

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

FINAL

Long Term Care Medicaid 20330.4.1 Annuities

Nature of the Proceedings:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend existing rules used to determine eligibility for medical assistance in the Division of Social Services Manual (DSSM) regarding the treatment of annuities provisions. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of repropoed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the September 2007 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by September 30, 2007 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

Summary of Proposal

Statutory Authority

Deficit Reduction Act of 2005 (Public Law 109-171), enacted on February 8, 2006

Background

On February 8, 2006, the Deficit Reduction Act (DRA) of 2005 was signed into law. The DRA made changes to certain Medicaid eligibility provisions in Section 1917 of Social Security Act affecting Long Term Care services and supports.

Summary of ReProposal

On June 1, 2007, the Division of Medicaid and Medical Assistance (DMMA) published for public comment a proposal to amend its annuity regulation (see 10 DE Reg. 1781). This regulatory action incorporated additional guidance received from the Centers for Medicare and Medicaid Services (CMS) regarding the DRA as it applies to the treatment of annuities. Due to the following substantive policy omission in the June 2007 issue of the *Register* this notice is being published again, as intended: DMMA will no longer require that an attempt be made to sell the stream of income from an annuity.

Also, on July 23, 2007, CMS provided clarification of the July 27, 2006 State Medicaid Directors (SMD) Letter Enclosure concerning treatment of annuities under the DRA. This clarification deals specifically with the new section 1917(c)(1)(G) of the Act, added by section 6012(c) of the DRA, and discussed beginning on page 6 of the section 6012 "Changes in Medicaid Annuities Rules" enclosure to the July 27 SMD letter. The discussion beginning on page 6 states that the purchase of an annuity by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services or other long-term care services shall be treated as a transfer of assets for less than fair market value unless the annuity meets certain criteria, which are described in detail on page 7 of the enclosure. CMS clarifies that this provision does not apply to annuities that are revocable and/or assignable.

And, finally, in response to the 10 DE Reg. 1781 request, comments were submitted that resulted in additional changes being made to the original proposal, primarily to substantially revise, renumber, reorganize and reword some policy items for greater clarity and ease of reading. DMMA intends to simplify the policy format and remove the above-referenced eligibility criteria.

Because of the substantive nature of these additional changes, DMMA is now republishing the proposal for public comment pursuant to 29 **Del.C.** §§10115 and 10118. This revision is derived from (i) comments made by the

general public during the public comment period on the original proposal; from (ii) clarifications and other improvements noted by DMMA staff during subsequent review and analysis; and, from (iii) further policy clarification noted by the above-referenced CMS memorandum.

Summary of Comments Received With Agency Response and Explanation of Changes

The Governor's Advisory Council for Exceptional Citizens (GACEC), the Delaware Developmental Disabilities Council (DDDC), and the State Council for Persons with Disabilities (SCPD) offered the following observations and recommendation summarized below. DMMA has considered each comment and responds as follows.

As background, in June 2007, DMMA published a proposed one-sentence amendment to its regulations covering treatment of annuities in the Medicaid LTC program. We endorsed the concept of the standards which ostensibly eliminated a requirement that annuities be sold by applicants for Medicaid LTC services. The Division has now published a comprehensive revision to its annuity regulation. The impetus behind the new proposal is issuance of a CMS policy letter, dated July 23, 2007; recognition that the version of the regulation published in June was incomplete; and further review by DMMA staff. We have the following observations.

First, the proposed regulation generally conforms to the CMS guidance and often incorporates language from the letters verbatim.

Second, §20330.10D1 merits amendment. It recites as follows: "The issuer of any annuity will be notified of the State's rights as a preferred remainder beneficiary". The use of the passive voice in this sentence makes it unclear if the State or the applicant provides the requisite notice to the issuer of the annuity. Compare DMMA Final LTC Promissory Note & Life Estate Reg. [11 DE Reg. 314, 315 (September 1, 2007) [substituting active for passive voice for clarity]. The July 27, 2006 CMS policy letter contemplates that the State will issue notice to the issuer of the annuity:

The State must also notify the issuer of any annuity disclosed for purposes of section 1917(c)(1)(F) of the State's rights as a preferred remainder beneficiary.

At §I.B.

Under the new section 1917(c) (see section I.B. above) the State must notify the issuer of the annuity of the State's right as the preferred remainder beneficiary.

At §II.B.

For these reasons, it would be preferable to affirmatively recite that the State will issue the requisite notice.

Agency Response: Thank you for your comments. DMMA agrees with your recommendation. §20330.10D is revised to increase clarity.

Findings of Fact:

The Department finds that the proposed changes as set forth in the September 2007 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Division of Social Services Manual regarding the treatment of annuities is adopted and shall be final effective November 10, 2007.

Vincent P. Meconi, Secretary, DHSS, October 15, 2007

DMMA FINAL ORDER REGULATION #07-50 **REVISIONS:**

20330.4.1 Annuities

An annuity is a financial device between an individual and a commercial company that conveys a right to receive periodic payments for life or a fixed number of months or years.

20330.4.1.A

A. Treatment of annuities purchased prior to February 8, 2006:

While the annuity itself may or may not be an available resource, the stream of income generated by the annuity is a countable income. The applicant must demonstrate to DMMA that a market to purchase the annuity stream of income does not exist. If a market exists, DMMA will consider the annuity to be an available resource. See 20 CFR 416.1201 (a).

DMMA will require that the fair market value of the annuity income stream be sold at Fair Market Value counted as a resource. See DSSM 20350.1.7 Fair Market Value (FMV).

DMMA will not count the value of an annuity purchased by a third party, e.g., the applicant's employer, as a retirement benefit to the applicant. However, DMMA will count the value of the income generated from a third party annuity.

An annuity that is revocable is always a countable resource. Revocable annuities are able to be converted to cash.

Spouses that claim the income allowance is inadequate to meet the needs of the Community Spouse may request additional resources be set aside to bring their income up to the minimum maintenance needs allowance. These requests MUST go through the fair hearing process in order to retain excess resources for their protected income share. See DSSM 20970 and 42 USC 1396r 5(e). In these cases, at the death of the annuity's owner, the beneficiary of the annuity must be the estate of the Medicaid recipient.

20330.4.1.B

B. Treatment of Annuities purchased on or After February 8, 2006:

As a condition of eligibility, an applicant or his/her representative shall disclose to DMMA any interest in any revocable or irrevocable annuity that the Medicaid applicant or his/her spouse has in an annuity or similar financial instrument as defined by the Secretary of Health and Human Services. Failure to report an annuity to DMMA may result in possible civil and criminal charges, and potential recovery of benefits that were incorrectly paid. The fair market value of the annuity minus any income received to date will be counted as a resource.

20330.4.1.B.1

The State of Delaware must be named as the beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized spouse, unless there is a community spouse, minor child or disabled child who resides in the applicant's home. In such a case, the State must be named as a beneficiary in the correct position or the purchase of the annuity shall be considered a transfer for less than fair market value.

20330.4.1.B.2

The State of Delaware shall notify the issuer of the annuity of its interest and beneficiary status. This notice shall require the issuer to notify the State of any changes in the amount of income, principal or beneficiary to the annuity. Any transactions that occur on or after 2/8/06, subject the annuity to Deficit Reduction Act rules, even if the annuity was originally purchased prior to 2/8/06. Transactions may include such things as addition of principal, elective withdrawals, requests to change the beneficiary, and elections to annuitize the contract.

20330.4.1.B.3

Annuities purchased where the community spouse is the annuitant will be considered as part of the community spouse resource and /or income allocation. The fair market value of the annuity shall be the value counted in the spousal resource calculation.

20330.4.1.B.4

The purchase of an annuity by or on behalf of an applicant for medical assistance for Long Term Care services shall be treated as a transfer of assets without fair consideration unless:

1. The annuity is
 - a. irrevocable and nonassignable; and
 - b. is actuarially sound according to the life expectancy table developed by the Social Security Administration at <http://www.ssa.gov/OACT/STATS/table4c6.html>; and,
 - c. Provides for payments in equal amounts during the term of the annuity with no deferral or balloon payments; and-
2. The annuity is an Individual Retirement Annuity (IRA) as described in Section 408(b) of the Internal Revenue Code of 1986; or
3. The annuity is part of a deemed IRA under a qualified employer plan as described in Section 408(q) of the Internal Revenue Code of 1986; or
4. The annuity was purchased with proceeds from:
 - a. An IRA account as described in Section 408(a), 408(c), 408(p), 408(k) or 408A of the Revenue Code of 1986.

20330.10 Annuities

20330.10.A Defining Annuity

For Medicaid purposes, an annuity is a financial device between an individual and a commercial company that conveys a right to receive periodic payments for life or a fixed number of months or years.

20330.10.B Disclosure of Interest in an Annuity

1. Any interest an applicant or community spouse has in a revocable or irrevocable annuity must be disclosed at the time of application.
2. Failure to disclose interest in an annuity may result in denial of payment for long term care services or denial of Medicaid eligibility.

20330.10.C Determining If Annuity Is Income And Or a Resource

1. The equity value of a revocable annuity is a countable resource.
2. An assignable annuity (the owner or payee may be changed) is a countable resource. The resource value is the amount the assignable annuity can be sold for on the secondary market.
3. An annuity purchased by a third party, e.g. applicant's employer, as a retirement benefit to the applicant will not be counted as an available resource. (DSSM 20330.4)
4. The stream of income generated by an annuity, whether a countable resource or not, is countable income.

20330.10.D State's Rights as a Preferred Remainder Beneficiary

1. The [issuer of any annuity DMMA] will [be notified of the State's rights as a notify, in writing, the issuer of an annuity owned by an applicant that the State is the] preferred remainder beneficiary.
This notice will require the issuer to notify the State of any changes in the amount of income, principal or beneficiary to the annuity.
This notice will require the issuer to notify the State of any changes in the amount of income, principal or beneficiary to the annuity.
2. Certain transactions that occur on or after February 8, 2006 will subject an annuity purchased prior to this date to the DRA provisions. (DSSM 20330.10.E., DSSM 20330.10.F.)
These transactions include such things as an addition to the principal, elective withdrawal,

requests to change beneficiary, or elections to annuitize the contract.

20330.10.E State Named Remainder Beneficiary in All Annuities Purchased On Or After February 8, 2006

1. The State of Delaware must be named as a beneficiary in the correct position.
The State must be named beneficiary in the first position for the total amount of medical assistance paid on behalf of the institutionalized spouse, unless there is a community spouse, minor child, or disabled child who resides in the applicant's home.
In such a case, the State must be named in a secondary or remainder position.
2. If the State is not named as a remainder beneficiary the purchase of the annuity will be considered a transfer for less than fair market value.
3. The full purchase value of the annuity will be considered the amount transferred.

20330.10.F Purchase of an Annuity Is Considered a Transfer of Assets

1. The transfer of assets provisions should be applied to all annuities purchased on or after February 8, 2006 unless:
 - A. The annuity is considered either:
 - A individual retirement annuity (according to Sec. 408 (b) of the Internal Revenue Code of 1986); or
 - A deemed Individual Retirement Account under a qualified employer plan (according to Sec. 408 (q) of the Internal Revenue Code of 1986).
 - OR
 - B. The annuity is purchased with proceeds from one of the following:
 - A traditional IRA (IRC Sec. 408a); or
 - Certain accounts or trusts which are treated as traditional IRAs (IRC Sec. 408 §(c));
or
 - A simplified retirement account (IRC Sec. 408 §(p)); or
 - A simplified employee pension (IRC Sec. 408 §(k)); or
 - A Roth IRA (IRC Sec. 408A).
 - OR
 - C. The annuity meets all of the following requirements:
 - The annuity is irrevocable and non-assignable; and
 - The annuity is actuarially sound; and
 - The annuity provides payments in approximately equal amounts, with no deferred or balloon payments.