

INTERIM RULEMAKING NOTICE FORM

Proposed Interim Rule Number 2016-7 Rule Number He-W 620.01(a)-(i), (j) intro, (1), (2), (4) and (5), and (k)-(x); He-W 621; He-W 656.05

1. Agency Name & Address: Dept. of Health and Human Services, Division of Family Assistance, 129 Pleasant St., Brown Bldg. Concord, NH 03301
2. RSA Authority: RSA 167:3-c, I, RSA 167:4, I(b) & IV(e)
3. Federal Authority:
4. Type of Action: Adoption, Amendment, Repeal, Readoption (X), Readoption w/amendment
5. Filing Date: March 4, 2016

6. Short Title: Expiring Rules Related to Asset Transfers, Undue Hardship Waivers for Asset Transfer Penalties or for Individuals with Substantial Home Equity, and Real Property Resources in the Cash and Medical Assistance Programs

7. Contact person for copies and questions including requests to accommodate persons with disabilities:
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TTY/TDD Access: Relay NH 1-800-735-2964 or dial 711 (in NH)

8. Summary explaining the effect of the rule:

The Department of Health and Human Services (Department) is proposing to readopt rules He-W 620.01 (various), He-W 621, and He-W 656.05 as interim rules pursuant to RSA 541-A:19, I(d) as most of them are slated to expire April 22, 2016:

- He-W 620.01 describes how asset transfers are treated for individuals applying for or receiving all categories of cash assistance, institutionalized medical assistance, or any category of home and community-based care (HCBC). This rule prevents applicants who have artificially impoverished themselves from qualifying for cash assistance, or, pursuant to RSA 167:4, IV, for medical assistance. The Department is proposing no changes;
• He-W 621 describes the requirements an institutionalized or HCBC applicant or recipient must follow when submitting an undue hardship waiver due to an asset transfer penalty and the requirements that must be met for the Department to approve the waiver. The Department is proposing no changes; and
• He-W 656.05 describes how real property resources shall be treated for all categories of cash assistance and the adult categories of medical assistance, and specifies how disposal of real property is treated. The Department is proposing no changes.

9. Listing of people, enterprises, and government agencies affected by the rule: **The people, enterprises, and government agencies affected by the proposed interim rules are as follows:**

- **He-W 620.01: Individuals applying for or receiving all categories of cash assistance, institutionalized medical assistance, or any category of HCBC;**
- **He-W 621: Institutionalized or HCBC applicants or recipients; and**
- **He-W 656.05: Individuals applying for or receiving all categories of cash assistance or the adult categories of medical assistance.**

10. Specific section or sections of state statute or federal statute or regulation which the rule is intended to implement.

Rule	Federal Reg./RSA
He-W 620.01(a)-(i), (j) intro, (1), (2), (4) and (5), and (k)-(x),	RSA 126-A:4-b,(a); RSA 161:4-a, II; RSA 167:3-c, I; RSA 167:4, I(b), III-a, & IV; 42 USC 1396p(c)
He-W 621.01	RSA 126-A:4-b,(a); RSA 167:3-c, I; RSA 167:4, III-a & IV; 42 USC 1396p(c)(2)(D)
He-W 621.02	RSA 126-A:4-b,(a); RSA 167:3-c, I; RSA 167:4, III-a & IV; 42 USC 1396p(f)
He-W 621.03	RSA 126-A:4-b,(a); RSA 126-A:5, VIII; 42 USC 1396p(c)(2)(D)
He-W 656.05	RSA 161:4-a, II; RSA 167:3-c,I; RSA 167:81; 45 CFR 233.20

11. Summary of the effect upon the state if the rule were not adopted:

These rules are being submitted for re-adoption as interim rules in accordance with RSA 541-A:19, I(d) to continue the rules which would otherwise expire prior to the completion of the re-adoption of the rules. If the rules were not re-adopted:

- **More individuals could be eligible for all categories of cash assistance, institutionalized medical assistance, or any category of HCBC, because certain individuals may transfer their assets to assist in his or her eligibility for cash assistance, nursing facility care, or HCBC services. This would result in increased but indeterminable costs to the state.**
- **Many institutionalized or HCBC individuals would not be penalized for any asset transfers, thus receiving more months of Medicaid eligibility. This would result in increased but indeterminable costs to the state.**
- **More individuals could be eligible for all categories of cash assistance or the adult categories of medical assistance because certain individuals may have countable real property that would make them ineligible for assistance, but the Department would not be able to enforce counting this real property. This would result in increased but indeterminable costs to the state.**

12. Proposed date of review by the Joint Legislative Committee on Administrative Rules: **3/18/2016**

13. The fiscal impact statement prepared by the Legislative Budget Assistant, if applicable. **Not applicable.**

Readopt He-W 620.01(a)-(i), (j) intro, (1), (2), (4) and (5), and (k)-(x), effective 4-22-08 (Document #9136), cited and to read as follows:

PART He-W 620 ASSET TRANSFERS

He-W 620.01 Asset Transfers.

(a) Asset transfers described in this rule shall be in addition to and shall not supersede Sections 1917(c)(2)(A), (B), (C) and (D) of the Social Security Act, 42 USC 1396p(c)(2)(A), (B), (C), and (D), as amended by Public Law 100-360, Public Law 100-485, Public Law 103-66, and Public Law 109-171.

(b) A transfer of assets shall be considered to have been made when:

(1) Action is taken that reduces or eliminates an individual's ownership or control of such assets;

(2) Another person has been given access to the asset through joint ownership and any action is taken, either by the individual or by any other person, that reduces or eliminates such individual's ownership;

(3) An instrument to transfer title at some future date has been completed by the individual who is applying for or receiving assistance and delivered to the individual who is to receive title;

(4) An individual who is applying for or receiving financial assistance or institutionalized care has transferred or transfers title or ownership of an otherwise excluded home to another individual or entity, including a home, which has become income producing;

(5) An individual places assets into an irrevocable trust or similar legal device, including an annuity;

(6) An individual applying for or receiving financial assistance or institutional care obtains a reverse mortgage, a home equity conversion mortgage, or similar loan on an otherwise excluded home or other real property and transfers the proceeds to another individual;

(7) An individual applying for or receiving financial assistance or institutional care converts a countable asset; or

(8) An individual is entitled to an asset but does not receive the asset because of action:

a. By the individual or the individual's spouse;

b. By a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse; or

c. By any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.

(9) An individual who is applying for or receiving medical assistance services described in 42 USC 1396p(c)(1) purchases a promissory note, loan, or mortgage, unless such note, loan, or mortgage:

- a. Provides a repayment term that is actuarially sound pursuant to He-W 620.01(i)(3);
- b. Provides for payments to be made in equal amounts during the term of the loan with no deferral and no balloon payments; and
- c. Prohibits the cancellation of the balance upon the death of the lender; or

(10) An individual who is applying for or receiving medical assistance described in 42 USC 1396p(c)(1) purchases a life estate interest in another individual's home, unless they have resided in the home for a period of at least one year after the date of the purchase.

(c) Actions which would cause income or resources not to be received shall include but not be limited to:

- (1) Irrevocably waiving pension income or any other form of income;
- (2) Waiving an inheritance;
- (3) Not accepting or accessing injury settlements, judgments, or court awards;
- (4) Tort settlements which are diverted by the defendant into a trust or similar device to be held for the benefit of the plaintiff; or
- (5) Refusal to take legal action to obtain a court ordered payment that is not being paid, such as child support or alimony.

(d) For individuals applying for or receiving financial assistance or institutionalized medical assistance, the district office shall evaluate asset transfers to determine if the individual derived fair market value, as defined in He-W 601.04(b), from the transfer.

(e) The district office shall evaluate the transfer to determine if the individual derived fair market value, as defined in He-W 601.04(b), whenever an individual applying for or receiving financial assistance or institutionalized medical assistance has transferred, assigned or disposed of title or ownership of an otherwise excluded home to another individual or entity.

(f) Asset transfers in which the client receives fair market value shall require no further evaluation for asset transfer.

(g) For an asset to be considered transferred for fair market value or to be considered to be transferred for valuable consideration, the compensation received for the asset shall be in a tangible or otherwise assessable form with intrinsic value. A transfer of assets for love and consideration, or similar reasons, shall not be considered to be a transfer for fair market value.

(h) Although relatives may legitimately be paid for providing care, a transfer of assets to a relative for care provided in the past shall not be a transfer for fair market value. It shall be assumed that services provided for free in the past were intended to be provided without compensation unless it can be rebutted with tangible evidence that a compensation arrangement had been agreed to in writing at the time services were provided.

(i) When determining whether an individual has received fair market value for a transfer when a life estate has been established, the division shall:

- (1) Determine what the fair market value of the asset was at the time of transfer;
- (2) Take into account the individual's age at the time of the transfer; and
- (3) Calculate the value of the life estate using the life estate tables found in the Supplemental Security Income (SSI) Program Operations Manual System (POMS), section SI 01140.120 as follows:
 - a. The life estate value shall be established by multiplying the market value of the asset by the life estate factor that corresponds to the individual's age at the time of the transfer;
 - b. The value of the life estate shall be subtracted from the value of the asset transferred; and
 - c. The difference between the value of the life estate and the amount the individual was reimbursed for the remainder interest shall be the portion of the asset transferred for less than fair market value.

(j) When determining whether an individual or spouse has received fair market value for a transfer of assets into an annuity, the department shall:

- (1) Determine the fair market value of the asset at the time of transfer into the annuity;
- (2) Determine if the expected return on the annuity is commensurate with a reasonable estimate of the life expectancy of the beneficiary in order to determine whether the annuity is actuarially sound;
- (4) Determine that the individual has received fair market value for the annuity if the average number of years of expected life remaining for the individual coincides or exceeds the life of the annuity; and
- (5) Determine that the individual did not receive fair market value for the annuity if the average number of years of expected life remaining for the individual is less than the life of the annuity.

(k) The background information of the asset transfer shall be evaluated further to determine if assets might have been transferred for purposes of qualifying for financial assistance or medical assistance as an institutionalized individual, if the district office determines that the individual did not receive fair market value from the transfer.

(l) Factors to be evaluated in assessing asset transfers shall include:

- (1) Timeframes between the transfer of assets and the date of application;
- (2) The individual's health at the time of the transfer; and
- (3) The individual's economic situation at the time of the transfer.

(m) The transfer shall be considered questionable if the evaluation of background information of the transfer suggests that the individual transferred assets for purposes of qualifying for financial assistance or medical assistance as an institutionalized individual or results in qualifying earlier than otherwise would have been possible if the individual had retained all of the asset(s).

(n) The individual shall provide additional information and documentation to demonstrate that assets were not transferred for purposes of qualifying for assistance, if the transfer is considered questionable.

(o) Reasons for transferring assets for purposes other than qualifying for assistance shall include:

(1) The individual transferred the asset to prevent foreclosure or sale of the asset by the lien holder, thus preventing total loss of the asset;

(2) The individual transferred the asset for self-support because the individual's income and resources were insufficient to meet basic needs or to maintain upkeep of the asset, such as taxes and repairs, and the individual's basic needs were provided for in return for the transfer, or the individual lived off the proceeds of the asset;

(3) The individual transferred the asset to meet the terms of a written agreement, including debts arising from such agreement;

(4) The individual transferred the asset to meet the terms of an oral agreement, including debts arising from such agreement; or

(5) The individual is not able to afford to take the necessary action to obtain the asset or the cost of obtaining the asset is greater than the asset is worth, resulting in a case of failure to cause assets to be received.

(p) The burden of proof for substantiating the fact that assets were not transferred for purposes of qualifying for assistance shall rest with the individual.

(q) If the individual refuses or fails to prove that assets were not transferred for purposes of qualifying for financial assistance, the district office shall determine that assets were transferred for the purposes of qualifying for assistance and shall deny financial assistance:

(1) For 60 months from the date of the transfer to an irrevocable trust when the principal is not available to the individual; and

(2) For 36 months from the date of all other transfers.

(r) If the individual refuses or fails to prove that assets were not transferred for purposes of qualifying for medical assistance, the district office shall determine that the assets were transferred for the purposes of qualifying for assistance and the individual shall be ineligible pursuant to (s) below for:

(1) Nursing facility services;

(2) A level of care in any institution equivalent to that of nursing facility services; and

(3) Home and community-based services.

(s) The department shall use the following methodologies to determine the number of months of ineligibility for the services described in (r) above for an individual who has transferred property for purposes of qualifying for medical assistance:

- (1) The penalty date for all individuals who transfer assets for less than fair market value in order to make themselves eligible for assistance prior to February 8, 2006, shall be the first day of the month in which the asset was transferred, provided that the date does not occur during an existing penalty period as described in (s)(5) below;
- (2) The penalty date for all individuals who transfer assets for less than fair market value in order to make themselves eligible for assistance on or after February 8, 2006, shall be whichever is later:
 - a. The first day the individual met all other eligibility criteria and would be eligible but for the transfer, provided that the date does not occur during an existing penalty period as described in (5) below; or
 - b. The first day of a month after which assets have been transferred provided that the date does not occur during an existing penalty period as described in (5) below;
- (3) When an individual or an individual's spouse makes multiple fractional transfers of assets in more than one month for less than fair market value, the penalty shall be based on the total cumulative uncompensated value of all such transfers, pursuant to 42 USC 1396p(c)(1);
- (4) The penalty period shall be based solely on the value of the assets transferred;
- (5) When a countable transfer takes place during an existing penalty period, a new penalty period shall not begin until the existing penalty period has expired;
- (6) When an individual makes a series of transfers within one month, the total value of the individual transfers for the month shall be used to calculate the penalty;
- (7) The penalty period shall be the number of months equal to:
 - a. The uncompensated value of assets transferred by the individual, divided by the average statewide monthly nursing facility private rate; and
 - b. The average statewide daily nursing facility rate shall be established by dividing the average statewide monthly nursing facility private rate, as determined and updated annually by the division's bureau of audits and rate setting, by 30.42;
- (8) When the penalty period consists of any number of full months and a partial month, the partial month penalty period shall apply in accordance with He-W 620.01(s)(10);
- (9) When the amount of the transfer is less than the average statewide monthly nursing facility private rate, a partial month penalty shall apply;
- (10) To determine the number of days the partial month penalty shall be in effect, the uncompensated value of assets transferred by the individual shall be divided by the average daily nursing facility rate described in He-W 620.01(s)(7)b;

(11) When assets have been transferred so that the penalty periods overlap, the individual penalty periods shall be calculated and imposed sequentially;

(12) When multiple transfers are made in such a way that the penalty period for each transfer would not overlap, each transfer shall be treated as a separate event, each with its own penalty period;

(13) When a spouse of an individual transfers an asset that results in a penalty for the individual, the penalty period shall be apportioned between the spouses when:

- a. The spouse either is or becomes eligible for Medicaid;
- b. A penalty could be assessed against the spouse; and
- c. Some portion of the penalty against the individual remains at the time the above conditions are met;

(14) When the penalty period for an individual is interrupted due to the death of the individual or due to discharge from institutionalized care, the remaining penalty period applicable to both spouses shall be served by the remaining spouse; and

(15) A penalty period imposed for a transfer of assets shall run continuously from the first date of the penalty period, regardless of whether the individual remains institutionalized.

(t) A penalty shall not be assessed for transfers of assets for less than fair market value under any of the following circumstances:

(1) The individual intended and attempted to dispose of the asset either at fair market value, or for other valuable consideration, and circumstances caused the individual to transfer the asset for less than fair market value;

(2) The individual transferred the assets for a purpose other than to qualify for medical assistance; or

(3) All of the assets transferred for less than fair market value have been returned to the individual.

(u) Individuals claiming that circumstances caused the asset to be transferred for less than fair market value pursuant to (t)(1) above, shall provide documentation of:

(1) The individual's attempt to dispose of the asset at fair market value, or for other valuable consideration; and

(2) The value at which the asset was disposed.

(v) Individuals claiming that assets were transferred for a purpose other than to qualify for medical assistance pursuant to (t)(2) above, shall provide documentation of:

(1) The specific purpose for which the asset was transferred; and

(2) The reason it was necessary to transfer the asset for less than fair market value.

(w) If a penalty was assessed for transferring an asset for less than fair market value and the asset was returned to the individual, then the department shall:

- (1) Generate a retroactive adjustment back to the beginning of the penalty period if the individual met all other eligibility criteria; or
- (2) Redetermine the penalty period pursuant to (s) above, when only part of an asset, or its equivalent value, has been returned.

(x) Asset transfer penalties shall not be imposed due to undue hardship pursuant to RSA 167:4,III-a and 42 USC 1396p(c)(2)(D) as amended by Public Law 109-171 Section 6011.

Readopt He-W 621, effective 4-22-08 (Document #9136), to read as follows:

PART He-W 621 TECHNICAL REQUIREMENTS FOR NURSING FACILITIES (NF) AND HOME AND COMMUNITY BASED CARE (HCBC) SERVICES

He-W 621.01 Waiver of Asset Transfer Penalty.

(a) Requests for a waiver of the asset transfer penalty due to undue hardship pursuant to RSA 167:4,III-a and 42 USC 1396p(c)(2)(D) as amended by Public Law 109-171 Section 6011, shall be submitted on a document provided by the department, which includes the following:

- (1) The individual's name;
- (2) The reason(s) for the undue hardship waiver request; and
- (3) The individual's or authorized representative's signature.

(b) For the request for a waiver described in (a) above to be considered complete, the individual shall provide all required verifications pursuant to (e) or (f) below, or RSA 167:4,III-a(a).

(c) The date the department receives the completed request described in (b) above, shall be the individual's filing date for a waiver of the asset transfer penalty.

(d) The filing date pursuant to (c) above, shall be no later than 30 calendar days from the date on the department's notice of a penalty period for NF or HCBC services.

(e) To verify the undue hardship described in 42 USC 1396p(c)(2)(D)(1)(A), as amended by Public Law 109-171 Section 6011, the individual shall provide:

- (1) For NF services:
 - a. A signed statement from the institution documenting that the individual:
 1. Is currently residing in the institution; and
 2. Does not demonstrate the ability to pay the institution for services; and

b. A signed statement from a licensed physician, or a licensed nurse practitioner documenting that:

1. They are the individual's primary health care professional; and
2. The deprivation of NF or HCBC services would deprive the individual of medical care such that the individual's health or life would be endangered; or

(2) For HCBC services:

a. A signed statement from a licensed physician, or a licensed nurse practitioner documenting that;

1. They are the individual's primary health care professional;
2. The individual does not demonstrate the ability to pay for HCBC services; and
3. The deprivation of NF or HCBC services would deprive the individual of medical care such that the individual's health or life would be endangered.

(f) To verify the undue hardship described in 42 USC 1396p(c)(2)(D)(1)(B), as amended by Public Law 109-171 Section 6011, the individual shall provide:

(1) A signed statement from the applicant or recipient of NF or HCBC services documenting that the application of a penalty period would deprive the individual of food, clothing, shelter, or other necessities of life; and

(2) A signed statement from every individual who directly received any asset transferred by the applicant or recipient of NF or HCBC services that are subject to a penalty period pursuant to 42 USC 1396p(c), documenting that the individual who received the transferred asset is unable or unwilling to provide the applicant or recipient of NF or HCBC services with food, clothing, shelter, or other necessities of life.

(g) Pursuant to 42 USC 1396p(c)(2)(D)(1)(B), as amended by Public Law 109-171 Section 6011, an individual shall be considered to be deprived of other necessities of life when the individual experiences:

(1) A discontinuation of heat, hot water, electricity, gas service, or cooking fuel; or

(2) A lack of transportation to obtain Medicaid covered medical and dental services from Medicaid enrolled providers.

He-W 621.02 Hardship Waiver for Individuals with Substantial Home Equity.

(a) Individuals shall not be denied for NF or HCBC services pursuant to He-W 656.05(d) if:

(1) The individual submits a request for a waiver of the eligibility criteria described in He-W 656.05(d); and

(2) The denial of NF or HCBC services would deprive the individual of:

- a. Necessary care such that his or her life would be endangered; or
- b. Food, clothing, shelter, or, pursuant to He-W 621.01(d), other necessities of life.

(b) The requests for a waiver described in (a) above shall be submitted on a document provided by the department, which includes the following:

- (1) The individual's name;
- (2) The reason(s) for the undue hardship waiver request; and
- (3) The individual's or authorized representative's signature.

(c) For a request for a waiver described in (b) above to be considered complete, the individual shall provide all required verification pursuant to (f) or (g) below.

(d) The date the department receives the completed request described in (c) above, shall be the individual's filing date for a waiver.

(e) The filing date pursuant to (d) above shall be no later than 30 calendar days from the date on the department's notice of a denial of NF or HCBC services.

(f) Individuals shall verify the undue hardship described in (a)(2)a. above by submitting the documentation described in:

- (1) He-W 621.01(e)(1) for NF services; or
- (2) He-W 621.01(e)(2) for HCBC services.

(g) Individuals shall verify the undue hardship described in (a)(2)b. above by submitting a notarized written declaration that documents the individual's undue hardship.

He-W 621.03 Administrative Appeals.

(a) Individuals denied waivers described in He-W 621.01 and He-W 621.02 may appeal the department's decision and request an administrative appeal pursuant to He-C 200.

Readopt He-W 656.05, effective 4-22-08 (Document #9136), to read as follows:

He-W 656.05 Real Property Resources.

(a) For the adult categories of financial and medical assistance, real property resources shall be treated as follows:

- (1) The home occupied by the client shall not be counted when determining eligibility for adult categories of financial or medical assistance;
- (2) An unoccupied home shall not be counted during periods of temporary absence such as short term hospitalization or institutionalization;
- (3) Income-producing property, shall not be counted;

- (4) Any real property not otherwise excluded shall not be counted if it is necessary as the residence for the client's spouse, minor child, or disabled child;
- (5) One burial plot per assistance group member shall not be counted; and
- (6) The equity value of real property which is not specifically excluded above shall be counted as a resource when determining eligibility for adult categories of financial or medical assistance.

(b) For adult categories of financial and medical assistance, the assistance group shall take action to dispose of the property within 6 months of being notified by the district office that the property must be liquidated, and:

- (1) The equity value of the property shall not be counted during the disposal period;
- (2) The disposal period shall be extended as long as:
 - a. The client verifies that action has been taken to sell the property and that there are valid reasons for inability to sell the property; or
 - b. The client's hospitalization or institutionalization, although long term, is not expected to be permanent and it is likely that the client will return to the home; and

(c) If disposal does not occur within the disposal period, as specified in (b) above, financial and medical assistance shall be denied or terminated.

(d) For the NHEP/FAP category of financial and medical assistance, disposal of real property shall be treated as follows:

- (1) The assistance group shall take action to dispose of the property within 6 months of being notified by the district office that the property must be liquidated;
- (2) Clients shall have an additional 3 months to dispose of excess unoccupied real property, when the client verifies that he or she has made a good faith effort to sell the property;
- (3) The equity value of the property shall not be counted during the disposal period described in (1) and (2) above; and
- (4) When the property is sold, the net proceeds from the sale of the property shall count as a lump sum resource.

(e) Applicants and recipients of medical assistance described in He-W 620.01(r), who have an equity interest in their primary residence of \$500,000 or more, shall not be eligible for such services, but shall remain eligible for other medical assistance services, unless the individual's spouse, minor child or disabled child resides in the property.

APPENDIX

Rule	Federal Reg./RSA
He-W 620.01(a)-(i),	RSA 126-A:4-b,(a); RSA 161:4-a, II; RSA 167:3-c, I; RSA 167:4, I(b), III-a,

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He-W 621.03	RSA 126-A:4-b,(a); RSA 126-A:5, VIII; 42 USC 1396p(c)(2)(D)
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