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**Federal Transfer of Assets Provisions  
After Enactment of the Deficit Reduction Act of 2005 (D.R.A. 2005)<sup>2</sup>**

**42 U.S.C. § 1396p. Liens, adjustments and recoveries, and transfers of assets**

**(a) Imposition of lien against property of an individual on account of medical assistance rendered to him under a State plan**

(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except—

(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or

(B) in the case of the real property of an individual—

(i) who is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs, and

(ii) with respect to whom the State determines, after notice and opportunity for a hearing (in accordance with procedures established by the State), that he cannot reasonably be expected to be discharged from the medical institution and to return home, except as provided in paragraph (2).

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<sup>2</sup> The Congress passed D.R.A. 2005 on February 1, 2006, by two votes in the House of Representatives, after failing to win passage in the Senate save by the vote of Vice President Cheney. The President signed the Act on February 8, 2006.

31 (2) No lien may be imposed under paragraph (1)(B) on such individual's home if—

32 (A) the spouse of such individual,

33 (B) such individual's child who is under age 21, or (with respect to States eligible  
34 to participate in the State program established under subchapter XVI of this chapter) is  
35 blind or permanently and totally disabled, or (with respect to States which are not eligible  
36 to participate in such program) is blind or disabled as defined in section 1382c of this  
37 title, or

38 (C) a sibling of such individual (who has an equity interest in such home and who  
39 was residing in such individual's home for a period of at least one year immediately  
40 before the date of the individual's admission to the medical institution),

41 is lawfully residing in such home.

42 (3) Any lien imposed with respect to an individual pursuant to paragraph (1)(B) shall  
43 dissolve upon that individual's discharge from the medical institution and return home.

44

45 **(b) Adjustment or recovery of medical assistance correctly paid under a State plan**

46 (1) No adjustment or recovery of any medical assistance correctly paid on behalf of an  
47 individual under the State plan may be made, except that the State shall seek adjustment or  
48 recovery of any medical assistance correctly paid on behalf of an individual under the State plan  
49 in the case of the following individuals:

50 (A) In the case of an individual described in subsection (a)(1)(B) of this section,  
51 the State shall seek adjustment or recovery from the individual's estate or upon sale of  
52 the property subject to a lien imposed on account of medical assistance paid on behalf of  
53 the individual.

54 (B) In the case of an individual who was 55 years of age or older when the  
55 individual received such medical assistance, the State shall seek adjustment or recovery  
56 from the individual's estate, but only for medical assistance consisting of—

57 (i) nursing facility services, home and community-based services, and  
58 related hospital and prescription drug services, or

59 (ii) at the option of the State, any items or services under the State plan.

60 (C)

61 (i) In the case of an individual who has received (or is entitled to receive)  
62 benefits under a long-term care insurance policy in connection with which assets  
63 or resources are disregarded in the manner described in clause (ii), except as  
64 provided in such clause, the State shall seek adjustment or recovery from the  
65 individual's estate on account of medical assistance paid on behalf of the  
66 individual for nursing facility and other long-term care services.

67 (ii) Clause (i) shall not apply in the case of an individual who received  
68 medical assistance under a State plan of a State which had a State plan  
69 amendment approved as of May 14, 1993,<sup>3</sup> *and which satisfies clause (iv),*  
70 *or which has a State plan amendment that provides for a qualified*  
71 *State long-term care insurance partnership (as defined in clause (iii))*  
72 *which provided for the disregard of any assets or resources—*

73 (I) to the extent that payments are made under a long-term care insurance  
74 policy; or

75 (II) because an individual has received (or is entitled to receive) benefits  
76 under a long-term care insurance policy.

77 (iii) *For purposes of this paragraph, the term 'qualified State*  
78 *long-term care insurance partnership' means an approved State plan*  
79 *amendment under this title that provides for the disregard of any*  
80 *assets or resources in an amount equal to the insurance benefit*  
81 *payments that are made to or on behalf of an individual who is a*  
82 *beneficiary under a long-term care insurance policy if the following*  
83 *requirements are met:*

84 (I) *The policy covers an insured who was a resident of such*  
85 *State when coverage first became effective under the policy.*

86 (II) *The policy is a qualified long-term care insurance policy*  
87 *(as defined in section 7702B(b) of the Internal Revenue Code*  
88 *of 1986) issued not earlier than the effective date of the State*  
89 *plan amendment.*

90 (III) *The policy meets the model regulations and the*  
91 *requirements of the model Act specified in paragraph (5).*

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<sup>3</sup> D.R.A. 2005 § 6021 revisions to the text of 42 U.S.C. 1396p commence here.

- 92 *(IV) If the policy is sold to an individual who--*
- 93 *(aa) has not attained age 61 as of the date of purchase,*
- 94 *the policy provides compound annual inflation*
- 95 *protection;*
- 96 *(bb) has attained age 61 but has not attained age 76 as*
- 97 *of such date, the policy provides some level of inflation*
- 98 *protection; and*
- 99 *(cc) has attained age 76 as of such date, the policy may*
- 100 *(but is not required to) provide some level of inflation*
- 101 *protection.*
- 102 *(V) The State Medicaid agency under section 1902(a)(5)*
- 103 *provides information and technical assistance to the State*
- 104 *insurance department on the insurance department's role of*
- 105 *assuring that any individual who sells a long-term care*
- 106 *insurance policy under the partnership receives training and*
- 107 *demonstrates evidence of an understanding of such policies*
- 108 *and how they relate to other public and private coverage of*
- 109 *long-term care.*
- 110 *(VI) The issuer of the policy provides regular reports to the*
- 111 *Secretary, in accordance with regulations of the Secretary,*
- 112 *that include notification regarding when benefits provided*
- 113 *under the policy have been paid and the amount of such*
- 114 *benefits paid, notification regarding when the policy otherwise*
- 115 *terminates, and such other information as the Secretary*
- 116 *determines may be appropriate to the administration of such*
- 117 *partnerships.*
- 118 *(VII) The State does not impose any requirement affecting the*
- 119 *terms or benefits of such a policy unless the State imposes*
- 120 *such requirement on long-term care insurance policies*
- 121 *without regard to whether the policy is covered under the*
- 122 *partnership or is offered in connection with such a*
- 123 *partnership.*

124 *In the case of a long-term care insurance policy which is exchanged*  
125 *for another such policy, subclause (I) shall be applied based on the*  
126 *coverage of the first such policy that was exchanged. For purposes*  
127 *of this clause and paragraph (5), the term `long-term care insurance*  
128 *policy' includes a certificate issued under a group insurance*  
129 *contract.*

130 *(iv) With respect to a State which had a State plan amendment*  
131 *approved as of May 14, 1993, such a State satisfies this clause for*  
132 *purposes of clause (ii) if the Secretary determines that the State plan*  
133 *amendment provides for consumer protection standards which are*  
134 *no less stringent than the consumer protection standards which*  
135 *applied under such State plan amendment as of December 31, 2005.*

136 *(v) The regulations of the Secretary required under clause (iii)(VI)*  
137 *shall be promulgated after consultation with the National*  
138 *Association of Insurance Commissioners, issuers of long-term care*  
139 *insurance policies, States with experience with long-term care*  
140 *insurance partnership plans, other States, and representatives of*  
141 *consumers of long-term care insurance policies, and shall specify*  
142 *the type and format of the data and information to be reported and*  
143 *the frequency with which such reports are to be made. The*  
144 *Secretary, as appropriate, shall provide copies of the reports*  
145 *provided in accordance with that clause to the State involved.*

146 *(vi) The Secretary, in consultation with other appropriate Federal*  
147 *agencies, issuers of long-term care insurance, the National*  
148 *Association of Insurance Commissioners, State insurance*  
149 *commissioners, States with experience with long-term care*  
150 *insurance partnership plans, other States, and representatives of*  
151 *consumers of long-term care insurance policies, shall develop*  
152 *recommendations for Congress to authorize and fund a uniform*  
153 *minimum data set to be reported electronically by all issuers of long-*  
154 *term care insurance policies under qualified State long-term care*  
155 *insurance partnerships to a secure, centralized electronic query and*  
156 *report-generating mechanism that the State, the Secretary, and other*  
157 *Federal agencies can access.*

158

159           **(2)** Any adjustment or recovery under paragraph (1) may be made only after the death of  
160 the individual’s surviving spouse, if any, and only at a time—

161                   **(A)** when he has no surviving child who is under age 21, or (with respect to States  
162 eligible to participate in the State program established under subchapter XVI of this  
163 chapter) is blind or permanently and totally disabled, or (with respect to States which are  
164 not eligible to participate in such program) is blind or disabled as defined in section  
165 1382c of this title; and

166                   **(B)** in the case of a lien on an individual’s home under subsection (a)(1)(B) of this  
167 section, when—

168                           **(i)** no sibling of the individual (who was residing in the individual’s home  
169 for a period of at least one year immediately before the date of the individual’s  
170 admission to the medical institution), and

171                           **(ii)** no son or daughter of the individual (who was residing in the  
172 individual’s home for a period of at least two years immediately before the date of  
173 the individual’s admission to the medical institution, and who establishes to the  
174 satisfaction of the State that he or she provided care to such individual which  
175 permitted such individual to reside at home rather than in an institution), is  
176 lawfully residing in such home who has lawfully resided in such home on a  
177 continuous basis since the date of the individual’s admission to the medical  
178 institution.

179           **(3)** The State agency shall establish procedures (in accordance with standards specified  
180 by the Secretary) under which the agency shall waive the application of this subsection (other  
181 than paragraph (1)(C)) if such application would work an undue hardship as determined on the  
182 basis of criteria established by the Secretary.

183           **(4)** For purposes of this subsection, the term “estate”, with respect to a deceased  
184 individual—

185                   **(A)** shall include all real and personal property and other assets included within  
186 the individual’s estate, as defined for purposes of State probate law; and

187                   **(B)** may include, at the option of the State (and shall include, in the case of an  
188 individual to whom paragraph (1)(C)(i) applies), any other real and personal property and  
189 other assets in which the individual had any legal title or interest at the time of death (to  
190 the extent of such interest), including such assets conveyed to a survivor, heir, or assign

191 of the deceased individual through joint tenancy, tenancy in common, survivorship, life  
192 estate, living trust, or other arrangement.

193 *(5)*

194 *(A) For purposes of clause (iii)(III), the model regulations and the*  
195 *requirements of the model Act specified in this paragraph are:*

196 *(i) In the case of the model regulation, the following*  
197 *requirements:*

198 *(I) Section 6A (relating to guaranteed renewal or*  
199 *noncancellability), other than paragraph (5) thereof, and the*  
200 *requirements of section 6B of the model Act relating to such*  
201 *section 6A.*

202 *(II) Section 6B (relating to prohibitions on limitations and*  
203 *exclusions) other than paragraph (7) thereof.*

204 *(III) Section 6C (relating to extension of benefits).*

205 *(IV) Section 6D (relating to continuation or conversion of*  
206 *coverage).*

207 *(V) Section 6E (relating to discontinuance and replacement of*  
208 *policies).*

209 *(VI) Section 7 (relating to unintentional lapse).*

210 *(VII) Section 8 (relating to disclosure), other than sections 8F,*  
211 *8G, 8H, and 8I thereof.*

212 *(VIII) Section 9 (relating to required disclosure of rating*  
213 *practices to consumer).*

214 *(IX) Section 11 (relating to prohibitions against post-claims*  
215 *underwriting).*

216 *(X) Section 12 (relating to minimum standards).*

217 *(XI) Section 14 (relating to application forms and replacement*  
218 *coverage).*

- 219 *(XII) Section 15 (relating to reporting requirements).*
- 220 *(XIII) Section 22 (relating to filing requirements for*
- 221 *marketing).*
- 222 *(XIV) Section 23 (relating to standards for marketing),*
- 223 *including inaccurate completion of medical histories, other*
- 224 *than paragraphs (1), (6), and (9) of section 23C.*
- 225 *(XV) Section 24 (relating to suitability).*
- 226 *(XVI) Section 25 (relating to prohibition against preexisting*
- 227 *conditions and probationary periods in replacement policies*
- 228 *or certificates).*
- 229 *(XVII) The provisions of section 26 relating to contingent*
- 230 *nonforfeiture benefits, if the policyholder declines the offer of*
- 231 *a nonforfeiture provision described in paragraph (4).*
- 232 *(XVIII) Section 29 (relating to standard format outline of*
- 233 *coverage).*
- 234 *(XIX) Section 30 (relating to requirement to deliver shopper's*
- 235 *guide).*
- 236 *(ii) In the case of the model Act, the following:*
- 237 *(I) Section 6C (relating to preexisting conditions).*
- 238 *(II) Section 6D (relating to prior hospitalization).*
- 239 *(III) The provisions of section 8 relating to contingent*
- 240 *nonforfeiture benefits.*
- 241 *(IV) Section 6F (relating to right to return).*
- 242 *(V) Section 6G (relating to outline of coverage).*
- 243 *(VI) Section 6H (relating to requirements for certificates*
- 244 *under group plans).*
- 245 *(VII) Section 6J (relating to policy summary).*
- 246 *(VIII) Section 6K (relating to monthly reports on accelerated*
- 247 *death benefits).*

248 *(IX) Section 7 (relating to incontestability period).*

249 *(B) For purposes of this paragraph and paragraph (1)(C)--*

250 *(i) the terms `model regulation' and `model Act' mean the long-term*

251 *care insurance model regulation<sup>4</sup>, and the long-term care insurance*

252 *model Act<sup>5</sup>, respectively, promulgated by the National Association of*

253 *Insurance Commissioners (as adopted as of October 2000);*

254 *(ii) any provision of the model regulation or model Act listed under*

255 *subparagraph (A) shall be treated as including any other provision*

256 *of such regulation or Act necessary to implement the provision; and*

257 *(iii) with respect to a long-term care insurance policy issued in a*

258 *State, the policy shall be deemed to meet applicable requirements of*

259 *the model regulation or the model Act if the State plan amendment*

260 *under paragraph (1)(C)(iii) provides that the State insurance*

261 *commissioner for the State certifies (in a manner satisfactory to the*

262 *Secretary) that the policy meets such requirements.*

263 *(C) Not later than 12 months after the National Association of*

264 *Insurance Commissioners issues a revision, update, or other modification of*

265 *a model regulation or model Act provision specified in subparagraph (A), or*

266 *of any provision of such regulation or Act that is substantively related to a*

267 *provision specified in such subparagraph, the Secretary shall review the*

268 *changes made to the provision, determine whether incorporating such*

269 *changes into the corresponding provision specified in such subparagraph*

270 *would improve qualified State long-term care insurance partnerships, and if*

271 *so, shall incorporate the changes into such provision.<sup>6</sup>*

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<sup>4</sup> The Regulations as adopted: [http://www.id.state.az.us/publications/ltc\\_mod\\_reg\\_641.pdf](http://www.id.state.az.us/publications/ltc_mod_reg_641.pdf).

<sup>5</sup> The Act with draft revisions (as of January, 2006):

[http://www.naic.org/documents/committees\\_models\\_ltcact9.doc](http://www.naic.org/documents/committees_models_ltcact9.doc).

<sup>6</sup> D.R.A. 2005 § 6021 revisions to the text of 42 U.S.C. 1396p (b), relating to state long term care insurance partnerships, conclude here. §6021 contains administrative provisions not incorporated in 42 U.S.C. 1396p, including these:

- § 6021 (a) (3) permits an effective date for any long term care insurance partnership created under the amendment to be no earlier than the first calendar quarter in which a state plan amendment is submitted to the Secretary of Health and Human Services.
- § 6021 (b) requires that the Secretary of Health and Human Services develop standards for uniform reciprocal recognition of any long term care insurance partnership plans by January 1, 2007.

272 **(c) Taking into account certain transfers of assets**

273 **(1)**

274 **(A)** In order to meet the requirements of this subsection for purposes of section  
275 1396a (a)(18) of this title, the State plan must provide that if an institutionalized  
276 individual or the spouse of such an individual (or, at the option of a State, a  
277 noninstitutionalized individual or the spouse of such an individual) disposes of assets for  
278 less than fair market value on or after the look-back date specified in subparagraph (B)(i),  
279 the individual is ineligible for medical assistance for services described in subparagraph  
280 (C)(i) (or, in the case of a noninstitutionalized individual, for the services described in  
281 subparagraph (C)(ii)) during the period beginning on the date specified in subparagraph  
282 (D) and equal to the number of months specified in subparagraph (E).

283 **(B)**

284 **(i)** The look-back date specified in this subparagraph is a date that is 36  
285 months (or, in the case of payments from a trust or portions of a trust that are  
286 treated as assets disposed of by the individual pursuant to paragraph (3)(A)(iii) or  
287 (3)(B)(ii) of subsection (d) of this section, *or in the case of any other*  
288 *disposal of assets made on or after the date of the enactment of the*  
289 *Deficit Reduction Act of 2005*<sup>7</sup>, 60 months) before the date specified in  
290 clause (ii).<sup>8</sup>

291 **(ii)** The date specified in this clause, with respect to—

292 **(I)** an institutionalized individual is the first date as of which the  
293 individual both is an institutionalized individual and has applied for  
294 medical assistance under the State plan, or

- 
- § 6021 (c) requires annual H.H.S. reports to Congress regarding “the extent to which such partnerships expand or limit access of individuals to long-term care and the impact of such partnerships on Federal and State expenditures under the Medicare and Medicaid programs.”
  - § 6021 (d) requires that H.H.S. create a “National Clearinghouse for long term care Information” through contract or inter-agency agreement to educate consumers and provide objective information regarding “whether to purchase long-term care insurance or to pursue other private market alternatives for purchasing long-term care and provide contact information for additional objective resources on planning for long-term care needs.” In addition, H.H.S. is charged with the duty to “maintain a list of States with State long-term care insurance partnerships under the Medicaid program that provide reciprocal recognition of long-term care insurance policies issued under such partnerships.”

<sup>7</sup> The President signed D.R.A. 2005 on February 8, 2006.

<sup>8</sup> D.R.A. 2005 § 6011 revisions commence here.

295 (II) a noninstitutionalized individual is the date on which the  
296 individual applies for medical assistance under the State plan or, if later,  
297 the date on which the individual disposes of assets for less than fair market  
298 value.

299 (C)

300 (i) The services described in this subparagraph with respect to an  
301 institutionalized individual are the following:

302 (I) Nursing facility services.

303 (II) A level of care in any institution equivalent to that of nursing  
304 facility services.

305 (III) Home or community-based services furnished under a waiver  
306 granted under subsection (c) or (d) of section 1396n of this title.

307 (ii) The services described in this subparagraph with respect to a  
308 noninstitutionalized individual are services (not including any services described  
309 in clause (i)) that are described in paragraph (7), (22), or (24) of section 1396d (a)  
310 of this title, and, at the option of a State, other long-term care services for which  
311 medical assistance is otherwise available under the State plan to individuals  
312 requiring long-term care.

313

314 ~~(D)~~ The date (D)

315 (i) *In the case of a transfer of asset made before the date of the*  
316 *enactment of the Deficit Reduction Act of 2005, the date* specified in this  
317 subparagraph is the first day of the first month during or after which assets have  
318 been transferred for less than fair market value and which does not occur in any  
319 other periods of ineligibility under this subsection.

320 (ii) *In the case of a transfer of asset made on or after the date of*  
321 *the enactment of the Deficit Reduction Act of 2005, the date specified*  
322 *in this subparagraph is the first day of a month during or after which*  
323 *assets have been transferred for less than fair market value, or the*  
324 *date on which the individual is eligible for medical assistance under*  
325 *the State plan and would otherwise be receiving institutional level*

326 *care described in subparagraph (C) based on an approved*  
327 *application for such care but for the application of the penalty period,*  
328 *whichever is later, and which does not occur during any other period*  
329 *of ineligibility under this subsection.<sup>9</sup>*

330 *(d) Availability of Hardship Waivers- Each State shall provide for a*  
331 *hardship waiver process in accordance with section 1917(c)(2)(D) of the*  
332 *Social Security Act (42 U.S.C. 1396p(c)(2)(D))--*

333 *(1) under which an undue hardship exists when application of the*  
334 *transfer of assets provision would deprive the individual--*

335 *(A) of medical care such that the individual's health or life*  
336 *would be endangered; or*

337 *(B) of food, clothing, shelter, or other necessities of life; and*

338 *(2) which provides for--*

339 *(A) notice to recipients that an undue hardship exception*  
340 *exists;*

341 *(B) a timely process for determining whether an undue*  
342 *hardship waiver will be granted; and*

343 *(C) a process under which an adverse determination can be*  
344 *appealed.*

345 **(E)**

346 **(i)** With respect to an institutionalized individual, the number of months of  
347 ineligibility under this subparagraph for an individual shall be equal to—

348 **(I)** the total, cumulative uncompensated value of all assets transferred by  
349 the individual (or individual's spouse) on or after the look-back date specified in  
350 subparagraph (B)(i), divided by

351 **(II)** the average monthly cost to a private patient of nursing facility  
352 services in the State (or, at the option of the State, in the community in which the  
353 individual is institutionalized) at the time of application.

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<sup>9</sup> D.R.A. 2005 § 6011 (c) specifies that “the amendments made by this section shall apply to transfers made on or after the date of the enactment of this Act.”

354                   **(ii)** With respect to a noninstitutionalized individual, the number of  
355 months of ineligibility under this subparagraph for an individual shall not be  
356 greater than a number equal to—

357                   **(I)** the total, cumulative uncompensated value of all assets  
358 transferred by the individual (or individual’s spouse) on or after the look-  
359 back date specified in subparagraph (B)(i), divided by

360                   **(II)** the average monthly cost to a private patient of nursing facility  
361 services in the State (or, at the option of the State, in the community in  
362 which the individual is institutionalized) at the time of application.

363                   **(iii)** The number of months of ineligibility otherwise determined under  
364 clause (i) or (ii) with respect to the disposal of an asset shall be reduced—

365                   **(I)** in the case of periods of ineligibility determined under clause  
366 (i), by the number of months of ineligibility applicable to the individual  
367 under clause (ii) as a result of such disposal, and

368                   **(II)** in the case of periods of ineligibility determined under clause  
369 (ii), by the number of months of ineligibility applicable to the individual  
370 under clause (i) as a result of such disposal.

371                   *(iv) A State shall not round down, or otherwise disregard any*  
372 *fractional period of ineligibility determined under clause (i) or (ii)*  
373 *with respect to the disposal of assets.<sup>10</sup>*

374                   *(F) For purposes of this paragraph, the purchase of an annuity shall*  
375 *be treated as the disposal of an asset for less than fair market value unless –*

376                   *(i) the State is named as the remainder beneficiary in the first*  
377 *position for at least the total amount of medical assistance paid on*  
378 *behalf of the annuitant under this title; or*

379                   *(ii) the State is named as such a beneficiary in the second*  
380 *position after the community spouse or minor or disabled child and is*  
381 *named in the first position if such spouse or a representative of such*  
382 *child disposes of any such remainder for less than fair market value.*

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<sup>10</sup> D.R.A. 2005 § 6016 revisions commence here. D.R.A. 2005 § 6016 (a).

383                    *(G) For purposes of this paragraph with respect to a transfer of*  
384                    *assets, the term “assets” includes an annuity purchased by or on behalf of*  
385                    *an annuitant who has applied for medical assistance with respect to nursing*  
386                    *facility services or other long-term care services under this title unless--*

387                    *(i) the annuity is--*

388                    *(I) an annuity described in subsection (b) or (q) of*  
389                    *section 408 of the Internal Revenue Code of 1986; or*

390                    *(II) purchased with proceeds from--*

391                    *(aa) an account or trust described in subsection (a), (c),*  
392                    *or (p) of section 408 of such Code;*

393                    *(bb) a simplified employee pension (within the meaning*  
394                    *of section 408(k) of such Code); or*

395                    *(cc) a Roth IRA described in section 408A of such Code;*  
396                    *or*

397                    *(ii) the annuity--*

398                    *(I) is irrevocable and nonassignable;*

399                    *(II) is actuarially sound (as determined in accordance*  
400                    *with actuarial publications of the Office of the Chief Actuary of*  
401                    *the Social Security Administration); and*

402                    *(III) provides for payments in equal amounts during the*  
403                    *term of the annuity, with no deferral and no balloon payments*  
404                    *made.<sup>11</sup>*

405                    *(H) Notwithstanding the preceding provisions of this paragraph, in*  
406                    *the case of an individual (or individual's spouse) who makes multiple*  
407                    *fractional transfers of assets in more than 1 month for less than fair market*

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<sup>11</sup> D.R.A. 2005 § 6012 (d) specifies that “the amendments made by this section shall apply to transactions (including the purchase of an annuity) occurring on or after the date of the enactment of this Act.”

408 *value on or after the applicable look-back date specified in subparagraph*  
409 *(B), a State may determine the period of ineligibility applicable to such*  
410 *individual under this paragraph by—*

411 *(i) treating the total, cumulative uncompensated value of all*  
412 *assets transferred by the individual (or individual's spouse) during all*  
413 *months on or after the look-back date specified in subparagraph (B)*  
414 *as I transfer for purposes of clause (i) or (ii) (as the case may be) of*  
415 *subparagraph (E); and*

416 *(ii) beginning such period on the earliest date which would apply*  
417 *under subparagraph (D) to any of such transfers.<sup>12</sup>*

418 *(I) For purposes of this paragraph with respect to a transfer of assets, the*  
419 *term “assets” includes funds used to purchase a promissory note, loan, or*  
420 *mortgage unless such note, loan, or mortgage--*

421 *(i) has a repayment term that is actuarially sound (as determined in*  
422 *accordance with actuarial publications of the Office of the Chief*  
423 *Actuary of the Social Security Administration);*

424 *(ii) provides for payments to be made in equal amounts during the*  
425 *term of the loan, with no deferral and no balloon payments made;*  
426 *and*

427 *(iii) prohibits the cancellation of the balance upon the death of the*  
428 *lender.*

429 *In the case of a promissory note, loan, or mortgage that does not satisfy the*  
430 *requirements of clauses (i) through (iii), the value of such note, loan, or*  
431 *mortgage shall be the outstanding balance due as of the date of the*  
432 *individual's application for medical assistance for services described in*  
433 *subparagraph (C).<sup>13</sup>*

434 *(J) For purposes of this paragraph with respect to a transfer of assets, the*  
435 *term “assets” includes the purchase of a life estate interest in another*

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<sup>12</sup> D.R.A. 2005 § 6016 (b).

<sup>13</sup> D.R.A. 2005 § 6016 (c).

436 *individual's home unless the purchaser resides in the home for a period of at*  
437 *least 1 year after the date of the purchase.*

438

439 (2) An individual shall not be ineligible for medical assistance by reason of paragraph (1)  
440 to the extent that—

441

442 (A) the assets transferred were a home and title to the home was transferred to—

443 (i) the spouse of such individual;

444 (ii) a child of such individual who

445 (I) is under age 21, or

446 (II) (with respect to States eligible to participate in the State  
447 program established under subchapter XVI of this chapter) is blind or  
448 permanently and totally disabled, or (with respect to States which are not  
449 eligible to participate in such program) is blind or disabled as defined in  
450 section 1382c of this title;

451 (iii) a sibling of such individual who has an equity interest in such home  
452 and who was residing in such individual's home for a period of at least one year  
453 immediately before the date the individual becomes an institutionalized  
454 individual; or

455 (iv) a son or daughter of such individual (other than a child described in  
456 clause (ii)) who was residing in such individual's home for a period of at least two  
457 years immediately before the date the individual becomes an institutionalized  
458 individual, and who (as determined by the State) provided care to such individual  
459 which permitted such individual to reside at home rather than in such an  
460 institution or facility;

461 (B) the assets—

462 (i) were transferred to the individual's spouse or to another for the sole  
463 benefit of the individual's spouse,

464 (ii) were transferred from the individual's spouse to another for the sole  
465 benefit of the individual's spouse,

466 (iii) were transferred to, or to a trust (including a trust described in  
467 subsection (d)(4) of this section) established solely for the benefit of, the  
468 individual's child described in subparagraph (A)(ii)(II), or

469 (iv) were transferred to a trust (including a trust described in subsection  
470 (d)(4) of this section) established solely for the benefit of an individual under 65  
471 years of age who is disabled (as defined in section 1382c (a)(3) of this title);

472 (C) a satisfactory showing is made to the State (in accordance with regulations  
473 promulgated by the Secretary) that

474 (i) the individual intended to dispose of the assets either at fair market  
475 value, or for other valuable consideration,

476 (ii) the assets were transferred exclusively for a purpose other than to  
477 qualify for medical assistance, or

478 (iii) all assets transferred for less than fair market value have been returned  
479 to the individual; or

480 (D) the State determines, under procedures established by the State (in accordance  
481 with standards specified by the Secretary), that the denial of eligibility would work an  
482 undue hardship as determined on the basis of criteria established by the Secretary. *The*  
483 *procedures established under subparagraph (D) shall permit the facility in*  
484 *which the institutionalized individual is residing to file an undue hardship*  
485 *waiver application on behalf of the individual with the consent of the*  
486 *individual or the personal representative of the individual. While an*  
487 *application for an undue hardship waiver is pending under subparagraph*  
488 *(D) in the case of an individual who is a resident of a nursing facility, if the*  
489 *application meets such criteria as the Secretary specifies, the State may*  
490 *provide for payments for nursing facility services in order to hold the bed*  
491 *for the individual at the facility, but not in excess of payments for 30 days.*<sup>14</sup>

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<sup>14</sup> D.R.A. 2005 § 6011 (D), "Availability of Hardship Waivers," provides that "[e]ach State shall provide for a hardship waiver process in accordance with section 1917(c)(2)(D) of the Social Security Act (42 U.S.C. 1396p(c)(2)(D)),

(1) under which an undue hardship exists when application of the transfer of assets provision would deprive the individual--

(A) of medical care such that the individual's health or life would be endangered; or

(B) of food, clothing, shelter, or other necessities of life; and

(2) which provides for--

492           **(3)** For purposes of this subsection, in the case of an asset held by an individual in  
493 common with another person or persons in a joint tenancy, tenancy in common, or similar  
494 arrangement, the asset (or the affected portion of such asset) shall be considered to be transferred  
495 by such individual when any action is taken, either by such individual or by any other person,  
496 that reduces or eliminates such individual’s ownership or control of such asset.

497

498           **(4)** A State (including a State which has elected treatment under section 1396a (f) of this  
499 title) may not provide for any period of ineligibility for an individual due to transfer of resources  
500 for less than fair market value except in accordance with this subsection. In the case of a transfer  
501 by the spouse of an individual which results in a period of ineligibility for medical assistance  
502 under a State plan for such individual, a State shall, using a reasonable methodology (as  
503 specified by the Secretary), apportion such period of ineligibility (or any portion of such period)  
504 among the individual and the individual’s spouse if the spouse otherwise becomes eligible for  
505 medical assistance under the State plan.

506

507           **(5)** In this subsection, the term “resources” has the meaning given such term in section  
508 1382b of this title, without regard to the exclusion described in subsection (a)(1) thereof.

509

510   **(d) Treatment of trust amounts**

511           **(1)** For purposes of determining an individual’s eligibility for, or amount of, benefits  
512 under a State plan under this subchapter, subject to paragraph (4), the rules specified in  
513 paragraph (3) shall apply to a trust established by such individual.

514           **(2)**

515           **(A)** For purposes of this subsection, an individual shall be considered to have  
516 established a trust if assets of the individual were used to form all or part of the corpus of  
517 the trust and if any of the following individuals established such trust other than by will:

518                   **(i)** The individual.

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*(A) notice to recipients that an undue hardship exception exists;*  
*(B) a timely process for determining whether an undue hardship waiver will be granted; and*  
*(C) a process under which an adverse determination can be appealed.”*

- 519                           (ii) The individual’s spouse.
- 520                           (iii) A person, including a court or administrative body, with legal  
521 authority to act in place of or on behalf of the individual or the individual’s  
522 spouse.
- 523                           (iv) A person, including any court or administrative body, acting at the  
524 direction or upon the request of the individual or the individual’s spouse.
- 525                           **(B)** In the case of a trust the corpus of which includes assets of an individual (as  
526 determined under subparagraph (A)) and assets of any other person or persons, the  
527 provisions of this subsection shall apply to the portion of the trust attributable to the  
528 assets of the individual.
- 529                           **(C)** Subject to paragraph (4), this subsection shall apply without regard to—
- 530                           (i) the purposes for which a trust is established,
- 531                           (ii) whether the trustees have or exercise any discretion under the trust,
- 532                           (iii) any restrictions on when or whether distributions may be made from  
533 the trust, or
- 534                           (iv) any restrictions on the use of distributions from the trust.
- 535                           **(3)**
- 536                           **(A)** In the case of a **revocable** trust—
- 537                           (i) the corpus of the trust shall be considered resources available to the  
538 individual,
- 539                           (ii) payments from the trust to or for the benefit of the individual shall be  
540 considered income of the individual, and
- 541                           (iii) any other payments from the trust shall be considered assets disposed  
542 of by the individual for purposes of subsection (c) of this section.
- 543                           **(B)** In the case of an **irrevocable** trust—
- 544                           (i) if there are any circumstances under which payment from the trust  
545 could be made to or for the benefit of the individual, the portion of the corpus  
546 from which, or the income on the corpus from which, payment to the individual

547 could be made shall be considered resources available to the individual, and  
548 payments from that portion of the corpus or income—

549 (I) to or for the benefit of the individual, shall be considered  
550 income of the individual, and

551 (II) for any other purpose, shall be considered a transfer of assets  
552 by the individual subject to subsection (c) of this section; and

553 (ii) any portion of the trust from which, or any income on the corpus from  
554 which, no payment could under any circumstances be made to the individual shall  
555 be considered, as of the date of establishment of the trust (or, if later, the date on  
556 which payment to the individual was foreclosed) to be assets disposed by the  
557 individual for purposes of subsection (c) of this section, and the value of the trust  
558 shall be determined for purposes of such subsection by including the amount of  
559 any payments made from such portion of the trust after such date.

560 (4) This subsection shall not apply to any of the following trusts:

561 (A) A trust containing the assets of an individual under age 65 who is  
562 disabled (as defined in section 1382c (a)(3) of this title) and which is established  
563 for the benefit of such individual by a parent, grandparent, legal guardian of the  
564 individual, or a court if the State will receive all amounts remaining in the trust  
565 upon the death of such individual up to an amount equal to the total medical  
566 assistance paid on behalf of the individual under a State plan under this  
567 subchapter.

568 (B) A trust established in a State for the benefit of an individual if—

569 (i) the trust is composed only of pension, Social Security, and other  
570 income to the individual (and accumulated income in the trust),

571 (ii) the State will receive all amounts remaining in the trust upon  
572 the death of such individual up to an amount equal to the total medical  
573 assistance paid on behalf of the individual under a State plan under this  
574 subchapter; and

575 (iii) the State makes medical assistance available to individuals  
576 described in section 1396a (a)(10)(A)(ii)(V) of this title, but does not  
577 make such assistance available to individuals for nursing facility services  
578 under section 1396a (a)(10)(C) of this title.

579 (C) A trust containing the assets of an individual who is disabled (as  
580 defined in section 1382c (a)(3) of this title) that meets the following conditions:

581 (i) The trust is established and managed by a non-profit  
582 association.

583 (ii) A separate account is maintained for each beneficiary of the  
584 trust, but, for purposes of investment and management of funds, the trust  
585 pools these accounts.

586 (iii) Accounts in the trust are established solely for the benefit of  
587 individuals who are disabled (as defined in section 1382c (a)(3) of this  
588 title) by the parent, grandparent, or legal guardian of such individuals, by  
589 such individuals, or by a court.

590 (iv) To the extent that amounts remaining in the beneficiary's  
591 account upon the death of the beneficiary are not retained by the trust, the  
592 trust pays to the State from such remaining amounts in the account an  
593 amount equal to the total amount of medical assistance paid on behalf of  
594 the beneficiary under the State plan under this subchapter.

595 (5) The State agency shall establish procedures (in accordance with standards specified  
596 by the Secretary) under which the agency waives the application of this subsection with respect  
597 to an individual if the individual establishes that such application would work an undue hardship  
598 on the individual as determined on the basis of criteria established by the Secretary.

599 (6) The term "trust" includes any legal instrument or device that is similar to a trust but  
600 includes an annuity only to such extent and in such manner as the Secretary specifies.

601 (e) [Disclosure And Treatment Of Annuities.]<sup>15</sup>

602 *(1) In order to meet the requirements of this section for purposes of section*  
603 *1902(a)(18), a State shall require, as a condition for the provision of*  
604 *medical assistance for services described in subsection (c)(1)(C)(i) (relating*  
605 *to long-term care services) for an individual, the application of the*  
606 *individual for such assistance (including any recertification of eligibility for*  
607 *such assistance) shall disclose a description of any interest the individual or*  
608 *community spouse has in an annuity (or similar financial instrument, as may*

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<sup>15</sup> D.R.A. 2005 § 6012 revisions commence here. The catch phrase is not in the amendatory language but is the caption of D.R.A. 2005 § 6012.

609 *be specified by the Secretary), regardless of whether the annuity is*  
610 *irrevocable or is treated as an asset. Such application or recertification*  
611 *form shall include a statement that under paragraph (2) the State becomes a*  
612 *remainder beneficiary under such an annuity or similar financial instrument*  
613 *by virtue of the provision of such medical assistance.*

614 (2)

615 (A) *In the case of disclosure concerning an annuity under subsection*  
616 *(c)(1)(F), the State shall notify the issuer of the annuity of the right of*  
617 *the State under such subsection as a preferred remainder beneficiary*  
618 *in the annuity for medical assistance furnished to the individual.*  
619 *Nothing in this paragraph shall be construed as preventing such an*  
620 *issuer from notifying persons with any other remainder interest of the*  
621 *State's remainder interest under such subsection.*

622 (B) *In the case of such an issuer receiving notice under subparagraph*  
623 *(A), the State may require the issuer to notify the State when there is a*  
624 *change in the amount of income or principal being withdrawn from*  
625 *the amount that was being withdrawn at the time of the most recent*  
626 *disclosure described in paragraph (1). A State shall take such*  
627 *information into account in determining the amount of the State's*  
628 *obligations for medical assistance or in the individual's eligibility for*  
629 *such assistance.*

630 (3) *The Secretary may provide guidance to States on categories of*  
631 *transactions that may be treated as a transfer of asset for less than fair*  
632 *market value.*

633 (4) *Nothing in this subsection shall be construed as preventing a State from*  
634 *denying eligibility for medical assistance for an individual based on the*  
635 *income or resources derived from an annuity described in paragraph (1).*  
636

637 (f) [Disqualification For Long-Term Care Assistance For Individuals With Substantial Home  
638 Equity]<sup>16</sup>

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<sup>16</sup> D.R.A. 2005 § 6014 revisions commence here. The catch phrase is not in the amendatory language but is the caption of D.R.A. 2005 § 6014. § 6014 (b) specifies that “[t]he amendment made by subsection (a) shall apply to

639 (1)

640 (A) Notwithstanding any other provision of this title, subject to  
641 subparagraphs (B) and (C) of this paragraph and paragraph (2), in  
642 determining eligibility of an individual for medical assistance with respect  
643 to nursing facility services or other long-term care services, the individual  
644 shall not be eligible for such assistance if the individual's equity interest in  
645 the individual's home exceeds \$500,000.

646 (B) A State may elect, without regard to the requirements of section  
647 1902(a)(1) (relating to statewideness) and section 1902(a)(10)(B) (relating  
648 to comparability), to apply subparagraph (A) by substituting for  
649 '\$500,000', an amount that exceeds such amount, but does not exceed  
650 \$750,000.

651 (C) The dollar amounts specified in this paragraph shall be increased,  
652 beginning with 2011, from year to year based on the percentage increase  
653 in the consumer price index for all urban consumers (all items; United  
654 States city average), rounded to the nearest \$1,000.

655 (2) Paragraph (1) shall not apply with respect to an individual if—

656 (A) the spouse of such individual, or

657 (B) such individual's child who is under age 21, or (with respect to  
658 States eligible to participate in the State program established under  
659 title XVI) is blind or permanently and totally disabled, or (with  
660 respect to States which are not eligible to participate in such  
661 program) is blind or disabled as defined in section 1614, is lawfully  
662 residing in the individual's home.

663 (3) Nothing in this subsection shall be construed as preventing an  
664 individual from using a reverse mortgage or home equity loan to reduce  
665 the individual's total equity interest in the home.

666 (4) The Secretary shall establish a process whereby paragraph (1) is  
667 waived in the case of a demonstrated hardship.

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individuals who are determined eligible for medical assistance with respect to nursing facility services or other long-term care services based on an application filed on or after January 1, 2006.”

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668  
669 *(g) Treatment of Entrance Fees of Individuals Residing in Continuing Care*  
670 *Retirement Communities.*

671 *(1) IN GENERAL- For purposes of determining an individual's eligibility*  
672 *for, or amount of, benefits under a State plan under this title, the rules*  
673 *specified in paragraph (2) shall apply to individuals residing in continuing*  
674 *care retirement communities or life care communities that collect an*  
675 *entrance fee on admission from such individuals.*

676 *(2) TREATMENT OF ENTRANCE FEE- For purposes of this subsection,*  
677 *an individual's entrance fee in a continuing care retirement community or*  
678 *life care community shall be considered a resource available to the*  
679 *individual to the extent that—*

680 *(A) the individual has the ability to use the entrance fee, or the*  
681 *contract provides that the entrance fee may be used, to pay for care*  
682 *should other resources or income of the individual be insufficient to*  
683 *pay for such care;*

684 *(B) the individual is eligible for a refund of any remaining entrance*  
685 *fee when the individual dies or terminates the continuing care*  
686 *retirement community or life care community contract and leaves the*  
687 *community; and*

688 *(C) the entrance fee does not confer an ownership interest in the*  
689 *continuing care retirement community or life care community.*  
690

691 ~~(e)~~ ~~(f)~~ ~~(g)~~ ~~(h)~~ **Definitions**<sup>17</sup>

692

693 In this section, the following definitions shall apply:

694 **(1)** The term “assets”, with respect to an individual, includes all income and resources of  
695 the individual and of the individual’s spouse, including any income or resources which the  
696 individual or such individual’s spouse is entitled to but does not receive because of action—

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<sup>17</sup> D.R.A. 2005 § 6014 revisions commence here. Subsection “(e)” is redesignated thrice, first by reference to D.R.A. 2005 § 6012 (a), next by D.R.A. 2005 § 6014 (a), and finally by D.R.A. 2005 § 6015 (b).

- 697                   **(A)** by the individual or such individual’s spouse,
- 698                   **(B)** by a person, including a court or administrative body, with legal authority to  
699 act in place of or on behalf of the individual or such individual’s spouse, or
- 700                   **(C)** by any person, including any court or administrative body, acting at the  
701 direction or upon the request of the individual or such individual’s spouse.
- 702                   **(2)** The term “income” has the meaning given such term in section 1382a of this title.
- 703                   **(3)** The term “institutionalized individual” means an individual who is an inpatient in a  
704 nursing facility, who is an inpatient in a medical institution and with respect to whom payment is  
705 made based on a level of care provided in a nursing facility, or who is described in section 1396a  
706 (a)(10)(A)(ii)(VI) of this title.
- 707                   **(4)** The term “noninstitutionalized individual” means an individual receiving any of the  
708 services specified in subsection (c)(1)(C)(ii) of this section.
- 709                   **(5)** The term “resources” has the meaning given such term in section 1382b of this title,  
710 without regard (in the case of an institutionalized individual) to the exclusion described in  
711 subsection (a)(1) of such section.

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716                   ***EFFECTIVE DATES-<sup>18</sup>***

717                   ***(1) IN GENERAL- Except as provided in paragraphs (2) and (3***  
718                   ***[below], the amendments made by this section shall apply to***  
719                   ***payments under title XIX of the Social Security Act (42 U.S.C. 1396***  
720                   ***et seq.) for calendar quarters beginning on or after the date of***  
721                   ***enactment of this Act, without regard to whether or not final***  
722                   ***regulations to carry out such amendments have been promulgated by***  
723                   ***such date.***

724                   ***(2) EXCEPTIONS- The amendments made by this section shall not***  
725                   ***apply--***

726                   ***(A) to medical assistance provided for services furnished***  
727                   ***before the date of enactment;***

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<sup>18</sup> D.R.A. 2005 § 6016 (e).

728 *(B) with respect to assets disposed of on or before the date of*  
729 *enactment of this Act; or*  
730 *(C) with respect to trusts established on or before the date of*  
731 *enactment of this Act.*

732 **(3) EXTENSION OF EFFECTIVE DATE FOR STATE LAW**  
733 **AMENDMENT-** *In the case of a State plan under title XIX of the*  
734 *Social Security Act (42 U.S.C. 1396 et seq.) which the Secretary of*  
735 *Health and Human Services determines requires State legislation in*  
736 *order for the plan to meet the additional requirements imposed by*  
737 *the amendments made by a provision of this section, the State plan*  
738 *shall not be regarded as failing to comply with the requirements of*  
739 *such title solely on the basis of its failure to meet these additional*  
740 *requirements before the first day of the first calendar quarter*  
741 *beginning after the close of the first regular session of the State*  
742 *legislature that begins after the date of the enactment of this Act. For*  
743 *purposes of the previous sentence, in the case of a State that has a 2-*  
744 *year legislative session, each year of the session is considered to be*  
745 *a separate regular session of the State legislature.*

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