

PRESENTED AT

14<sup>th</sup> Annual Changes and Trends Affecting Special Needs Trusts

February 15-16, 2018

Austin, TX

**Working with SSA Part II: Updates to the SSA POMS  
regarding trusts, Practice Tips, Reporting and More**

**Mary E. O'Byrne**

Author Contact Information:

Mary E. O'Byrne  
O'Byrne Law, LLC  
Lutherville, MD

[mary@obyrnelawoffice.com](mailto:mary@obyrnelawoffice.com)

# SI 0 1120.227 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**

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](#), 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.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Working with SSA Part II: Updates to the SSA POMS regarding trusts, Practice Tips, Reporting and More

Also available as part of the eCourse

[2018 Special Needs Trusts eConference](#)

First appeared as part of the conference materials for the  
14<sup>th</sup> Annual Changes and Trends Affecting Special Needs Trusts session  
"Working with SSA Part II: Updates to the SSA POMS regarding trusts, Practice Tips,  
Reporting and More"