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## SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00

Topic	Reference
Introduction to Medicaid Trust Exceptions	SI 01120.203A
Policy—Exception To Counting Medicaid Trusts	SI 01120.203B
Policy—Waiver For Undue Hardship	SI 01120.203C
Procedure— Developing Exceptions To Resource Counting	SI 01120.203D
Procedure—Development Of Undue Hardship Waiver	SI 01120.203E
Procedure—Nonprofit Associations	SI 01120.203F
Procedure—Follow-Up To A Finding Of Undue Hardship	SI 01120.203G
Procedure—Reevaluating Revocable Trusts Processed Under The Policy In Effect From 1/1/2000 Through 1/31/2001	SI 01120.203H

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### A. Introduction to Medicaid trust exceptions

We refer to the exceptions discussed in this section as **Medicaid trust exceptions** because sections 1917(d)(4)(A) and (C) of the Social Security Act (the Act) (42 U.S.C. § 1396p(d)(4)(A) and (C)) set forth exceptions to the general rule of counting trusts as income and resources for the purposes of Medicaid eligibility and can be found in the Medicaid provisions of the Act. While these exceptions are also Supplemental Security Income (SSI) exceptions, we refer to them as Medicaid trust exceptions to distinguish them from other exceptions to counting trusts provided in the SSI law (e.g., undue hardship) and because the term has become a term of common usage.

Development and evaluation of Medicaid trust exceptions are based on the type of trust under review. There are two types of Medicaid trusts to consider:

- Special Needs Trusts

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- Pooled Trusts

## **B. Policy—~~Exception~~ for exception to counting Medicaid trusts**

### **1. Special needs trusts established under Section 1917(d)(4)(A) of the Act**

#### **a. General ~~—Special~~ rules for special needs trusts**

**NOTE:** Although this exception is commonly referred to as the **special needs** trust exception, the exception applies to any trust meeting the following requirements and does not have to be a strict **special needs** trust.

The resource counting provisions of Section 1613(e) do not apply to a trust:

- Which contains the assets of an individual **under age 65** and who is **disabled**; and
- Which is **established for the benefit of such individual through the actions of a parent, grandparent, legal guardian or a court**; and
- Which provides that the **State(s) will receive all amounts remaining** in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State Medicaid plan.

**CAUTION:** A trust which meets the exception to counting the trust under the SSI statutory trust provisions of Section 1613(e) must still be evaluated under the instructions in [SI 01120.200-2](#) to determine if it is a countable resource. If the trust meets the definition of a resource ([SI 01110.100B.1.](#)), it would will be subject to regular resource-counting rules.

#### **b. Under age 65**

To qualify for the special needs trust exception, the trust must be established for the benefit of a disabled individual under age 65. This exception does not apply to a trust established for the benefit of an individual age 65 or older. If the trust was established for the benefit of a disabled individual prior to the date the individual attained age 65, the exception continues to apply after the individual reaches age 65.

#### **c. Additions to trust after age 65**

Additions to or augmentation of a trust after age 65 (except as outlined below) are not subject to this exception. Such additions may be income in the month added to the trust, depending on the source of the funds (see [SI 01120.201J-7](#)) and may be counted as resources in the following months under regular SSI trust rules.

Additions or augmentation do not include interest, dividends or other earnings of the trust or portion of the trust meeting the special needs trust exception. If the trust contains the irrevocable assignment of the right to receive payments from an annuity or support payments made when the trust beneficiary was less than 65 years of age, annuity or support payments paid to a special needs trust are treated the same as payments made before the individual attained age 65 and do not disqualify the trust from the special needs trust exception.

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#### d. Disabled

To qualify for the special needs trust exception, the individual whose assets were used to establish the trust must be disabled for SSI purposes under section 1614(a)(3) of the Act.

#### e. Established for the benefit of the individual

Under the special needs trust exception, the trust must be established for and used for the benefit of the disabled individual. SSA has interpreted this provision to require that the trust be for the sole benefit of the individual, as described in [SI 01120.201F.2](#). ~~Any provisions that:~~ Other than trust provisions for payments described in [SI 01120.201F.2.b](#) and [SI 01120.201F.2.c](#), any provisions that:

- provide benefits to other individuals or entities during the disabled individual's lifetime, or
- allow for termination of the trust prior to the individual's death and payment of the corpus to another individual or entity (other than the State(s) or another creditor for payment for goods or services provided to the individual), will result in disqualification for the special needs trust exception.

Payments to third parties for goods and services provided to the trust beneficiary are allowed. ~~However, such payments should be evaluated under POMS [SI 01120.200E](#), [SI 01120.200F](#), and [SI 01120.201I](#), under the policy described in [SI 01120.201F.2.b](#); however, such payments should be evaluated under [SI 01120.200E](#) through [SI 01120.200F](#) and [SI 01120.201I](#) to determine whether the payments may be income to the individual.~~

#### f. Who established the trust

The special needs trust exception does not apply to a trust established through the actions of the disabled individual himself ~~or~~ herself. To qualify for the special needs trust exception, the assets of the disabled individual must be put into a trust established through the actions of the disabled individual's:

- parent(s);
- grandparent(s);
- legal guardian(s); or
- a court.

In the case of a legally competent, disabled adult, a parent or grandparent may establish a “seed” trust using a nominal amount of his or her own money, or if State law allows, an empty or dry trust. After the seed trust is established, the legally competent disabled adult may transfer his or her own assets to the trust or another individual with legal authority (e.g., power of attorney) may transfer the individual's assets into the trust.

In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. Approval of a trust by a court is not sufficient.

**NOTE:** Under 1613(e) of the Act, a trust is considered to have been “established by” an individual if any of the individual's (or the individual's spouse) assets are transferred to the trust other by will. Alternatively, under the Medicaid trust exceptions in 1917(d)(4)(A) and (C) of the Act, a trust can be “established by” an individual who does not provide the corpus of the trust, or

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transfer any of his/her assets to the trust, but rather someone who took action to establish the trust. To avoid confusion, we use the phrase “established through the actions of” rather than “established by” when referring to the individual who physically took action to establish a special needs or pooled trust.

#### **g. Legal authority and trusts**

The person establishing the trust with the assets of the individual or transferring the assets of the individual to the trust must have legal authority to act with respect to the assets of that individual. Attempting to establish a trust with the assets of another individual without proper legal authority to act with respect to the assets of the individual will generally result in an invalid trust.

For example, a parent establishing a seed trust for his adult child with his or her own assets has legal authority over his own assets to establish a trust. He or she only needs legal authority over his child's assets if he or she actually takes action with the child's assets, e.g., transfers them to a previously established trust.

A power of attorney (POA) is legal authority to act with respect to the assets of a disabled individual. However, a trust established under a POA will result in a trust we consider to be established through the actions of the disabled individual himself or herself because the POA merely establishes an agency relationship.

#### **h. State Medicaid reimbursement requirement**

To qualify for the special needs trust exception, the trust must contain specific language that provides that upon the death of the individual, the State(s) will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). The State(s) must be listed as the first payee and have priority over payment of other debts and administrative expenses except as listed in [SI 01120.203B.3.a.](#)

The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s). Medicaid payback may also not be limited to any particular period of time, i.e. payback cannot be limited to the period after establishment of the trust.

**NOTE:** Labeling the trust as a **Medicaid pay-back trust**, **OBRA 1993 pay-back trust**, trust **established in accordance with 42 U.S.C. § 1396p**, or as an **MQT**, etc. is not sufficient to meet the requirements for this exception. The trust must contain language substantially similar to the language above. An oral trust cannot meet this requirement.

## **2. Pooled trusts established under Section 1917(d)(4)(C) of the Act**

### **a. General — ~~Pooled~~ rules for pooled trusts**

A pooled trust is a trust established and administered by an organization. It is sometimes called a “master trust” because it contains the assets of many different individuals, each in separate accounts established through the actions of individuals, and each with a beneficiary. By analogy, the pooled trust is like a bank that holds the assets of individual account holders.

Whenever you are evaluating the trust, it is important to distinguish between the master trust, which is established through the actions of the nonprofit association, and the individual trust accounts within the master trust, which are established through the actions of the individual or another person for the individual.

The provisions of the SSI trust statute do not apply to a trust containing the **assets of a disabled individual** which meets the following conditions:

- The pooled trust is established and maintained by a **nonprofit association**;
- **Separate accounts** are maintained for each beneficiary, but assets are pooled for investing and management purposes;
- Accounts **are established solely for the benefit of the disabled individuals**;
- The account in the trust is **established through the actions of the individual, a parent, grandparent, legal guardian, or a court**; and
- The trust provides that to the extent any amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, **the trust will pay to the State(s)** the amount remaining up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under State Medicaid plan(s).

**NOTE:** There is no age restriction under this exception. However, a transfer of resources to a trust for an individual age 65 or over may result in a transfer penalty (see [SI 01150.121](#)).

**CAUTION:** A trust which meets the exception to counting the trust under the SSI statutory trust provisions of 1613(e) must still be evaluated under the instructions in [SI 01120.200](#) to determine if it is a countable resource.

#### **b. Disabled**

Under the pooled trust exception, the individual whose assets were used to establish the trust account must meet the definition of disabled for purposes of the SSI program.

#### **c. Nonprofit ~~Association~~association**

The pooled trust must be established through the actions of a nonprofit association. For purposes of the pooled trust exception, a nonprofit association is an organization established and certified under a State nonprofit statute. (~~See (For development, see SI 01120.203F. for development.)~~).

#### **d. Separate ~~Account~~account**

A **separate account within the trust** must be maintained for each beneficiary of the pooled trust, but for purposes of investment and management of funds, the trust may pool the funds in the individual accounts. The trust must be able to provide an individual accounting for the individual.

#### **e. Established for the sole benefit of the individual**

Under the pooled trust exception, the individual trust account must be established for the sole benefit of the disabled individual. (~~See SI 01120.201F.2. for~~For a definition of sole benefit.)

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This, see SI 01120.201F.2). Other than the payments described in SI 01120.201F.2.b. and SI 01120.201F.2.c., this exception does not apply if the trust account:

- provides a benefit to any other individual or ~~entities~~entity during the disabled individual's lifetime, or
- allows for termination of the trust account prior to the individual's death and payment of the corpus to another individual or entity

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#### **f. Who established the trust account**

In order to qualify for the pooled trust exception, the trust **account** must have been established through the actions of the disabled individual himself ~~or~~ herself or through the actions of the disabled individual's:

- parent(s);
- grandparent(s);
- legal guardian(s); or
- a court.

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A legally competent, disabled adult who is establishing or adding to a trust account with his or her own funds has the legal authority to act on his or her own behalf. A third party establishing a trust account on behalf of another individual with that individual's assets must have legal authority to act with regard to the assets of the individual. An attempt to establish a trust account by a third party with the assets of an individual without the legal right or authority to act with respect to the assets of that individual will generally result in an invalid trust.

In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. Approval of a trust by a court is not sufficient.

#### **g. State Medicaid reimbursement provision**

To qualify for the pooled trust exception, the trust must contain specific language that provides that, to the extent that amounts remaining in the individual's account upon the death of the individual are not retained by the trust, the trust pays to the State(s) from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). To the extent that the trust does not retain the funds in the account, the State(s) must be listed as the first payee(s) and have priority over payment of other debts and administrative expenses except as listed in [SI 01120.203B.3.a.](#)

The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s). Medicaid payback may also not be limited to any particular period of time, i.e., payback cannot be limited to the period after establishment of the trust.

**NOTE:** Labeling the trust as a **Medicaid pay-back trust, OBRA 1993 pay-back trust, trust established in accordance with 42 U.S.C. § 1396p,** or as an **MQT**, etc. is not sufficient to meet the requirements for this exception. The trust must contain language substantially similar to the language above. An oral trust cannot meet this requirement.

### **3. Allowable and prohibited expenses**

The following instructions about trust expenses and payments apply to Medicaid special needs trusts and to Medicaid pooled trusts.

#### **a. Allowable administrative expenses**

~~The~~ Upon the death of the trust beneficiary, the following types of administrative expenses may be paid from the trust prior to reimbursement of medical assistance to the State(s):

- Taxes due from the trust to the State(s) or Federal government because of the death of the beneficiary;
- Reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.

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#### **b. Prohibited expenses and payments**

~~The~~ Upon the death of the trust beneficiary, the following expenses and payments are examples of some of the types not permitted prior to reimbursement of the State(s) for medical assistance:

- Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;
- Inheritance taxes due for residual beneficiaries;
- Payment of debts owed to third parties;
- Funeral expenses; and
- Payments to residual beneficiaries.

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**NOTE:** For the purpose of prohibiting payments prior to reimbursement of medical assistance to the State(s), a pooled trust is not considered a residual beneficiary.

#### **c. Applicability**

This restriction on payments from the trust applies upon the death of the beneficiary. Payments of fees and administrative expenses during the life of the beneficiary are allowable as permitted by the trust document and are not affected by the State Medicaid reimbursement requirement.

### **4. Reevaluate trusts processed under the policy in effect from 1/1/2000 through 1/31/01**

#### **a. Applicability**

Trusts evaluated under the policy in effect from 1/1/2000 through 1/31/2001, that were found to meet the requirements of a Medicaid special needs trust or a Medicaid pooled trust, must be reevaluated under these instructions.

#### **b. Policy change**

These instructions contain a policy change that is effective prospectively from 2/1/2001. Under the prior policy, we did not count as a resource any trust meeting the

requirements of a Medicaid special needs trust or a Medicaid pooled trust. Effective 2/1/2001, a trust determined to meet the requirements of a Medicaid special needs trust in [SI 01120.203B.1.](#) or Medicaid pooled trust in or [SI 01120.203B.2.](#) [in this section](#) must also be evaluated using the instructions in [SI 01120.200.](#) This is the case because even though a trust may meet the requirements for an exception to counting under Section 1613(e)(5) of the Act, a trust may still meet the definition of a resource and be countable. The special needs and pooled trust exceptions are **not** resource exclusions.

### c. Trusts that become countable

If a trust previously not counted under the policy in effect 1/1/2000 ~~–through~~ 1/31/2001 is now found to be a countable resource under [SI 01120.200](#), we will not reopen the case retroactively, but will count the trust as a resource prospectively beginning with 2/1/2001. Any payments made to the individual between the month the case was initially adjudicated using the prior policy and the readjudication under these instructions are **not overpayments**. See [SI 01120.203H-](#) [in this section](#).

**NOTE:** The undue hardship waiver in [SI 01120.203C-](#) [in this section](#) does **not** apply to trusts counted as resources under [SI 01120.200](#). The waiver only applies to trusts counted under section 1613(e) ([SI 01120.201](#) through [SI 01120.203](#)).

## 5. Income trusts established under Section 1917(d)(4)(B) of the Act

Income trusts, sometimes called *Miller* trusts (after a court case), established under section 1917(d)(4)(B) of the Act are **not** considered exceptions to trust rules for SSI eligibility purposes. However, some States may exclude these trusts from counting as a resource for Medicaid eligibility purposes.

## C. Policy—~~Waiver~~ for waiver for undue hardship

### 1. ~~Definition~~ Definitions

#### a. Undue ~~Hardship~~ hardship

For purposes of the trust provisions of section 1613(e) of the Act, undue hardship exists in a month if:

- failure to receive SSI payments would deprive the individual of food or shelter; **and**
- the individual's available funds do not equal or exceed the Federal benefit rate (FBR) plus federally administered State supplement, if any.

**NOTE:** Inability to obtain medical care does not constitute undue hardship for SSI purposes although it may under a State Medicaid plan. Also, the undue hardship waiver does not apply to a trust counted as a resource under [SI 01120.200](#). It only applies to trusts counted under section 1613(e) of the Act ([SI 01120.201](#) through [SI 01120.203](#)).

#### b. Loss of ~~Shelters~~ shelter

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For purposes of this provision, an individual would be deprived of shelter if:

- he~~/or~~ she would be subject to eviction from their current residence if SSI payments were not received; and
- there is no other affordable housing available, or there is no other housing available with necessary modifications for a disabled individual.

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## 2. Application of the undue hardship waiver

### a. Applicability

We will consider the possibility of undue hardship under this provision only when:

- counting an **irrevocable** trust as a resource results in the individual's ineligibility for SSI due to excess resources;
- the individual alleges (or information in the file indicates) that not receiving SSI would deprive him~~/or~~ her of food or shelter; and
- the trust specifically prohibits disbursements or prohibits the trustee from exercising his~~/or~~ her discretion to disburse funds from the trust for the individual's support and maintenance.

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**NOTE:** Since an individual may revoke a revocable trust and access the funds for his~~/or~~ her support and maintenance, the requirements for undue hardship cannot be met if the individual established a revocable trust.

### b. Suspension of resource counting

The counting of an irrevocable trust as a resource is not applicable in any month for which counting the trust would cause undue hardship.

### c. Resource counting resumes

Resource counting of a trust resumes for any month(s) for which it would not result in undue hardship.

## 3. Available funds

In determining the individual's available funds we include:

### a. Income

- All countable income received in the month(s) for which undue hardship is an issue.
- All income excluded under the Act received in the month(s) for which undue hardship is an issue. (See [SI 00830.099](#) and [SI 00820.500](#), respectively, for a list of unearned and earned income exclusions provided under the Act.)
- The value of in-kind support and maintenance (ISM) being charged, i.e., the presumed maximum value (PMV), the value of the one-third reduction (VTR), or the actual lesser amount.

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(Do not include SSI payments received or items that are not income per [SI 00815.000](#) ~~ff~~).

**NOTE:** The receipt of ISM, in and of itself, does not preclude a finding of undue hardship.

#### b. Resources

- All countable liquid resources as of the first moment of the month(s) for which undue hardship is at issue. (~~See SI 01110.300 for~~ For a definition of liquid resources ~~); see SI 01110.300~~).
- All liquid resources excluded under the Act as of the first moment of the month(s) for which undue hardship is at issue. (~~See SI 01130.050 for~~ For a list of resource exclusions under the Act ~~); see SI 01130.050~~).

SSI benefits retained into the month following the month of receipt are counted as a resource for purposes of determining available funds.

(Do not include nonliquid resources or assets determined not to be a resource per [SI 01120.000](#) ~~ff~~).

#### 4. Example

Frank Williams filed for SSI in 3/2008 as an aged individual. In 2/2008, he received an insurance settlement from an accident that was placed in an irrevocable trust. After determining that he met the other requirements for undue hardship (including a prohibition on the trustee from disbursing any funds for Mr. Williams' support and maintenance), the claims representative (CR) determined Mr. Williams' available funds. He receives \$450 in title II benefits per month. His only liquid resource is a bank account that has \$500 in it. The total of \$950 in available funds (\$450 title II and \$500 bank account balance) means that undue hardship does not apply in 3/2008 because that amount exceeds the FBR. (His State has no federally-administered State supplement ~~);~~).

Mr. Williams comes back into the office in 6/2008. He presents evidence that he has spent down the \$500 in his bank account on living expenses in the past 3 months. As of 6/2008, he has no liquid resources and his income total of \$450 is below the \$637 FBR. Mr. Williams meets the undue hardship test for 6/2008 (which is his E02 month). The trust does not count as his resource in that month. If his situation does not change, he will qualify for an SSI payment in 7/2008.

### D. Procedure—~~Developing~~ for developing Medicaid trust exceptions to resource counting

#### 1. Special needs trusts under Section 1917(d)(4)(A) of the Act

The following is a summary of special needs trust development presented in a step-action format. Refer to the policy cross-references for complete requirements.

<u>Step</u> <b>STEP</b>	<u>Action</u> <b>ACTION</b>
1	Does the trust contain the assets of an individual who was under age 65 when the trust was established? ( <a href="#">SI 01120.203B.1.b.</a> <del>);</del> <u>in this section</u> ).

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	<ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 2</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
2	<p>Does the trust contain the assets of a disabled individual? (SI 011203B.1.d.)</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 3</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
3	<p>Is the disabled individual the sole beneficiary of the trust? (SI 01120.203B.1.e.)</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 4</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
4	<p>Did a parent, grandparent, legal guardian or a court establish the trust? (SI 01120.203B.1.f.) <a href="#">in this section</a>.</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 5</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
5	<p>Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in SI 01120.203B.1.h. <a href="#">in this section</a>?</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 6</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
6	<p>The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in SI 01120.203B.1.c. <a href="#">in this section</a>.</p> <p>Go to <b>Step 7</b> for treatment of assets placed in trust prior to age 65.</p> <p>Go to <b>Step 8</b> for treatment of assets placed in trust after attaining age 65.</p>
7	<p>Evaluate the trust under SI 01120.200D.1.a. to determine if it is a countable resource.</p>
8	<p>The trust (or portion thereof) does not meet the requirements for the special needs trust exception.</p> <p>Determine whether the pooled trust exception in SI 01120.203B.2. applies.</p>

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## 2. Pooled trusts established under Section 1917(d)(4)(C) of the Act

The following is a summary of pooled trust development presented in a step-action format. Refer to the policy cross-references for complete requirements.

<b>Step</b> <b>STEP</b>	<b>Action</b> <b>ACTION</b>
1	<p>Does the trust account contain the assets of a disabled individual? (See SI 01120.203B.2.b.) <a href="#">in this section</a>.</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 2</b>.</li> </ul>

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	<ul style="list-style-type: none"> <li>If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
2	<p>Was the pooled trust established and maintained by a nonprofit association? (See <a href="#">SI 01120.203B.2.a.</a>, <a href="#">SI 01120.203B.2.c.</a> and development instructions in <a href="#">SI 01120.203F</a> → <a href="#">in this section</a>).</p> <ul style="list-style-type: none"> <li>If <b>yes</b>, go to <b>Step 3</b>.</li> <li>If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
3	<p>Does the trust pool the funds, yet maintain an individual account for each beneficiary, and can it provide an individual accounting? (<a href="#">SI 01120.203B.2.d.</a> → <a href="#">in this section</a>).</p> <ul style="list-style-type: none"> <li>If <b>yes</b>, go to <b>Step 4</b>.</li> <li>If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
4	<p>Is the disabled individual the sole beneficiary of the trust account? (<a href="#">SI 01120.203B.2.e.</a> → <a href="#">in this section</a>).</p> <ul style="list-style-type: none"> <li>If <b>yes</b>, go to <b>Step 5</b>.</li> <li>If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
5	<p>Did the individual, parent(s), grandparent(s), legal guardian(s) or a court establish the trust account? (<a href="#">SI 01120.203B.2.a.</a> and <a href="#">SI 01120.203B.2.f.</a> → <a href="#">in this section</a>).</p> <ul style="list-style-type: none"> <li>If <b>yes</b>, go to <b>Step 6</b>.</li> <li>If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
6	<p>Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death from funds not retained by the trust as required in <a href="#">SI 01120.203B.2.g.</a>? <a href="#">in this section?</a></p> <ul style="list-style-type: none"> <li>If <b>yes</b>, go to <b>Step 7</b>.</li> <li>If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
7	<p>The trust meets the Medicaid pooled trust exception, however, the trust still should be evaluated under <a href="#">SI 01120.200D.1.a.</a> to determine if it is a countable resource.</p>
8	<p>The trust does not meet the requirements for the Medicaid pooled trust exception. Determine if the undue hardship waiver applies under <a href="#">SI 01120.203E</a> → <a href="#">in this section</a>.</p>

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## E. Procedure—Development for development of undue hardship waiver

The following is a summary of development instructions for undue hardship presented in a step-action format. Refer to cross-references for complete instructions

<u>Step</u> <b>STEP</b>	<u>Action</u> <b>ACTION</b>
1	Is the trust irrevocable?

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	<ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 2</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
2	<p>Does counting the trust result in excess resources?</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 3</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
3	<p>Does the individual allege (or information in the file indicate) that not receiving SSI would deprive him<del> or</del> her of food or shelter according to <a href="#">SI 01120.203C.1.?</a> <a href="#">in this section?</a></p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 4</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
4	<p>Obtain the individual's signed statement (on the DPST screen in MSSICS, or in non-MSSICS cases, on a SSA-795 faxed into NDRed) as to whether:</p> <ul style="list-style-type: none"> <li>• Failure to receive SSI payments would deprive the individual of food or shelter;</li> <li>• The individual's total available funds are less than the FBR plus federally administered State supplement;</li> <li>• The individual agrees to report promptly any changes in income and resources; and</li> <li>• The individual understands that he<del> or</del> she may be overpaid if available funds exceed the FBR plus State supplement for any month, or other situations change.</li> <li>• Go to <b>Step 5</b>.</li> </ul>
5	<p>Does the trust contain language that specifically prohibits the trustee from making disbursements for support and maintenance or that prohibits the trustee from exercising discretion to disburse funds for support and maintenance?</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 6</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
6	<p>Add up all of the individual's income, both countable and excludable (see <a href="#">SI 01120.203C.3.a.</a> <a href="#">in this section</a>). Do not include any SSI payments received or items that are not income per <a href="#">SI 00815.000 ff.</a>. If the individual is receiving ISM, include as income the ISM being charged (PMV, VTR, or actual amount, if less). Add up all of the individual's liquid resources, both countable and excludable (See <a href="#">SI 01120.203C.3.b.</a> <a href="#">in this section</a>).</p> <p>Does the total of the income and the liquid resources equal or exceed the FBR plus federally administered State supplement, if any?</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 8</b>.</li> <li>• If <b>no</b>, go to <b>Step 7</b>.</li> </ul>
7	<p>Suspend counting of the trust as a resource for any month in which all requirements above are met (<a href="#">SI 01120.203C.2.</a> <a href="#">in this section</a>).</p>

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	<ul style="list-style-type: none"> <li>• In MSSICS, document the findings of undue hardship and applicable months in the <b>DROC</b> screen.</li> <li>• On paper forms, document the information in the <b>REMARKS</b> section. <del>See SI 01120.202C and SI 01120.202D. For</del> For further documentation, <del>see SI 01120.202C and SI 01120.202D and SI 01120.203G.</del> see <a href="#">SI 01120.203G in this section</a>. <b>STOP.</b></li> </ul>
8	Undue hardship does not apply. However, in some instances where income and resource are currently too high, unless the trust is revocable, undue hardship may apply in future months.

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## F. Procedure—~~Nonprofit~~ for nonprofit associations

When a trust is alleged to be established through the actions of a nonprofit, or a tax-exempt organization, follow policy and procedure for verifying tax-exempt status of organizations found at [SI 01130.689E](#) “Gifts to children with life-threatening conditions.”

## G. Procedure—~~Follow~~ for follow-up to a finding of undue hardship

### 1. When to use this procedure

Use this procedure when it is necessary to determine whether an individual who established a trust continues to be eligible for SSI based on undue hardship. Since undue hardship is a month-by-month determination, recontact the individual to redevelop undue hardship periodically.

### 2. Recontact period

The recontact period may vary depending on the individual's situation. If the individual alleges, and information in the file indicates, that the individual's income and resources are not expected to change significantly and the individual is continuously eligible for SSI because of undue hardship, recontact the individual **no less than every ~~six~~ six months**. If the individual's income and resources are expected to fluctuate or the file indicates a history of such fluctuation, the recontact period should be shorter, even monthly in some cases.

### 3. Documentation

At each recontact:

- Obtain the individual's statement either signed or recorded on a DROC that failure to receive SSI would have deprived the individual of food or shelter for any month not covered by a prior allegation;
- Determine whether total income and liquid resources exceeded the FBR plus State supplement for each prior month;

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- If undue hardship continued for the prior period and is expected to continue in the future period, continue payment and tickle the case for the next recontact per [SI 01120.203G.4](#). [in this section.](#)
- If undue hardship did not continue through each month, clear the **excluded amount** and **exclusion reason** entries on the **ROTH** screen for each month that undue hardship did not apply. Process the excess resources overpayment for those months. If undue hardship stops due to a continuing change in the individual's situation, e.g., income or resources, do not tickle the file to follow up. The individual must recontact SSA and make a new allegation of undue hardship.

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#### 4. Recontact ~~Controls~~controls

Use the Modernized Development Worksheet (MDW) to control the case for recontact when the individual is eligible for SSI based on undue hardship. Set up an MDW screen using instructions in MSOM MDW 001.001 and the following MDW inputs:

- In the **ISSUE** field: input TRUST
- In the **CATEGORY** field: input T16MISC
- In the **TICKLE** field: input the date the individual should be recontacted to redevelop undue hardship
- In the **MISC** field: input information (up to 140 characters) about the trust undue hardship issue including issues to be aware of and anything else the CR deems appropriate in the case. If additional space is needed, use **REMARKS**.

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## H. Procedure—~~Reevaluating~~for reevaluating revocable trusts processed under the policy ~~in~~In effect ~~from~~From 1/1/2000 ~~Through~~through 1/31/2001

### 1. Policy change

These instructions represent a prospective policy change related to revocable Medicaid special needs trusts and Medicaid pooled trusts. The policy in effect from 1/1/2000 through 1/31/2001 provided for an exception to counting these trusts without regard to whether the trusts were resources under the general resource rules. Effective 2/1/2001, revocable Medicaid special needs trusts and Medicaid pooled trusts initially evaluated under the policy in effect 1/1/2000 through 1/31/2001 must be reevaluated under these instructions.

### 2. Identify trust cases

Identify any cases processed under the 1/1/2000 through 1/31/2001 policy.

#### a. Irrevocable trusts

You do not need to do anything additional with these cases.

**b. Revocable trusts**

You must reevaluate these cases prospectively from 2/1/2001, following the instructions in [SI 01120.200-](#) to determine if they meet the definition of a resource. If the trust meets the definition of a resource, it is subject to regular resource counting rules as of 2/1/2001.

**c. Prior period**

You do not need to reopen any period prior to 2/1/2001 and no overpayments will result for the prior period as a result of the policy change.

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