



"People  
helping people  
help  
themselves"

Mitchell E. Daniels, Jr., Governor  
State of Indiana

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November 1, 2009

### **Introduction**

Changes in federal law and state regulations are effective November 1, 2009 governing consideration of certain assets and the way in which transfer of property penalties are calculated and imposed for Medicaid eligibility. This policy document outlines the changes only and is not intended to be a full discussion of the entire transfer of property provisions. The new provisions will be integrated into the Program Policy Manual in the next transmittal.

Throughout this document reference is made to *LTC* and *LTC Services*. Both terms refer to services in a Medicaid facility and home and community-based waiver services.

#### **Legal Basis:**

Section 1917(c) of the Social Security Act

IC 12-15-2-23(c)

405 IAC 2-3.1.1; 405 IAC 2-3-1.2; 405 IAC 2-3-2; 405 IAC 2-3-15; 405 IAC 2-3-22;

405 IAC 2-3-24

### **The Look-Back Review Period**

The law does change the look-back period from 36 months to 60 months for all transfers. However, with the implementation date of 11-1-09, the full look-back period won't materialize until 2014, and except for trust transactions which have been 60 months for many years, a look back of more than 36 months won't occur until 2012. Therefore, the look back period is as is currently stated in the IPPM.

### **Penalty Start Date and Calculation of the Penalty Period**

Two of the most significant changes involve the calculation of the penalty period, which prohibits the rounding down of the number of penalty months, and the start date of the penalty period which, for the most part, closes a longstanding loophole that allowed an individual to "live through" the penalty without eligibility being affected.

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## Penalty Start Date

**For transfers of property occurring on and after 11-1-09**, the penalty period will begin on the **later** of:

- The date on which the individual would be **otherwise eligible** for LTC Services under Medicaid based on an approved application were it not for the imposition of the penalty period; or
- The first day of a month during which assets have been transferred for less than fair market value; *and*
- The penalty does not occur during any other transfer of property penalty.

The following examples illustrate the determination of the penalty start date.

### Example #1

Individual entered LTC facility on 10-15-09.

12-05-09      Gifted money.

05-10-10      Applied for Medicaid.

The months covered by the application are Feb, Mar, April, and continuing.

During the eligibility process it is determined that the gifting was an improper transfer, and that the applicant had excess resources for the months of Feb and Mar.

Therefore, Medicaid is effective 04-01-2010 and a transfer penalty is imposed starting the same date, 04-01-10. Assume the penalty period is 5 full months. The penalty begins on 04-01-2010 and ends on 08-31-2010.

Under the old rules (pre -11/09), the transfer penalty would have begun on 01-01-10, the month after the month of transfer, and ended on May 31, 2010.

### Example 2

Individual entered LTC on 10-15-09.

Transfers of property were made on 07-01-09 and 02-01-10.

Medicaid application was filed on 06-10-10.

Because the dates of the transfers were before and after 11-01-09, the rules in effect for both periods must be used to establish the penalty start dates. Assume both transfers were improper and that based on the calculated uncompensated value, the first transfer invokes a 10 month penalty and the second transfer invokes a 4 month penalty. Using the rules for pre-11/09 transfers, the penalty for the first transfer starts 08-01-09 (month after transfer) and ends 05-31-10. The applicant is determined otherwise Medicaid eligible beginning 03-01-10 (the first retroactive month based on the date of application.) Based on the 2<sup>nd</sup> transfer alone, the penalty period would begin on 03-01-10; however this would cause penalty periods to overlap which the rules do not allow. Therefore, the 2<sup>nd</sup> penalty starts 06-01-10, when the first one has ended. The entire transfer penalty is 08-01-09 through 09-30-10.

Once a penalty period has been determined and invoked for an individual in LTC, it runs continuously until the end date regardless of the individual's circumstances. For example, discharge from a facility or closure of Medicaid does not result in a termination of the penalty period. In other words, the penalty does not stop and re-start. Similarly, if an application is denied, a transfer penalty is not established. In a denial situation a transfer penalty does not run its course, without ever having an impact on LTC eligibility.

The above policy and examples only explained the new way in which the penalty start date is determined, without consideration of the actual calculation of the length of the penalty. The second significant change in the transfer rules is how the penalty is determined using a new methodology that, in accordance with the federal law, does not permit rounding down of partial months. In this way, the penalty is served on the full amount of the improper transfer.

### **Calculation of the Penalty Period**

All improper transfers occurring on and after 11-01-09 are accumulated into one total amount to determine the penalty period. The uncompensated value determination must take into consideration the de minimis transfer allowance as explained in IPPM 2640.10.15.10. Transfer penalties using the specific method explained below may end on any date in a month not just the last day of a month.

Two standard values are used in the penalty period calculation:

- Monthly Standard of days in a month - 30.42 days. (365 days divided by 12).
- Average Monthly Facility Private Rate - Refer to IPPM 3006.00 for the applicable rate to use based on the date of an application.

Once the final uncompensated value (UV) of all improper transfers made on and after 11-01-09 has been determined, the steps below are to be followed to determine the length of the penalty period:

- Divide the UV by the current Facility Private Rate. Round up at 2 decimal places. (For example, 2.26216807 is 2.27 months.) This result is the length of the penalty period.

- If the above division happens to result in whole months, the calculation of the penalty is complete.

- If the length of the penalty period as calculated above includes a fractional month, the next step is to convert the fractional month into days. Multiply the partial month by 30.42 and round up to determine the number of days in last month of the penalty period.

For Example: UV = 10,129.24      Private Rate = \$4,611  
\$10,129.24 divided by \$4611 = 2.1967555    2.20 months  
Partial month .20 x 30.42 Standard of days = 6.084    7 days  
Penalty period is 2 months, 7 days.

Example #1

Individual admitted to LTC facility on 10-08-08; Application filed on 11-20-09.  
Facility Private Rate \$ 4611  
First month of eligibility is 10-09. (Applicant ineligible for August and September due to excess resources.)

Transfers:

11-03-08: \$10,000 cash gift to sister  
11-09-09 \$800 cash gift to son  
11-14-09 \$20,000 cash to best friend

Evaluation:

All transfers are determined to be improper and subject to penalty. Because the application was filed after 10-1-09, the \$1200 de minimis transfer allowance rule applies to each year of transfers. The \$10,000 transfer is reduced to \$8,800 because the gift was to a family member. \$8,800 divided by \$4611 = 1.91 rounded down = 1 month penalty, beginning 12-1-08 and ending 12-31-08. Note, this penalty is over by the time the person applied for Medicaid and has no impact on eligibility.

The uncompensated value of the transfers in 2009 = \$20,800. Only the \$800 gift to a family member is subject to the de minimis; the gift to the friend is not reduced.

The uncompensated value subject to penalty is \$20,000.

$\$20,000 \div \$4,611 = 4.3374539$     4.34 months

Convert the .34 partial month to days:

$30.42 \times .34 = 10.3428$     11 days

Penalty period is 4 months 11 days: Starts on 10-01-09, ends on 02-11-10.

### **Home Equity Restriction**

Prior to this new provision, a penalty consisting of ineligibility for LTC services was only invoked when an individual disposed of or divested interest in a resource. This provision invokes the same type of penalty due to the *ownership* of a resource. A penalty is imposed if the applicant's equity interest or his share of equity interest, in his or her home is greater than \$500,000. The penalty starts on the date that the applicant is otherwise eligible for Medicaid and would be receiving LTC services under Medicaid were it not for the equity restriction provision, but not before 11-01-09. The penalty continues as long as the equity value remains over \$500,000.

The home is the applicant's principal place of residence prior to requiring LTC services. A hospitalization, visit with friends or family, or other absence from the home does not change the home designation for the purpose of this provision. Income producing home property is subject to the equity restriction.

This restriction does not apply if the individual's spouse, dependent child under the age of twenty-one (21), or blind or disabled (per SSI standards) child of any age, is lawfully residing in the home. Additionally, the amount of equity that would fall under the asset protection of a long term care partnership policy reduces the amount of the equity in excess of the limitation.

The equity value of a home is the current fair market value (FMV) minus any encumbrance against the property. An encumbrance is a legally binding debt against the home. This can be a mortgage, reverse mortgage, home equity loan, or other debt secured by the home. The current property tax assessment must be obtained as verification of the FMV. Any such assessment other than the most current one is unacceptable. If the individual disputes the property tax assessment, a current arms length, independent professional appraisal can be submitted and will be used in lieu of the assessment. Arms length means that there can be no special relationship, directly or indirectly, between the appraiser and the applicant/recipient so that the interests of both are independent of each other.

If there is an encumbrance against the property such as a mortgage, home equity loan, reverse mortgage, etc., the date that the encumbrance was established must be verified for the purposes of eligibility and whether or not an improper transfer occurred. If, for example a home equity loan was taken out within the review period, the loan transaction in and of itself may not be a violative transfer. However any subsequent transaction involving the proceeds from the loan must be evaluated for determination of whether an improper transfer occurred.

The equity restriction works in conjunction with the existing eligibility provisions regarding the treatment of real property, not in lieu of them. Even if all other eligibility provisions are met, the home equity restriction may still be a factor in whether or not LTC services will be paid for on the individual's behalf.

**Example #2**

Single individual entered a nursing facility on 10-15-09 and listed her home for sale with a realtor. She applies for Medicaid on 11-11-09. Her home is valued at \$800,000. For resource eligibility purposes, the value of the home which is up for sale at fair market value is exempt. However she is subject to the home equity restriction penalty beginning the first of the month in which she is otherwise eligible for LTC services under Medicaid. Her first retro month is 07-09. She meets all other eligibility requirements and her application is approved with Medicaid effective 07-01-09. Her LTC penalty starts 10-01-09, the month in which she was otherwise eligible for LTC.

This new provision applies to individuals who apply for Medicaid on and after November 1, 2009, and for these individuals, any subsequent redeterminations that occur as the result of seeking LTC services as well as the annual scheduled redeterminations.

**Purchase Of A Life Estate In The Home Of Another Person**

A transfer penalty is imposed, using the full amount of the purchase price, when an individual purchases a life estate interest in another individual's home and does not reside in that home for at least one full year after the date of the purchase. The year of residence in the home begins with the month after the documented purchase and continues for 12 consecutive months. This 12-month period is not a waiting period. The individual must establish and provide documentation of residence in the property and live there for the one year period. Otherwise, a transfer penalty will be imposed. The penalty cannot be prorated or shortened in any fashion based on fewer months of residence. The start date of the penalty and length of the penalty period is determined the same as described previously for post-11/1/09 transfers.

This provision addresses the very specific circumstance of an individual purchasing a life estate in someone else's home. It does not change or eliminate the rule in IPPM 2640.10.025.05 regarding an individual who retains a life estate in property that he/she transferred. Similar to the home equity restriction, this provision works in tandem with the resource rules concerning real property. An individual who purchases a life estate in another person's home and does live there for the 12-month period will not have a transfer penalty imposed under this provision. However, ownership of the life estate is evaluated using existing rules. If it is not producing income and is no longer the person's home, then it will have to be offered for sale or rent at FMV as a condition of Medicaid eligibility. Any transfer or otherwise disposal of the life estate must be evaluated as a transfer of property.

This new provision applies to individuals who purchase a life estate in another individual's home on and after November 1, 2009.

### **Treatment Of Loans Established On Or After 11-1-09 As A Transfer Of Assets**

This new provision applies to loans established on and after November 1, 2009. It applies to individuals who loan money directly to another as well as those who may purchase a loan or promissory note that was originally entered into between 2 other persons. The likelihood of the latter may be small, however given the concern that many private loans are merely gifts appearing to be loans, it is important to understand the possible transactions that may occur by someone trying to shelter assets to become eligible for Medicaid.

Whenever an individual has a promissory note, loan agreement, or mortgage as presumed evidence that a transfer of money was not a gift but was made with the expectation of full repayment, the arrangement will be considered an improper transfer unless all of the following criteria are met:

- a) The repayment term is actuarially sound in accordance with the attached Period Life Table;
- b) The agreement provides for payments to be made in equal amounts during the term of the loan, with no deferral of payments and no balloon payments; and
- c) The promissory note, loan, or mortgage prohibits the cancellation of the balance upon the death of the lender.

In the case of a promissory note, loan or mortgage, that does not satisfy the requirements above and is established on or after 11-1-09, the value of such contract considered as an improper transfer will be the outstanding balance due as of the date of the individual's application for Medicaid or date of LTC admission, whichever is later. In the case of HCBS, the balance to be used is the amount as of the date of the Cost Comparison Budget approval.

When determining if the loan is actuarially sound, refer to the person's age on the Period Life Table as of the date the loan is established. If the loan cannot be repaid within the person's life expectancy, it is not actuarially sound, and is therefore an improper transfer.

The amount of the loan payments are countable income as usual.

### **Treatment of Continuing Care Retirement Community Entrance Fees**

A Continuing Care Retirement Community (CCRC) or similar life care community typically provides a variety of living arrangements, from independent living through skilled nursing care. In many cases, potential residents must provide extensive information about their finances, including their assets and income, before being accepted for admission. In addition, they frequently must pay substantial entrance fees and sign detailed contracts before moving to the community.

Effective with contracts entered into on and after November 1, 2009, entrance fees paid by an individual to a CCRC or similar life care community are counted as an available non-exempt resource of the individual for Medicaid eligibility determinations when all of the following 3 conditions apply:

1. The person has the ability to use the entrance fee, or the contract provides that the entrance fee may be used, even in part, to pay for care if the person's other resources or income are insufficient to pay for their care.

It is not necessary for the CCRC to provide a full, lump sum refund of the entrance fee to the resident. If even a portion of the fee can be refunded or applied to pay for care as required, this condition would be met.

2. The person is eligible for a refund of any remaining entrance fee when the person dies or terminates the contract and leaves the community.

In order to meet this second condition, it is not necessary for the resident to actually receive a refund of the entrance fee or deposit. This second condition is met as long as the resident could receive a refund were the contract to be terminated or if the resident dies.

3. The entrance fee does not confer an ownership interest in the continuing care retirement community or life care community.

Ownership interest generally means the right to possess and convey property. Therefore, the resident will be required to verify whether or not they have an ownership interest in a CCRC or life care community by presenting documentation from the facility to that effect. If the CCRC or life care community confirms that the entrance fee does not confer an ownership interest to the resident, then the third condition described above is met.

For Medicaid eligibility determinations, all spousal impoverishment protection rules regarding income and asset allocations for a community spouse are applicable when one spouse resides in the skilled nursing care section of the facility, and the other spouse (the community spouse) resides in an independent living setting. CCRC and similar life care community contracts are required by federal law to account for spousal impoverishment income and asset allocations to a community spouse before determining the amount of resources that a resident must spend on his or her own care.

### **Presumption That a Transfer Was for the Purpose of Becoming Eligible for Medicaid**

The provisions in IPPM 2640.10.30 remain in effect. An individual is responsible for providing documentation whenever claiming that a transfer was done exclusively for some other purpose than becoming eligible for Medicaid. State legislation passed in 2009 permits the agency to allow transfers that follow a pattern that existed for at least 3 years prior to the Medicaid application. However there is no automatic determination that transfers are not improper based

simply on the fact that the gifting was done for 3 straight years. A series of transfers over 3 years may still be improper based on the fact that gifting was done without receipt of adequate consideration. These types of gifts can very easily be violations of the federal Medicaid transfer of property law, disguised to look like a transfer for some other reason due to the repeated nature of the gift.

## **Annuities**

### **New Provisions Regarding Disclosure and Treatment Of Annuities**

The new provisions require disclosure of annuities, specify the circumstances in which a purchase or transaction involving an annuity will be treated as an improper transfer, and require the State to be beneficiary. The new provisions apply to purchases and certain transactions as described below occurring on and after November 1, 2009.

Transactions that are subject to the new provisions include any action taken by the individual that changes the course of payment to be made by the annuity, or the treatment of the income or principal of the annuity, including such actions taken on annuities purchased before November 1, 2009. These actions include:

- additions of principal;
- elective withdrawals;
- requests to change the distribution of the annuity;
- elections to annuitize the contract;
- a change in ownership; or
- any other non-routine action not listed below.

The following types of changes and events would not subject an annuity purchased prior to November 1, 2009 to treatment under the new rules:

Routine transactions such as notification of an address change, notification of death or divorce of a remainder beneficiary, and other similar circumstances;

Changes that occur based on terms of the annuity which existed prior to November 1, 2009 and which do not require a decision, election or action to take effect; or

Changes beyond the control of the individual, such as a change in law, a change in the policy of the issuer, or a change in the terms based on other factors, such as the issuer's economic condition.

**Any interest in an annuity must be reported.**

The requirement to disclose all resources when applying for Medicaid has always been in effect for LTC applicants/recipients. These new provisions specifically require disclosure of any interest that the LTC applicant/recipient and or spouse have in annuities. The failure to disclose and provide all necessary documentation will result in denial or closure due to failure to cooperate. At minimum, the applicant/recipient must provide a copy of the complete annuity contract and documentation of transactions that occur after the purchase. The application and redetermination forms have been revised to allow for annuity disclosure as required by federal law.

**The State must be beneficiary.**

Annuities purchased and transactions made on annuities owned by the applicant/recipient and spouse must name the State as a remainder beneficiary in accordance with the rules that follow below. If these rules regarding the beneficiary assignment in the correct position are not met, the full purchase price of the annuity is considered an improper transfer and a penalty must be imposed.

1. An annuity must name the State as the remainder beneficiary in the first position unless there is a community spouse and/or a minor or disabled child. A disabled child is one who meets the SSI or SSDI disability criteria.
2. If there is a community spouse and/or minor or disabled child, the State must be named as the remainder beneficiary in the second position after the community spouse or minor or disabled child.
3. If the State has been named as a remainder beneficiary after a community spouse and/or a minor or disabled child, and any of those individuals or their representatives dispose of any of the remainder of the annuity for less than fair market value, the State must then be named beneficiary in the first position.
4. The requirement is waived if the individual has purchased a long-term care insurance policy that protects the annuity as approved by the Indiana Long-Term Care Partnership (ILTCP).

As remainder beneficiary, the State is entitled to receive the total amount of medical assistance paid on behalf of the annuitant.

**Additional Criteria Applicable ONLY to the person in LTC**

The rules explained below do not apply to annuities owned by or transactions made by community spouses.

There are 2 separate sets of criteria that, if met by the terms of the annuity, will not result in a transfer penalty. The first set will be referred to as “soundness” criteria. The second set will be referred to as “class exceptions”. The annuity does not have to meet both sets of criteria – it has to meet the criteria from either set.

The purchase of an annuity or transactions completed will not result in a transfer of property penalty if the following conditions, referred to as soundness criteria, are met:

1. The annuity is irrevocable and non-assignable in that it cannot be cashed in nor ownership transferred to another individual or entity; *and*
2. The annuity is actuarially sound in that it is expected to return full principal and interest within the institutionalized individual’s life expectancy; *and*
3. The annuity provides payments in approximately equal amounts with no deferred or balloon payments;

The methodology for determining actuarial soundness is the same that is in the IPPM 2640.10.25.10, captioned below. However, do not use the Life Expectancy Table in that section for these new rules. Use the Period Life Table referenced for loans and promissory notes at the end of this document.

If the individual does not (will not) receive compensation in the amount of the full purchase price within his lifetime (or within the contract’s specified time period if shorter than the life expectancy), the uncompensated amount is the difference between the purchase price and the amount that the annuity will pay out to the individual within the individual’s life expectancy, or term of the contract if shorter than life expectancy.

Ownership of an annuity in one of the following classes of retirement annuities will not result in a transfer of property penalty:

1. An individual retirement annuity (according to Sec. 408(b)) of the Internal Revenue Code of 1986 (IRC); or
2. A deemed Individual Retirement Account (IRA) under a qualified employer plan (according to Sec. 408(q) of the IRC); or
3. The annuity is purchased with proceeds from a traditional IRA (IRC Sec. 408a); or
4. The annuity is purchased with proceeds from certain accounts or trusts which are treated as traditional IRAs (IRC Sec. 408 §(c)); or
5. The annuity is purchased with proceeds from a simplified retirement account (IRC Sec. 408 §(p));

6. The annuity is purchased with proceeds from simplified employee pension (IRC Sec 408 §(k))
7. The annuity is purchased with proceeds from a Roth IRA (IRC Sec. 408A)

To determine that an annuity is established under any of the various provisions of the Internal Revenue Code that are referenced above, rely on verification from the financial institution, the employer or the employer association that issued the annuity. The burden of proof is on the applicant or recipient (or his/her authorized representative) to produce this documentation.

### **Transfer Penalty Hardship Exception**

The hardship procedures explained in this section are used when a transfer penalty has been imposed on an individual for a transfer of property occurring on and after November 1, 2009, except when the penalty is due to an annuity purchase. There is no hardship exception for an annuity purchase.

#### **POLICY**

When a penalty is imposed, the ICES generated notice will explain that an appeal based on the merits of the penalty determination can be filed, *or* a hardship exception can be requested if the individual alleges and can document that such a hardship exists. Procedures for filing the Request for Hardship Exception-Transfer of Property directly to the FSSA Office of Medicaid Policy & Planning (OMPP) are explained in the notice. (The text of the hardship language on the eligibility notice is at the end of this section.) The request for an undue hardship exception will serve as admission by the individual that a transfer of assets for less than adequate consideration was made and that the agency's penalty determination was correct.

The penalty will be removed or modified under a hardship exception if documentation substantiates that the recipient's health is endangered as result of the penalty or that the recipient will be deprived of food, clothing, shelter, or other necessities of life.

#### **PROCEDURE**

A hardship exception request must be filed within 30 days of the notice imposing the transfer penalty. The following persons can apply for a hardship exception:

- The recipient;
- The recipient's authorized representative; or

The nursing facility in which the recipient currently resides, if written consent from the recipient or the recipient's personal representative is given for the nursing facility to file the request.

The OMPP will make the decision to waive all or a portion of the transfer penalty based solely on the evidence submitted with the request. The Notice of Decision on Transfer of Property Hardship Exception Request will be issued by OMPP to the requestor within 45 days of receiving a request for an exception. A denial of a hardship exception is subject to administrative appeal.

A copy of the Notice of Decision on Transfer of Property Hardship Exception Request will be sent to the Division of Family Resources. An approval of a hardship exception must be acted upon by the Division within 10 days (normal change processing requirements) to remove or shorten the penalty as approved.

#### NOTICE TEXT

If you disagree with this determination you have the right to appeal as explained at the end of this notice. The appeal would be about the merits of the determination. For example, you may disagree with the value of the property, what you received in return for the property, or the way the rules were applied to your circumstance.

If you believe that this restriction on your Medicaid benefits will cause you a hardship, you can file for a hardship exception. In filing for a hardship exception, you agree that you have no dispute about the facts or interpretations of law that we used to apply the penalty. If you file an appeal on the merits, you cannot file for a hardship exception.

A hardship exception to the penalty must be requested within 30 days of the date of this notice if you choose not to file an appeal. In a hardship request you must substantiate that the transfer penalty will cause you to be deprived of food, clothing, shelter, or other necessities of life, or will deprive you of medical care such that your health is endangered.

A "Request for Hardship Exception-Transfer of Property" form can be obtained on the internet at [www.in.gov/fssa/ompp](http://www.in.gov/fssa/ompp), or by calling the Office of Medicaid Policy and Planning at 317/232-4966. A hardship exception can be requested by:

The applicant;

The applicant's personal representative; or

The facility in which the applicant currently resides if written consent is provided by the applicant or applicant's personal representative.

Please note that if the penalty has been imposed due to the purchase of an annuity or transaction involving an annuity, a hardship exception is not approvable.

Period Life Table

Age	Life Expectancy- Male	Life Expectancy- Female
60	20.42	23.53
61	19.66	22.70
62	18.91	21.88
63	18.17	21.08
64	17.44	20.28
65	16.73	19.49
66	16.02	18.70
67	15.32	17.93
68	14.63	17.17
69	13.96	16.42
70	13.30	15.69
71	12.66	14.97
72	12.04	14.27
73	11.43	13.58
74	10.84	12.90
75	10.26	12.24
76	9.70	11.59
77	9.15	10.96
78	8.63	10.34
79	8.11	9.74
80	7.62	9.16
81	7.14	8.59
82	6.68	8.04
83	6.24	7.52
84	5.82	7.02
85	5.41	6.54
86	5.03	6.08
87	4.67	5.65
88	4.34	5.25
89	4.02	4.87
90	3.72	4.52
91	3.45	4.19

92	3.20	3.89
93	2.97	3.61
94	2.77	3.36
95	2.59	3.13
96	2.43	2.93
97	2.29	2.75

A complete table will be in the IPPM and can be found at [www.ssa.gov/OACT/STATS/table4c6.html](http://www.ssa.gov/OACT/STATS/table4c6.html). This will then be updated in the IPPM for 2010.