DSS Responses to CMS Comments

1. **General – CMS has received substantial negative comments from elder law attorneys and the CT General Assembly regarding this proposal. Concerns range from not taking into account General Assembly disapproval of this proposal before submission to CMS, to the potential negative consequences on affected beneficiaries at a time when they need care the most. How does the state react to these comments? What steps did the state undertake to address and resolve these concerns prior to proposal submission? What are Connecticut's public notice requirements? What actions were taken to publicize this proposal to interested parties – both consumers and providers? Has the state considered the 9/27/94 Federal Register provisions for public notice?**

   The Department received negative comments from advocates, nursing facility administrators and elder law attorneys about the ramifications of our Transfer of Assets Waiver Demonstration proposal. The Department has responded to each concern. The following timeline illustrates the sequence of events in the public hearing process and demonstrates the Department's efforts to respond to public concerns:

   - **July 1, 2001 –** Public Act 01-2 of the June 2001 Special Session becomes law. Section 4 requires that…"The Commissioner of Social Services shall seek a waiver of federal law for the purpose of establishing that the penalty period during which an applicant for or recipient of assistance for long-term care under the Medicaid program is ineligible for Medicaid-funded services due to a transfer of assets for less than fair market value shall begin in the month the applicant is found otherwise eligible for Medicaid coverage of services rather than in the month of the transfer of assets. This section shall only apply to transfers that occur on or after the effective date of the waiver."
   - **December 18, 2001 –** Pursuant to Connecticut General Statute (C.G.S.) 17b-8, the Department published its Notice of Intent to Request a Waiver of Federal Regulations in the Connecticut Law Journal. C.G.S. 17b-8 (copy attached) describes Connecticut's public notice requirements. The Transfer of Asset Demonstration Waiver proposal is made available by request and on the Department's website. The statute provides for a fifteen-day written comment period.
   - **December 21, 2001 –** The Department extends the comment period to the close of business on January 4, 2002. This is done in response to concerns that the fifteen-day comment period was insufficient due to the observance of three holidays within the period.
   - **January 2, 2002 –** The Department notifies the Mohegan and Mashantucket Pequot tribes of our intent to apply for the waiver.
   - **January 4, 2002 –** The public comment period closes. The Department receives seventeen written comments expressing similar concerns.
   - **February 7, 2002 –** In response to comments that the waiver could adversely affect individuals who are unable to explain transfers due to dementia as well as individuals who have been exploited, the Department proposes legislation strengthening the undue hardship protections for these individuals. The proposed legislation would also allow the Department to grant assistance and pursue recovery from the transferees if the transfer was done to qualify for assistance.

- **February 28, 2002 –** The Department submits the Transfer of Asset Waiver Proposal to the Human Services and Appropriations Committees of the Connecticut General Assembly along with the public comments and the Department's formal responses to those comments.
- **March 1, 2002 –** The Department and the Secretary of the Office of Policy and Management meet with representatives of the Connecticut Elder Law Association to hear their concerns and to explain various aspects of the waiver.
- **March 26, 2002 –** Attorneys at Connecticut's Office of Legislative Research (OLR) release a report (attached) stating the Department may proceed with the submission of an 1115 waiver without the joint approval of the Human Services and Appropriations Committees.
- **March 28, 2002 –** The Human Services and Appropriations Committees conduct a joint public hearing. In addition to the revised waiver proposal, the Department provides legislators and the public with the Department's response to the public comments, a "primer" explaining the premise behind the waiver and excerpts from a 1998 study conducted by Connecticut's Auditors of Public Accounts recommending submission of the waiver. Copies of these documents are attached. The Department, along with the Secretary of Connecticut's Office of Policy and Management, answer questions and respond to comments from legislators. After the hearing, the 19-member Human Services Committee votes against the waiver. The 54-member Appropriations Committee adjourns without voting. However, the savings attributable to the waiver remain in the Appropriation Committee's proposed state budget.
- **April 16, 2002 –** Based on the March 26th OLR report and the fact that all of the versions of our state budget rely on savings from the waiver, the Department submits the Transfer of Asset Waiver proposal to Secretary Thompson.

Additionally, the Department has responded to all letters that we have received concerning the waiver. The Hartford Courant also published a response from the Department to a recent letter criticizing the waiver. The Department believes these actions satisfy the 9/27/94 Federal Register provisions for public notice.

2. **Page 4, Item B. – Please provide more detail on what real property would be subject to the extended lookback period. The application states that transfers that are currently exempt or excepted under the transfer rules would not be subject to an extended lookback period, but provides no information about what transfers would be subject to an extended lookback period.**

   Connecticut's Transfer of Asset Waiver Proposal would extend the lookback period for all transfers involving real property - that is, land and buildings, to five years. Although all transfers involving real property occurring in the five-year lookback period will be subject to review, the waiver will maintain existing provisions that do not penalize certain exempt transfers. For example, an individual would have to disclose the transfer of his or her home property within five years of application, however the transfer would not result in a penalty if the transferee were a disabled child.

3. **Page 7 – Please provide the status of the Department's proposed legislation to provide additional protections for vulnerable populations under the demonstration. In the absence of this legislation, what protections are in place?**

The Department believes that our existing regulations provide adequate protection for individuals who have been exploited or who have dementia and are unable to explain specific transfers. A copy of these regulations is attached. We would, however, like to eliminate the condition at 3028.25(B)(2) that a transferor show that the transferee does not have assets that could be used to pay for the cost of long term care services in order to establish an undue hardship. The Department has introduced legislation that would accomplish this as well as enhance our ability to pursue recovery from transferees. We are confident that the General Assembly will ultimately pass this legislation.

4. **Please provide a more detailed explanation of historical experience and trending used in developing the budget neutrality model. Specifically:**
   a. **Please explain the figures and trend rates utilized in the NF and HCB tables on page 19.**

      The enrollment trends were developed by our actuarial consultants from a review of the historical enrollment data which is presented in Table A-5 of Appendix A. The historical enrollment data did contain fluctuations from year to year, so the trends incorporated in the 1115 Waiver application smoothed out these fluctuations to reflect a reasonable estimate of future enrollment.

      The total NF and HCB applicants were developed from a review of the FFY97 base year data and represents the State's best estimate of the number of new applicants for which this waiver could impact. In the FFY97 base year, there were 5,012 and 663 people who left/exited either a NF or HCB, respectively. In that same year, the State experienced a net decrease in NF enrollment of 74 and a net increase in HCB of 558 people. Therefore, the State estimated that there were 4,937 (5012 - 74) and 1,221 (663 + 558) new applicants in NF and HCB, respectively.

      The percent with transfers reflects the State's estimate of the percentage of new applicants who would have asset transfer activity, which could be subject to a penalty period. These percentages were developed from a review of a random sample of 300 out of 15,558 long-term care (LTC) applications from calendar year 2000. According to the State's actuaries, this is a statistically valid sample, providing a 90% level of confidence. Through the use of this random sample, we determined the following statistics: the percentage and number of new LTC applications who did obtain Medicaid coverage of LTC, and the number of those new LTC applicants with asset transfer activity. The result was an estimated 36 percent of NF and 35 percent of HCB applicants having asset transfer activity, which could be subject to a penalty period.

      The number of people with transfers is derived by multiplying the "percent with transfers" value and the "total applicants" value. This represents the State's estimate of the number of people submitting applications for Medicaid coverage of LTC for which asset transfer activity could result in a penalty period being imposed.

   b. **Please clarify the state's assumption of zero months of penalty actually served for without waiver calculations, when the state admits some individuals did incur a penalty? Please provide further explanation of the historical experience in delaying Medicaid reimbursement for long-term care through imposed penalty periods.**

A basic tenet of our Transfer of Asset Waiver proposal is that current transfer of asset rules allow individuals to readily transfer assets and incur penalty periods that expire before they actually need Medicaid. Although we impose penalties from time to time that actually affect Medicaid payment, such occurrences are few. This fact is supported by the Department's study of transfer activity for applications filed in 2000. None of the documented transfers actually resulted in the denial of Medicaid payment for long term care services as the corresponding penalties expired before the actual need for Medicaid payment.

c. **Please explain the jump in HCBS populations in 1998 and 1999, as well as the decrease in nursing home population at the same time.**

In 1997, the State of Connecticut closed the HCBS program to new enrollees and created a waiting list. The waiting list grew to be as large as 10,000 people as the public notice of the closure prompted people to be placed on the waiting list prior to age 65 and prior to spending down through their assets. In 1998 the waiting list was cleaned up and the State re-opened intake to new HCBS enrollees. This resulted in a significant increase in enrollment in both 1998 and 1999. This correspondingly impacted the nursing home population trends.

d. **Is FFY 1997 the latest data available? The application notes that 1998 – 2000 data was available to develop trend rates – could this data be used for the base year?**

Detailed data was available from FFY92 through FFY97. In addition, a separate, but less detailed, data extract was available for calendar years 1998 to 2000. The latter data set was used for trending purposes in the development of the cost and caseload projections. FFY97 was chosen as the base year throughout the cost and caseload projections due to the level of detail, completeness and rigorous validation that had been applied to the earlier data set.

5. **Are there any increased costs associated with the establishment of new asset transfer thresholds? If so, these costs should be included in the budget neutrality calculations.**

The establishment of thresholds under the waiver does not represent an increased cost. Any transfer disregarded using thresholds would not result in a penalty under current rules. Thresholds are part of the new methodology our workers will use when reviewing the asset histories of our Medicaid applicants. As the Department contends that the waiver will result in fewer transfers, we do not foresee an increase in our administrative costs under the waiver.

6. **The proposal should be modified to request that the Secretary waive compliance with section 1902(a)(18) which requires that states "comply with the provisions of section 1917 with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfer of assets, and treatment of certain trusts." We will work with the state to craft appropriate language to accomplish the goals of the demonstration through a waiver of 1902(a)(18).**

The Department appreciates your offer to help us craft appropriate language to accomplish the goals of the demonstration through a waiver of 1902(a)(18).