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Division of Medicaid Services

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DMS Operations Memo 17-34

To: Income Maintenance Supervisors
Income Maintenance Lead Workers
Income Maintenance Staff
W-2 Agencies
Workforce Development Boards
Job Center Leads and Managers
Training Staff
Child Care Coordinators

Affected Programs:
☐ BadgerCare Plus
☐ FoodShare
☒ Medicaid
☐ SeniorCare
☐ Caretaker Supplement
☐ FoodShare Employment and Training

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Division of Medicaid Services

Promissory Notes, Loans, and Mortgages: Divestment and Income Policy Changes

CROSS REFERENCE

- Operations Memo 15-38
- Medicaid Eligibility Handbook, Section 15.4.8 Loans/Promissory Notes, Section 16.7 Liquid Assets, and Section 17.12 Promissory Notes

EFFECTIVE DATE

August 1, 2017

PURPOSE

This Operations Memo communicates new policy related to the treatment of promissory notes, loans, and mortgages as directed by the federal Centers for Medicare and Medicaid Services (CMS). It also communicates new policy regarding the treatment of note, loan, and mortgage repayments received by a member for a note, loan, or mortgage that cannot be sold. This Memo also clarifies that policies related to promissory notes also apply to loans, and mortgages (including land contracts) made by applicants, members, and their spouses.

BACKGROUND

A promissory note, loan, or mortgage is a written, unconditional agreement whereby one party promises to pay a specified sum of money at a specified time (or on demand) to another party, which may be given in return for goods, property, money loaned, or services rendered. The notes, loans, and mortgages considered in this Memo are those where an elderly, blind, or disabled Medicaid applicant or member gives their or their spouse's money, property, or goods to another person in exchange for a note, loan, or mortgage (including land contracts) in which the other person promises to pay back the applicant or member. In most places this Memo will only refer to promissory notes (or notes); however, all the policies described here refer equally to loans and mortgages (including land contracts).

In order to be eligible to receive Medicaid for the Elderly, Blind, or Disabled (EBD), an individual is subject to nonfinancial and financial criteria, including an asset limit. In evaluating whether applicants or members meet that asset limit, Wisconsin law passed in 2015 required the Wisconsin Department of Health Services (DHS) to count promissory notes as assets when they are negotiable, assignable, enforceable, and do not contain any terms making them unmarketable.

Medicaid divestment statutes and policy prevent applicants or members from giving away assets or transferring assets for less than fair market value. Long-term care members that divest assets or applicants that have divested assets during the five-year "look-back" period prior to applying for Medicaid long-term care are ineligible for long-term care services (such as nursing home or community waivers) otherwise covered by Medicaid for a period based on the value of the divested assets. This period of ineligibility is the divestment "penalty period."

In an attempt to reduce assets below program thresholds, some applicants, members, or spouses have attempted to use promissory notes as a tool to convert countable resources, such as bank deposits or bonds, into unavailable assets, thus making the individuals financially eligible for Medicaid. In order to prevent such an agreement from being seen as a divestment, it must meet all of the following federal criteria, which are also stated in Medicaid Eligibility Handbook, Section 17.12.2 Promissory Notes on or After January 1, 2009:

- The note's repayment term is actuarially sound as determined in accordance with the standards determined by the Office of the Chief Actuary of the Social Security Administration.
- The note's payments are to be made in equal amounts during the term of the loan, with no deferral or balloon payments.
- Cancellation of the note's balance upon the death of the lender is prohibited.

To prevent further misuse of promissory notes to obtain long-term care, 2015 Wisconsin Act 55 added another provision that required promissory notes also be negotiable, assignable, enforceable, and not contain any terms making them unmarketable in order for them to not be considered a divestment. Wisconsin Act 55 became effective on July 14, 2015. The change was implemented by DHS after publication of Operations Memo 15-38, "Promissory Notes as Assets" on October 12, 2015.

CMS has since informed DHS that federal Medicaid laws do not allow the addition of the condition that promissory notes must be negotiable, assignable, enforceable, and marketable in order to not be considered a divestment. As a result, DHS is ending this policy effective August 1, 2017, to comply with federal law.

Supplemental Security Income (SSI) policy specifies note repayments be treated differently depending on whether the note is countable as an asset. In cases where a note can be sold, it is counted as an available asset. In such cases, payments received from the borrower against the loan principal are considered to be conversions of an asset, and are therefore not counted as income. This policy is the basis of the current Medicaid policy in Medicaid Eligibility Handbook, Section 15.4.8 Loans/Promissory Notes.

However, in cases where the note cannot be sold, the note is not counted as an available asset. For these notes, SSI policy considers payments received from the borrower against the loan principal to be countable income. Regardless of whether the note can be sold, the interest portion of a loan repayment is always considered income to the note holder. Medicaid law requires states to follow SSI income and asset policies when determining eligibility for any elderly, blind or disabled persons. For this reason, when determining eligibility for any category of EBD Medicaid, we must follow the SSI policy of counting the principal in a note repayment as income when the note itself cannot be sold.

Finally, while the previous Operations Memo and some chapters of the Medicaid Eligibility Handbook may only refer to promissory notes, or promissory notes and loans, both federal and state law require the asset, divestment, and income policies described here be applied in the same way for promissory notes, loans, and mortgages (including land contracts).

POLICY

OLD POLICY

Promissory notes, loans, and mortgages that were not considered to be negotiable, assignable, enforceable, and marketable were considered to be divestments.

Count any repayments toward the principal of the loan as an asset and not as income.

NEW POLICY

Effective August 1, 2017, promissory notes, loans, and mortgages (including land contracts), whether or not they are considered to be negotiable, assignable, enforceable, and marketable, are not to be considered a divestment if they meet all three of the following conditions:

- The note’s repayment term is actuarially sound as determined in accordance with the standards determined by the Office of the Chief Actuary of the Social Security Administration.
- The note’s payments are to be made in equal amounts during the term of the loan, with no deferral or balloon payments.
- Cancellation of the note’s balance upon the death of the lender is prohibited.

Regardless of whether the note is considered a divestment or the applicant or member has requested long-term care benefits, use the following criteria when determining whether or not to count repayments as income when determining eligibility for any category of EBD Medicaid:

- If the note cannot be sold because it is not considered to be negotiable, assignable, enforceable, and marketable, it cannot be considered an available asset. Count any repayments toward the principal of the loan as income.
- If the note can be sold, it is counted as an available asset, and the principal portion of the repayment remains an asset. Continue to disregard any repayments toward the principal of the loan as income.
- Continue to count the interest portion of any loan repayment as income to the member, applicant, or spouse.

IMPLEMENTATION OF THE NEW POLICY

Apply these new policies to any applications, changes, or renewals received on or after August 1, 2017. If a person is in a divestment penalty period and that penalty period is based on the previous policy under Operations Memo 15-38, "Promissory Notes as Assets," workers must adjust the divestment penalty period by removing the amount of the divestment associated with the promissory note. This should only be done when the individual applies for long-term care, seeks a renewal of benefits, or requests an adjustment of their divestment penalty, on or after August 1, 2017. The effective date of the adjustment to the penalty period should be the date of the application, renewal, or change report.

If a member has a promissory note, loan, or mortgage (including land contracts) that is not counted as an available asset because it is not negotiable, assignable, enforceable, or marketable, begin counting the principal portion of the repayments no later than at the time of the member's next renewal or change report and provide timely notice of the change.

Example: Jean gave her adult son $50,000 in exchange for a promissory note, which was expected to be paid back in full during her life expectancy, with regular monthly payments. Later that year, Jean entered a nursing home and applied for Medicaid.

Since the terms of the promissory note were actuarially sound, meeting all the conditions laid out in the Medicaid Eligibility Handbook, Section 17.12.2 Promissory Notes on or After January 1, 2009, the transfer was not considered a divestment. However, the note included a provision that it could not be assigned to another party and thus could not be sold. As such the note is considered an unavailable asset.

The terms of the note required monthly payments of $500, of which $40 was in interest and $460 in principal. Since the note cannot be sold, count the entire $500 payment as unearned income.

CARES

This EBD Medicaid policy, which counts the principal portion of repayments on an unsellable note, does not extend to the FoodShare program. For that reason, workers will enter the principal portion of the repayments using the Income type of **INED – Interest EBD Medicaid** on the Unearned Income page in CARES Worker Web. When there is a FoodShare request, the interest portion of the repayments should be entered as Income Type of **Interest** in order to count the interest income portion for FoodShare.

CONTACTS

BEPS CARES Information and Problem Resolution Center

DHS/DMS/BEPS/JL