, GA, HI, ID, KS, LA, MO, ME, MS, NC, ND, NE, NH, NJ, NM, NV, OR, PA, SC, SD, TX, UT, VA, VT, WA, and WY) have penalties for transfers. Eleven other states and DC (AR, CO, CT, DC, IL, KS, MI, MN, MO, NE, NY, NY,

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38 Report attached as Appendix C

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and OR) may or may not have penalties for transfers depending on certain factors or the state policy is unknown.

There have been several legal challenges to state Medicaid agencies attempting to enforce a transfer penalty for funding of pooled trusts with funds from individuals over age 64. None have been entirely successful, although Courts have suggested that if the recipient can prove that the transfer was for fair market value, then the transfer penalty cannot be levied.

Colorado is the scene of one such long legal action. The Colorado Fund for People with Disabilities (CFPD) a pooled trust, brought an action against the Colorado Department of Health Care Policy and Financing (DHCPF) regarding age 65 and over transfers involving a case in which an administrative law judge had determined that the transfer to the pooled trust, according to a “spending plan” had been for fair market value. The DHCPF then reversed the decision.

Since late 2012, the state Medicaid agency had effectively reversed its prior policy of allowing individuals transferring funds into a pooled trust to overcome the presumption that the transfer was made for less than fair market value through convincing evidence by summarily rejecting all actuarial formula spending plans that it previously accepted. The Colorado pooled trust statute does not reference overcoming the presumption requirement, although it apparently does allow the agency to establish rules to that effect.

In July, 2018, a Colorado state district court issued an order summarily rejecting each of the agency’s arguments. These agency arguments included requirements that the transfer be “a full and immediate exchange of value”, a comparison of the spending plan to a “promissory note and annuity”, and relying on a 2008 CMS memorandum regarding post age 64 transfers. The Court concluded that the spending plan, combined with the CFPD's fiduciary duties, constitutes fair consideration for purposes of rebutting the presumption, and the Medicaid agency improperly created a rule outside of the rulemaking process by interpreting "fair consideration" as requiring an immediate exchange of value. The Court concluded that the agency’s actions are unsupported by substantial evidence, arbitrate, and capricious, setting aside the agency’s decision denying
eligibility on those grounds. Nevertheless, the case remains active on other counts, and the parties must continue with the litigation.

A Kansas case had a similar outcome. The 73-year-old individual sold her home and put about $59,000 into a pooled trust. The state Medicaid agency levied a transfer penalty on the funding of the pooled trust. The penalty was challenged in a state court and a ruling issued that upheld the state position that it has the right to impose a transfer penalty if the transfer was for less than fair market value\textsuperscript{39}. The case had been remanded back to the defendant agency by the Court to determine the factual question as to whether or not the transfer was or was not for fair market value, but the recipient died in December 2017 before the fair market value issue could be determined and the case was terminated. This outcome apparently established a precedent for future cases in that jurisdiction.

A more recent Maine pooled trust transfer challenge is now in the United States Court of Appeals for the First Circuit\textsuperscript{40}. The class action case was brought by a post age 64 individual and a pooled trust challenging the Maine Medicaid agency’s imposition of a transfer penalty due to a transfer made to the trust. The federal District Court dismissed the actions involving the individual as “unripe” but allowed the pooled trust to remain in the case through a private cause of action under 42 U.S.C. § 1983. However, the District Court otherwise sided with the state in dismissing the count involving the challenge to the transfer penalty. The parties await a decision of the Court of Appeals on multiple issues.

Massachusetts has issued draft regulations that impose a transfer penalty on age 65 and over transfers to a pooled trust. Advocacy groups have opposed the proposed regulation and await the final regulations with the threat that it will be legally challenged if issued as written in the draft regulations. Meanwhile, legislation has been proposed and received significant support among legislators requiring the state Medicaid agency to allow the transfers without a penalty. The

\textsuperscript{39} Marcia Hutson v. Susan Mosher, M.D., Secretary of Kansas Department of Health and Environment, Court of Appeals of the State of Kansas, No. 117,020, September 8, 2017

\textsuperscript{40}Richardson v. Hamilton, Fed Dist Ct, D. Maine, No 2:17-cv-00134-JAW, Feb. 27, 2018
current issue for passage seems to be whether or not a maximum value should be put on the amount transferred in order to be exempted from a penalty.

**National Foundation for Special Needs Integrity, Inc. v. Reese**

Theresa Givens was an indigent woman who received a $250,000 personal injury settlement and was informed by her personal injury attorneys that she needed to place the funds into a pooled trust so that she could retain her Medicaid eligibility. She died shortly after the trust was funded and before a Medicaid payback debit was created. She had informed her attorneys and the trust administrators that any funds remaining upon her death should go to her children that would not otherwise go back to Medicaid. However, the trust joinder agreement that she signed named herself as remainder beneficiary.

Legal actions eventually ensued between the pooled trust and the heirs. A federal district court determined that the children did not prove that Theresa intended for the children to receive the remainder. The Court refused to reform the trust in their favor, accepting “clear and convincing evidence” that she understood the terms of the Joinder Agreement as signed by her giving the remainder to the trust upon her death. The Court went on to state that even if the reformation claim survived, there was an inexcusable delay in asserting the reformation claim, and reformation of the Joinder Agreement would prejudice National Foundation and its current pooled trust members.

The decision was appealed to the 7th Circuit Court of Appeals\(^{41}\), and on February 7, 2018, the court issued its decision that the trust agreement was “ambiguous” as a key question to be determined by the court. It stated that beyond the document, the overwhelming weight of evidence showed that Givens intended that any remaining assets pass to her children as the beneficiaries of her estate rather than to the Foundation. It remanded and directed entry of judgment for the estate, without reaching the equitable theories or the laches defense. It ordered the district court to award damages and prejudgment interest in favor of the estate.

\(^{41}\) National Foundation For Special Needs Integrity, Inc. v. Reese, No. 17-1817 (7th Cir. 2018)
In a somewhat bizarre twist to the whole matter, the attorney that founded the pooled trust and personally established the trust for Givens was removed by the trust Board in 2014. The attorney has allegedly stated that he intentionally drafted the trust terms to be confusing to potential beneficiaries such as Givens. He was also suspended indefinitely from the practice of law in June 2017 for alleged felony theft involving other Indiana special needs trusts.

**SUBSIDIZED HOUSING**

We have previously reported on subsidized housing and the effect of distributions from special needs trusts, including pooled trusts, particularly involving the *DeCambre* case. In *DeCambre*, the housing agency had determined that distributions from the trust created with the proceeds from a lawsuit settlement should be counted as income, whereas if the recipient had kept the settlement funds in a bank account in her own name, they would not be countable when withdrawn. The First Circuit Court of Appeals concluded that distribution of settlement funds from a trust was the same as if the recipient had maintained the settlement funds in her own name. “We therefore conclude that the BHA improperly counted the distributions from the principal of DeCambre's settlement funded irrevocable trust toward her annual income.” Unfortunately, the federal Department of Housing and Urban Development, and to our knowledge state housing agencies, have not officially or effectively implemented any new policies or regulations since the 2016 decision.

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SMD# 17-002

RE: Implications of the ABLE Act for State Medicaid Programs

September 7, 2017

Dear State Medicaid Director:

The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (the ABLE Act), enacted as Division B of Pub. L. No. 113-295, and as amended by the Protecting America from Tax Hikes Act of 2015 (Pub. L. No. 114-113), enables individuals with disabilities to save money in tax-advantaged accounts which they can later use for meeting their disability-related needs, with limited impact on their eligibility for certain means-tested benefits. The purpose of this letter is to provide guidance to states on the implications of the ABLE Act for state Medicaid programs.

Background

The ABLE Act amended the Internal Revenue Code of 1986 to create section 529A (“Qualified ABLE Programs”), permitting states to establish ABLE programs within which people with disabilities can open accounts that will generally be exempt from taxation. The purpose of the ABLE Act is to permit people with disabilities to save money in and withdraw funds from their ABLE accounts to pay for disability-related expenses, in support of their efforts to maintain health, independence and quality of life. The law states that ABLE accounts should “supplement, but not supplant” benefits available to ABLE account beneficiaries under Medicaid, the Supplemental Security Income program (SSI), and other programs.

Section 103 of the ABLE Act (hereinafter referred to as “section 103”) provides that, for the purpose of determining an individual’s eligibility to receive, or the amount of, any assistance provided by a needs-based federal program (such as Medicaid), amounts in, contributions to, and certain distributions from, ABLE accounts shall be disregarded. This letter provides guidance to states on the treatment of funds in, contributions to, and distributions from an ABLE account, under section 103, for purposes of Medicaid eligibility. We also address the treatment of funds in an ABLE account for purposes of the post-eligibility treatment of income, and the disposition of amounts remaining in a Medicaid beneficiary’s ABLE account upon the death of the beneficiary.

Eligibility to Participate in a Qualified ABLE Program

1 State agencies should apply the guidance set forth in this letter to the Children’s Health Insurance Program (CHIP) where applicable to determine the income of the family unit to which the applicant belongs.

2 ABLE Act, section 101(2)
Section 103 applies to individuals who have an ABLE account in a qualified ABLE program. Eligibility for an ABLE account is open to an individual of any age who has blindness or a disability, provided, however, that the individual’s blindness or disability occurred before the age of 26. An individual is permitted to have only one ABLE account. The individual may open the account in the program of the state of which the individual is a resident, or in another state’s ABLE program. The determination of eligibility for an ABLE account is the responsibility of the ABLE program in which an individual seeks to establish the account.

Under section 102(a) of the ABLE Act (codified at 26 U.S.C. §529A(e)), an individual is eligible for an ABLE account if the individual is receiving SSI or Social Security Disability Insurance (SSDI) benefits based on a disability or blindness that occurred before age 26. Alternatively, an individual (or a parent or guardian acting on the individual’s behalf) may establish eligibility by filing a disability certification (and obtaining a signed physician’s diagnosis) with the qualified ABLE program indicating that the individual has a medically determinable impairment meeting certain criteria that occurred before age 26. However, while sufficient to establish eligibility to participate in an ABLE program, section 102(a) of the ABLE Act provides that “no inference” may be drawn from a disability certification for purposes of establishing eligibility for Medicaid.

Although the statute refers to “qualified” ABLE programs, the ABLE Act does not provide for formal federal certification of a state ABLE program as a “qualified” program. Moreover, the Department of Treasury and Internal Revenue Service (IRS) have not proposed to establish a formal certification process in a proposed rule that is designed to implement the ABLE act. We have concluded that state Medicaid agencies should presume that an ABLE program established by a state is a qualified program in the absence of evidence to the contrary (CMS will issue additional guidance if a formal certification process for ABLE programs is established).

Treatment of Funds in an ABLE Account

Generally, an account containing funds that a Medicaid applicant or beneficiary can access is considered a resource in determining Medicaid eligibility if a resource test is applied, as is generally the case in determining eligibility for individuals excepted from application of Modified Adjusted Gross Income (MAGI)-based methodologies. Section 103 requires that funds in an ABLE account, including earnings on the account (e.g., interest), be disregarded in determining eligibility for Medicaid and other federal need-based programs. We interpret section 103 to mean that state Medicaid agencies must disregard all funds in an ABLE account in determining the resource eligibility of Medicaid applicants and beneficiaries who are subject to a resource test. Additionally, although earnings generated by funds in an account generally will

3 “Guidance Under Section 529A: Qualified ABLE Programs,” 80 F.R. 35602 (June 22, 2015). We note that a proposed rule does not have the force of law and is not legally effective. Moreover, an agency may make changes from a proposed rule based on the timely public comments and other factors. The Department of Treasury and IRS have not issued a final rule at this time.

4 We interpret section 103 to apply to an individual’s ABLE account, regardless of whether the individual opens his or her ABLE account in the state of which the individual is a resident or in another state’s ABLE program.

5 Section 103(a)(1) and (2) state that, “in the case of the supplemental security income program . . . , a distribution for housing expenses . . . shall not be so disregarded,” and “any amount . . . in [an] ABLE account shall be considered a resource to the designated beneficiary to the extent that such amount exceeds $100,000.” However, while SSI methodologies are typically applied for non-MAGI eligibility determinations, these limitations on the
be countable income in determining eligibility for both MAGI and non-MAGI based eligibility groups, the disregard required under the ABLE Act applies “notwithstanding any other provision of Federal law,” which we interpret as including the general prohibition on application of disregards in determining income eligibility using MAGI-based methods under section 1902(e)(14)(B) of the Social Security Act ("the Act"). Accordingly, under section 103, earnings on the account should be excluded from income for both individuals subject to and those excepted from application of MAGI-based methodologies.

Contributions to ABLE Accounts

Contributions by a Third Party

For MAGI and SSI-based eligibility determinations, under section 103, third party contributions to an ABLE account are disregarded in determining Medicaid eligibility. This is different than the treatment of such contributions in determining financial eligibility using SSI-based methodologies and, in narrow circumstances, different than the treatment of such contributions under MAGI-based methodologies.

Under SSI-based methodologies, applied to most non-MAGI eligibility groups, money contributed by a third party to an account which an individual can access generally is considered countable income in the month in which the contribution is received and, if not spent, a resource in the month following. Per section 103, however, third party contributions to an ABLE account are not counted either as income or included in total resources of the account beneficiary.

For MAGI-based individuals, a third-party contribution to an account that is accessible to the individual would generally qualify as a gift which usually is not taxable to the gift recipient. Even in the rare circumstance in which a gift could be subject to a gift tax lien against the recipient (e.g., where the donor does not pay a tax due on gifts), section 103 directs that its disregards apply “notwithstanding any other provision of Federal law,” which means the third party contribution must be disregarded in a MAGI-based income determination.

Section 529A(b)(2)(B) of the Internal Revenue Code generally limits aggregate annual contributions to an individual’s ABLE account to the annual gift tax exclusion, which means a third-party’s accepted contribution to an ABLE account, when it is the third party’s only gift during the taxable year, will not be taxable to either the donor or ABLE account beneficiary.
Some ABLE account beneficiaries may also be a beneficiary of a special needs trust (SNT) or pooled trust, as described in section 1917(d)(4) of the Act. Distributions from such trusts made on behalf of the trust beneficiary to the beneficiary’s ABLE account should be treated the same as contributions to ABLE accounts from any other third party. Thus, while disbursements from an SNT or pooled trust can be considered in some circumstances income to the trust beneficiary, disbursements from an SNT or pooled trust to the ABLE account of the trust beneficiary are not counted as income under section 103. Therefore, states should disregard as income a distribution from an SNT or pooled trust that is deposited into the ABLE account of the SNT or pooled trust beneficiary.

Contributions by the ABLE Account Beneficiary

Designated beneficiaries of an ABLE account can contribute their own income or resources to their ABLE account. If an ABLE account beneficiary transfers some of his or her own (otherwise countable) resources to his or her ABLE account, the effect would be a corresponding reduction in total countable resources. By contrast, if a beneficiary of an ABLE account transfers some of his or her income in the month received to his or her ABLE account, the effect would not be a reduction in countable income. This is because how an individual uses income generally does not change its designation as income at the point of its receipt, and there is nothing in the ABLE Act which supersedes this general rule. Consistent with this interpretation, the Treasury’s and IRS’s NPRM does not propose that income contributed to an ABLE account by the designated beneficiary reduces the individual’s taxable income. Similarly, SSA’s Program Operations Manual System (POMS) directs that income contributed to an ABLE account by the account beneficiary is counted as available income.9 Therefore, income contributed to an ABLE account by the applicant or beneficiary him- or herself is not disregarded from income, unless the state utilizes its authority under section 1902(r)(2) of the Act and 42 CFR §435.601(d) (regarding less restrictive methodologies), if available.10

Contributions by Third Parties who Apply for Medicaid

It is possible that a third party who has made a contribution to an ABLE account of someone else may apply for Medicaid and seek coverage of long-term services and supports (LTSS). Section 103 of the ABLE Act does not provide for any special treatment of contributions made to an ABLE account benefiting another person. Thus, for example, a contribution from a grandfather to the ABLE account of his grandchild, whether from the grandfather’s income or resources, would constitute a transfer of assets from the grandfather to his grandchild’s account which may need to be evaluated under the requirements in section 1917(c)(1) of the Act (depending on when the transfer occurred), if the grandfather subsequently seeks Medicaid coverage of LTSS. The

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8 This determination is generally made under the rules of SI 01120.200 of the Social Security Administration’s Program Operations Manual System (POMS) (“Trusts, General – Including Trusts Established Prior to 1/1/00, Trusts Established with the Asset of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act,” available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120200).
10 Per section 1902(e)(14)(B) of the Act, states cannot disregard in MAGI-based eligibility determinations income as a less restrictive methodology under the authority of section 1902(r)(2) of the Act and 42 CFR §435.601(d).
amount transferred by the grandfather to his grandchild’s ABLE account would not be an exempt transfer by virtue of section 103 in the determination of the grandfather’s eligibility for Medicaid coverage of LTSS.\(^{11}\)

**Distributions from ABLE Accounts**

Like *funds in* and *contributions to* ABLE accounts, *distributions from* ABLE accounts are not included in the beneficiary’s taxable income or counted as income in eligibility determinations for federal programs such as Medicaid as long as they are used for “qualified disability expenses” (QDEs). Section 529A(e)(5) of the Internal Revenue Code broadly defines QDEs as any expenses related to the eligible individual’s blindness or disability which may include, but are not limited to, expenses incurred for education, housing, transportation, employment training and support, and assistive technology. The Treasury’s and IRS’s NPRM explains that QDEs can include ones not identified in the statute, and that the term should be broadly construed “in order to implement the legislative purpose” of the ABLE Act.\(^{12}\) As long as distributions from an ABLE account are used for QDEs of the designated beneficiary, they are not included as income for purposes of determining Medicaid eligibility for MAGI-based and non-MAGI eligibility categories.

In some cases, however, ABLE account beneficiaries may receive distributions that exceed their QDEs in a taxable year or are paid toward expenses that do not qualify as QDEs. Distributions from an ABLE account that are not for QDEs do not fall within the scope of the protection afforded by section 103, and may be countable as income under both MAGI-based and non-MAGI financial methodologies. The extent to which distributions exceeding total QDEs are countable as income for Medicaid eligibility purposes depends on whether the individual is being evaluated for eligibility under a MAGI-based or non-MAGI category.

**Treatment of Distributions Exceeding QDEs for Non-MAGI Determinations**

For individuals whose financial eligibility is determined using SSI-based methodologies, receipt of cash from a resource, whether the resource itself is counted or excluded, generally is not considered to be income, but rather the conversion of a resource from one form to another. The protection afforded under section 103, however, does not require that distributions from an ABLE account be used within the month the distribution is made, or within any particular time frame. Accordingly, a distribution from an ABLE account may be countable as a resource only if (1) it is retained beyond the month in which the distribution is made and (2) it is used for something other than a QDE in that or a subsequent month. Thus, we interpret section 103 to mean that states should continue to disregard ABLE account distributions retained after the month of receipt unless used for a non-qualifying expense.

For example, if an SSI-based individual receives an ABLE account distribution in August, but does not spend the distribution until December (and uses the distribution for a QDE in that month), the amount of the distribution is not counted in any month. If the individual uses the

\(^{11}\) Section 1917(c) would not apply to a Medicaid applicant’s contribution of income or resources to his or her own ABLE account, as the individual retains the ability to use the funds for his or her own needs.

\(^{12}\) 80 F.R. at 35608.
distribution in December for a non-QDE, the distribution would be counted as a resource in the month of December.

Treatment of Distributions Exceeding QDEs for MAGI-Based Eligibility

A portion of ABLE account distributions which exceed the QDEs incurred by the account beneficiary in a taxable year is taxable and therefore, per section 1902(e)(14)(A) of the Act and 42 CFR §435.603(c), included in determining MAGI-based income eligibility. The taxable portion will be determined based upon Department of Treasury and IRS rulemaking. Based on the formula proposed and preamble discussion in Treasury’s and IRS’s NPRM, we expect that, in nearly all circumstances, the taxable portion of such distributions will be de minimus,\(^\text{13}\) nonetheless, however small, the taxable portion is included in an individual’s MAGI-based income. Under 42 CFR §435.945(a), states may accept self-attestation of income for which no electronic data for verification purposes is available. Because the amount of taxable income from ABLE account distributions exceeding QDEs is likely to be negligible, a state may want to consider exercising the option to take self-attestation. If additional verification is necessary, documentation should only be required in accordance with 42 CFR §435.952. Pursuant to 42 CFR §435.945(j), a state must update its verification plan to reflect its procedure for verifying taxable income from ABLE account distributions.

Post-Eligibility Treatment of Income

Under regulations at 42 CFR §435.700 et. seq. and §435.832, the extent of medical assistance provided to certain individuals receiving LTSS in institutions or through home and community-based services (HCBS) waivers under sections 1915(c) or (d) of the Act is reduced by the amount of the individual's available income. Under these regulations, the Medicaid agency determines the beneficiary’s total income. After making certain deductions, the individual is required to apply the remaining income toward the cost of LTSS received. The requirement that affected individuals apply most of their total available income to the cost of LTSS before federal financial participation for medical assistance is available is referred to as post-eligibility treatment of income (PETI).

Under long-standing CMS policy, reflected in section 3701.2 of the State Medicaid Manual, all income is taken into account for purposes of PETI, including types or amounts of income that are not counted in making an initial eligibility determination. Consistent with this policy, distributions from an ABLE account, including earnings, typically would be counted. However, section 103 of the ABLE Act provides that its provisions apply “notwithstanding any other provision of Federal law.” Accordingly, for purposes of PETI, states should disregard from an individual’s total income any ABLE account distributions that are used for a QDE. To the extent that a distribution is counted as income in determining the individual’s eligibility for other Medicaid benefits, discussed above, the distribution also would be counted for purposes of PETI.

Transfers of ABLE Account Funds to States and Estate Recovery

\(^{13}\) See 80 Fed. Reg. at 35607.
Section 529A(f) requires that certain amounts remaining in an ABLE account upon the death of the account beneficiary, subject to any outstanding payments due for QDEs, shall be distributed to a state that provided medical assistance to the beneficiary after the establishment of the ABLE account upon the filing of a claim for payment by such state ("section 529A claim"). The amount that may be so distributed is limited to the excess of the total medical assistance paid for the account beneficiary after the establishment of the ABLE account over the amount of premiums paid from the ABLE account or paid by or on behalf of the beneficiary to a Medicaid “Buy-In program” under the state’s Medicaid plan.\(^{14}\)

The Treasury’s and IRS’s NPRM does not propose mandating that states file section 529A claims. However, even in the absence of a Treasury and IRS mandate regarding claims against ABLE accounts, pursuant to section 1917(b) of the Act, states are required to seek recovery against the estates of certain deceased Medicaid beneficiaries.\(^{15}\) Thus, consistent with section 1917(b) of the Act, states are required to seek recovery of funds in an ABLE account that have become part of an estate subject to recovery under the statute. If the estate of an ABLE account beneficiary is not subject to Medicaid estate recovery, states have discretion whether to file a section 529A claim against the ABLE account of a deceased individual who had been enrolled in a Medicaid Buy In program.

CMS is committed to realizing the goals of the ABLE program and facilitating the program’s implementation. If you have questions about this guidance, please contact Gene Coffey at 410-786-2234, or gene.coffey@cms.hhs.gov, or contact your SOTA team lead.

Sincerely,

/s/

Brian Neale
Director

cc:
National Association of Medicaid Directors
National Academy for State Health Policy
National Governors Association
American Public Human Services Association
Association of State Territorial Health Officials
Council of State Governments
National Conference of State Legislatures
Academy Health

\(^{14}\) Neither the ABLE Act nor the Treasury’s and IRS’s NPRM define a Medicaid “buy in” program. We are working with the Treasury and IRS to provide clarification to stakeholders on the scope of this language.

\(^{15}\) The specific individuals whose estates state Medicaid agencies must seek recovery from are those who received Medicaid at the age of 55 or older, or who received coverage for certain LTSS and were subject to PETI rules.
# APPENDIX B

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**NOTE: Ann Mohageri serves as the Regional Communications Director for Seattle and Denver**
POOLED TRUST 65 AND OLDER SURVEY
MAY 2018

Eighteen (18) states allow transfers into pooled trust sub-accounts without imposing a penalty: AL, AK, CA, DE, FL, IA, IN, ID, KY, MA, MD, MT, OH, OK, TN, RI, WV, and WI:

Eleven (11) states and DC all have variations or are unknown:

- CO – used to use a spending plan; this is in litigation with a change in policy;
- CT does not allow funding unless there is a spending plan, approved by the state, that shows the amounts contributed will be spent on a actuarially sound basis;
- DC – penalize but allows ability to show fair market value
- IL – allows if public guardian involved; otherwise it does not.
- KS – per holding in Hutson, the state cannot impose a per se penalty based upon the transfer to the trust, but must analyze whether fair market value was received by the applicant/beneficiary.
- MN – impose a penalty unless fair market value is shown – Three cases in litigation right now.
- NY - No transfer penalty for “Community” Medicaid services but Transfer penalty for purposes of “institutional” Medicaid service eligibility.
- MI is supposed to do the divestment determination to see if transfer was for less than fair market value.
- AR – unknown
- NE – unknown
- MO – mixed – imposes a penalty for NF services but not for some 1915 waiver services.
- OR – holding now “may constitute a disqualifying transfer” OAR 461-140-210

Twenty-one (21) states penalize transfers into pooled trust sub-accounts for individuals age 65 and older per se: AZ, GA, HI, LA, ME, MS, NC, ND, NH, NJ, NM, NV, PA, SC, SD, TX, UT, VA, VT, WA, WY (21 states)