DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

December 23, 1993

Dear Ms. Fatoullah:

I am responding to your letter asking us to confirm your understanding of the meaning of section 13611(b) of the OBRA 93, as codified in section 1917(d)(3)(B)(i) of the Social Security Act (the Act). This section discusses treatment of irrevocable trusts for purposes of determining eligibility for Medicaid.

Briefly, the cited section provides that if there are any circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual, actual payments made are considered to be income to the individual. Payments that could be made, but are not, are considered resources to the individual. Payments made for any purpose other than to or for the benefit of the individual are treated as a transfer of assets under section 1917(c) of the Act.

You interpret this part of the statute as meaning that, if a person establishes an irrevocable trust guaranteeing the income of the trust to him or herself for life, but excluding the distribution of the trust corpus to him or herself, the corpus of the trust will not be considered an available resource to the individual after the applicable transfer-of-assets waiting period (which you believes to be 60 months). You have asked us to confirm your interpretation.

Your understanding of the statutory requirements is essentially correct. However, as a technical point, we would note that the appropriate statutory reference dealing with the situation you describe is section 1917(d)(3)(B)(ii) rather than subsection (i). Subsection (ii) deals specifically with trusts where there is some portion of the trust from which distributions cannot, for any reason, be made to or for the benefit of the grantor. In this situation, the 60-month transfer-of-assets waiting period to which you refer applies. The section you referenced in your letter actually deals with trusts where some distribution can be made to or for the benefit of the grantor. In such situations, the portion that could be distributed is counted as a resource to the individual. Where distributions can be made, the waiting period for treatment as transfers of assets of distributions made to or for someone other than the grantor is 36 months.

Also, you should understand that where a portion of a trust cannot, under any circumstances, be distributed to or for the benefit of the grantor, that portion is never considered an available resource to the grantor. Rather, the value of that portion of the trust is treated as a transfer of assets for less than fair market value. An individual who transfers assets for less than fair market value can still be eligible for Medicaid. However, the Medicaid program will not pay for the cost of various long-term-care services, including nursing facility care. The length of time for which payment of services would be denied would depend on the value of the transferred asset (or, in the situation you describe, the value of that portion of the trust which cannot be paid to or for the benefit of the grantor)

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I hope this information is useful to you.

Sincerely,
Sally K. Richardson
Director
Medicaid Bureau