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To: JoAnn Araujo-Moniz – Taunton MEC  
From: Amy Dybas – Director Member Services Policy Implementation  
By: Caroline Cai, Assistant General Counsel  
Date: October 19, 2015  
Re: [REDACTED]

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**SUMMARY:**

We received your request for legal opinion to determine whether the assets of the [REDACTED] 2007 Irrevocable Trust (the “Trust”) are countable in the applicant’s eligibility determination for MassHealth long-term care benefits. Based on a review of the material submitted with your request, all assets of the Trust are countable. As discussed below, this is because both income and principal of the Trust are available to the applicant, who is the Donor, Trustee and Beneficiary of the Trust.

**FACTS:**

The applicant, [REDACTED], is [REDACTED] years old and has applied for MassHealth long-term care benefits. On September 11, 2007, the applicant established the Trust as the Donor. The Trustees of the Trust are the applicant and her daughter, [REDACTED]. The Trust is titled as irrevocable and states that the applicant “does not retain any power or authority whatever to revoke or amend any provision of this Agreement of Trust.” The submitted material indicated that the Trust has a brokerage account which as of April 30, 2015 was valued at \$48,253.05.

Clause 3 of the Trust provides in part:

3.1 [REDACTED] reserves the power, exercisable by [REDACTED]’s will or any codicil thereto, to appoint any part or all of the principal of the Trust Fund, outright or upon trusts, conditions or limitations, to charitable or non-profit organizations other than governmental entities, or to any one or more of the Legatees.

[REDACTED] also reserves the power, exercisable at any time or from time to time by written instrument delivered to the Trustees during [REDACTED]’s lifetime, to appoint any articles of tangible personal property, outright or upon trusts, conditions or limitations, to any one or more of the Legatees. .

3.2 [REDACTED] reserves the power, exercisable at any time or from time to time by written instrument delivered to the Trustees during [REDACTED]’s lifetime to appoint any part or all of the principal of the Trust Fund, outright or upon trusts, conditions or limitations, to charitable or non-profit organizations other than governmental entities.

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<sup>1</sup> See generally Health Insurance Portability and Accountability Act (“HIPAA”), P.L. 104-191; 42 U.S.C. § 1320d-2; 42 U.S.C. § 1396a(a)(7); 42 U.S.C. § 1320d-2, -4; Privacy Act of 1974, 5 U.S.C. § 552a Act; 42 C.F.R. § 164.508; 42 C.F.R. § 431.300-307; 42 C.F.R. § 483.10; 42 C.F.R. § 435.945(f)(4); 45 C.F.R. 164 *et seq.*; 20 C.F.R. § 401.100; G.L. c. 118E § 49; G.L. c. 214 § 1B; G.L. c. 66A § 2; 130 CMR 515.007(B); 130 CMR 517.006(B).

3.4 [REDACTED] reserves the right to alter the order and number of the successor Trustees named in paragraph 2.1, or to name additional Trustees or successor Trustees.

3.5 [REDACTED] shall have the right to live rent-free in any house which is owned by the Trust, while paying for all maintenance and repairs, water and sewer, ground rent (if any), insurance charges and taxes relating to said premises during such time.

3.6 [REDACTED] reserves the power to require the Trustees to accumulate any or all of the income and capital gains of the Trust Fund. [REDACTED] also reserves the power to require the Trustees to terminate the Trust by accelerating the remainder provisions of the Trust Fund and distributing all principal as if [REDACTED] had then died.

Clause 4 of the Trust provides in part:

4.1 During the lifetime of [REDACTED] the Trustee shall distribute, to or for the benefit of [REDACTED], all of the net income of the Trust Fund. If the Trust Fund contains real estate or a mobile home, the income of the Trust Fund shall be applied first to all expenses associated with maintaining or repairing such asset, and the Trustees are only authorized to distribute the net income after such expenses have been paid.

4.2 During the lifetime of [REDACTED] the Trustee may distribute, to or for the benefit of the remainderpersons then planned via paragraph 5.2 (her children) or via the exercise of the special power of appointment contained in paragraph 3.1 and 3.2, so much of the principal of the Trust Fund at such time or times and in such amounts and proportions as the Trustees, in their uncontrolled discretion, may deem advisable; provided, however, that any distributions, or series thereof, which have the substantial effect of terminating the Trust shall be made in the proportions and under the terms which would exist if [REDACTED] had died on the date of distribution.

**ANALYSIS:**

In order to be approved for MassHealth long-term care benefits, among other things, the total value of countable assets or resources owned by or available to the applicant may not exceed \$2,000. 130 CMR 520.003(A)(1). 130 CMR 520.007 provides that: "Countable assets are all assets that must be included in the determination of eligibility. Countable assets include assets to which the applicant or member or their spouse would be entitled whether or not these assets are actually received when failure to receive such assets results from the action or inaction of the applicant, member, spouse, or person acting on his or her behalf..." See also 42 U.S.C. § 1396p(h).

Federal Medicaid statute governs the treatment of a Medicaid applicant's trust. 42 U.S.C. §1396p(d) *et seq.* as codified in 130 CMR 520.023(C)(1)(A) provides "[a]ny portion of the principal or income from the principal (such as interest) of an irrevocable trust that could be paid

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under *any circumstances* to or for the benefit of the individual is a countable asset” (emphasis added). The “any circumstances” test was created because both Congress and courts have recognized and rejected the use of trusts as devices to shelter assets for the benefit of the family members while simultaneously obtaining taxpayer funded Medicaid benefits. Notably, the Massachusetts Supreme Judicial Court in *Lebow v. Commissioner of Div. of Med* explained that:

[the Medicaid program] is designed to provide health care for indigent persons. Individuals are expected to deplete their own resources before obtaining assistance from the government. The unfortunate reality is that some individuals with significant resources devise strategies to appear impoverished in order to qualify for Medicaid benefits. One such strategy is to transfer assets into an inter vivos trust, whereby funds appear to be out of the individual's control, yet generally are administered by a family member or loved one.

*Lebow v. Commissioner of Div. of Med. Assistance*, 433 Mass. 171, 172 (2000). Further, in providing guidance to states on how to apply the “any circumstance” standard described above, the federal agency empowered to interpret and enforce the Medicaid statute has specifically instructed that:

“[f]or purposes of this section a payment from a trust is any disbursement from the corpus of the trust or from income generated by the trust which benefits the party receiving it. **A payment may include actual cash, as well as noncash or property disbursements, such as the right to use and occupy real property**” (emphasis added). The State Medicaid Manual<sup>2</sup>, HCFA Transmittal 64, § 3259.1(A)(8).

Applying these rules to this case, the express terms of the Trust show that the assets of the Trust have been and remain available to the applicant. It is clear that the Trust is an irrevocable trust established and funded by the applicant during her lifetime. It is equally clear that under the “any circumstances” test, the Trust, by its express terms, provides circumstances whereby the entire value of the Trust is available to the applicant. It is undisputable that the applicant is a mandatory income beneficiary of the Trust. The principal of the Trust is likewise available to her. For example, under Clause 3.1, the applicant reserved a special power of appointment to appoint the principal to charitable organizations. One such charitable organization can very well be a pooled trust, a vehicle created by nonprofits to combine a Medicaid applicant’s asset with other assets for investment and management purposes, though the applicant’s assets are used for her sole benefit. Therefore, there is nothing precluding the applicant from appointing the Trust principal to a pooled trust, creating a circumstance whereby the terms of the Trust would allow the applicant to use principal of the Trust for her benefit.

In addition, Clause 3.5 of the Trust states that the applicant “shall have the right to live rent-free in any house which is owned by the Trust, while paying for all maintenance and repairs, water and sewer, ground rent (if any), insurance charges and taxes relating to said premises during such

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<sup>2</sup> HCFA [Health Care Financing Administration, now called Centers for Medicare and Medicaid Services, or CMS] issues policy transmittals giving direction to states regarding the application or implementation of the federal statutes. HCFA’ policies, including Transmittal 64, are entitled to deference by the reviewing courts as long as they are consistent with the plain language and purpose of the statute, and if they are consistent with prior administrative views. See *Johnson v. Guhl*, 166 F.Supp.2d 42, 48-49 (D.N.J., 2001).

time.” This language is evidence that the applicant regards Trust assets as personal asset and had no intention of relinquish ownership and control of such assets to the Trust. More importantly because of her right to use and occupy real property owned by the Trust is considered a payment of from the Trust under the State Medicaid Manual, that is yet another one circumstance whereby the principal of the Trust can be made available for the benefit of the applicant.

Therefore, pursuant 130 CMR 520.023(C), 42 U.S.C. §1396p, and Massachusetts court precedents cited herein, there are circumstances under which the principal and income of the Trust can be made available to the applicant. As such the assets of the Trust are countable.

If during the look-back period, any Trust assets was distributed to someone other than the Applicant or used for other than her sole benefit, these would be disqualifying transfers of resources. 130 CMR 520.019.

