

**ISM Contracts as a Special Needs Planning Technique to  
Shelter Excess Resources**

**and**

**The New National SSI Rental Subsidy Policy to  
Avoid ISM/PMV Income Reductions**

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This session discusses ISM Contracts in the context of the 2024 regulations removing food from ISM and allowing rental subsidies to quash PMV reductions from SSI cash payments. SSI benefits start at the maximum Federal Benefit Rate, but SSA staff must subtract from that benefit earned income and unearned income. A form of unearned income is Inkind Support and Maintenance (ISM) required under either the VTR rule or the PMV rule. The regulatory removal of “Food” does not affect the VTR determination or its prepayment in ISM Contracts. Any goods or services can be prepaid, including food as well as shelter. If the SSI claimant prepays their own food and shelter, there is no ISM deduction. And there is no transfer penalty if the POMS on ISM Contracts are followed.

## **ISM Contracts as a Special Needs Planning to Eliminate Excess Resources**

When a person on SSI-disability or SSI-elder benefits receives an unexpected inheritance or proceeds from a lawsuit, the event calls for special needs planning to continue the SSI monthly checks and state Medicaid without going over the \$2,000 countable resource limit. Many practitioners think the best or only answer is an individual or pooled special needs trust (SNT). That is not necessarily the case. This article discusses the advantages of an ISM Contract for a term of months or for a lifetime to transfer substantial amounts of cash to trusted relatives transfer-penalty-free following the SSA published example. The ISM Contract, where appropriate, has significant cash and other benefits over a personal services contract or an SNT.

***Transfer of Resources Re-instituted.*** In 1999 Congress changed the Social Security Act to impose a Supplemental Security Income (SSI) transfer of resources penalty for a maximum of months 36 months for transferring assets for less than fair market value (FMV). Foster Care Independence Act of 1999 (P.L. 106-169). Before this change, persons with disabilities in the forty 1634 states could simply give away excess resources and continue to receive SSI cash benefits which would trigger continuation of Medicaid by law. Social Security Act, Section 1634(a). Every one of the now forty-one 1634 states have a state statute, Medicaid rule, or agreement with DHHS in the Medicaid State Plan, or all three, to provide mandatory Medicaid to every person who is eligible for at least one dollar of SSI cash benefits or is deemed to be “otherwise eligible for SSI” benefits without even filing a Medicaid application. Life was simple.

**Fair Market Value.** In response to the 1999 Congressional amendment, the Social Security Administration (SSA) immediately added SI 01150.005 to the Program Operations Manual System (POMS) to explain how the agency will assess Fair Market Value and to delineate the exceptions to the transfer penalty, giving the special needs attorney some additional and often better tools to maintain public benefits when an additional resource (asset) arrives.

The issue for transferring money penalty-free from the SSI beneficiary to another depends on whether the transfer results in “Fair Market Value.” SSA defines Fair Market Value in a long POMS SI 01150.005 as “the current market value (CMV) at the time the resource transfers,” noting that CMV is the going price at which the resource could reasonably be expected to sell on the open market in the local area. POMS SI 01150.005.B.1. SSA defines compensation as the cash or other valuable consideration provided in exchange for the resource, paid by cash or real or personal property received in exchange. SI 01150.005.B.2.

The value of the compensation received by the SSI claimant is determined by looking at the legally binding agreement between the SSI claimant-transferor and the person or entity receiving the resource. Particularly important is the POMS statement that:

“A transferor receives compensation when they receive something of value **pursuant to a legally binding agreement (e.g., a contract, a bill of sale, a deed)** that was in effect at the time of transfer. The transferor may actually receive the compensation **before, at, or after the actual time of transfer.**” POMS SI 01150.005.C.2. (*Emphasis added*).

That simple sentence also forms the basis for elderly people over 65 to transfer funds without penalty to a pooled special needs trust if the anticipated date of spending all the money in the pooled trust occurs before the date of expected death based on the SSA Chief Actuary’s estimated life expectancy webpage.

In determining whether the SSI claimant can receive an SSI check, and the amount of the SSI check, if any, SSA has to subtract countable earned and uncountable unearned income each month.

Inkind Support and Maintenance (ISM) is defined as unearned income in the form of food or shelter. The Social Security Act (the Act) considers ISM, along with other forms of unearned income, when determining supplemental security income (SSI) eligibility and payment amounts. 20 CFR §416.1130. Specifically, ISM Contracts, also called “food and shelter” or “room and board” contracts, may provide all the alternative distribution needed to avoid the transfer penalty if the transferred amount is valued at its full CMV multiplied by the length of time for which the ISM is to be provided under the agreement, as long as the amount paid does not exceed the life expectancy of the SSI transferor.

**Is “food” as a household expense really gone from SSA calculations?** No. It’s still retained for VTR calculations and it is still a future expense that can be prepaid via an ISM Contract. The title of the relevant POMS section SI 01150.005 is “**Determining Fair Market Value.**” You can prepurchase many types of goods or services, not just food and shelter. For example, the POMS in subparagraph c, includes the “value of services” with the following example:

**Example: Determining the value of services**

In exchange for \$9,000 cash, the individual contracts for yard maintenance services for 5 years. The maintenance company charges \$150 per month (\$1,800 per year). Five years of maintenance at \$1,800 per year equals \$9,000.

Another example:

**b. Document the agreement for services**

Verify the agreement to provide services by getting a copy of the services contract or a signed statement from the person getting the transferred resource that shows the type, frequency, and duration of the services provided. If the agreement does not specify the frequency, but rather that the person receiving the resource will provide services on an “as needed” basis, the statement must include their expectations as to the frequency of the services and the basis for the expectation.

**Example: Compensation Received as Services**

Linden transferred livestock valued at \$2,000 to their neighbor. As compensation, the neighbor agreed to put a new roof on Linden's home. The claims representative (CR)

contacted a local roofing contractor and found that the cost of a new roof would be about \$2,100. The compensation Linden received was valued at \$2,100. Therefore, the CR determines that Mr. Linden received FMV for his livestock.

**NOTE:** The fact that the new roof's value (\$2,100) exceeded the value of the livestock (\$2,000) does not result in income to Linden for SSI purposes. For information on conversion or sale of a resource, see SI 00815.200.

That is how a personal services contract is specifically allowed.

**What is ISM?** ISM is defined as unearned income in the form of shelter but capped at the Presumed Maximum Value rule (one third of the Federal Benefit Rate plus \$20). Under SSA's old, old rules, ISM included "food, clothing, and shelter" and counted ISM received as unearned income, which may affect a person's eligibility (if the SSI payment is less than the PMV amount) or reduce their payment amount by the PMV.

"Clothing" was removed by federal regulation beginning March 9, 2005. This year, on March 27, 2024, the Social Security Administration (SSA) finalized a rule called "Omitting Food from In-Kind Support and Maintenance (ISM) Calculations" that took effect on September 30, 2024.

"Food" as a category of ISM was removed as part of Inkind Support and Maintenance disqualifying calculations effective September 30, 2024.

You should always determine the "pro rata share of household operating expenses" using the new federal regulation without adding "food" to the calculation of "household expenses". However, in determining the amount of an ISM Contract, you can use both prepaid food as well as prepaid household expenses to determine that the transfer of the contract amount is not greater than the Fair Market Value of the amount transferred by the SSI claimant in prepayment for the two items. Food is food and your estimate must be reasonable; but shelter is specifically defined by SSA policy. Household operating expenses do not include all home-related expenses that some of us may include in our own financial planning, such as the cost of pest control, swimming pool

maintenance, yard maintenance, cable TV and streaming services, internet, etc. But for ISM Contract purposes, household expenses are limited to those in subparagraph (c) below:

**20 CFR 416.1133 What is a pro rata share of household operating expenses.**

(a) **General.** If you pay your pro rata share toward monthly household operating expenses, you are living in your own household and are not receiving in-kind support and maintenance from anyone else in the household. The one-third reduction, therefore, does not apply to you. (If you are receiving ~~food~~ or shelter from someone outside the household, we value it under the rule in § 416.1140.)

(b) **How we determine a pro rata share.** Your pro rata share of household operating expenses is the average monthly household operating expenses (based on a reasonable estimate if exact figures are not available) divided by the number of people in the household, regardless of age.

(c) **Average household operating expenses.** Household operating expenses are the household's total monthly expenditures for ~~food~~, rent, mortgage, property taxes, heating fuel, gas, electricity, water, sewerage, and garbage collection service. (The term does not include the cost of these items if someone outside the household pays for them.) Generally, we average household operating expenses over the past 12 months to determine a pro rata share.

*Amendment to the federal regulation published at 89 FR 21201 on March 27, 2024, effective September 30, 2024.*

Note, however, that clothing is not and never has been a part of household operating expenses, and therefore should not be added in when creating an ISM Contract under the SSI rules.

Secondly, the new regulation maintains an old pre-existing POMS that says that household expenses are to be averaged over the previous past 12 months. Therefore, get and use the past year's data before doing your calculations to determine the ISM Contract and include that data with your computations you file with SSA when notifying them of the ISM Contract.

***Existing POMS Example – Value of ISM non-cash compensation for a term of years or months.*** SSA provides a helpful example in POMS SI 01150.005(C)(3)(b) of an ISM contract for a period of years:

**b. In-kind support and maintenance (ISM)**

We value compensation received in the form of ISM at its full CMV (monthly or annually depending upon the agreement) multiplied by the length of time for which it is to be

provided under the agreement. We do not cap the value of the compensation at the value of the one-third reduction (VTR) or presumed maximum value (PMV).

**Example: Determining whether ISM applies**

Thomas transfers \$30,000 cash to their sibling based on a written contract that they would provide Thomas with food and shelter for 5 years. The sibling values the food and shelter at \$500 per month. The CR develops Thomas' living arrangements and determines that Thomas has a flat fee arrangement with their sibling and required to pay \$500 per month. The food and shelter for 5 years is worth \$30,000 (5 years x \$6,000 per year). Therefore, Thomas received FMV for the \$30,000 they transferred. ISM is not counted because the individual has prepaid for their food and shelter with the \$30,000 they transferred. For procedure on determining an individual's contribution toward household operating expenses, see [SI 00835.480D](#).

**NOTE:** Using the same facts as in the preceding example, assume that the CR is conducting a redetermination 2 years later and the sibling providing the ISM alleges that the value of the food and shelter they provide has increased to \$650 per month. Since Thomas entered into an agreement that the \$30,000 covered their food and shelter for 5 years, do not re-open the LA/ISM determination due to breakpoints that may occur in that household such as an increased flat fee charge. Assume that the individual is not getting ISM for the duration of the 5 years unless the individual moves from that household to a new residence.

Removing “food” from the list of ISM items does not mean that the cost of buying food cannot be included in the ISM contract. To set the value of the compensation in the agreement, SSA staff must use the *actual* value of the ISM as defined in the 20 CFR 416.1133 and not the one-third reduction or presumed maximum value (PMV). POMS SI 01150.005.D.3. Staff are further instructed to obtain a statement from the ISM provider to confirm the ISM is being provided using SSA’s form 8011-F3 (Statement of Household Expenses and Contributions). Note, however, that going to the SSA forms webpage, we are told that form 8011-F3 is not available to the public online. Be prepared to provide whatever information SSA staff ask for on whatever form they provide.

***Should the valuation be annual or by month?*** For ease of both calculation and to align with SSI’s requirement that every month is a separate SSI qualification period, it would be easiest to just use the number of months into the future that the rent is prepaid. The example with Thomas was created 24 years ago. Using a more realistic number, suppose the FMV of the rent is \$800 per

month and the food is \$400 per month. Thus the \$30,000 transferred to the sibling is now valued at \$1,200 per month (the Current Market Value of receiving room and board in the sibling's home). Thomas is only prepaying for 25 months into the future not the 60 months (five years) as calculated in the 1999 example. In drafting, specify the date of the transfer and the number of months into the future that are covered, and include the specific beginning and ending dates.

***Existing POMS example of ISM for Life.*** What about a legally binding agreement that in exchange for some real property, personal property, or cash, the SSI claimant will receive ISM for his or her life. How is the amount properly calculated?

SSA staff are instructed to multiply the yearly CMV of the ISM provided by the SSI claimant's "years of life remaining" per the SSI claimant's gender and age data as found in POMS SI 01150.005F which in turn directs you to the SSA Chief Actuary's webpage. Log on the Chief Actuary's webpage at <https://www.ssa.gov/oact/population/longevity.html> and select gender and date of birth, and it instantly gives you the "additional life expectancy" for the claimant in years. It does not and should not factor in current health or family history that could increase or decrease life expectancy. The Chief Actuary's webpage notes that "the estimates of additional life expectancy do not take into account a wide number of factors such as current health, lifestyle, and family history that could increase or decrease life expectancy." The fact that your client is in hospice with terminal cancer and is predicted to have less than six months to live does not matter in the calculations permissible under the rules; you are required by the POMS to use the results in your ISM Contract calculations.

Note that the SSA Chief Actuary's estimate of life expectancy may be different from the life expectancy charts in the state Medicaid Manuals or private life insurance company charts. You must use the SSA estimate to qualify for SSA's SSI benefits.



Print out the SSA Life Expectancy Calculator result to send to SSA with your faxed Notice of Changed Financial Circumstances informing SSA of the inheritance or personal injury award, and your ISM Contract showing SSA the calculations of estimates of value of food and household expenses used in the ISM Contract.

SSA gives two useful examples, one approved and one denied, showing the effect of an agreement to provide ISM for life to show the impact of life expectancy.

**POMS SI 01150.005.D.3.c**

**Example 1: Total value of ISM results in FMV compensation**

Valerie Payne transfers non-home real property valued at \$185,000 to her sister. As compensation, her sister agrees to provide Valerie with room and board in the sister's home for the rest of Valerie's life. ISM development shows that the sister's total household expenses are \$1,500 per month. The household consists of three persons, including Valerie who was age 53 at the time of the transfer. The CMV of the ISM is \$6,000 per year ( $\$1,500/3 = \$500$  per month  $\times 12$  months = \$6,000). Then,  $\$6,000 \times 31.61$  (average years of life remaining at age 50) = \$189,660 compensation. In this case, Valerie received FMV for the transferred resource. We do not count ISM because the individual prepaid for her own food and shelter with the value of the home she transferred. For the procedure on determining an individual's contribution toward household operating expenses, see SI 00835.480D.

**Example 2: Total value of ISM results in uncompensated value**

Assume the same case facts as in Example 1 except that Valerie Payne is 80 years old at the time of the transfer. As in Example 1, the ISM is worth \$6,000 per year. At 80 years of age, the life expectancy table indicates 7.16 years. Multiplying 7.16 years times \$6,000 results in compensation of \$42,960. In this case there is uncompensated value of \$142,040 (\$185,000 minus \$42,960). Therefore, Valerie is subject to a period of ineligibility for SSI because she transferred the house for less than FMV.

With an SSI-elderly claimant, you may need to use a combination of special needs planning techniques – some aggressive spend-down (buy a \$100,000 new car), pay off credit card debts, make a maximum ABLE contribution if eligible, and the remainder balance in an ISM Contract for the 80 year SSI-elderly client as long as the numbers work out. Remember also that the examples were created a quarter century ago, in 1999. Current actual costs will yield a FMV much higher and that's good. It means you can transfer more to the sister.

***When to use the ISM Contract and when not to.*** The best scenario is one that occurred organically – that is, that the SSI claimant and a family member had previously decided to live together. For example, the agreement between Valerie Payne, the SSI claimant, and her sister could arise in a couple of ways. Perhaps Valerie and her sister have already been living together for years when suddenly Valerie inherits her deceased mother’s home (described in the example as “non-home real property”). Or perhaps Valerie has been living in her own home, and now that she is becoming more physically frail, she wants to sell it for net cash sales proceeds of \$185,000 and move in with her sister who can help care for her. Regardless, Valerie tells you at a conference, “I just want to give the money to my sister.” Valerie’s former home had become a disqualifying “countable resource” since it was no longer her primary residence. If it is sold, the net sales proceeds are over the \$2,000 SSI asset limit. You can fix her ineligibility by transferring the cash to her sister in an ISM Contract.

A current client is receiving a Federal Tort Claims Act settlement and is in the United States alone. The only person she would contemplate prepaying years and years of ISM to is her non-relative landlady. Obviously, there are risks and we do not recommend an ISM Contract in this scenario.

***What are the options to deal with the new asset?*** At this point Valerie decides to sell for cash or transfer the real property to her sister and continue to live with her sister, or to move in with her sister if she has not been living with her before. Remember, there is no deeming of sister’s income and assets to Valerie, the SSI claimant. How does the ISM Contract measure up to the other options?

**Option 1: Just give the money to her sister and go off benefits for three years.** If Valerie sells the house, receives the \$185,000 sales proceeds, and gives the money to her sister with no

agreement for anything in return, the transfer penalty applies in full. The penalty of loss of SSI is the amount transferred (\$185k) divided by the Federal Benefit Rate (currently \$943 per month) resulting in a penalty calculation of 196 months, but the penalty is capped by statute at 36 months from the date of transfer (the maximum penalty under the Foster Care Independence Act). While that choice results in a loss of approximately \$11,316 tax free income per year for three years, or \$33,948 total (without COLAs), the more significant potential loss is the SSI-related mandatory Medicaid health insurance coverage in the forty-one §1634(a) states.

**Option 2: Use a special needs trust.** If Valerie sells the home, receives \$185,000, and puts the funds in a SNT with the trust paying Valerie's share of the household expenses triggering the PMV loss, the trust's contribution triggers the ISM reduction by the PMV amount, currently the reduction of \$334.33 per month in 2024 from her \$943 SSI check. She loses over \$3,780 per year in tax-free SSI benefits by having a trust because her SSI check is reduced from \$943 to \$628.67 per month. And she incurs attorney fees to create the SNT, trustee fees to administer the SNT, and CPA fees for the SNT tax returns, and if she uses a pooled or individual SNT, a potential startup fee as well. The result is that Valerie has more expenses and less tax-free income than if she used the ISM Contract. At 31 years of life expectancy, the one-third loss of tax-free SSI income amounts to \$117,180 in unpaid SSI benefits, and the trustee fee could amount to losing thousands of dollars at 2.95% over the 31 years.

**Option 3: Use a personal services contract.** Instead, Valerie decides to engage in other special needs planning and transfers the sales proceeds to her sister in an agreement for personal services to be received in the future. Personal service contracts (PSC) are specifically allowed under the same Fair Market Value POMS at SI 01150.005.D.4.

How to draft and apply the Fair Market Value rule in a Personal Services Contract is laid out in an SSA Atlanta Regional Chief Counsel Precedent (opinion letter) at **PS 01820.011 Florida, PS 14-102 Supplemental Security Income Resource Determination—Validity of Personal Services Contract**. The big problem is the amount Valerie's sister receives from the PSC is IRS-taxable income of \$185,000 which results in a potential substantial loss of \$33,939 (at 24%) to the government if using the standard deduction and the sister having no other taxable income. For a recent physician client of mine providing a PSC to his mother would result in a 38% tax bracket loss of \$70,300 more federal income taxes. Using the ISM Contract resulted in 0% more taxes.

**Option 4: Use the ISM Contract for pro rata household expenses detailed above.** The benefit to Valerie of using the SSA-approved option of transferring all the real estate cash sales proceeds or transferring title to the non-home property to the sister include avoiding:

- personal federal income taxes of the sister to the federal and possibly the state governments if the PSC is one of the alternatives;
- the ISM deduction from Valerie's SSI checks;
- attorney fees for trust preparation; and
- lifetime trustee fees and expenses.

Once the sister receives the payment under the terms of the ISM Contract, she can spend the funds any way she likes and does not have to account further for the funds and does not have to hold them to meet future contractual requirements. Sharing of actual expenses (at "cost") per the Internal Revenue Code is not a taxable event since there is no "profit" involved. The sister is required under the ISM Contract to provide food and shelter for Valerie, but she does not need to keep an account of doing so nor report to SSI or Medicaid in the future. Ongoing accounting fees for the funds received are also eliminated.

***There is no added income taxes owed.*** Three separate tax experts have advised our office in three separate cases that the room and board contract to share food and shelter expenses results in no federal income tax consequences for the person who receives the funds and agrees to provide the food and shelter at cost. Thus, the \$36,011 federal income tax loss incurred by using the PSC is eliminated by the prepaid ISM Contract. The substantial tax loss is even more if you live in a state with state income taxes as well.

Special needs planning should not be one shoe fits all, nor should special needs planners apply only a single technique to a particular SSI claimant's situation. Combinations of appropriate spend down (paying off credit card bills; paying down mortgages; purchasing new appliances, vehicles, clothes, computers, dental care, and infinitely more), ABLE accounts for those eligible, some funds in ISM contracts, etc., can make clients extremely happy to have a special needs plan tailored to meet their individual needs.

ISM Contracts can effectively manage small or larger amounts of funds since such contracts can be for a term of several months, several years, or as described by SSA in the POMS example, for a lifetime. Additionally, ISM Contracts increase the amount of SSI check by avoiding the ISM deduction resulting in the full SSI benefits because the SSI claimant is paying her fair share of shelter costs.

ISM Contracts are not appropriate in every case, but where they are, the advantages over SNTs and PSCs are substantial.

## **The New National SSI “Rental Subsidy” Policy To Avoid ISM/PMV Income Reductions**

A client, Victoria, this month called because her mother, Anna, lost Anna’s SSI-elderly payment of \$45 per month because SSA was subtracting the ISM provided by the adult daughter to her mother. Anna had a small Title 2 retirement check and an even smaller private pension that only left \$45 of SSI owed. But the client had moved from her condo apartment on the second floor that Anna owned, to a first floor apartment that Victoria rented for her. As a result, the client was notified that Victoria’s Inkind Support and Maintenance (ISM) meant that after subtracting the ISM amount, Anna lost the \$45 SSI check and the resulting SSI-related Medicaid. Fortunately, SSA had issued new federal regulations on rental subsidy policies that became effective September 30, 2024, that solves the client’s problem.

What happens next? Anna is receiving food stamps and so the PMV rule applies.

Pursuant to the new rental subsidy regulation, Anna and Victoria entered into a “business arrangement” (written lease) with Anna paying \$350 per month. Under the proposed rule, this means that Anna will continue to receive the SSI check \$45 with no further reduction for ISM.

***The background of the new national “rental subsidy policy.”*** A month after issuing the new proposed regulations eliminating “food” as an ISM category, SSA also published a second Notice of Proposed Rule Making, 88 FR 57910, to expand its favorable SSI rental subsidy policy from seven states mandated by the federal courts (Connecticut, Illinois, Indiana, New York, Texas, Vermont, and Wisconsin) to nationwide. In those states, rental assistance, such as renting at a discounted rate, was less likely to affect a person’s SSI eligibility or payment amount from the full SSI check to an amount reduced by the Presumed Maximum Value rule. This new SSA regulation extends the same helpful policy to all SSI applicants and recipients nationwide. This will increase

the SSI cash payment amount some people are eligible to receive and will allow more people to qualify for critical SSI payments and at a higher rate.

SSA provided in the April 2024 Notice of Proposed Rule-Making to the federal regulations the following examples to make clear the adverse impact of the old, former policy versus the new policy.

***Impact of former policy explained in the Notice of Proposed Rule-Making.*** A disabled adult son with a wife and child was renting a home from his mother at \$350 per month. The Current Market Rental Value was \$1,500 per month. SSA used to count the difference as Inkind Support and Maintenance (ISM) and applied the Presumed Maximum Value (PMV) rule and reduced the claimant’s SSI check in 2023 from \$914 per month to \$589.34 per month, the rates in effect the year of the example:

Example 1-- Current General Rental Subsidy Policy	
Equation	Application of the example
CMRV-Required Monthly Rent = Household ISM.	$\$1,500 - \$350 = \$1,150.$
Household ISM/Number of people in household = ISM/Rental Subsidy to the SSI Recipient.	$\$1,150/3 \text{ people in household} = \$383.33.$
ISM is capped at the PMV.....	$\$383.33 > \$324.66.$
SSI payment = FBR-PMV.....	$\text{SSI payment} = \$914 - \$324.66 = \$589.34.$

Screen capture from NPRM. NOTE: “CMRV” is the acronym for Current Market Rental Value.

***Under the new regulation.*** As long as a “business arrangement” (lease) exists between the mother and disabled son for an amount of rent equal to or greater than the PMV amount, there is no reduction in the disabled son’s SSI disability check. See Example 2:

Example 2--Rental Subsidy Exception Policy Proposed To Be Extended

PMV < CMRV..... \$324.66 < \$1,500.  
Required Monthly Rent > PMV..... \$350 > \$324.66.  
Therefore, no ISM to the SSI Recipient. = SSI Payment = \$914.

*Screen capture from NPRM.*

The new federal regulation at §416.1130(b)(1), effective September 30, 2024, on In-Kind Support and Maintenance, amends paragraph (b) by revising new paragraph (b)(1) to read:

(1) We calculate in-kind support and maintenance considering any shelter that is given to you or that you receive because someone else pays for it. Shelter includes room, rent, mortgage payments, real property taxes, heating fuel, gas, electricity, water, sewerage, and garbage collection services. You are not receiving in-kind support and maintenance in the form of room or rent if you are paying the amount charged under a business arrangement. A business arrangement exists when the amount of monthly required rent to be paid equals or exceeds the presumed maximum value described in § 416.1140(a)(1). If the required amount of rent is less than the presumed maximum value, we will impute as in-kind support and maintenance the difference between the required amount of rent and either the presumed maximum value or the current market rental value (see § 416.1101), whichever is less. In addition, cash payments to uniformed service members as allowances for on-base housing or privatized military housing are in-kind support and maintenance.

The key part of the new “business arrangement” provisions is:

You are not receiving in-kind support and maintenance in the form of room or rent if you are paying the amount charged under a business arrangement. A business arrangement exists when the amount of monthly required rent to be paid **equals or exceeds the presumed maximum value**. *Emphasis added.*

In adopting the proposed rule as the new final federal regulation, 89 FR 25507, SSA offered another example of the former rental subsidy rule in the first paragraph versus the current national rental subsidy rule in the second paragraph below:

To illustrate, if the owner of an apartment would rent that property to any potential tenant for \$800 per month, then the CMRV is \$800 per month. Consequently, in this example, if an SSI applicant or recipient agrees to pay the landlord rent in the amount of \$800 per month, a “business arrangement” would exist and the SSI applicant or recipient would not be receiving ISM in the form of room or rent. The SSI applicant or recipient in this example would thereby—absent any other countable income or resources—receive the Federal Benefit Rate (FBR). Conversely, if the SSI applicant or recipient agrees to pay the landlord less than the CMRV of \$800 per month (for example, \$400 per month), we would impute the difference between the CMRV and the monthly required rent as ISM received by the



applicant or recipient in the form of room or rent (up to the PMV, which is \$334.33 in 2024). In this example, the landlord agrees to accept a rent of \$400 per month instead of the CMRV of \$800. The rental subsidy amount is \$400. However, the PMV is \$334.33 in 2024, so only \$314.33 would be counted as ISM (after we subtract the \$20 general income exclusion from the PMV and assuming there is no other income). Consequently, in this example the SSI recipient would receive \$628.67 as a monthly payment in 2024 (the 2024 FBR (\$943) minus the PMV and minus the general income exclusion (\$314.33 (or \$334.33-\$20)) = \$628.67).

Application of this [new] rental subsidy exception tends to reduce or eliminate the amount of ISM counted towards an individual's SSI payment, which generally results in a higher SSI payment amount. In the example, discussed above, an SSI applicant or recipient...who agrees to pay \$400 per month for an apartment with a CMRV of \$800 per month would not be charged ISM because their monthly required rent is more than the PMV (\$334.33 for 2024). Consequently, the SSI applicant or recipient would continue to receive the FBR (provided they did not have any other countable income or resources for SSI purposes).

However, the week before the beginning of the new rental subsidy policy, the local Boca Raton Florida SSA office, denied eligibility based on their believe that a mother and daughter could not have a “business arrangement.”

Fortunately, SSA revised the POMS on September 20<sup>th</sup> and issued an Emergency Memorandum, EM 24047, that among other things, addressed the mother/daughter business arrangement issue:

### 3. Rental Subsidy

Effective September 30, 2024, in rental subsidy situations **where someone in the household is related to the landlord as parent or child**, we consider a business arrangement exists when the verified required rent or flat fee equals or exceeds the lessor of the applicable presumed maximum value (PMV) or current market rental value (CMRV). If the required rent or flat fee equals or exceeds either the PMV or CMRV, no further development is needed, and no rental subsidy applies. If the required rent or flat fee is less than both the PMV and CMRV, complete development to determine if ISM applies following instructions in SI 00835.380.

This process currently exists in the Second and Seventh circuit states and Texas but is now being expanded nationwide. Current states include Connecticut, New York, and Vermont (Second Circuit); Illinois, Indiana, and Wisconsin (Seventh Circuit); and Texas.

EXAMPLE: Billie receives SSI and pays their mother, who is also their landlord, \$350 in monthly rent. The rent exceeds the 2024 PMV of \$334.33; therefore, no rental subsidy is charged even though the CMRV is \$500 per month. No other development is needed.

The PMV changes nearly every year when the Federal Benefit Rate (the maximum SSI check) goes up with the cost-of-living-adjustment to the Federal Benefit Rate. The formula for calculating the PMV every year is one third the FBR + \$20. Rather than playing as close to the penny as possible, our office has decided to round up to \$350 monthly rent in a business lease and use the exact amount in the NPRM so that the claimant is above the PMV and therefore the claimant's check is NOT reduced and SSA staff will approve it because it is just like the NPRM example. The relative receiving the \$350 rent can do anything with it: spend it on themselves, add to the SSI claimant's ABLE account, use it to provide additional non-countable goods or services to the SSI claimant, or add it to an SNT – just don't give it back as cash to the SSI recipient.

Trustees, family members, disabled and elderly SSI claimants and their attorneys should now review their files and see if any claimants are having their SSI check reduced by the PMV amount because of the old method to determine the existence of ISM. Create a lease to show the "business arrangement" in writing. Advise SSA of the change and request that the SSI claimant's check be increased from \$628 to \$943. You are adding an additional tax-free \$3,780 per year (\$943 minus \$628 = \$315 per month x 12 = \$3,780) to the claimant's SSI check.

**Be a hero for your clients. Do the lease.**