May 7, 2021

Acting Administrator Liz Richter  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Hubert H. Humphrey Building  
200 Independence Avenue, S.W.  
Washington, DC  20201

RE:  New York’s Application for 1115 Waiver Authority to Implement a 30-month Transfer of Assets Look-back for Community Based Long-Term Care Services

Dear Acting Administrator Richter:

AARP, on behalf of our nearly 38 million members – including nearly 2.5 million members in New York State – and all older Americans nationwide, appreciates the opportunity to comment on New York’s application for 1115 Waiver authority to implement a 30-month transfer-of-assets look-back period for certain individuals newly seeking coverage for community based long-term care (CBLTC) services. AARP has a long history of advocating for access to high quality care and consumer protections, and AARP opposes the application of the asset transfer policies to individuals living in the community (non-institutionalized individuals).

Specifically, New York proposes to implement a policy to impose penalties on certain individuals in need of CBLTC services who are applying for Medicaid and who have transferred assets during a 30-month look-back period. The penalty for such transfers is to subject the individual to a period of Medicaid ineligibility. The policy would be applied to individuals applying for Medicaid coverage of CBLTC services on or after January 1, 2022, including to people seeking adult day health care, assisted living program services, certified home health agency services, personal care services, consumer directed personal assistance program, limited licensed home care services, private duty nursing services, and managed long-term care in the community. Under the waiver amendment application, individuals who transfer assets for less than fair market value during those 30 months (beginning on October 1, 2020) would have their ability to access Medicaid covered services denied or delayed.

The punitive asset transfer rules subject vulnerable individuals – many of whom are elderly and have disabilities – to a period of ineligibility that can leave a person who needs help to live independently in their home and community, and their family members, scrambling to figure out how to obtain such care. This policy would exacerbate the current health crisis when it comes to
caring for those who are sick, older adults, or people with disabilities, making it harder for them to access Medicaid and long-term care services in the community.

As part of the American Recovery Plan Act (ARP) of 2021, Congress enacted policies and funding to prioritize the expansion and availability of home and community-based services in recognition of the increased needs for those services demonstrated by the pandemic. The ARP provided for an enhanced federal matching payment to encourage not just the delivery of those services, but to encourage more innovation in home and community-based care and to expand access to those services. New York’s proposal is inconsistent with the strong policy preference that Congress enacted to recognize and support the value in keeping people who need long-term care in their homes and communities. Instead of impeding, delaying, or reducing access to those services, CMS and New York should support more options for people to access the community-based services that they need. In addition, if individuals do not have access to the CBLTC services they need to remain in their homes and communities, they could be at risk of going into a nursing home or other institutional setting. This would generally be less preferable and more costly for most individuals and the state. Given that the Biden Administration has made the expansion of home and community-based services a priority, we urge CMS to reject the proposed state policy change.

Medicaid is an important safety net and option of last resort for individuals who need long-term services and supports, including for those who have exhausted their own savings paying for care. Understanding and applying for Medicaid is not a simple process. In fact, it is a complicated and time-consuming step that individuals and family caregivers may need to undertake after potentially years of needing gradually increased services and supports or the sudden need for Medicaid to pay for care during a crisis.

Despite the concerns outlined above, should CMS decide to approve, and the state move forward, with imposing asset transfer penalties to certain individuals applying for CBLTC services, we urge CMS to ensure that New York’s policy includes guardrails to protect vulnerable individuals who do not intentionally violate or misuse asset transfer rules and ensure that implementation of the policy is not a barrier to enrollment due to length, complexity, and documentation requirements. In addition, New York should ensure that certain exceptions to the transfer-of-asset rules are available to individuals who are facing hardship and for other reasonable exceptions.

New York’s policies and procedures should focus on imposing penalties only in cases where asset transfers are deliberately violating asset transfer rules and not penalize routine and ordinary practices of many individuals and families with moderate and low incomes. The state should clearly define and target asset transfer practices that are deliberately violating the rules as well as clearly define legitimate transfers that should not be subject to penalties. For example, legitimate transfers could include charitable donations and contributions to relatives’ medical and educational expenses. They should also include routine and reasonable family activities, such as providing family members with birthday or holiday gifts. Such permitted transfers could be subject to a ceiling amount, above which the state would apply more rigorous review and for which penalties could potentially be applied to rule violations.
In addition, AARP recommends that New York establish a threshold amount that reflects reasonable levels of transfers for charities, religious donations, or personal gifts. Transfers occurring during the look-back period that are below that threshold amount would not be subject to transfer-of-asset limitations and penalties would not apply. Likewise, a reasonable transfer threshold amount should be set so that transfers of amounts below that threshold that are undocumented should be deemed legitimate unless the state can demonstrate an intent to qualify for Medicaid improperly. These rules would facilitate a timely review process for small amounts, ensuring that applicants with innocuous and routine asset transfers are not subject to unreasonable barriers to CBLTC services. New York’s transfer-of-assets policy should also provide for clear exceptions for certain individuals, including those who are grandfathered.

We also note the potentially very time-consuming and burdensome process that individuals and families would need to undertake to track down 30 months of documentation – if they are fortunate enough to still have it – for birthday and holiday gifts to family members, charitable contributions, religious donations, and other reasonable and routine family and other activities described above. This is over and above any daily responsibilities for meeting an individual’s care needs prior to Medicaid eligibility and dealing with any crisis that may arise.

The administrative process for reviewing transfers should be straightforward and transparent, should not create a barrier to necessary community-based care services, and should be completed in a timely fashion. Reviewing applications for Medicaid eligibility that include asset transfer documentation should be subject to reasonable timelines that take into account any exigent need for care which could be furnished in the community. To the extent that the state is unable to meet a reasonable timeliness standard, the asset transfers under review should be deemed permissible. Vulnerable individuals in need of long-term care services should not be delayed from receiving benefits because the state agency is slow to review documentation and complete the enrollment process, especially absent deliberate violations of asset transfer rules during the 30-month look-back period. New York should also allow for and promptly process hardship waiver requests, including for individuals with an immediate need for services to prevent institutionalization.

If, after reviewing asset transfers during the look-back period, the state makes a determination that an individual is subject to a penalty period of ineligibility, the imposition of a penalty period should be delayed until it is determined that the applicant has the income and resources sufficient to pay for all necessary medical and support care and treatment, food, housing, utilities, and other necessities for the duration of the penalty period.

Applicants who are denied enrollment because of a transfer-of-assets penalty should be permitted to appeal the outcome of the transfer-of-assets review. The appeals process should be straightforward, easy to access, and provide for a timely determination. Individuals whose applications are subject to transfer-of-assets reviews should be provided with plain language information about how to access the appeals process and hardship waivers upon submitting their Medicaid application.

Again, we urge CMS to reject the proposed policy to impose transfer-of-assets prohibitions on certain individuals needing CBLTC services. We appreciate your consideration of AARP’s
comments. If you have any additional questions, feel free to contact me or have your staff contact Rhonda Richards on our Government Affairs staff at rrichards@aarp.org.

Sincerely,

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs