



1355 S. Colorado Blvd.  
Suite 920  
Denver, CO 80222  
Main: 303.733.2867  
Fax: 303.531.0466  
www.cfpdtrust.org

November 5, 2019

Dear Medical Services Board Members:

Re: Proposed Rule 18-10-18-A Concerning Pooled Trusts

I am the Executive Director of the Colorado Fund for People with Disabilities (CFPD) and I am writing today to **urge you to oppose the proposed rule concerning Pooled Trusts** that will be introduced by David Smith. We believe that the proposed changes need to be introduced as a legislative change to the statute as they contain substantially different agency interpretations of the rule and are **not under the authority of the Medical Services Board through rule making.**

I would like to call your attention to three major points.

- CFPD is opposed to the proposed regulation, which we believe is illegal.
  - CFPD has engaged in the stakeholder process with the Department of Health Care Policy and Financing (the Department).
  - The proposed rule change would have a substantial impact on the 1200+ low-income, individuals with disabilities currently served by CFPD as well as limit our ability to provide additional services in the future.
1. CFPD is opposed to the proposed regulation. Please see Exhibit A outlining our position and the Federal and State Statutes that support our position. See also the memo from our attorney, Tammy Conover, sent separately and Exhibit B.
  2. CFPD has engaged in the stakeholder process with the Department of Health Care Policy and Financing (the Department).
    - a. May 30, 2019: Meeting with the Department in re: current pooled trust beneficiaries with trusts funded after the age of 65. The Rule was given to us at the conclusion of the meeting.
    - b. September 13, 2019: CFPD, along with other stakeholders<sup>1</sup>, attended the Medical Services Board meeting and gave testimony during the Public Comment Period in re: it's Opposition to the Proposed Rule. David Smith initially introduced Pooled Trusts during this meeting but did not circulate the proposed rule to the Medical Services Board.

---

<sup>1</sup> Stakeholders who have attended meetings with the Department have represented CFPD Board and Staff, Arc of the Pikes Peak Region Pooled Trust, Disability Law CO, Colorado Cross Disability Coalition, Members of the CO Bar Association Elder Law Section – specifically the Medicaid Regulatory Committee; Elder Law Attorneys in private practice, Family members of those affected by disability.

- c. September 23, 2019: CFPD and stakeholders attended the Public Rule Review Meeting. During that meeting, David Smith and his staff stated that maintaining the status quo of the current rule was untenable. The Stakeholders present at the meeting, including the CO Bar Association members, expressed their opposition to the proposed regulations. The Department asked stakeholders for proposals which would address their concerns. Stakeholders asked for a delay in the rule so that we would have time to develop and submit the proposals to the Department and engage in future meetings.
  - d. October 4, 2019: CFPD submitted four different proposals to the Department for their review. See Exhibit C.
  - e. October 7, 2019: CFPD meeting with the Department and stakeholders to discuss CFPD's proposals. One of the staff from the Department said that proposal #3 was "great". The Department began discussions about a counter proposal considering a "true up" in terms of a payment to the Department at the end of the year if funds were not spent.
  - f. October 10, 2019: the Department sent a Response to CFPD Proposal Concerning Proposed Pooled Trust Regulations. See Exhibit D.
  - g. October 18, 2019: CFPD Attorney Tammy Conover sent an email to Jennifer Weaver of the Attorney General's office with CFPD's counter to the Department's response dated 10/10/19. See Exhibit E.
  - h. October 21, 2019: CFPD and other stakeholders met with the Department for the Public Rule Review meeting in preparation or the Medical Services Board meeting on November 8<sup>th</sup>. At this meeting, David Smith reported that despite making great progress in our discussions, he now believed we were "miles apart". CFPD continued to contend that this rule change is a substantial change to the rule and that it needs to be a change to the statute.

At this point of the meeting CFPD again asked for a Cost Benefit Analysis. During the remainder of the meeting and in email correspondence following, Chris Leoniak of the Department asked a number of questions about CFPD's operations.
  - i. October 31, 2019: CFPD and other stakeholders received notice of the proposed rule being published. The Regulatory Analysis is Exhibit F.
3. The proposed rule change would have a substantial impact on the 1200+ low-income, individuals with disabilities served by CFPD. As part of the Regulatory Analysis, the Department shall provide a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of people. The Department provided a simple three sentence response to the question, which reads as follows:

"The Payback Provision will decrease revenue for trust companies that currently retain 100% of any leftover amounts in pooled trust sub-accounts following the death of the beneficiary. These impacted companies may be required to change business practices



and/or develop revenue from other sources if the proposed rule is adopted. The Penalty for Over 65 Transfers will disallow disabled individuals over the age of 65 to transfer assets into a pooled trust or create a pooled trust for the purpose of maintaining resource eligibility.”

From CFPD’s perspective, it does not appear that the Department has performed a full analysis in regards to the impact to the individuals served by CFPD, specifically from its Charitable Fund. (CFPD refers to the retained funds as retained funds or Charitable Fund). According to the Master Pooled Trust Document, which was developed and adopted by the Board of Directors on February 13, 1994, and then approved by Colorado Medicaid at that time and each time it has been amended in 2000, 2008, 2010 and most recently in 2011,

“Upon the death of a Beneficiary, any amounts remaining in the Beneficiaries Trust sub-account shall be deemed to be surplus Trust property and shall be retained by the Trust and, in the Trustee’s sole discretion, used (a) for the benefit of other Beneficiaries, (b) to add indigent disabled persons, as defined in 42 U.S.C. 1382c(a) (3), to the Trust as Beneficiaries, (c) to provide indigent disabled persons, as defined in 42 U.S.C. 1382c(a) (3), with equipment, medication or services deemed suitable by Trustee. (d) for such other charitable purposes as the Trustee may determine consistent with the intent of the Trust.”

CFPD requests that the Medical Services Board ask the Department to consider the following qualitative and quantitative impacts to individuals served by CFPD.

- a. Payback Provision. If HCPF is successful, what happens to/when...?
  1. Charitable Organizational Rep Payee program that currently serves 110 individuals. These individuals are referred to CFPD by Adult Protective Services, Social Security, Guardians, Conservators, Courts through the Public Administrators, family members, mental health centers, community centered boards, Arcs, etc. This program is supplemented by CFPD’s retained funds through the current 100% payback provision. This CFPD Program lessens the strain on all of the entities who are currently referring people to CFPD. Most importantly, it ensures access to the basic human needs of shelter, food, clothing and medical care for the individuals served.
  2. An individual was a beneficiary of the pooled trust and explained to his pooled trust case manager that he wanted to leave his Medicaid paid nursing facility and his brother/guardian was preventing it. With the use of CFPD’s retained funds, an attorney was hired with CFPD’s retained funds and he moved to a less restrictive/less costly community setting with a new volunteer guardian.

3. A pooled trust beneficiary lost her housing due to the flooding several years ago, CFPD used its retained funds to buy her a new trailer for her and her minor child when insurance and FEMA did not cover the costs. This action likely prevented a strain on child protective services, homeless shelters and other charities.
4. A pooled trust beneficiary had a family member move into her condo and try to list it for sale, CFPD petitioned the court on an emergency basis for a conservator to be appointed to secure the property. The attorney and conservatorship fees were paid by CFPD's retained funds. This likely prevented a move to more restrictive environment and most definitely averted financial exploitation of an at-risk adult, which would have included the resources of the courts and law enforcement.
5. Our Rep Payee Coordinator picks up the phone and agrees to serve as Rep Payee because no one else will. Until a Rep Payee can be appointed, and the funds are held up by the Social Security Administration and a person does not have access to them.
6. Our Rep Payee Coordinator picks up the phone again and agrees to serve as Rep Payee for a woman with severe mental illness who has been found by the police after her remaining parent died. These SSA funds are then used to pay for her room and board at her group home and Medicaid pays less.
7. Our trust case manager gets a call from a community member about likely online financial exploitation of an at-risk adult, she immediately talks to the beneficiary and applies for CFPD to be the Rep Payee to cut off the funds going to the exploiter.
8. The 37 individuals with Intellectual/Developmental Disabilities experiencing homelessness who received temporary housing from CFPD's Charitable Fund for nearly three months. This prevented a strain on shelters and other community providers during this time.
9. The beneficiary of a disability trust who constantly asked CFPD, as trustee, to pay for her basic needs, despite healthy SSDI income. We suspected she was exploited by others. She agreed with CFPD becoming her Rep Payee and she now has plenty of money in her conserved SSDI funds and the spending from the trust has decreased significantly.
10. A Conservatorship is terminated and the Guardian Ad Litem or Guardian documents that a Guardian and/or Conservatorship is no longer necessary due to the case management provided by CFPD. This reduces the impact to the courts, and already strained professionals providing reduced or pro bono services.

11. CFPD is asked to step in (on more than one occasion) when a successor Trustee, Rep Payee, Conservator, other fiduciary has stolen all or most of the money.
  12. A pooled trust beneficiary with a major mental illness suffers a stroke, and his CFPD case manager visited his home and found that he had been discharged home inappropriately. He was living in a contaminated and unsafe environment and he was at risk medically. She worked with his other supports and helped him to apply for a Home and Community Based Services Waiver to meet his needs since he was adamantly against moving to a skilled nursing facility. This advocacy for his independence also led to a cost savings to Adult Protective Services and Medicaid LTC.
  13. CFPD educates the community (and this is at least twice a month but typically more) on being a Trustee, Rep Payee, what to look for in hiring a Trustee, etc. which likely prevents further mismanagement of trusts and other financial accounts by family members.
- b. 65+ funding a trust over the age of 65. If HCPF is successful, what happens to...?
1. Someone like Mary, the first beneficiary of CFPD's pooled trust, an 88 year old woman living in a skilled nursing facility, who joined the trust on March 20, 1994 with \$12,500 derived from a personal injury settlement against the nursing home for severe abuse and neglect.
  2. Or someone like Barbie who has had an intellectual/developmental disability since birth. She has been on Medicaid services through the Comprehensive Services Waiver for many years. As many of you know, the waiver has a long waiting list and is very difficult to get on. Barbie received a back-payment in Social Security for \$8,000. Under the proposed rules, she would have to spend down immediately instead of setting the funds aside to pay for medical services not otherwise paid for by Medicaid, clothing and trips during her life expectancy.
  3. Or someone like Patrick who had a stroke at the age of 55 and then was hit in a crosswalk while using his wheelchair to cross the street when he was 75. Patrick's daughter reports that the funds in her father's pooled trust to provide accessible transportation to family events, to install accessibility features to his apartment so he did not need to move into a nursing facility (a much greater expense to Medicaid).
  4. Examples of other health and safety trust distributions that CFPD regularly pays for:
    - i. Accessible Vehicle Maintenance
    - ii. Wheelchairs or other mobility devices
    - iii. Professional Guardianship Fees



1355 S. Colorado Blvd.  
Suite 920  
Denver, CO 80222  
Main: 303.733.2867  
Fax: 303.531.0466  
[www.cfpdtrust.org](http://www.cfpdtrust.org)

- iv. Dental Work
- v. Technology to keep people in a less restrictive setting
- vi. Transportation
- vii. Community Activities and companionship
- viii. Therapies not covered by Medicaid
- ix. Other equipment not covered by Medicaid to enhance quality of life

In conclusion, I urge the Medical Services Board to consider all of the ways in which CFPD's services are benefiting our community in Colorado for people with disabilities. CFPD is the largest pooled trust in located in Colorado and, to my knowledge, is the only pooled trust that consistently uses its Charitable Fund to give back to our local, Colorado community and to provide services and supports to address unmet needs or underserved populations while reducing the financial impact to other state agencies and private entities.

Sincerely,

Megan Brand  
Executive Director, CFPD



## CFPD Opposes the Proposed Regulations Concerning Pooled Trusts

The Colorado Department of Health Care Policy and Financing has proposed two major changes to the pooled trust regulations:

- (1) Limiting the age to establish a pooled trust to individuals under the age of 65;
- (2) A change to the funds in the trust sub-accounts upon death.

**These changes will significantly and negatively impact people with disabilities and older adults, including over 1200 individuals that the Colorado Fund for People with Disabilities (CFPD) currently serves,** and potentially jeopardize critically important charitable services offered by the Colorado Fund for People with Disabilities.

To put this all in context, pooled trusts are trusts that can be used by people with disabilities who are on Medicaid and/or SSI or applying to become Medicaid eligible. Individuals who join a pooled trust typically do so because they received a sum of money from a source such as a personal injury settlement or inheritance. However, these are relatively small amounts of money or an average of \$33,500 at the time the pooled trust is established. Pooled trust funds are solely for use by the beneficiary.

**The Colorado Fund for People with Disabilities is a 501(c)(3) nonprofit organization that serves as Colorado's largest, locally managed pooled trust.** The CFPD charitable fund (comprised of retained funds following an individual's death) funds several extremely important services including **representative payee services, case management services, community education, and other programs designed to assist low income individuals with disabilities across Colorado.** The loss of charitable funds would have a substantial impact on people with disabilities.

**Neither state nor federal law sets an age limit for establishment of a pooled trust** and setting such unnecessary age restrictions unnecessarily burdens older people with disabilities, who now lose a service simply because they are over 65. **In addition, the federal and state statute allow for pooled trust organizations to retain 100% of the remainder at the time of the individual's death** (See p. 2).

The changes to the pooled trust regulations that the Department of Health Care Policy and Financing have proposed are harmful and came about after HCPF lost a court case on this very issue. In 2012 CFPD encountered a change in practice by HCPF for individuals over the age of 65 joining the trust. The next several years of uncertainty resulted in CFPD appealing and litigating a case in State District Court with a finding **in CFPD's favor holding that the final agency decision was "unsupported by substantial evidence when the record is considered as a whole, arbitrary and capricious, and not in accordance..." with the Administrative Procedures Act.**

Questions: Megan Brand, Executive Director, CFPD, [mbrand@cfpdtrust.org](mailto:mbrand@cfpdtrust.org)

· Federal Statute: 42 U.S.C. § 1396p(d)(4)(c)(iv) *To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.*

· Colorado Statute: C.R.S. 15-14-412.9.(1)(e) *The trust provides that, upon the death of the beneficiary or termination of the trust during the beneficiary's lifetime, whichever occurs sooner, to the extent that amounts remaining in the beneficiary's trust account are not retained by the trust, the state medical assistance program receives any amount remaining in that individual's trust account up to the total medical assistance paid on behalf of the individual.*

· Colorado Medicaid Regulation: 10.C.C.R 2505-10, Section 8.100.7E.6.c.i: *Following the disabled individual's death or termination of the trust account, whichever occurs sooner, to the extent that the remaining funds in the trust account are not retained by the pooled trust, the Department shall receive any amount remaining in the individual's trust account up to the total amount of Medical Assistance paid on behalf of the individual.*



**MEMORANDUM**

**To:** Medical Services Board

**From:** Conover Law, LLC, as counsel to Colorado Fund for People with Disabilities, Inc.

**Date:** November 5, 2019

**Re:** Opposition to Proposed Rule MSB 18-10-18-A

---

**Summary/Background**

Proposed Rule MSB 18-10-18-A (“Proposed Amendment”) is illegal under the Colorado State Administrative Procedure Act, and therefore, if adopted as proposed, will be void and unenforceable.

On October 31, 2019, the Department of Health Care Policy and Finance (the “Department”) published to the Colorado Register a notice of proposed rule-making pursuant to which two substantive provisions of 10 C.C.R. 2505-10 § 8.100.7.E.6.c (the “Regulation”) would be amended:

- 1) Individuals 65 and older would be prohibited from establishing or transferring assets to a pooled trust; and,
- 2) HCPF would be entitled to compensation for Medical Services provided to a beneficiary up to 50% of the balance of an account.

Only the Colorado General Assembly can effectuate the change that the Department seeks. The Proposed Amendment exceeds the Department’s authority, conflicts with applicable statutes and, upon examining the underlying purpose and legislative intent underpinning pooled trusts, there is no conflict within the pooled trust statute as alleged by the Department. The regulation is therefore void and if passed, cannot be enforced. C.R.S. § 24-4-103(8)(a); *Cartwright v. State Bd.*

*of Accountancy*, 796 P.2d 51, 53 (Colo.App. 1990) (“... courts have a duty to invalidate administrative regulations which conflict with the design of a statute.”)

I. The Department Cannot Legislate Through the Rule Making Process.

The Proposed Regulation exceeds the Department’s rule-making authority and power.

An executive branch agency cannot legislate through the rulemaking process. This principal is expressly codified under the State Administrative Procedure Act, which states that: “[a]ny rule or amendment to an existing rule issued by any agency ... which conflicts with a statute shall be void.” C.R.S. § 24-4-103(8)(a). There is no presumption that a regulation is consistent with a statute simply because its wording does not expressly contradict the explicit wording of a statute. As stated in Administrative Procedure Act: “[a] rule shall not be deemed to be within the statutory authority and jurisdiction of any agency merely because such rule is not contrary to the specific provisions of a statute.” *Id.*

Only the legislature can amend laws and enact statutes. Regulations, properly enacted, further the will of the General Assembly. A regulation cannot amend, expand, modify or contravene existing statutes. *See Miller International, Inc. v. State Dept. of Revenue*, 646 P.2d 341 (Colo. 1982) (Department of Revenue regulation that attempted to tax certain transactions not enumerated in statute was void for impermissibly amending and expand statute). As noted by the Colorado Supreme Court: “[a]s we have often said, a regulation must further the will of the legislature and may not modify or contravene an existing statute.” *Id.*, at p. 344.

Courts have a duty to invalidate administrative regulations that conflict with the design of a statute. *Ettelman v. Colo. State Bd. Of Accountancy*, 849 P.2d 795, 797 (Colo.App. 1992). Because only the General Assembly can amend, expand, modify or contravene existing statutes, a

regulation that attempts to do so will be deemed to exceed an agency's authority, courts will declare it void, and will prohibit its application. *Miller International*, 646 P.2d at 345.

The Proposed Regulation is void because it seeks to amend, expand and/or modify the Colorado Probate Code. With respect to the payback provision, C.R.S. § 15-14-412.9(2)(e) permits retention of trust account balances by charitable pooled trust administrators, at the trustee's discretion, to include as much or as little of the balance as the trustee wishes. The Department lack authority to effectively amend this statute by to impose a restriction, whether that restriction is 50% or 100%.<sup>1</sup> Similarly, C.R.S. § 15-14-412.9(2)(c) does not impose an age restriction on the creation and/or funding of a pooled trust; by seeking to add an age restriction where the General Assembly did not is to engage in legislating, not rulemaking. *See Miller International* (voiding rule promulgated under statute where the statute was entirely silent on that issue, and requirement was borrowed from separate act within the C.R.S.)

## II. Regulations Must be Consistent with the Colorado Probate Code as a Whole.

A regulation must be considered in light of the entire act under which it is promulgated. *Ettelman v. Colo. State Bd. of Accountancy*, 849 P.2d 795, 797 (Colo.App. 1992). The validity of a regulation is determined by reading and considering a statute as a whole, gleaning the statute's overall scheme and purpose and from that, ascertaining its legislative intent.

When viewed in light of the Colorado Probate Code as a whole, the Proposed Regulation clearly constitutes an impermissible amendment, modification, and/or expansion of the Probate Code. With respect to age limits, it is not in dispute that the Probate Code expressly imposes an

---

<sup>1</sup> The Department's lack of authority to propose the payback rule in the Proposed Regulation is evidenced in its own *Notice of Proposed Rule Making*. In the Notice, the Department stated it considered a 100% payback provision, but graciously declined to do so only because of "certain charitable purposes" that pooled trust administrators engage in. *See Notice at ¶ 6*. Thus, per the Department's reasoning, it could – next year, or 5 years from now – within its discretion, require 100% payback. It cannot, only the General Assembly can do so.

age limit on the formation of, and contributions to, individual disability trusts. C.R.S. § 15-14-412.8(1). Conversely, it is similarly clear that the Probate Code *never* imposes an age limit on the formation of, and/or contributions to, a pooled trust. *See* C.R.S. 15-14-412.9. With respect to payback provisions, *neither* income trusts nor disability trusts contain a provision permitting a trustee to retain the balance upon termination. *See* C.R.S. 15-14-412.7 & 412.8. In contrast, the General Assembly *expressly* permitted pooled trust administrators to retain remaining balances in pooled trusts without limitation. C.R.S. 15-14-412.9(1)(e).

Where specific language is included in one section of a statute, but omitted in another section of the same statute, the exclusion is presumed to be intentional. *Well Augmentation Subdistrict of Cent. Colo. Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399, 419 (Colo. 2009). Courts have repeatedly rejected attempts to graft statutory language from one section of a statute into another section in the name of “statutory interpretation.” *See, e.g., Abu-Nantambue-El v. State*, 433 P.3d 101 (Colo.App 2018) (under compensation statute for wrongful convictions, use of term “all convictions” in one provision necessarily includes misdemeanor convictions where statute elsewhere expressly references only “felony convictions”); *Airth v. Zurich* 2018 COA 9, ¶28 (Colo.App. 2018) (rejecting plaintiff’s attempt to require express written rejection of *additional* un/underinsured motorist insurance, where statute only requires written rejection of *minimum* un/underinsured motorist insurance); *Beeghly v. Mack*, 20 P.3d 610 (Colo. 2001) (where certain provisions under the Forcible Entry and Detainer statute expressly permit default judgments, silence regarding default judgment in other provisions of FED statute must be construed as intentional.) Thus, the absence of specific provisions or language in a statute can as loudly as an express inclusion. *See Romer v. Bd. Of County Commissioners of Pueblo*, 956 P.2d 566, 567 (Colo. 1998).

Viewing the Probate Code as a whole, it is clear that the omission of both an age limit and restrictions on retention of trust balances with respect to pooled trusts was intentional. The General Assembly knew how to impose age restrictions on Medicaid Trusts: it did so, on both income trusts and disability trusts. The General Assembly knew how to require the payback of trust balances to the State upon termination of a Medicaid Trust: it did so, without qualification, for both income trusts and disability trusts. Yet, with respect to Pooled Trusts, no age limit was imposed, and trustees were given unfettered discretion to retain balances on termination. By promulgating the Proposed Regulation, the Department necessarily ignores the choices made by the General Assembly; because the Department lacks authority to do so, the Proposed Regulation exceeds its authority and is therefore void.

III. There is no Conflict between C.R.S. § 15-14-412.9(c) and (e).

The Department's proposed payback requirement is premised on both a faulty reading of C.R.S. 15-14-412.9 and a lack of understanding of the legislative intent underpinning the statute. When properly read and properly understood, there is no statutory "inconsistency" within C.R.S. § 15-14-412.9(2). Subsections (2)(c) and (2)(e) address different issues and questions, employ distinct language, and are in fact part of a consistent statutory scheme designed to effectuate the legislative intent underpinning Medicaid Trusts.

Among their many functions, pooled trusts effectuate two legislative goals: (1) preventing the heirs of Medicaid recipients from inheriting wealth; and, (2) furthering the charitable purpose of pooled trust administrators, that must necessarily be charitable organizations. Therefore, C.R.S. § 15-14-412.9(2)(c) prohibits all payments upon termination or death of the beneficiary, which prevents enrichment of trust beneficiaries' heirs. C.R.S. § 15-14-412.9(2)(e) speaks to retention of the account balance by a trustee upon termination or death of the beneficiary, thereby furthering

the charitable purposes of pooled trust administrators. As explained by one federal court analyzing pooled trusts and the interplay between these two aims:

Retaining the residual enables the trust to cover administrative fees and other overhead without increasing charges on accounts of living beneficiaries. At the same time, should the trust attempt to pass the money to the deceased's estate, this provision acts as a safeguard to ensure that the State gets repaid.

*Lewis v. Alexander*, 685 F.3d 325, 347 (3d. Cir. 2012).

Accordingly, the Department is incorrect that there is a conflict: subsection (2)(c) prevents paying trust assets to beneficiaries' heirs, while subsection (2)(e) furthers the charitable purposes of pooled trust administrators.



## **CFPD Proposal to the Department of Health Care Policy and Financing in light of proposed regulations concerning Pooled Trusts.**

Submitted by Megan Brand, Executive Director, CFPD, as approved by the CFPD Board of Directors on 10/4/2019.

### **Background:**

There are three different groups or scenarios in which individuals over the age of 65 may fund a pooled trust.

**Group 1:** Individuals set up a trust for the first time over the age of 65 and fund it with a one-time and/or additional ongoing deposits.

**Group 2:** Individuals set up a trust before the age of 65 and then have an additional, one-time deposit into the pooled trust after the age of 65.

**Group 3.** Individuals set up a trust before the age of 65 and then have additional, ongoing deposits into the pooled trust after the age of 65.

For instance, many individuals in this group have an Intellectual/Developmental Disability. In 2010, CO Medicaid changed the way in which the PETI, or Post Eligibility Treatment of Income was calculated for people with Intellectual/Developmental Disabilities who are on the Comprehensive Services Waiver. Beginning in 2010, the amount a person pays for PETI towards their room and board is a set fee, no matter their income. In 2019, the amount is \$695/month. For many on SSI of \$771, this leaves \$76 for personal needs every month. However, many people with I/DD either work or receive SSDI through their own benefit or their parent's benefit. We know of some people whose income is closer to \$1,500 or even \$1,800/month. For someone with income of \$1,800/month, they must spend over \$1,100 each month in order to stay under their \$2,000 resource limit. Many of these individuals have set up pooled trusts so that they can slowly build the funds over time and then use them for a vacation, dental implants or other larger purchases instead of spending them down frivolously each month. These individuals often add to their trust monthly or quarterly. Having their funds in the pooled trust also mitigates the risk of financial exploitation since we are bound by our fiduciary duty.

### **Proposals:**

1. Maintain status quo\*<sup>1</sup> and HCPF requests FTE dedicated for pooled trust issues / review. CFPD will publicly support this request of the Joint Budget Committee.
2. Maintain the status quo\* with the current regulations and HCPF delegates trust expenditure review to the county (with annual redeterminations trustee can send in annual accountings to confirm sole benefit and permissible purchases to ensure trustee is not breaching fiduciary duty) through education to counties through an operational memo to provide for consistency through the Department's direction.

---

<sup>1</sup> \* Status quo includes current CMS "guidance", Federal Statute and Regulation and State Statute and Regulations.

3. Maintain the status quo\* with current regulations and HCPF will create an Operational Memo which sets forth the parameters of the Spending plan and annual review for people over the age of 65. The parameters would be as follows:
- a. A spending plan will be created by the trustee at the time in which a transfer into the pooled trust is made for an individual over the age of 65. The spending plan will include this historical background information:
    - i. Name
    - ii. Date of Birth
    - iii. Life Expectancy as defined by SSA Tables
    - iv. Government Benefits
    - v. Initial Deposit/Funding amount
    - vi. Source of Funding
    - vii. Additional Deposits (if any)
    - viii. Primary Disability
    - ix. Background Information
    - x. Housing
    - xi. Medical
    - xii. Mobility
    - xiii. Dental
    - xiv. Social
    - xv. Education
    - xvi. Employment
    - xvii. Transportation
    - xviii. End of Life Plan (Burial or cremation)
    - xix. Spending Plan
      1. One time or Annual Expenditures
      2. Ongoing Annual Deposits
      3. Summary of spending and time frame in which funds will be spent
  - b. The Spending Plan will be reviewed by the trustee on an annual basis and submitted to the Department upon request and annually. The trustee will submit the following:
    - i. An accounting (Statement) of deposits and expenditures.
    - ii. A report of deposits (planned vs. actual) and a report of disbursements (planned vs. Actual). This will follow the same format as a conservatorship report but will be condensed based on the initial spending plan (See form JDF 885SC).

Example (for Disbursements):

<b>Description of Disbursement / Expense Category</b>	<b>Column A</b>	<b>Column B</b>	<b>Column C</b>
List Total Disbursements/Expenses from Detail Listing (From Step 1 or Separate Spreadsheet)	*Total Amount of Disbursement / Expense from <input type="checkbox"/> <b>Prior</b> Reporting Period or <input type="checkbox"/> <b>Financial Plan</b>	Total Amount of Disbursement / Expense for <b>Current</b> Reporting Period	<b>Change</b> in amount of Disbursement/ Expense  <i>Indicate +/-</i>
Clothing **			



Entertainment/Movies			
Equipment			
Farm/Ranch Expense			
Fees – Guardian - Prof			
Medical-Supplemental			
Transportation			
Pet Care			
Travel/Vacations			
Phone/Cable			
<b>TOTALS</b>			

\*\* Please note that the categories in the example are for illustrative purposes and would be customized based on the individual plan. The reallocation between categories would be permissible so long as the overall spending is consistent with the plan.

- c. A table would be completed for both Annual/one-time spending as well as for ongoing spending. The annual table would include a note section to explain if any one-time expenditures had not yet occurred and when they are planned.
  - d. At the annual review, if the annual variance across all categories of spending exceeds 20%, the trustee will revise the plan or explain the deviation. Similarly, if the annual variance in deposits exceeds 20%, the trustee will revise the plan or explain the deviation.
4. Although this is not consistent with CFPD’s previous legal arguments (we believe there is a requirement to analyze the transfers), we are willing to pursue this scenario if the Department would like to discuss it. Regarding individuals 65 and older, the regulations would be changed to allow for transfers no greater than the amount of the Home Equity Exclusion per the CO Medicaid Regulations (\$585,000 in 2019).

**Summary:**

We intend for these proposals to be a starting point for discussion and believe that the ultimate solution could include a hybrid of multiple proposals.



**COLORADO**  
Department of Health Care  
Policy & Financing

1570 Grant Street  
Denver, CO 80203

## Response to CFPD Proposal Concerning Proposed Pooled Trust Regulations

---

### Background:

On May 31, 2019, the Colorado Department of Health Care Policy & Financing (the "Department") proposed a rule change that would impact pooled trusts operating in the State of Colorado. As currently proposed, the revised rule would: (1) disallow the resource exemption for any transfers into a pooled trust sub-account by an individual over the age of sixty-five (65); and (2) require pooled trust organizations to remit to the Department the lesser of fifty percent (50%) of a remaining sub-account balance or an amount equal to the total medical assistance received upon termination of the sub-account. In response, the Colorado Fund for People with Disabilities ("CFPD") and other stakeholders have engaged with the Department to discuss the proposed rule change. On October 4, 2019, the Department received a proposal from CFPD regarding the proposed rule change ("CFPD's Proposals"). The Department responds to CFPD's Proposals as follows:

### Response to CFPD Proposals:

**Proposal #1 - Maintain the status quo and Department requests FTE to be dedicated for pooled trust issues/review.**

The Department does not agree with Proposal #1.

The addition of FTE to the Department's trust unit does not provide a complete or partial resolution to the ongoing issues with pooled trust sub-accounts, which is the goal of the regulation changes as originally proposed.

**Proposal #2 - Maintain the status quo and Department delegates trust expenditure review to the county.**

The Department does not agree with Proposal #2.

Delegating the Department's review of pooled trusts to the counties does not provide a complete or partial resolution to the ongoing issues with pooled trust sub-accounts, which is the goal of the regulation changes as originally proposed.



Proposals #3 & #4 - Maintain the status quo and Department will create an Operational Memo which sets forth the parameters of the Spending Plan and annual review for people over the age of 65 OR allow for transfers no greater than the amount of the Home Equity Exclusion per the CO Medicaid Regulations (\$585,000 in 2019).

The Department does not agree with Proposals #3 or #4 as currently written.

However, based on the conversations with Stakeholders that took place on Monday, October 7, 2019, the Department has considered some of the concerns raised, the solutions proposed, and offers the following as avenues for potential resolution.

Please review the options provided below and consider whether they, or some variation thereof, may satisfy the concerns of both the Department and the stakeholders.

### Additional Options for Consideration:

**HCPF Option #A:** Allow over-65 pooled trusts with a limit to the over-65 contributions, conduct ongoing monitoring of Spending Plans, allow adjustments to Spending Plans as needed to account for deviations, and require 50% payback of any funds leftover in pooled trust subaccounts regardless of age.

*Over-65 Contributions to a Pooled Trust permitted, with contribution limit.*

- Allow for the creation and contribution to pooled trusts for individuals over the age of 65.
- Allow for transfers into the pooled trusts no greater than the current average balance for the pooled trust sub-accounts funded by individuals over the age of sixty-five (approximately \$45,000 as reported by CFPD).<sup>1</sup>

*Over-65 pooled trust contributions/Spending Plans will be monitored annually.*

- The pooled trust organization would provide Spending Plans for any beneficiary that transfers an amount into their pooled trust sub-account after attaining the age of sixty-five (65).
- Spending Plans shall include the information stated in CFPD's Proposal under paragraph (3)(a), and be actuarially sound based on the SSA Tables.

---

<sup>1</sup> Currently, only two pooled trust organizations accept over-65 pooled trust transfers in Colorado—CFPD and Life Enrichment Trust. The sub-account values for the over-65 trusts held by Life Enrichment Trust have been significantly lower than those accepted by CFPD.



- The pooled trust organization would continue to be required to provide the eligibility site and the Department with an annual accounting of trust deposits and disbursements.
- An updated Spending Plan would be required if an additional deposit is made into the trust sub-account that was previously unaccounted for or there is more than a 5% deviation in the amount that was expected to be spent for the year.
- As long as the Spending Plan is updated for any variances, then no penalty should be imposed for any failure to make an expected disbursement.

*Payback provision applies to all pooled trust sub accounts, regardless of age.*

- The pooled trust organization will remit fifty percent (50%) of the balance of all pooled trust sub accounts to the Department, unless the medical assistance received for that beneficiary is less than the balance. In that instance, the payback to the Department would be limited to the amount paid out in medical assistance on behalf of the beneficiary.
- This payback provision will apply to the entire sub-account balance, including any portions attributable to under-65 contributions to a pooled trust.

**HCPF Option #B: Allow over-65 pooled trusts without limit to the over-65 contributions, conduct ongoing monitoring of spending plans, require “settling up” when deviations from the spending plans occur, and require 100% payback of any funds leftover that were contributed to a pooled trust after the age of 65, or 50% of any funds leftover in pooled trust subaccounts established prior to turning 65.**

*Over-65 Contributions to a Pooled Trust permitted, no contribution limit.*

- Allow for the creation and contribution to pooled trusts for individuals over the age of 65.
- No limit for pooled trust sub-accounts funded by individuals over the age of sixty-five (as long as there is an actuarially sound Spending Plan).

*Over-65 pooled trust contributions/Spending Plans will be monitored annually.*

- The pooled trust organization would provide Spending Plans for any beneficiary that transfers an amount into their pooled trust sub-account after attaining the age of sixty-five (65).
- Spending Plan shall include the information stated in CFPD's Proposal under paragraph (3)(a) and be actuarially sound based on the SSA Tables.
- The pooled trust organization would provide the eligibility site and the Department with an annual accounting, which shall include a report of deposits (planned vs. actual) and a



report of disbursements (planned vs. actual) in a similar format to a conservatorship report.

- As discussed at the stakeholder meeting, any deviation from the Spending Plan that results in a beneficiary receiving an amount less than the total planned distributions for the year shall be considered a transfer without fair consideration unless the pooled trust organization remits the amount deviated to the Department. However, if there is a deviation from the Spending Plan that results in a beneficiary receiving an amount more than the total planned distributions for the year, then the pooled trust may revise the Spending Plan and submit a copy to the Department to decrease future disbursements as long as the Spending Plan is still actuarially sound.

*Payback provision percentages change depending on whether it is an over-65 pooled trust.*

- The pooled trust organization will remit one-hundred percent (100%) of the balance of a pooled trust containing contributions made by an individual over the age of 65, unless the medical assistance received for that beneficiary is less than the balance. In that instance, the payback to the Department would be limited to the amount paid out in medical assistance on behalf of the beneficiary.<sup>2</sup>
- The pooled trust organization will remit fifty percent (50%) of the balance of all other pooled trust sub accounts, unless the medical assistance received for that beneficiary is less than the balance. In that instance, the payback to the Department would be limited to the amount paid out in medical assistance on behalf of the beneficiary.

## Summary

This response is being provided to all stakeholders for their comments. Attached is CFPD's Proposal for reference.

## For more information contact

David L. Smith  
[david.smith@state.co.us](mailto:david.smith@state.co.us)

---

<sup>2</sup> As it applies to trusts created prior to an individual turning 65, but contributions are made to the trust after the age of 65, the Department envisions a "last in-first out" application of this payback provision. Thus, any disbursements made from the sub-account after the age of sixty-five (65) will be presumed to be deducting first from the over sixty-five (65) contributions. Then, any remaining "under-65" balance left in the sub-account will be subject to the lower, fifty percent (50%) payback requirement.



## Megan Brand

---

**From:** Tammy Conover <tammy@conoverlawllc.com>  
**Sent:** Tuesday, October 22, 2019 2:49 PM  
**To:** Megan Brand  
**Subject:** FW: pooled trust rule

Tammy Conover, Attorney  
Conover Law, LLC  
6161 South Syracuse Way, Suite 270  
Greenwood Village, CO 80111  
(303) 376-6224 phone  
(303) 379-1693 fax  
[tammy@conoverlawllc.com](mailto:tammy@conoverlawllc.com)

NOTICE: This e-mail message is the property of Conover Law, LLC. This e-mail message, metadata contained therein, and any attachments may contain confidential information that is protected by law under attorney-client privilege, attorney-work-product doctrine, and/or other applicable privileges. If you are not the intended recipient of this message, please forward a copy to [tammy@conoverlawllc.com](mailto:tammy@conoverlawllc.com) and delete the message and its attachments from your computer.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and may not be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party who is not the original addressee of this communication any transaction or matter addressed herein.

**From:** Tammy Conover  
**Sent:** Friday, October 18, 2019 11:15 AM  
**To:** Jennifer Weaver <Jennifer.Weaver@coag.gov>  
**Subject:** Re: pooled trust rule

Jennifer,

Thank you again for reaching out. CFPD did hold a follow up board meeting yesterday in response to the Department's proposals A and B.

The board is not in agreement with proposal A.

With regard to proposal B, the board would agree to the spending plan updates annually if there is a difference in spending (up or down), of 20% or more, but does not agree with any of the "true up" provisions. This restriction has the end result of taking away the discretion of the trustee and will result in a very real possibility of breaching fiduciary duties.

The board is not in agreement with any provision to transfer the remainder interest to the state. However, CFPD is willing to supply an annual report outlining the programs the remainder interest supports.

We will provide additional written responses with our legal and procedural concerns with the proposed rule changes to the Department and MSB prior to the 11/8 meeting.

We will see you Monday.

Tammy Conover

Sent from my iPhone

On Oct 15, 2019, at 2:56 PM, Jennifer Weaver <[Jennifer.Weaver@coag.gov](mailto:Jennifer.Weaver@coag.gov)> wrote:

Hi Tammy,

I'm not sure if you know that Corelle Spettigue is out of the office until 10/28, so if you need to communicate with the AG's office you can contact me. And, I believe CFPD was going to have a board meeting last week and then you were going to report back to Corelle on the latest proposal. So, please let me know if you have any updates. Thanks, Jen

Jennifer L. Weaver  
First Assistant Attorney General  
Colorado Department of Law  
State Services Section, Health Care Unit  
Ralph L. Carr Colorado Judicial Center  
1300 Broadway, 6th Floor  
Denver, Colorado 80203  
(720) 508-6145 Direct

This message may contain confidential and/or legally privileged information and is intended only for the individual(s) named. Any name or signature block is not a legally binding electronic signature. If you are not an intended recipient you are not authorized to disseminate, distribute or copy this e-mail. Please notify the sender immediately if you have received this e-mail by mistake and delete this e-mail from your system.

Title of Rule: Revision to the Medical Assistance Rule Concerning Pooled Trusts, Section 8.100.7.E.6.c.

Rule Number: MSB 18-10-18-A

Division / Contact / Phone: Third Party Liability & Recoveries Section / David Smith / 303-866-3247

## STATEMENT OF BASIS AND PURPOSE

1. Summary of the basis and purpose for the rule or rule change. (State what the rule says or does and explain why the rule or rule change is necessary).

The Colorado Department of Health Care Policy & Financing ("the Department") intends to amend the Medical Assistance Rule Concerning Pooled Trusts, 10 C.C.R. 2505-10, Sec 8.100.7.E.6.c, to provide clarification regarding: (i) the amount that the pooled trust is permitted to retain when the trust terminates upon the death of a beneficiary (the "Payback Provision"); and (ii) how to treat transfers of assets into a pooled trust after attaining the age of sixty-five (65) (the "Penalty For Over 65 Transfers").

Payback Provision. 10 C.C.R. 2505-10, Sec 8.100.7.E.6.c.i.i currently states:

"Following the disabled individual's death or termination of the trust account, whichever occurs sooner, to the extent that the remaining funds in the trust account are not retained by the pooled trust, the Department shall receive any amount remaining in the individual's trust account up to the total amount of Medical Assistance paid on behalf of the individual."

As written currently, the rule can be interpreted to allow 100% retention by the pooled trust upon the death of the beneficiary. However, the statutory authority under which the rule is promulgated is inconsistent as to whether the Department is entitled to all of the remaining funds in the trust or only those funds that the pooled trust does not retain. Those statutory subsections are shown below:

C.R.S. § 15-14-412.9(2)(c) The sole lifetime beneficiaries of the trust are the individual for whom the trust is established and the state medical assistance program. After the death of the person for whom the trust is created or after the trust is terminated during the beneficiary's lifetime, whichever occurs sooner, no person is entitled to payment from the remainder of the trust until the state medical assistance agency has been fully reimbursed for the assistance rendered to the person for whom the trust was created.

C.R.S. § 15-14-412.9(2)(e) The trust provides that, upon the death of the beneficiary or termination of the trust during the beneficiary's lifetime, whichever occurs sooner, to the extent that amounts remaining in the beneficiary's trust account are not retained by the trust, the state medical assistance program receives any amount remaining in that individual's trust account up to the total medical assistance paid on behalf of the individual.

Therefore, an amendment to the regulations is necessary to provide clarification for stakeholders. The Department proposes that it is entitled to receive reimbursement for the

Initial Review

**[date]**

Final Adoption

**[date]**

Proposed Effective Date

**[date]**

Emergency Adoption

**[date]**

**DOCUMENT #**



Title of Rule: Revision to the Medical Assistance Rule Concerning Pooled Trusts, Section 8.100.7.E.6.c.

Rule Number: MSB 18-10-18-A

Division / Contact / Phone: Third Party Liability & Recoveries Section / David Smith / 303-866-3247

medical assistance rendered to the beneficiary up to an amount not to exceed fifty percent (50%) of the remaining funds in the sub-account upon the death of the beneficiary, and the pooled trust would be entitled to retain the balance.

Penalty For Over 65 Transfers. 10 C.C.R. 2505-10, Sec 8.100.7.E.6.c.i.ii currently states:

If an institutionalized individual for whom a pooled trust is established is 65 years of age or older, the transfer of assets into the pooled trust creates a rebuttable presumption that the assets were transferred without fair consideration and shall be analyzed in accordance with the rules on transfers without fair consideration in this volume. This regulation is effective for transfers to pooled trusts after January 1, 2001.

The rule currently allows establishment of, or additions to, a pooled trust by persons over the age of 65, subject to a rebuttable presumption that those asset transfers are transfers without fair consideration. The department would like to specify that all transfers, additions or augmentations to a pooled trust after the age of 65 are transfers for less than fair market value. As written, the rebuttable presumption creates a prohibitively resource intensive process for evaluating whether or not fair consideration is received in exchange for transfers of assets to pooled trusts by over-65 individuals. The non-binding, purely discretionary nature of certain pooled trust documents makes it impossible for the Department to determine whether funds spent are in fact prohibited transfers or not. Additionally, some spending plans contain line items for products or services that may in fact be paid for by Medical Assistance. Therefore, because the current rule requires a specific, fact based inquiry which is impossible to ascertain in many circumstances, the rule change is necessary to further discourage, if not prohibit, transfers for less than fair market value.

The Department proposes this rule change to strictly prohibit an initial transfer of funds, or any additions or augmentations to a pooled trust account by an individual 65 years of age or older. This will be deemed a transfer of assets for less than fair market value.

2. An emergency rule-making is imperatively necessary

- to comply with state or federal law or federal regulation and/or
- for the preservation of public health, safety and welfare.

Explain:

3. Federal authority for the Rule, if any:

Initial Review	<b>[date]</b>	Final Adoption	<b>[date]</b>
Proposed Effective Date	<b>[date]</b>	Emergency Adoption	<b>[date]</b>
			<b>DOCUMENT #</b>

Title of Rule: Revision to the Medical Assistance Rule Concerning Pooled Trusts, Section 8.100.7.E.6.c.

Rule Number: MSB 18-10-18-A

Division / Contact / Phone: Third Party Liability & Recoveries Section / David Smith / 303-866-3247

42 U.S.C. 1396p(d)(4)

4. State Authority for the Rule:

Sections 25.5-1-301 through 25.5-1-303, C.R.S. (2018);  
15-14-412.9(4), C.R.S

Initial Review

**[date]**

Final Adoption

**[date]**

Proposed Effective Date

**[date]**

Emergency Adoption

**[date]**

**DOCUMENT #**

Title of Rule: Revision to the Medical Assistance Rule Concerning Pooled Trusts, Section 8.100.7.E.6.c.  
Rule Number: MSB 18-10-18-A  
Division / Contact / Phone: Third Party Liability & Recoveries Section / David Smith / 303-866-3247

## REGULATORY ANALYSIS

1. Describe the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

The amendment to the Payback Provision will affect pooled trust companies operating in the State of Colorado, which are currently The Arc Pikes Peak Region, Colorado Fund for People with Disabilities (CFPD), Charities Pooled Trust (CPT), Life Enrichment Trust, Inc. (LET), Secured Futures, Inc., Secured Pooled Special Needs Trust, The National Foundation for Special Needs Integrity, Inc., and Special Needs Trust Network, Inc. There should be no additional costs of implementing this proposed rule to the Department. However, pooled trusts will be limited in the amount they are able to retain upon the death of a beneficiary. Currently, most of the pooled trusts received by the Department for review are from CFPD and LET. Typically, CFPD retains all remaining funds, but LET remits all remaining funds to the Department up to the total amount of Medical Assistance paid on behalf of the individual. This disparity is the result of the current discretion of the pooled trust itself to decide how much of the remaining funds to remit to the Department. The remittance of all remaining funds to the Department from LET indicates that it is possible to operate a pooled trust without any retention by the pooled trust itself, and that the institution of a clear payback rule splitting the remaining funds evenly would not result in any detriment and is more equitable than a 100% payback rule.

The Payback Provision will lower costs of the state's Medical Assistance program for Colorado taxpayers.

The amendment to the Penalty For Over 65 Transfers will affect disabled individuals who have attained the age of 65 but establish or transfer assets into a pooled trust for the purpose of maintaining resource eligibility for Medical Assistance. The Department foresees no additional cost to implement this proposed rule.

The Penalty For Over 65 Transfers will also lower costs of the state's Medical Assistance program for Colorado taxpayers. Additionally, it will enhance the Department's ability to carry out its mission by avoiding resource intensive determinations as to whether purely discretionary pooled trusts, as written or as administered, contain prohibited transfers.

2. To the extent practicable, describe the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons.

Title of Rule: Revision to the Medical Assistance Rule Concerning Pooled Trusts, Section 8.100.7.E.6.c.

Rule Number: MSB 18-10-18-A

Division / Contact / Phone: Third Party Liability & Recoveries Section / David Smith / 303-866-3247

The Payback Provision will decrease revenue for trust companies that currently retain 100% of any leftover amounts in pooled trust sub-accounts following the death of the beneficiary. These impacted companies may be required to change business practices and/or develop revenue from other sources if the proposed rule is adopted.

The Penalty For Over 65 Transfers will disallow disabled individuals over the age of 65 to transfer assets into a pooled trust or create a pooled trust for the purpose of maintaining resource eligibility.

3. Discuss the probable costs to the Department and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

This rule change will result in increased recovery of Department expenditures for Medical Assistance, therefore adoption of this rule should increase state revenues. There are no new costs to the Department or any other agency if this rule is adopted. Because the rule will lower the operational burden to the Department, no new employees will be needed to implement the rule.

4. Compare the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction.

Adoption of this rule will clarify how the inconsistent subsections of C.R.S. § 15-14-412.9(2)(c) and (e) will be interpreted by the Department. Adoption of the rule will increase payback to the state for Medical Assistance expenditures when funds remain in a pooled sub-account after the beneficiary dies or the account is terminated. This proposed change will have little effect on most trust companies and their operations. The rule will also prevent over age-65 disabled individuals from transferring assets for the purpose of maintaining resource eligibility for Medical Assistance.

Inaction will result in no clarification of the statutory language, less recovery for Medical Assistance expenditures when funds are available to do so and will allow persons over the age of 65 to maintain resource eligibility for Medical Assistance to transfer assets into a pooled trust without fair consideration.

5. Determine whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

Title of Rule: Revision to the Medical Assistance Rule Concerning Pooled Trusts, Section 8.100.7.E.6.c.

Rule Number: MSB 18-10-18-A

Division / Contact / Phone: Third Party Liability & Recoveries Section / David Smith / 303-866-3247

There are no less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

6. Describe any alternative methods for achieving the purpose for the proposed rule that were seriously considered by the Department and the reasons why they were rejected in favor of the proposed rule.

Regarding the Payback Provision, the Department considered requiring the pooled trusts to remit all remaining funds to the Department up to the total amount of Medical Assistance paid on behalf of the individual, which is an approach followed by at least seventeen other state Medicaid departments. However, the Department rejected this type of 100% payback provision because the Department understands that there are certain charitable purposes for which retained funds are utilized to enrich the lives of other pooled trust beneficiaries beyond what Medical Assistance benefits provide. Therefore, the Department determined that the most beneficial and equitable approach is to allow the pooled trust to retain a portion of remaining funds. A 50% payback rule ensures fairness with respect to paying back the Medical Assistance program when funds are available from a deceased beneficiary's sub-account and allowing the pooled trust to fulfill its charitable purpose.

Regarding the Penalty for Over 65 Transfers, the Department considered alternatives which apply a lengthy fact-based test to determine whether an individual has rebutted the presumption that a transfer without fair consideration has occurred. The Department found that such tests are incredibly difficult to implement and burdensome in application due to the case-by-case nature of the fact finding involved. Additionally, the application of a fact-based test would be subjective and may result in an increase in litigation brought against the Department. The Department considered that the non-binding, purely discretionary nature of pooled trust agreements makes it difficult if not impossible for the Department to determine whether funds are being spent at all, or if those funds spent are indeed prohibited transfers. Thus, the amended rule as proposed is the best way to further discourage, if not proscribe, transfers for less than fair market value made for the purpose of maintaining resource eligibility for Medical Assistance.

1 **8.100.7.E Consideration of Trusts in Determining Medical Assistance Eligibility**

2  
3  
4  
5 6. The preceding regulations for trusts established on or after July 1, 1994, do not apply to the  
6 following:

7 a. Income Trusts

8 i) A trust consisting only of the individual's pension income, social security income  
9 and other monthly income that is established for the purpose of establishing  
10 income eligibility for Long Term Care institution care or Home and Community  
11 Based Services (HCBS). To be valid, the trust must meet the following criteria:

12 a) The individual's gross monthly income must be above the 300%-SSI limit  
13 but below the average cost of private Long Term Care institution care in  
14 the geographic region in which the individual resides and intends to  
15 remain. The Colorado Department of Health Care Policy and Financing  
16 shall calculate the average rates for such regions on an annual,  
17 calendar-year basis. The geographic regions which are used for  
18 calculating the average private pay rate for Long Term Care institution  
19 care shall be based on the Bureau of Economic Analysis Regions and  
20 consist of the following counties:

21 REGION I: (Adams, Arapahoe, Boulder, Broomfield, Denver, Jefferson)

22 REGION II: (Cheyenne, Clear Creek, Douglas, Elbert, Gilpin, Grand,  
23 Jackson, Kit Carson, Larimer, Logan, Morgan, Park, Phillips,  
24 Sedgwick, Summit, Washington, Weld, Yuma)

25 REGION III: (Alamosa, Baca, Bent, Chaffee, Conejos, Costilla, Crowley,  
26 Custer, El Paso, Fremont, Huerfano, Kiowa, Lake, Las Animas,  
27 Lincoln, Mineral, Otero, Prowers, Pueblo, Rio Grande,  
28 Saguache, Teller)

29 REGION IV: (Archuleta, Delta, Dolores, Eagle, Garfield, Gunnison,  
30 Hinsdale, La Plata, Mesa, Moffat, Montezuma, Montrose, Ouray,  
31 Pitkin, Rio Blanco, Routt, San Juan, San Miguel)

32 b) For Long Term Care institution clients, each month the trustee shall  
33 distribute the entire amount of income which is transferred into the trust.  
34 An amount not to exceed \$20.00 may be retained for trust expenses

- 1 such as bank charges if such charges are expected to be incurred by the  
2 trust.
- 3 c) The only deductions from the monthly trust distribution to the Long Term  
4 Care institution are the allowable deductions which are permitted for  
5 Medical Assistance-eligible persons who do not have income trusts.  
6 Allowable deductions include only the following:
- 7 i) Personal need allowance  
8 ii) Spousal income payments  
9 iii) Approved PETI payments
- 10
- 11 d) Any funds remaining after the allowable deductions shall be paid solely  
12 to the cost of the Long Term Care institution care in an amount not to  
13 exceed the Medical Assistance reimbursement rate. Any excess income  
14 which is not distributed shall accumulate in the trust.
- 15 e) No other deductions or expenses may be paid from the trust. Expenses  
16 which cannot be paid from the trust include, but are not limited to, trustee  
17 fees, attorney fees and costs (including attorney fees and costs incurred  
18 in establishing the trust), accountant fees, court fees and costs, fees for  
19 guardians ad litem, funeral expenses, past-due medical bills and other  
20 debts. Trustee fees which were ordered prior to April 1, 1996 may  
21 continue until the trust terminates.
- 22 f) For HCBS clients, the amount distributed each month shall be limited to  
23 the 300% of the SSI limit. Any monthly income above that amount shall  
24 remain in the trust. An amount not to exceed \$20.00 may be retained for  
25 trust expenses such as bank charges if such charges are expected to be  
26 incurred by the trust. No other trust expenses or deductions may be paid  
27 from the trust. For the purpose of calculating Individual Cost  
28 Containment or client payment (PETI), the client's monthly income will be  
29 300% of the SSI limit. Upon termination, the funds which have  
30 accumulated in the trust shall be paid to the Department up to the total  
31 amount of Medical Assistance paid on behalf of the individual.
- 32 g) For a court-approved trust, notice of the time and place of the hearing,  
33 with the petition and trust attached, shall be given to the eligibility site  
34 and the Department in the manner prescribed by law.
- 35 h) The sole beneficiaries of the trust are the individual for whose benefit the  
36 trust is established and the Department. The trust terminates upon the  
37 death of the individual or if the trust is not required for Medical  
38 Assistance eligibility in Colorado.

- 1 i) The trust must provide that upon the death of the individual or  
2 termination of the trust, whichever occurs sooner, the Department shall  
3 receive all amounts remaining in the trust up to the total amount of  
4 Medical Assistance paid on behalf of the individual.
- 5 j) The trust must include the name and mailing address of the trustee. The  
6 trustee must notify the Department of any trustee address changes or  
7 change of trustee(s) within 30 calendar days.
- 8 k) The trust must provide that an annual accounting of trust income and  
9 expenditures and an annual statement of trust assets shall be submitted  
10 to the eligibility site or to the Department upon reasonable request or  
11 upon any change of trustee.
- 12 l) The amount remaining in the trust and an accounting of the trust shall be  
13 due to the Department within three months after the death of the  
14 individual or termination of the trust, whichever is sooner. An extension  
15 of time may be granted by the Department if a written request is  
16 submitted within two months of the termination of the trust.
- 17 m) The regulations in this section for income trusts shall also apply to  
18 income trusts established after January 1, 1992, under the undue  
19 hardship provisions in 26-4-506.3(3), C.R.S. and 15-14-412.5, C.R.S.

20 b. Disability Trusts

- 21 i) A trust that is established solely for the benefit of a disabled individual under the  
22 age of 65, which consists of the assets of the individual, and is established for  
23 the purpose or with the effect of establishing or maintaining the individual's  
24 resource eligibility for Medical Assistance and which meets the following criteria:
  - 25 a) The individual for whom the trust is established must meet the disability  
26 criteria of Social Security.
  - 27 b) The only assets used to fund the trust are (1) the proceeds from any  
28 personal injury case brought on behalf of the disabled individual, or (2)  
29 retroactive payments of SSI benefits under Sullivan v. Zebley. (This  
30 provision is applicable to disability trusts established from July 1, 1994 to  
31 December 31, 2000.)
  - 32 c) The trust is established solely for the benefit of the disabled individual by  
33 the individual, the individual's parent, the individual's grandparent, the  
34 individual's legal guardian, or by the court.
  - 35 d) The sole lifetime beneficiaries of the trust are the individual for whose  
36 benefit the trust is established and the Colorado Department of Health  
37 Care Policy and Financing



- 1 e) The trust terminates upon the death of the individual or if the trust is no  
2 longer required for Medical Assistance eligibility in Colorado.
- 3 f) Any statutory lien pursuant to section 25.5-4-301(5), C.R.S. must be  
4 satisfied prior to funding of the trust and approval of the trust.
- 5 g) If the trust is funded with an annuity or other periodic payments, the  
6 Department shall be named on the contract or settlement as the  
7 remainder beneficiary up to the amount of Medical Assistance paid on  
8 behalf of the individual.
- 9 h) The trust shall provide that, upon the death of the beneficiary or  
10 termination of the trust, the Department shall receive all amounts  
11 remaining in the trust up to the amount of total Medical Assistance paid  
12 on behalf of the individual.
- 13 i) No expenditures may be made after the death of the beneficiary, except  
14 for federal and state taxes. However, prior to the death of the individual  
15 beneficiary, trust funds may be used to purchase a burial fund for the  
16 beneficiary.
- 17 j) The amount remaining in the trust and an accounting of the trust shall be  
18 due to the Department within three months after the death of the  
19 individual or termination of the trust, whichever is sooner. An extension  
20 of time may be granted by the Department if a written request is  
21 submitted within two months of the termination of the trust.
- 22 k) The trust fund shall not be considered as a countable resource in  
23 determining eligibility for Medical Assistance.
- 24 l) [Rule 8.110.52 B 5. b. 1) l), adopted or amended on or after November 1,  
25 2000 and before November 1, 2001 was not extended by HB 02-1203,  
26 and therefore expired May 15, 2002.]
- 27 m) Distributions from the trust may be made only to or for the benefit of the  
28 individual beneficiary. Cash distributions from the trust shall be  
29 considered income to the individual. Distributions for food or shelter are  
30 considered in-kind income and are countable toward income eligibility.
- 31 n) If exempt resources are purchased with trust funds, those resources  
32 continue to be exempt. If non-exempt resources are purchased, those  
33 resources are countable toward eligibility.
- 34 o) The trust must include the name and mailing address of the trustee. The  
35 Department must be notified of any trustee address changes or change  
36 of trustee(s) within 30 calendar days.

1 p) The trust must provide that an annual accounting of trust income and  
2 expenditures and an annual statement of trust assets shall be submitted  
3 to the eligibility site or to the Department upon reasonable request or  
4 upon any change of trustee.

5 q) Prior to the establishment or funding of a disability trust, the trust shall be  
6 submitted for review to the Department, along with proof that the  
7 individual beneficiary is disabled according to Social Security criteria. No  
8 disability trust shall be valid unless the Department has reviewed the  
9 trust and determined that the trust conforms to the requirements of 15-  
10 14-412.8,C.R.S., as amended, and any rules adopted by the Medical  
11 Services Board.

12 c. Pooled Trusts

13 i) A trust consisting of individual accounts established for disabled individuals  
14 under the age of 65 for the purpose of establishing resource eligibility for Medical  
15 Assistance. A valid pooled trust shall meet the following criteria:

16 a) The individual for whom the trust is established must meet the disability  
17 criteria of Social Security.

18 b) The trust is established and managed by a non-profit association which  
19 has been approved by the Internal Revenue Service.

20 c) A separate account is maintained for each beneficiary; however, the trust  
21 pools the accounts for the purposes of investment and management of  
22 the funds.

23 d) The sole lifetime beneficiaries of each trust account are the individual for  
24 whom the trust is established and the Department.

25 e) If the trust is funded with an annuity or other periodic payments, the  
26 Department or the pooled trust shall be named as remainder beneficiary.

27 f) The trust account shall be established by the disabled individual, parent,  
28 grandparent, legal guardian, or the court.

29 g) The only assets used to fund each trust account are (1) the proceeds  
30 from any personal injury case brought on behalf of the disabled  
31 individual, or (2) retroactive payments of SSI benefits under Sullivan v.  
32 Zeblev . (This provision is applicable to pooled trusts established from  
33 July 1, 1994 to December 31, 2000.)

34 h) Any statutory lien pursuant to section 25.5-4-301(5), C.R.S. must be  
35 satisfied prior to funding of the individual's trust account and approval of  
36 the joinder agreement.

- 1 i) Following the disabled individual's death or termination of the trust  
 2 account, whichever occurs sooner, to the extent that the remaining funds  
 3 in the trust account are not retained by the pooled trust, the Department  
 4 shall receive any amount remaining in the individual's trust account up to  
 5 the total amount of Medical Assistance paid on behalf of the individual.  
 6 The Any amount retained by the pooled trust shall not exceed the greater  
 7 of: (i) fifty percent (50%) of the amount remaining in the individual's trust  
 8 account; or (ii) the amount remaining in the trust account less the total  
 9 amount of Medical Assistance paid on behalf of the individual. Any  
 10 retained amount retained by the pooled trusts must be used for other  
 11 individuals who are disabled under the criteria in 42 U.S.C. §  
 12 1382c(a)(3).
- 13 j) The pooled trust account shall not be considered as a countable  
 14 resource in determining Medical Assistance eligibility.
- 15 k) Distributions from the trust account may be made only to or for the  
 16 benefit of the individual. Cash distributions to the individual from the trust  
 17 shall be considered as income to the individual. Distributions for food or  
 18 shelter are considered in-kind income and are countable toward income  
 19 eligibility.
- 20 l) If exempt resources are purchased with trust funds, those resources  
 21 continue to be exempt. If non-exempt resources are purchased, those  
 22 resources are countable toward resource eligibility.
- 23 ~~ii) If an institutionalized individual for whom a pooled trust is established is 65 years~~  
 24 ~~of age or older, the transfer of assets into the pooled trust creates a rebuttable~~  
 25 ~~resumption that the assets were transferred without fair consideration and shall~~  
 26 ~~be analyzed in accordance with the rules on transfers without fair consideration~~  
 27 ~~in this volume. This regulation is effective for transfers to pooled trusts after~~  
 28 ~~January 1, 2001.~~
- 29 iii) When the individual beneficiary of an income, disability or pooled trust dies or the  
 30 trust is terminated, the trustee shall promptly notify the eligibility site and the  
 31 Department. To the extent required by these rules the trustee shall promptly  
 32 forward the remainder of the trust property to the Department, up to the amount  
 33 of Medical Assistance paid on behalf of the individual beneficiary.
- 34 d. Third Party Trusts
- 35 i) Third party trusts are trusts which are established with assets which are  
 36 contributed by individuals other than the applicant or the applicant's spouse for  
 37 the benefit of an applicant or client
- 38 ii) The terms of the trust will determine whether the trust fund is countable as a  
 39 resource or income for Medical Assistance eligibility.

- 1           iii)       Trusts which limit distributions to non-support or supplemental needs will not be  
2                    considered as a countable resource. If distributions are made for income or  
3                    resources, such distributions are countable as such for eligibility.
- 4           iv)       If the trust requires income distributions, the amount of the income shall be  
5                    countable as income in determining eligibility.
- 6           v)       If the trust requires principal distributions, that amount shall be considered as a  
7                    countable resource.
- 8           vi)       If the trustee may exercise discretion in distributing income or resources, the  
9                    income or resources are not countable in determining eligibility. If distributions  
10                   are made for income or resources, such distributions are countable as such for  
11                   eligibility.
- 12       e.       Federally Approved Trusts
- 13           i)       If an SSI recipient has a trust which has been approved by the Social Security  
14                   Administration, eligibility for Medical Assistance cannot be delayed or denied.  
15                   Individuals on SSI are automatically eligible for Medical Assistance despite the  
16                   existence of a federally approved trust.
- 17           ii)       If the eligibility site has a copy of a federally approved trust, the eligibility site  
18                   must send a copy to the Department.
- 19       7.       Submission of Trust Documents and Records
- 20           a.       The trustee of a trust which was established by or which benefits a Medical Assistance  
21                   Applicant or client shall submit trust documents and records to the eligibility site and to  
22                   the Department.
- 23           b.       This requirement includes documents and records for income trusts, disability trusts and  
24                   the joinder agreement for each pooled trust account.
- 25           c.       The eligibility site shall submit any trust which is submitted with an application or at  
26                   redetermination to The Department. The eligibility site shall determine Medical  
27                   Assistance eligibility based on the determination of The Department as to the effect of the  
28                   trust on eligibility.
- 29