

Secretary of State
**CERTIFICATE AND ORDER FOR FILING TEMPORARY ADMINISTRATIVE RULES
and
STATEMENT OF NEED AND JUSTIFICATION**

I certify that the attached copies are true, full and correct copies of the TEMPORARY Rule(s) adopted on March 13, 2017 by the

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| Department of Human Services, Office of Self-Sufficiency Programs | 461 |
| Agency and Division | Chapter Number |

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to become effective March 13, 2017 through September 8, 2017.*

**Temporary rules are effective for a maximum of 180 days including the effective date.*

Rule Caption: *Amending rule relating to treatment of revocable trusts to determine eligibility*

In the Matter of: *The temporary amendment of OAR 461-145-0540*

AMEND: 461-145-0540

ORS 411.060, 411.070, 411.083, 411.404, 413.085, 414.685

Stat. Auth.

42 USC 1396p(d)(4)(A)

Other Auth.

ORS 411.060, 411.070, 411.083, 411.404, 413.085, 414.685, 414.839

Stats. Implemented

Rule Summary

OAR 461-145-0540 relating to the treatment of trusts is being amended to reinstate the treatment of revocable trusts in the ERDC, REF, REFM, and TANF programs in effect prior to 2016 to align the ERDC and TANF programs with the SNAP program, and align the REF and REFM programs with the TANF program. The amendment counts trust payments as unearned income in these four programs.

The rule text showing changes is available at
http://www.dhs.state.or.us/policy/selfsufficiency/ar_recent.htm.

Need for the Rules

OAR 461-145-0540 needs to be amended to align the SNAP program with the ERDC, REF, REFM, and TANF programs and reduce unnecessary spending in these four programs by reinstating the treatment of revocable trusts in the ERDC, REF, REFM, and TANF programs in effect prior to prior to 2016 and correctly counting trust payments as unearned income in these four programs.

Documents Relied Upon

None

Justification of Temporary Rules

The Department finds that failure to act promptly by amending OAR 461-145-0540 will result in serious prejudice to the public interest and the Department. Without the change, the Department's SNAP program will not be aligned with the ERDC, REF, REFM, and TANF programs and these four programs will spend funds unnecessarily. The Department needs to proceed by temporary rule because new eligibility decision are being made on an ongoing basis and funds are limited.

Trusts

- (1) This section applies to all *trust funds* (see OAR 461-001-0000) in the REF, REFM, SNAP, and TANF programs. It also applies in the OSIP, OSIPM, and QMB-DW programs for *trust funds* established before October 1, 1993:
 - (a) *Trust funds* are counted as a resource if the fund is legally available for use by a member of the *financial group* (see OAR 461-110-0530) for items covered by program benefits. In the OSIP, OSIPM, and QMB-DW programs, the amount of the trust that is considered legally available is the maximum amount that could be distributed to the beneficiary under the terms of the trust, regardless of whether the trustee exercises his or her authority to actually make a distribution.
 - (b) *Trust funds* are excluded if the fund is not available for use by a member of the *financial group*. The *financial group* must try to remove legal restrictions on the trust, unless that would cause an expense to the group.
 - (c) The part of the fund available for use for medical expenses covered by the medical program for which the *financial group* is eligible is counted.
- (2) In the ERDC program, all *trust funds* are excluded.
- (3) In the OSIP, OSIPM, and QMB-DW programs, *trust funds* established on or after October 1, 1993, are treated in accordance with sections (5) to (11) of this rule.
- (4) In the QMB-BAS, QMB-SMB, and QMB-SMF programs:
 - (a) All *trust funds* are excluded as a resource.
 - (b) A payment made from the trust to or for the benefit of the client is counted as unearned income.
- (5) A trust is considered established if the *financial group* used their resources to form all or part of the trust and if any of the following established a trust, other than by a will:
 - (a) The client.
 - (b) The client's spouse.
 - (c) Any other person, including a court or administrative body, with legal authority to act in place of or on behalf of the client or the client's spouse.
 - (d) Any other person, including a court or administrative body, acting at the direction or upon the request of the client or the client's spouse.
- (6) If the trust contains resources or income of another person, only the share attributable to the client is considered available.

(7) Except as provided in section (10) of this rule, the following factors are ignored when determining how to treat a trust:

- (a) The purpose for which the trust was established.
- (b) Whether or not the trustees have or exercise any discretion under the trust.
- (c) Any restrictions on when or if distributions may be made from the trust.
- (d) Any restrictions on the use of distributions from the trust.

(8) If the trust is revocable, it is treated as follows:

(a) In ~~all programs except the QMB-BAS, QMB-SMB, QMB-SMF, and SNAP~~ the OSIP, OSIPM, and QMB-DW programs:

- (A) The total value of the trust is considered a resource available to the client.
- (B) A payment made from the trust to or for the benefit of the client is excluded as income.

(b) In the ERDC, REF, REFM, SNAP, and TANF programs:

- (A) The total value of the trust is considered a resource available to the client.
- (B) A payment made from the trust to or for the benefit of the client is considered unearned income.

(c) A payment from the trust other than to or for the benefit of the client is considered a transfer of assets covered by OAR 461-140-0210 and following.

(9) If the trust is irrevocable, it is treated as follows:

- (a) If, under any circumstances, the funds transferred into the trust are unavailable to the client and the trustee has no discretion to distribute the funds to or for the benefit of the client, the client is subject to a transfer-of-resources penalty as provided in OAR 461-140-0210 and following.
- (b) If, under any circumstances, payments could be made to or on behalf of the client, the share of the trust from which the payment could be made is considered a resource. A payment from the trust other than one to or for the benefit of the client is considered a transfer of assets that may be covered by OAR 461-140-0210.
- (c) If, under any circumstances, income is generated by the trust and could be paid to the client, the income is unearned income. Payments made for any reason other

than to or for the benefit of the client are considered a transfer of assets subject to disqualification per OAR 461-140-0210.

- (d) If any change in circumstance makes assets (income or resources) from the trust unavailable to the client, the change is a disqualifying transfer as of the date of the change.
- (10) Notwithstanding the provisions in sections (1), (3), and (5) to (9) of this rule, the following trusts are not considered in determining *eligibility* (see OAR 461-001-0000) for OSIPM and QMB-DW:
- (a) A trust containing the assets of a client determined to have a disability that meets the SSI criteria that was created before the client reached age 65, if the trust was established by one of the following and the state will receive all funds remaining in the trust upon the death of the client, up to the amount of medical benefits provided on behalf of the client:
 - (A) The client's *parent* (see OAR 461-001-0000).
 - (B) The client's grandparent.
 - (C) The client's legal guardian or conservator.
 - (D) A court.
 - (b) A trust established between October 1, 1993 and March 31, 1995 for the benefit of the client and containing only the current and accumulated income of the client. The accumulated amount remaining in the trust must be paid directly to the state upon the death of the client up to the amount of medical benefits provided on behalf of the client. The trust is the total income in excess of the income standard for OSIPM. The remaining income not deposited into the trust is available for the following deductions in the order they appear prior to applying the patient liability:
 - (A) Personal-needs allowance.
 - (B) Community spouse monthly maintenance needs allowance.
 - (C) Medicare and other private medical insurance premiums.
 - (D) Other incurred medical.
 - (c) A trust established on or after April 1, 1995 for the benefit of the client whose income is above 300 percent of the full SSI standard and containing the current and accumulated income of the client. The accumulated amount remaining in the trust must be paid directly to the state upon the death of the client up to the amount of medical assistance provided on behalf of the client. The trust contains all of the client's income. The income deposited into the trust is distributed

monthly in the following order with excess amounts treated as income to the individual subject to the rules on transfer of assets in division 140 of this chapter of rules:

- (A) Personal needs allowance and applicable room and board standard.
- (B) Reasonable administrative costs of the trust, not to exceed a total of \$50 per month, including the following:
 - (i) Trustee fees.
 - (ii) A reserve for administrative fees and costs of the trust, including bank service charges, copy charges, postage, accounting and tax preparation fees, future legal expenses, and income taxes attributable to trust income.
 - (iii) Conservatorship and guardianship fees and costs.
- (C) Community spouse and family monthly maintenance needs allowance.
- (D) Medicare and other private medical insurance premiums.
- (E) Other incurred medical costs as allowed under OAR 461-160-0030 and 461-160-0055.
- (F) Contributions to reserves or payments for child support, alimony, and income taxes.
- (G) Monthly contributions to reserves or payments for the purchase of an irrevocable burial plan with a maximum value of \$5,000.
- (H) Contributions to a reserve or payments for home maintenance if the client meets the criteria of OAR 461-155-0660 or OAR 461-160-0630.
- (I) Patient liability not to exceed the cost of *home and community-based care* (see OAR 461-001-0030) or nursing facility services.

(11) This section of the rule applies to a trust signed on or after July 1, 2006.

- (a) Notwithstanding the provisions of sections (1), (3), and (5) to (9) of this rule, a trust that meets the requirements of subsection (b) of this section is not considered in determining *eligibility* for OSIPM and QMB-DW, except that if the client is age 65 or older when the trust is funded or a transfer is made to the trust, the transfer may constitute a disqualifying transfer of assets under OAR 461-140-0210 and following.
- (b) This section of the rule applies to a trust that meets all of the following conditions:

- (A) The trust is established and managed by a non-profit association.
 - (B) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
 - (C) The trust is established by the client, client's *parent*, grandparent, or legal guardian or a court for clients who have disabilities.
 - (D) Upon the death of the beneficiary or termination of the trust, the trust pays to the state an amount equal to the total medical assistance paid on behalf of the beneficiary under the State plan for Medicaid. The amount paid to the state may be reduced by administrative costs directly related to administering the sub-trust account of the beneficiary.
 - (E) The trust contains the resources or income of a client who has a disability that meets the SSI criteria.
- (12) In the OSIP, OSIPM, and QMB-DW programs, the provisions of this rule may be waived for an irrevocable trust if the Department determines that denial of benefits would create an undue hardship on the client if, among other things:
- (a) The absence of the services requested may result in a life-threatening situation.
 - (b) The client was a victim of fraud or misrepresentation.

Stat. Auth.: ORS 411.060, 411.070, 411.083, 411.404, 411.816, 412.049, 413.085, 414.685
Stats. Implemented: ORS 411.060, 411.070, 411.083, 411.404, 411.816, 412.049, 413.085, 414.685, 414.839