STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES
MED-QUEST DIVISION

NOTICE OF PUBLIC HEARING

Pursuant to sections 91-3 and 92-41, Hawaii Revised Statutes, notice is hereby given that the Department of Human Services will hold a public hearing to consider proposed amendments to existing rules, and the adoption of new rules of the Med-QUEST Division for the purpose of conforming to State and Federal Statutes.

The proposed amendments are based on State and Federal laws. Brief descriptions of the proposed changes are listed below.

CHAPTER 17-1721 MEDICAL ASSISTANCE TO THE AGED, BLIND AND DISABLED

New Subchapter 8 of Chapter 17-1721 incorporates the Medicaid regulations regarding the transfer of assets for individuals requesting coverage of long-term care services from repealed section 17-1721-45 with new provisions required by the Deficit Reduction Act of 2005 (DRA). The Medicaid program provides coverage of medical services for impoverished individuals who do not have sufficient income and assets to pay for required medical services. Medicaid has evolved to be the primary payer of long-term care services, because individuals who require long-term care services will eventually become impoverished due to the high cost and continual need of long-term care services. Medicaid regulations impose penalty periods when individuals artificially impoverish themselves to qualify for Medicaid by making non-exempt transfers of their assets. Medicaid will not pay for long-term care services during a penalty period. The intent of the penalty period is to have individuals use personal assets to pay for their long-term care services before accessing Medicaid funding. The length of the penalty period is based on the period the transferred asset could have paid for the individual's long-term care services. Individuals or their representatives have exploited loopholes in the Medicaid regulations to make non-exempt transfers without incurring or serving a penalty period. The DRA amendments address many of these loopholes, thus ensuring that individuals will use personal assets to pay for long-term care services before accessing Medicaid. Transfers made to the individual's spouse and dependent children (minors, children who are blind or disabled) are exempt from the application of a penalty period. The penalty provisions also do not apply to the transfer of the home property to a non-dependent caretaker adult child who resided with the individual for two years prior to the need for long-term care service payments. Thus, a penalty period is generally applied to transfers made to non-dependent relatives who were not caregivers, and to other non-related individuals.

1. §17-1721-45, Disposal of assets for less than fair market value. This section is repealed. The provisions of this section will be incorporated in subchapter 8.

2. §17-1721-50, Purpose. This section states that this subchapter will establish the requirements for the treatment of assets for individuals who require coverage of long-

term care services, to include a period of ineligibility for individuals who transferred assets for less than fair market value.

3. §17-1721-51, Definitions. This sections provides definitions of "Actuarially sound", "Annuity", "Blind child", "Disabled child, "Encumbrance", "Fair market value", "Home equity", "IRA", "IRC", "Irrevocable trust", "Life interest", "Look-back period", "Penalty period", "Promissory note", "Remainder beneficiary", "Revocable trust", "Stream of income", and "Valuable consideration" for purposes of this subchapter.

4. §17-1721-52, Penalty for the transfer of an asset for less than fair market value. This section specifies that Medicaid will not cover long-term care services for an individual who transferred assets for less than fair market value in the period prior to requesting coverage of long-term care services. This period is defined as the "look-back" period. The DRA requires a sixty months look-back period for all transfers made on or after February 8, 2006. The look-back period for assets transferred prior to February 8, 2006 remains at thirty-six months, or sixty months for assets transferred to an irrevocable trust. The section specifies the treatment of transfers made subsequent to the look-back period, and the assets and income that are exempt from consideration in determining a penalty period.

5. §17-1721-53, Treatment of annuities. This section describes the treatment of annuities owned by individuals who require coverage of long-term care services. Annuities established on or after February 8, 2006 that fail to meet certain requirements shall be considered as transferred assets. The primary requirements are that the State shall be named as a remainder beneficiary, the annuity is actuarially sound, and equal payments are made throughout the term of the annuity. The DRA amendments specify that certain annuities are exempt from consideration as a transferred asset if they were established by retirement accounts and IRAs that meet specified requirements of the Internal Revenue Code.

6. §17-1721-54, Treatment of promissory notes, loans and mortgages. This section specifies that promissory notes, loans, and mortgages established on or after February 8, 2006 shall be considered as a transferred asset unless the instrument is actuarially sound, makes equal payments, and is not cancelled upon the death of the individual.

7. §17-1721-55, Treatment of the purchase of a life interest in the home property of another. This section specifies that the funds used to purchase a life interest in the property of another on or after February 8, 2006 shall be considered as a transferred asset if the individual does not live on the property for a year after the purchase.

8. §17-1721-56, Treatment of the transfer of income. This section describes the treatment of the transfer of income by an individual who requires coverage of long-term care services or their spouse. The provisions would be applicable to the transfer of income received, or to income that could have been be received.

9. §17-1721-57, <u>Transfer of assets that are not subject to the assessment of a penalty.</u> This section describes the transfers that are not subject to a penalty period for coverage of long-term care services. Transfers made to the individual's spouse and dependent children are exempt and transfers of the individual's home to caretaker children and to siblings under certain conditions are exempt. In additions, transfers that can be proven to have been made for other purposes than to qualify for Medicaid may be exempted.

10. §17-1721-58, <u>Determining a penalty period.</u> This section describes the process to calculate and impose a penalty period for an individual who transferred an asset for less than fair market value. The DRA prohibits the rounding down or exempting partial month penalties. In addition, the DRA requires new provisions for assets transferred on or after February 8, 2006. The existing provisions specify that a penalty period would commence in the month the asset was transferred, regardless of the individual's eligibility for Medicaid at the time of the transfer. The new provisions require that a penalty would commence when the individual is eligible for Medicaid and requires the coverage of long-term care services. Thus, the DRA provisions ensure that Medicaid will not provide coverage of long-term care services during a penalty period.

11. §17-1721-59, <u>Waiver of a penalty period due to undue hardship</u>. This section describes the provisions to waive a penalty period if the application of the penalty would result in undue hardship the individual who require coverage of long-term care services. The Department may grant waiver of a penalty if the individual can substantiate that the transferred asset cannot be returned and used to pay for individual's long-term care.

12. §17-1721-60, <u>An individual with</u> <u>substantive equity in a home property.</u> This section specifies that coverage of long-term care services shall not be provided to individuals who have over $750,000 equity in their home property. Equity in a home can be considered an exempt asset in determining Medicaid eligibility. The DRA amendments do not allow coverage of long-term care services for individual who is eligible for Medicaid who has substantial equity in a home property. Hawaii has elected to use $750,000, the maximum allowed by the DRA. This provision does not apply if the spouse or a dependent child of the individual is residing in the home. In addition, there are provisions to grant a waiver of this section if the individual cannot legally reduce the equity in the home.

<u>CHAPTER 17-1725 ASSETS</u>

1. §17-1725-2 <u>Definitions.</u> This section amends the definition of "institutionalized individual" and adds definitions of "Annuity", "Continuing care retirement community", "Irrevocable trust", "Life care community", "Promissory note", and "Revocable trust" to reflect amendments to Chapter 17-1721 to implement the new provisions of the Deficit Reduction Act of 2005 regarding the transfer of assets for individuals requesting coverage of long-term care services.

2. §17-1725-10 <u>Assets to be exempted.</u> New paragraph (35) is added to specify that exempt assets would include an annuity that was irrevocable and not assignable.

3. §17-1725-15 Assets to be considered. New paragraphs (21), (22), and (23) are added to specify conditions to count annuities, promissory notes, and entrance fees for an individual residing in a continuing care retirement community as available assets.

A public hearing will be held at the following time and place:

Tuesday, July 28, 2009 at 9:00 am, Liliuokalani Building, 1390 Miller Street, 2nd Floor Conference Rooms, Honolulu, Hawaii.

All interested parties are invited to attend the hearing and to state their views relative to the proposed rules either orally or in writing. Should written testimony be presented, five (5) copies shall be made available to the presiding officer at or before the public hearing to:

Department of Human Services
Med-QUEST Division
P. O. Box 700190
Kapolei, Hawaii 96709-0190

Residents of Hawaii, Kauai, Maui, and Molokai wishing to present oral testimonies may also contact the Med-QUEST Division on the respective islands no earlier than seven (7) days before the Honolulu hearing date to have their testimony recorded:

East Hawaii Section
88 Kanoelehua Avenue, Room 107
Hilo, Hawaii 96720 (933-0339)

West Hawaii Section
Lanihau Professional Center
75-5591 Palani Road, Ste. 3004
Kailua-Kona, Hawaii 96740 (327-4970)

Kauai Section
4473 Pahee Street, Suite A
Lihue, Hawaii 96766 (241-3575)

Maui Section
210 Imi Kala Street, Suite 101
Wailuku, Hawaii 96793 (243-5780)

Molokai Section
State Civic Center
65 Makaena Street, Room 110
Kaunakakai, Hawaii 96748 (553-1758)

Lanai Unit
Call toll free 1-800-894-5755

A copy of the proposed rules will be mailed at NO COST to any interested person by requesting a copy by writing to:

Department of Human Services
Med-QUEST Division
P. O. Box 700190
Kapolei, Hawaii 96709-0190

or by calling 692-8058. Neighbor island residents may request a copy of the proposed rules at NO COST by contacting the Med-QUEST Division Sections as noted above.

A copy of the proposed rule changes will be available for public viewing from the first working day that the legal notice appears in the Honolulu Star Bulletin, Hawaii Tribune Herald, West Hawaii Today, The Maui News, and The Garden Island, through the day the public hearing is held, from Monday - Friday between the hours of 7:45 a.m. to 4:30 p.m. at the appropriate Med-QUEST Division offices on their respective islands listed above. On Oahu, the proposed rules will be available at 601 Kamokila Boulevard, Room 518, Kapolei, Hawaii 96707 and 801 Dillingham Boulevard, 3rd Floor, Honolulu, Hawaii 96817.

Proposed rules are also available at the Virtual Rules Center located at the following website:

http://www.hawaii.gov/dhs/main/har/

Special accommodations (i.e. Sign Language Interpreter, large print, taped materials, or accessible parking) can be made, if requested at least seven (7) working days before the scheduled public hearing on Oahu by calling 692-8058. Neighbor island residents needing special accommodations should contact the Med-QUEST Division Sections on the respective islands with their requests.

DEPARTMENT OF HUMAN SERVICES
LILLIAN B. KOLLER, DIRECTOR