

SI 01120.227 Null and Void Clauses in Trust Documents

Citations: Social Security Act (Act) as amended, Sections [1613\(e\)](#), [1917\(d\)\(4\)\(A\)](#) and [\(C\)](#) (42 U.S.C. §§ 1382b(e), 1396p(d)(4)(A) and (C)).

A. How to determine when to apply the policies in this section

1. New trusts and trusts that have not been previously excepted under section 1917(d)(4)(A) or (C) of the Act

A trust that is either newly formed or not previously excepted from resource counting must meet all of the criteria set forth in [SI 01120.199](#) through [SI 01120.203](#) and [SI 01120.225](#) through [SI 01120.227](#) to be excepted under section 1917(d)(4)(A) or (C). Do not except such a trust from resource counting unless the trust meets all of these requirements.

2. Trusts that previously met the requirements to be excepted under section 1917(d)(4)(A) or (C) of the Act

A trust that we previously determined to be excepted from resource counting under section 1917(d)(4)(A) or (C) continues to be excepted from resource counting, provided the trust is amended to conform with the requirements of [this section within 90 days](#). That 90-day period begins on the day we inform the recipient or representative payee that the trust contains provisions that must be amended in order to continue qualifying for the exception under section 1917(d)(4)(A) or (C). Do not count a previously excepted trust as a resource during the 90-day amendment period. If the trust still fails to meet the requirements of [this section](#) after the expiration of the 90-day amendment period, begin counting the trust [under normal](#) resource counting rules.

NOTE: Each previously excepted trust is permitted only one 90-day amendment period.

B. Background on “null and void” or “savings” clauses in trust documents

State law determines the necessary elements of a legally valid trust. Commonly, trust documents contain “null and void” or “savings” clauses (hereafter “null and void”). These null and void clauses operate to cure defects in a trust and preserve the remaining provisions. They prevent the trust from being determined invalid by removing the offending sections from consideration.

C. Case processing alert

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Trusts are often complex legal arrangements involving State law and legal principles that a claims representative may not be able to apply without obtaining the advice of legal counsel. Therefore, the following instructions may be sufficient only to recognize that an issue is present that you should refer to the regional office (RO) for possible referral to the Regional Chief Counsel. When in doubt, discuss the issue with the RO staff. You can resolve many issues by phone.

D. Policy on SSI treatment of null and void clauses in trust documents

For SSI resource counting purposes, a null and void clause does **not** cure an otherwise defective trust instrument. When reviewing a trust containing a null and void clause:

- Consider all of the provisions set forth in the trust document to determine whether the trust is a countable resource. For SSI purposes, a null and void clause cannot nullify provisions that would otherwise make the trust a countable resource.
- Null and void clauses cannot overcome missing or conflicting trust provisions.

1. Treatment of null and void clauses in trusts excepted under Section 1917(d)(4)(A) or (C)

To be excepted from resource counting under the provisions of section 1917(d)(4)(A) or (C) of the Act, the trust must meet all of the criteria set forth in SI 01120.199 through SI 01120.203 and SI 01120.225 through SI 01120.226, without regard to the presence of a null and void clause. Trust provisions that fail to meet any of the required criteria must be amended or removed in order to except the trust from resource counting.

2. Treatment of null and void clauses in all other trusts

To not be considered a countable resource, a trust that does not purport to meet the criteria in section 1917(d)(4)(A) or (C) of the Act and that is formed after 01/01/00 must be considered under the criteria in SI 01120.201, without regard to the presence of a null and void clause. Trust provisions that fail to meet the criteria in SI 01120.201 must be amended or removed, in order not to count the trust as a resource.

E. Examples

EXAMPLE 1: The field office receives a special needs trust document to assess. During their review of the trust, the field office discovers that the Medicaid payback provision does not provide for payment to any State except for the State in which the individual currently lives. The field office notes the trust includes a null and void clause and the trustee assures the field office staff that the author of the trust, the family attorney, said that would be sufficient to have it approved. The field office notifies the trustee that, due to the incomplete Medicaid payback provision, the trust is not excludable, as written.

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EXAMPLE 2: The field office receives a trust document that meets all of the requirements for exception for a section 1917 (d)(4)(A) trust. This trust also contains a null and void clause. The field office approves the trust because, even though the trust includes a null and void clause, the clause has no relevance. The trust meets the test of exception without relying on the null and void clause.

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