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Health, Education and Human Services Division

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July 28, 1997

The Honorable John McCain
United States Senate

Subject: Medicaid: Divestiture of Assets to Qualify for Long-Term Care Services

Dear Senator McCain:

Medicaid--the $160 billion federal and state program that pays for health services for low-income people--pays for nearly half of nursing home care costs in the United States. To qualify for Medicaid benefits, an individual's income and assets must fall below established standards.[1] With private nursing home costs averaging more than $3,000 per month, the elderly who pay for an extended nursing home stay can quickly deplete their entire life savings. By divesting themselves of their assets and income to qualify for Medicaid benefits, the elderly can protect their assets from being depleted by long-term care expenditures and preserve them for the benefit of their families and heirs. Over the past 2 decades, the Congress and the states have become increasingly concerned that elderly Americans with substantial financial means are divesting themselves of their assets to qualify for Medicaid benefits, particularly those for nursing home care. The Congress has acted to limit such activities, primarily through amending title XIX of the Social Security Act and imposing civil penalties on persons who improperly transfer assets. Last year, as part of the Health Insurance Portability and Accountability Act (HIPAA) (P.L. 104-191), the Congress made such activities subject to criminal penalties.

In a congressional hearing, however, the Administrator of the Health Care Financing Administration, the agency that oversees the Medicaid program, testified that the magnitude of the problem with divesting of assets to gain Medicaid coverage may be exaggerated. Moreover, a representative of the Consumers Union testified that the criminal provision of the law has resulted in considerable alarm among seniors who, as a result, may not seek the care that they need. In light of these events, you asked us to assess the prevalence of

[1]In most states, Medicaid's asset standards are $2,000 for an individual and $3,000 for a couple.

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asset transfers to qualify for Medicaid benefits. You also asked us to answer some specific questions regarding the application of the new criminal provision.

As agreed to with your office, to respond to your concerns and questions, we reviewed the recent literature on the subject, as well as our previous work, and spoke with experts in the field. We also conducted a legal analysis of the new provision in HIPAA. We did our work in June and July 1997 in accordance with generally accepted government auditing standards.

In brief, we found that it is difficult to determine from available studies the prevalence of divestitures that are made with the purpose of becoming eligible for Medicaid. Several limited-scope studies, however, have shown that some individuals do shelter their assets–through transfers, conversions, and other divestitures–despite legislative efforts to discourage this type of activity. For example, studies based on case file reviews in two states showed that from 13 to 22 percent of people who applied for nursing home and other long-term care benefits through Medicaid have transferred their assets. However, the studies also found that divested assets often are not sufficient to pay for even 1 year of nursing home coverage–in some cases, the assets that were transferred could not pay for a single month of such care. We also found that the law's implications for individuals who transfer assets with the purpose of becoming eligible for Medicaid–the only type of divestiture that is subject to criminal penalty–are not clear in several respects.

BACKGROUND

Under Medicaid law, it is possible for the elderly to divest of their assets by transferring ownership of assets; converting countable assets, such as cash, stocks, and bonds, to noncountable assets, such as burial arrangements and automobiles; or increasing through an appeal the value of assets the spouse living at home is allowed to keep.[2] Since the rules for determining financial eligibility are complex, many individuals who divest themselves of their assets to become eligible for Medicaid seek the counsel of a financial planner or elder-law attorney.

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[2]When a spouse applies for Medicaid, a methodology is used to determine how the couple's combined assets, including income, will be divided. These limits can be appealed. We use the term "divestiture" primarily to refer to the transfer and the conversion of assets.

Throughout the 1980s, the Congress passed a number of amendments to discourage such actions. In general, individuals are ineligible for Medicaid long-term care benefits if they or their spouses transfer assets for less than fair market value. The law creates a presumption that individuals who transfer their assets within a specified time period before applying for Medicaid benefits do so for the purpose of meeting Medicaid eligibility criteria. If an individual is found to have improperly transferred assets, a penalty period is imposed, during which the individual is ineligible for Medicaid long-term care benefits. The length of the period of ineligibility is calculated with a formula that divides the value of the assets transferred by the average monthly cost of private nursing home care in the state. For example, if the assets transferred were $30,000 and the average monthly cost of private nursing home care was $3,000, the penalty period would be 10 months. However, the penalty period starts when the assets are transferred, not when the application for Medicaid benefits is made. Therefore, if the application is made 12 months after what would have been a 10-month ineligibility period, no penalty would be imposed.

The Congress enacted several provisions in the Omnibus Budget Reconciliation Act of 1993 (OBRA 1993) to further limit the transfer of assets for the purpose of becoming eligible for Medicaid and to enhance the monitoring and enforcement of the statute.[3] For example, the "look-back"[4] period was extended from 30 months to 36 months, and multiple transfers over a period of time were considered as a single transfer, with the penalty period determined by the total amount transferred. In addition, the transfer of jointly held assets, whether the transfer was made by the applicant or a nonapplicant, was prohibited, and the circumstances under which income and assets placed in trusts are considered countable resources were clarified. HIPAA added a provision, Section 217, that imposes criminal penalties in certain circumstances for a person who transfers assets to become eligible for Medicaid.[5]

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[3]OBRA 1993 also contained a provision requiring states to establish estate recovery programs to recover costs of nursing facility and other long-term care services from the estates of Medicaid beneficiaries.

[4]The look-back period defines the amount of time before Medicaid application in which asset transfers may be reviewed and subject to a penalty period.

[5]Section 1320a-7b of title 42 of the U.S. Code.

THE PREVALENCE OF ASSET TRANSFERS IS DIFFICULT TO DETERMINE, BUT INFORMATION HAS BEEN COLLECTED IN A FEW STATES

The methods by which individuals divest their assets to become eligible for Medicaid benefits often are not reported or tracked. Therefore, discussions of the prevalence of such activities tend to be based not on broad-based empirical evidence but on small-scale studies conducted in a few states. On the basis of this limited information, it appears that some individuals do divest themselves of their assets to become Medicaid eligible.

In 1993, we reviewed a sample of October 1992 case files of Massachusetts residents who had applied for Medicaid nursing facility benefits in the state.[6] We found that of the 403 applicants, 54 percent had converted some of their countable assets to noncountable assets–usually just before they were approved for Medicaid. The average amount converted was $5,618 and, in almost all cases, this was used to pay for burial arrangements. Another 13 percent transferred assets averaging $45,912, but about a third of these individuals transferred less than $10,000. Transfer amounts greater than $100,000 occurred in six cases, or 1.5 percent of the sample.[7] Single transfers of cash represented the most common form of asset transfer.

Since our review and the changes made by OBRA 1993, there have been at least three studies on the prevalence of asset divestiture among the elderly Medicaid population. The Minnesota Department of Human Services looked at a sample of eligibility cases in which beneficiaries' assets were close to the maximum allowable limit of $3,000.[8] The state found that of the 445 cases it reviewed, 98, or 22 percent, involved transfers of assets–most of which were improper. The average number of transfers was 3 per case (297 in 98 cases), and the majority

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[6]See Medicaid Estate Planning (GAO/HRD-93-29R, July 20, 1993). Our review did not account for applicants who transferred assets prior to the required look-back period, nor did it account for those individuals who had transferred assets but had not yet applied for Medicaid.

[7]More than half of the cases that transferred assets were denied Medicaid eligibility or withdrew the application, including five of the six cases that transferred $100,000 or more.

[8]Minnesota Department of Human Services, Medical Assistance Quality Control: Long-Term Care Client Asset Review (St. Paul, Minn.: Minnesota Department of Human Services, Feb. 1996).

were made after the beneficiaries had entered a nursing home. Approximately two-thirds of the transfers (180 of 297) were for less than $2,700, the average monthly payment for nursing home care in the state; the other third (96 of 297) involved transfers of higher amounts.[9] The report noted that the method, timing, and amounts of the transfers may indicate that the beneficiaries had received advice on how to legally divest themselves of their assets and become eligible for Medicaid.

A second study, conducted by the MEDSTAT Group, looked at divestiture activity in four states–California, Florida, Massachusetts, and New York. Through interviews with eligibility workers and their supervisors, the study concluded that while the level of activity differed across these four states, the majority of individuals who applied for Medicaid long-term care benefits did not divest themselves of or shelter their assets for the purpose of being eligible before applying for Medicaid.[10] For unmarried applicants, most eligibility workers estimated that the percentage who divested themselves of or sheltered their assets before applying for Medicaid ranged from 5 to 10 percent. Eligibility workers consistently estimated a higher rate of activity for cases involving married applicants, with most estimates falling in the 20- to 25-percent range.

A third study, conducted by a group of Connecticut researchers, revealed similar findings. To estimate the prevalence of asset divestiture in the state, the researchers interviewed state eligibility workers and a sample of elder-law attorneys and financial planners.[11] A majority of state eligibility workers estimated that fewer than half of the applicants transferred assets during the look-back period. Over half of the state eligibility workers indicated that the average value of a transferred asset was under $50,000–which, in Connecticut, covers less than a year of nursing home care. Although a majority of financial planners and elder-law attorneys interviewed agreed that there was an overall

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[9]Only one in three of the improper transfers actually resulted in a penalty period because the penalty period was for less than 1 month; that is, the amount involved was less than a month's payment for nursing home care.

[10]Brian Burwell and William H. Crown, Medicaid Estate Planning in the Aftermath of OBRA 1993 (Cambridge, Mass.: The MEDSTAT Group, Aug. 1995).

[11]Leslie Walker, Cynthia Gruman, and Julie Robison, Medicaid Estate Planning for Nursing Home Care in Connecticut: Policies, Practices and Perceptions, (Draft manuscript being prepared for publication, Hartford, Conn.: Braceland Center for Mental Health and Aging, Aug. 1, 1996).

increase in the number of clients who transferred their assets in order to qualify for Medicaid, most of the financial planners believed that fewer than 25 percent of their clients transferred assets with this purpose, while elder-law attorneys tended to believe that almost half of their clients who transferred assets ultimately did so for the purpose of qualifying for Medicaid.

CRIMINAL PENALTIES UNDER HIPAA RAISE A NUMBER OF QUESTIONS

In 1996, as part of HIPAA, a provision was added to the Social Security Act that imposes criminal penalties for certain transfers of assets for the purpose of becoming eligible for Medicaid. Section 217 added paragraph (6) to 42 U.S.C. 1320a-7b(a):

> (a) Whoever . . .
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> **(6) knowingly and willfully disposes of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance under a State plan under subchapter XIX of this chapter, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1396p(c) of this title,**
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> shall (i) in the case of such a statement, representation, concealment, failure or conversion by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under the program, be guilty of a felony and upon conviction thereof fined not more than $25,000 or imprisoned for not more than five years or both, or (ii) in the case of such a statement, representation, concealment, failure, or conversion by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than $10,000 or imprisoned for not more than one year, or both . . . .

The law also provides for an additional administrative penalty: Those convicted of violating this provision can have their eligibility for federal health care programs limited, restricted, or suspended for up to a year. However, concerns regarding the application of this provision and its impact on elderly citizens have been raised, prompting a number of questions.[12]

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[12]At this writing, there are no court decisions or agency regulations on this law. Until a court decides an issue, answers to questions about the interpretation of a criminal statute are speculative. Only one prosecution, Peebler and Nay v. Reno (D. Or. Civ. No. 97-256-HA), has been brought under this statute. The case was dismissed on the basis that the court lacked jurisdiction.

One concern is that individuals who transfer assets without the intent to qualify for Medicaid will be found in violation of the law. To violate the law, a person must have "knowingly and willfully" disposed of assets for less than fair market value in order to become eligible for a Medicaid program. We believe that "knowingly and willfully" means with specific intent. Therefore, a person who transfers assets without intending to qualify for Medicaid is not in violation of the criminal provision. However, such a transfer may result in the person becoming ineligible for Medicaid assistance for a period prescribed in the look-back provision (42 U.S.C. 1396p(c)), in which intent is not a factor.

There also is concern that dispositions of assets made before the effective date of the statute may be subject to the criminal penalties. We believe that dispositions before the effective date of the law should not be subject to the criminal penalties because, in general, it is unconstitutional to later criminalize conduct that was legal at the time it took place. However, the prior dispositions could result in a loss of eligibility under the look-back provision.

Questions regarding the criminal liability of individuals other than the owner of the assets also have been raised. Section 217 applies to those who dispose of assets for less than fair market value to qualify for Medicaid; it does not expressly apply to others who may participate in the disposition. However, under the general conspiracy statute (18 U.S.C. 371), anyone who conspires in the commission of an offense can be prosecuted for conspiracy and can be fined, imprisoned for up to 5 years, or both. In addition, anyone who "aids, abets, counsels, commands, induces or procures" the commission of an offense by someone else is punishable to the same extent as the person who commits the offense (18 U.S.C. 2), and anyone who knows of the commission of a felony and does not report it to law enforcement authorities is subject to prosecution (18 U.S.C. 4).

There are additional questions concerning the penalty clause of the law, as amended by section 217 of HIPAA. These questions arise because the language added by HIPAA to section 1320a-7b of title 42, U.S. Code, is not well-integrated with the rest of the law. Section 1320a-7b(a)–in an unchanged portion that follows paragraph 6–lists criminal penalties for the activities listed prior to the amendment. Specifically, the law provides that whoever makes certain false statements or representations, conceals or fails to disclose certain information, or converts another's benefits to his own use, "shall . . . in the case of such a statement, representation, concealment, failure or conversion" be guilty of a crime. However, when section 217 of HIPAA added a new class of criminal conduct to section 1320a-7b(a), consisting of "disposing of assets" under certain conditions, it failed to add "disposition" to the penalty clause. In other words,

the penalty clause should have been amended to read "shall . . . in the case of such a statement, representation, concealment, failure, conversion, *or disposition* . . . ." It is reasonable to assume that the drafters intended that the same penalties apply to all the activities listed in the section, but that is not clear from a literal reading of the law because of the failure to add the conduct prohibited by section 217 to the list of the kinds of conduct subject to penalties.

Even if one concluded that the penalty clause applies to those disposing of assets to become eligible for Medicaid, a question would remain whether that conduct is a felony or a misdemeanor. Under the law, activities committed by someone "in connection with the furnishing of items or services for which payment is or may be made under the program"--such as hospitals, physicians, and other providers--are felonies; those committed by anyone else are misdemeanors. Because individuals disposing of assets in order to apply for benefits are not providers, they are presumably subject only to the misdemeanor penalties. However, it is not clear whether this is what the Congress intended.

As arranged with your office, we will make copies of this letter available to others upon request.

Please call Richard Jensen at (202) 512-7146 or me at (202) 512-7114 if you or your staff have any questions about the information in this letter. Other contributors were Stefanie Weldon and Karen Sloan.

Sincerely yours,

William J. Scanlon

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