STATE OF CALIFORNIA--HEALTH AND WELFARE AGENCY

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TO: All County Welfare Directors
All County Administrative Officers
All County Medi-Cal Program Specialists/Liaisons

Letter No.: 97-05

RECENT CHANGES IN FEDERAL LAW REGARDING POSSIBLE CRIMINAL PENALTIES FOR TRANSFERS WHICH RESULT IN AN IMPOSED PERIOD OF INELIGIBILITY FOR NURSING FACILITY LEVEL OF CARE

The purpose of this letter is to provide counties with information and guidance about new federal penalties that may result against an institutionalized individual or any other person who assists that institutionalized individual in making a disqualifying transfer of property.

Background

Under Section 1128B of the Social Security Act, an individual may be fined up to $25,000 and/or imprisoned for up to five years upon conviction of a Medicaid program related felony.

Effective January 1, 1997, the Kennedy-Kassenbaum "Health Insurance Portability and Accountability Act of 1996" adds a new crime to the prohibited activities listed in Section 1128B for cases where an individual knowingly and willfully makes a disqualifying transfer of assets on or after January 1, 1997 in order to become eligible for Medicaid, which results in the imposition of a period of ineligibility for nursing facility level of care.

Legal commentators have pointed out that in its present version, this law will be very difficult to enforce because its meaning is unclear. Among the problems in interpretation is the language which states that a criminal act occurs only in the event that the transfer "results in the imposition of a period of ineligibility."

Normally, a crime is committed once a defendant performs the criminal act. Under this law, the act of disposing of an asset is not a crime until a regulatory agency decides to impose a penalty.

The legal commentators also pointed out that there are several possible interpretations of when a period of ineligibility is meant to be imposed.

The new law, yet been tested in the courts, attempts to make the institutionalized individual who transfer nonexempt assets, and anyone who assists in the transfer, including the recipients of the assets, health care provider, insurance companies, attorneys, etc., criminally liable under the new law.

Some legal commentators have emphasized that the pre-existing sections of the Social Security Act make the disposition of assets in order to qualify for Medicaid a criminal offense only when coupled with conduct such as making a false statement or misrepresentation of a material fact, concealment or failure to disclose information, or conversion of a benefit or payment. The commentators are of the opinion that a transfer by itself which does not otherwise include any of the prohibited conduct has not been made criminal.

Please Note: The transfer of assets rules were not changed as a result of this legislation, i.e., counties shall continue to follow All County Welfare Directors Letter (ACWDL) No. 90-01 to determine whether or not there has been a transfer for less than adequate consideration and whether or not a period of ineligibility for nursing facility level of care will be imposed. For example, counties must still consider only those transfers within the look-back period, only those transfers made to establish eligibility, etc.

This means that those institutionalized individuals who make disqualifying transfers of property on or after January 1, 1997, and who **will receive only restricted services** as a result of an imposed period of ineligibility for nursing facility level of care, could also be subject to criminal penalties. In addition, any person who has assisted that individual in making the disqualifying transfer could **also** be subject to criminal penalties. If a convalescent hospital employs individuals who assist in establishing eligibility for Medi-Cal and the employee or employer provides assistance in transferring individuals' property and a transfer is determined to be a disqualifying transfer which results in the actual imposition of a period of ineligibility for nursing facility level of care, the **employer or employee** of the convalescent hospital could also be subject to criminal penalties.

Implementation

The **federal** government will decide **whether or not** to press charges and to prosecute specific individuals. Therefore, in order to ensure that only absolutely accurate cases are forwarded to the federal authorities, **effective January 1, 1997**, counties are instructed to gather all the necessary information as usual, determine whether or not the transfer was made on or after January 1, 1997 and whether or not it is potentially disqualifying in accordance with ACWDL No. 90-01, Section 50408 - 50411.5. If the transfer still appears to be a disqualifying transfer, counties shall complete the MC 176 PI. If in completing the MC 176 PI, ***any months remain for which a period of ineligibility would be imposed*** resulting in restricted services eligibility for the

institutionalized individual, then the counties shall copy and send or fax all pertinent case record documentation including a county contact name and phone number to the address below for review and possible referral to the federal government.

Property Analyst
Department of Health Services
Medi-Cal Eligibility Branch
714 P Street, Room 1650
Sacramento, CA 95814

The county shall pend the case and shall NOT send a notice of action for restricted services eligibility to the institutionalized individual until the property analyst has completed the review of the case record documentation and determination. When the property analyst completes the review, counties will be notified whether or not the notice of action should be sent and if any modification in the imposed period is required. Only at that point shall counties issue notices of action granting restricted services or reducing services to restricted services for institutionalized individuals.

After the period of time for requesting an appeal of the restricted services eligibility has passed, Medi-Cal Eligibility Branch (MEB) will forward the case record documentation through departmental channels for referral to the appropriate federal authorities. If fair hearings or rehearings are requested, MEB will not forward the cases until the results of the administrative appeals are known. If at the end of the administrative appeals process, the final order upholds the counties' decision and retains imposition of restricted services eligibility, MEB will forward the case to the federal authorities at that point. This should affect only a small number of cases. At last count, there were only 28 cases statewide that where receiving restricted services due to periods of ineligibility for nursing facility level of care.

Decisions about whether or not to prosecute specific individuals will be made *ONLY* by the federal authorities.

Please note that these sections of the federal law **may be amended or rescinded during the next congressional session**. The Department of Health Services will keep counties advised as changes occur.

Finally, ***these new penalties do not change any of the notification requirements that counties are currently required to provide to applicants/beneficiaries on how to reduce excess property in order to qualify for Medi-Cal in the month.*** If spenddown requirements are appropriately explained and followed by the applicant/beneficiary, no disqualifying period of ineligibility should occur as a result. In discussing transfers of property without adequate consideration by non-institutionalized individuals, counties must simply continue to warn those individuals that if they do give property away and then require nursing facility level of care in a medical institution or nursing facility anytime within 30 months of the transfer, they may be penalized with a period of ineligibility for nursing facility level of care.

If you have any questions on this issue, please call Sharyl Shanen-Raya at (916) 657-2942 or Kathy Harwell at (916) 657-0146.

Sincerely,

ORIGINAL SIGNED BY
TOM WELCH for

FRANK S. MARTUCCI, Chief
Medi-Cal Eligibility Branch