DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

Statutory Authority: 31 Delaware Code, Ch. 5, Section 512 (31 **Del.C.** §512)

FINAL

ORDER

Long Term Care Medicaid - Annuities

Nature of the Proceedings:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance initiated proceedings to amend existing rules in the Division of Social Services Manual (DSSM) to comply with the treatment of annuities provisions mandated by the Deficit Reduction Act (DRA) of 2005 (Public Law 109-171). The proposal amends rules used to determine eligibility for medical assistance. 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 proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the November 2006 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by November 30, 2006 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

Summary of Proposed Amendment

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(c)(1)(B)(i) of Social Security Act affecting Long Term Care services and supports.

Summary of Proposals

The DRA contains a number of provisions necessitating changes to Delaware rules. This regulatory action incorporates the mandatory provisions as it relates to Disclosure and Treatment of Annuities and State Named as Remainder Beneficiary.

DSSM 20330.4.1 is revised and updated as follows:

Disclosure and Treatment of Annuities

Current law provides that the term "trust," for purposes of asset transfers and the look-back period, includes annuities only to the extent that the HHS Secretary defines them as such. CMS guidance (Transmittal Letter 64) asks states to determine the ultimate purpose of an annuity in order to distinguish those that are validly purchased as part of a retirement plan from those that abusively shelter assets.

Section 6012 of the DRA requires individuals, upon Medicaid application for long term care services and redetermination of eligibility, to disclose to the state, a description of any interest the individual or community spouse has in an annuity (or similar financial instrument), and regardless of whether the annuity is irrevocable or is treated as an asset.

Disclosure and Treatment of Annuities on or after February 8, 2006

For the purposes of being eligible for long term care services under Medicaid, the applicant or the applicant's spouse must disclose any interest in an annuity (or similar financial instrument). Section 6012 of the

DRA:

- Mandates the disclosure and treatment of annuities.
- Mandates that the purchase of an annuity be treated as a transfer of assets for less than fair market value unless the State is named as the remainder beneficiary.
- Mandates that an annuity shall be treated as a transfer of assets for less than fair market value unless the annuity is irrevocable, non-assignable, actuarially sound, and provide for equal payments.

State Named as the Remainder Beneficiary

Current law only requires the State be named a remainder beneficiary when the annuitant is the client, not the community spouse.

Section 6012(b) of the DRA changes this to include annuities purchased for or by a person who is the community spouse on or after February 8, 2006.

Summary of Comments Received With Agency Response and Explanation of Changes

Attorneys-at-Law, Jerry A. Hyman, Laurence I. Levinson and Thomas Herlihy, III, the Governor's Advisory Council for Exceptional Citizens (GACEC) and, the State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. DMMA has considered each comment and responds as follows:

Mr. Hyman

With respect to *Annuities*, DMMA's proposal rests on the statutory authority of new Federal law, the Deficit Reduction Act (DRA), enacted on February 8, 2006. On the subject of annuities, the DRA added two new subsections to Federal law at 42 U.S.C. §1396p(c), which is entitled, "Taking into account certain transfers of assets. It is clear that these provisions pertain only to situations when the purchase of an annuity may constitute a transfer of assets. Nowhere do the provisions of the DRA define the inclusion of an annuity as a resource.

In Delaware, the question of whether annuities are countable as resources has been determined in the case of *Delaware Department of Health and Social Services v. Dean*, 781 A.2d 693 (Del. Supr. 2001), affirming a Superior Court case (C.A. No. 00A-05-006, December 6, 2000) on the basis of and for the reasons set forth" in the Superior Court decision includes language the defines resources in Federal Medicaid law.

The Dean decision makes it clear that, under Delaware law, the purchaser of a standard commercial annuity has no property right which can be counted as a resource. The purchaser has only income. That is the supreme law in Delaware, as set forth by the State Supreme Court; it cannot be overridden by any provision in the State Medicaid Manual.

Therefore, the provisions of proposed §20330.1.1.A, which define an annuity as a resource equivalent to the value of its income stream, cannot apply to a standard commercial annuity (an annuity purchased from a commercial issuer which is irrevocable, non-assignable, and provides for equal payments for the entire term).

Furthermore, a "stream of income" also does not constitute a property right equivalent to a resource. This proposed §20330.1.1.A is in direct conflict with other provisions of the State Manual itself, such as DSSM §20200.9, on Relationship of Income to Resources. The proposed regulation would violate this provision by counting an annuity as both income and resources in the same month.

Similar prohibitions on "double-counting" are also found in §20300.3.2 of the DSSM which define "resources" and §20200.6 which lists specific types of annuities as income, namely Social Security, Railroad Retirement and pensions. Like any commercial annuities, they are "streams of income," countable as such, not as resources.

Therefore, the Medicaid Manual should make clear what the law (and common sense dictates). Standard, commercial annuities, when they are in "pay status" (i.e., are actually making monthly payments to the annuitant) are not resources. Proposed §§20330.4.1.A, B. and B.3 should be stricken, or should at least be written to carve out an exception for such annuities so they are not counted as resources.

To make this point abundantly clear, an existing section of the manual, §20300.3.2, should also be amended. That section includes "annuities and their streams of income," as a resource, another violation of Dean and of the common-sense principle that income cannot be a resource, and vice versa.

Agency Response: Section 6012(a)(4) of the DRA states that "Nothing in this subsection shall be

construed as preventing a State from denying eligibility for medical assistance for an individual based on the income or resources derived from an annuity described in paragraph (1)."

Mr. Levinson

The "summary of proposals" is inaccurate and misleading. Although, the proposed regulation does indeed incorporate changes mandated by DRA, the proposed regulation proposes changes that are nowhere found in the DRA or CMS guidelines and violate both established state and federal law. The proposed changes are not mandated by the DRA and are illegal in that the type of change to the law that is proposed must be done through the legislature and not by regulation.

The bulk of §20330.4.1.B more or less tracks the DRA. However, the last sentence appears nowhere in the DRA or in present or federal law (or in any other State's implementation of DRA). Simply out, the DRA does not mandate that an irrevocable annuity is a countable resource. On the other hand established Delaware law holds that certain irrevocable annuities are not countable resources.

The issue of whether an irrevocable, nonassignable, no cash value, actuarially sounds annuity was a countable resource was settled in Delaware in *Dean v. Delaware Department of Health and Social Services*, a Delaware Superior Court decision affirmed by the Delaware Supreme Court [enclosed].

With a standard, commercial irrevocable annuity, such as described in the Dean case and outlined in the DRA under the transfer provisions, the buyer does not own the purchasing funds and cannot reclaim them. The property right in the annuity cannot be liquidated and therefore is not considered a resource. It is agreed that under present law that the income derived from the annuity may be considered income.

All annuities are not non countable resources. Any revocable annuity is a resource under state and federal law. Any irrevocable annuity that does not comply with all the DRA requirements concerning transfer of annuities is also a countable resource because it will be considered a transfer of assets.

On July 27, 2006, CMS sent a letter to State Medicaid Directors along with enclosures to offer guidance to the implementation of the DRA. The CMS guidance nowhere states that all revocable or irrevocable annuities are countable resources. Nowhere does CMS state that the total price of the annuity minus and income received to date will be counted as a resource. The word "considered" does not mean "counted". The plain language of the DRA and the CMS guidelines state that the state may take income or resources derived from an annuity into consideration. This is actually a statement of current federal and state law, there is nothing new here. This is settled law. In other words, the DRA still allows states to count income derived from annuities as income, and annuities where resources may be derived as resources.

Agency Response: Based on CMS guidance, "total purchase price" is stricken and "fair market value" is added.

The DRA defines "asset" in relation to annuities. For some reason proposed regulation §20330.4.1.B.4 has omitted the language of the DRA. This is a misleading omission and only shows that the authors of regulation want to pick and choose what part of the DRA they want to incorporate. The DRA says that states have to incorporate all the provisions.

It may be helpful in the proposed regulation to define what types of annuities are countable resources and which are not. An example of a regulation that would comply with all law would be as follows:

> An applicant or his/her representative shall disclose to the DMMA any interest in any revocable or irrevocable annuity that the Medicaid applicant or his/her representative has an annuity or similar financial instrument. Failure to report an annuity to DMMA may result in possible civil and criminal charges, and potential recovery of benefits that were incorrectly paid. If it is determined that income or resources may be derived from an annuity, such income or resources shall be considered in determining eligibility, including spousal income and resources, and in the post eligibility calculation, as appropriate. If income may be derived from an annuity it shall be considered income. If resources may be derived from an annuity, the total purchase price of the annuity minus any income received to date for which qualification is sought will be counted as a resource.

The above example follows CMS guidelines and the DRA.

Agency Response: The language of the regulation is intended to be synonymous with the federal statute.

CMS has given States considerable flexibility to define the parameters in creating regulations. This regulation, as proposed, is consistent with the provisions and intent of the DRA.

Finally, the effective date of the proposed to §20330.4.1.B cannot be applied for all annuities purchased after February 8, 2006. Since the DRA does not mandate annuities to be counted as resources, the date of February 8, 2006 is meaningless. Furthermore, there may be people who relied on existing Delaware law and the Medicaid manual and purchased annuities between the effective date of any proposed new regulations. In order to have an orderly transition without needless litigation, in the interest of due process and fundamental fairness, the effective date that any new regulations shall apply should be the effective date of the proposed regulation. This is a fundamental and democratic and legal principal. This is also in fact what most if not all of the states that have implemented DRA have done. It would be legal and administrative quagmire to do otherwise. The alternative is to litigate an unknown number of fair hearings and/or federal lawsuits.

Agency Response: Any annuity purchased after February 8, 2006 is subject to the provisions of the DRA.

The proposed changes stated in §20330.4.1.B.3 are also not mandated by the DRA. The DRA does not state anywhere that annuities are to be counted as a resource. The same arguments above apply to this section. Under state and federal law an annuity of the type described in §20330.4.1.B.4 is not a countable resource so cannot be counted in the resource calculation. A community spouse's income is not countable except in relation to the MMMNA calculation. Nowhere does the DRA mandate that if spousal income derived from an annuity is over the maximum MMMNA it is then somehow magically turned into a resource. The DRA does permit the counting of income or resources derived from an annuity in the MMMNA calculation. Likewise the DRA does permit resources derived from an annuity to be used in the spousal resource calculation. If it were the intent of Congress to include any income derived from an annuity as a resource if over the maximum MMMNA it would have been clearly stated in the legislation. Since it is not stated it cannot be implied. If the state wants to change the law they always have the option of going through the legislature.

Agency Response: Based on CMS guidance, the second sentence in §20330.4.1.B.3 is stricken and in the third sentence "total purchase price" is stricken and "fair market value" is added.

Note: Also submitted for consideration by Mr. Levinson is a recent Pennsylvania Federal Court case that was decided on November 21, 2006, specifically addressing spousal annuities.

Finally, just to illustrate the misunderstanding of the law a section of the summary of the proposed regulations reads as follows:

State Named as the Remainder Beneficiary

Current law only requires the State be named a remainder beneficiary when the annuitant is the client, not the community spouse.

This is a complete misstatement of current Delaware law. Nowhere in current law or regulation is there a requirement that the state be made the remainder beneficiary when the annuitant is the client. This is illustrative of ignorance, irresponsibility or total disregard of the law when proposing the new regulations.

The purpose of regulations is to interpret state and federal law. The purpose of the Medicaid Manual is to interpret that law in a form that case workers may use in making a determination of eligibility. Regulations cannot change existing law only the legislature can. If DSS [DMMA} wants to be truly intellectually hones with these proposed regulations, they will go back and correct the portions that are not mandated by DRA and violate Delaware law.

It is important that DSS [DMMA] enact clear, lawful regulations on treatment of annuities that will be applied consistently. This will make it clear to Medicaid applicants and the Elder Law bar as to what and what is not allowed. A clear regulation and guidelines will make it possible for decisions regarding annuities to be made on a caseworker level, instead of the current practice of sending all annuity cases to the policy administrator for review which often results in cases pending for more than ninety days and inconsistent results.

Enactment of this proposed regulation in its present form will only result in litigation which is a tremendous waste of time and resources given the most likely outcome of that litigation, especially in light of the fact that a denial of a Medicaid application is now appealable directly to federal court.

Agency Response: For the sake of clarity, an important change relating to Medicaid annuities was signed into law on December 20, 2006, as part of the Tax Care and Health Care Act of 2006. It changed the word

"annuitant" to "institutionalized individual" in Section 6012(b) of the DRA. As such, §20330.4.1.B.1 is amended by striking "annuitant" and inserting "institutionalized individual".

Mr. Herlihy

20330.4.1.A

An annuity should not be considered a resource if all of the income therefrom is contributing to the long term care of the Medicaid recipient or applicant.

Agency Response: Section 6012(a)(4) of the DRA states that "Nothing in this subsection shall be construed as preventing a State from denying eligibility for medical assistance for an individual based on the income or resources derived from an annuity described in paragraph (1)."

20330.4.1.B

Criminal or civil charges are clearly inappropriate absent very clear, detailed and timely notice of the requirement to disclose annuities and the intentional failure to disclose. This should be stated in the new rule.

Agency Response: Both the CMS and the Attorney General's Office have reviewed the regulation. No changes will be made to §2030.4.1.B as a result of this comment.

20330.4.1.B.2

The failure to disclose sufficient information about annuities as required by the individual, spouse, representative or issuer limits the authority of the State to deny or terminate coverage of ONLY long term care services under section 1917(e)(1) of the Deficit Reduction Act (signed 2/8/06) "DRA" (sec. 6012(a)). Under existing Medicaid program authority, the State can deny or terminate eligibility for Medicaid entirely based on the applicant's failure to cooperate. CMS Guidelines 7/27/06, SMDL #06-018, page 3. Thus, under the above authority, the State can not deny or terminate coverages other than for long term care services unless it is the applicant or recipient who fails to cooperate. If the issuer of the annuity refuses to cooperate, then the State only has the authority to deny or terminate coverage of long term care services and no other coverages. The proposed rule goes beyond the above authority.

Agency Response: The last two sentences of §2030.4.1.B.2 are stricken.

20330.4.1.B.3

This rule treats annuities where the community spouse is the annuitant as part of the community spouse resource "and/or" income allocation. It can't be both resource and income. There's no DRA provision for determining which it is. The last sentence valuing the annuity is contrary to the valuation guidelines in the above proposed rules. The sentence should be made consistent with the other valuation guidelines.

The DRA says nothing to change pre-DRA law concerning the treatment of an annuity as income or resource. Rather, the DRA only says at Sec 1396(e)(4) that the State may deny eligibility "based on the income or resource derived [emphasis supplied] from an annuity." If the actuarially sound annuitization of an annuity resulted in the annuity being treated under Sec 3258.9 of the CMS' State Medicaid Manual as income rather than a resource, then the same result should occur despite the other changes to the treatment of annuities by the DRA.

Agency Response: The second sentence of §2030.4.1.B.3 is stricken.

20330.4.1.B.4

This rule appears to require that the purchase of an annuity shall be treated as a transfer of assets without fair consideration unless the annuity is irrevocable, non-assignable, actuarially sound and provides for equal payments AND the State is named in the first position as remainder beneficiary OR second position after the community spouse or minor or disabled, OR the annuity is a retirement fund annuity. This interpretation is based on 42 USC Sec. 1396(p)(c)(1), subsections (F) and (G).

An interpretation more consistent with the DRA is that under (F) the State be named as beneficiary in the

first or second position applies only to annuities that do not meet the requirements of (G). This interpretation is consistent with the requirement of Sec. 1396(p)(c)(1) that the Medicaid "application or recertification form shall include a statement that under paragraph (2) the State becomes a remainder beneficiary under such annuity or similar financial instrument by the virtue of the provision of such medical assistance." Paragraph (2) refers only to an annuity under (F). It makes no reference to an annuity under (G). This makes sense, because an annuity under (F) must name the State as a preferred remainder beneficiary in order for the purchase of the annuity not to be treated as the disposal of an asset for less than fair market value. No such requirement applies to an annuity under (G). Hence, the statement required by paragraph (2) of Sec. 1396p(e) is limited to only those annuities under (F).

Why would paragraph (2) of Section 1396p(e) require that the statement "the State becomes a remainder beneficiary under such an annuity" be included on applications or recertifications where there is an annuity under (F) but not under (G)? The only answer is that the State must be a remainder beneficiary unless the annuity satisfies the requirements of (G). An annuity that meets the requirements of (G) is not included within the term "assets." Since such an annuity is not an "asset," its purchase cannot be treated as the disposal of an asset for less than fair market value. Only an annuity that is an asset can be treated as the disposal of an asset for less than fair market value under (F). However, (G) explicitly excludes from the term "assets" the retirement annuities described in (G)(i) and non-retirement annuities that are irrevocable and non-assignable, actuarially sound, and provide for payments in equal amounts during the term of the annuity with no deferral and no balloon payment made.

The DRA requirements do not apply to all annuities purchased by the community spouse. As discussed above, (F)'s requirement that the State be named as beneficiary in the first or second position applies only to annuities that do not meet the requirements of (G). Therefore, annuities purchased by the community spouse also should need only name the State as beneficiary if the requirements of (G) are not met.

Even if the community spouse were required to name the State as remainder beneficiary, (F) only requires that the State be named as remainder beneficiary "for at least the total amount of medical assistance paid on behalf of the annuitant [emphasis added]. Unless the applicant is the annuitant, the assistance paid on behalf of the applicant is not relevant. If the community spouse is not applicant and receives no assistance, the State is entitled to nothing as remainder beneficiary regardless of the assistance paid on behalf of the applicant.

The proposed rules fail to follow the DRA in the above respects.

I do not claim to be the originator of many of the above positions. Much of the above is the work of a team of lawyers of the National Academy of Elder Law Attorneys reviewing the DRA. They did not review the Delaware rules. I have reviewed their reasoning, found it to validly apply to the proposed rules in issue.

Agency Response: Items #2 and #3 are stricken in §20330.4.1.B.4. As such, this section is re-numbered, accordingly.

SCPD & GACEC

First, SCPD did not find any significant substantive inconsistencies between the proposed DMMA regulation and DRA §6012. There are some ostensible anomalies in the DMMA regulations. For example, an annuity purchased with proceeds from and IRA or Roth IRA may explicitly qualify as a "disregarded" transfer of assets [§20330.4.1.b.4, Par. 6] while an annuity purchased with proceeds from a 401(k) or 403(b) plan would not. However, this is the literal result of DRA §6012(c).

Agency Response: DMMA agrees that this is the literal result of DRA §6012(c).

Second, there is an error in §20330.4.1.B.1. The clause "(u)nless there is a community spouse, minor child or disabled child who resides in the applicant's home" should be included in the first sentence. Moreover, the second sentence, which refers to the State being named as a beneficiary in "the correct position", is not very illuminating. Consistent with the DRA §6012(b), and §20330.4.1.B.4, Par. 3 (both of which refer to "remainder beneficiary"), consider the following substitute:

> In such a case, the State must be named in a secondary or remainder position after the community spouse, minor child or disabled child who resides in the applicant's home or the purchase of the annuity shall be considered a transfer for less than fair market value.

Agency Response: DMMA accepts the substitute. §20330.4.1.B.1.has been revised.

Third, §20330.4.1.B.4 could be improved. At a minimum, a semi-colon should be added at the end of Par.

1.b. of this section. Moreover, the format of the section is somewhat confusing. Purchase of an annuity is not treated as a transfer of assets without fair consideration if Par. 1 is met and either Pars. 2, 3, 4, 5, or 6 are met. Conceptually, it would be clearer to configure the section to require that Par. 1 and 2 (including proposed Pars. 2-6 as subparts) be met. The current format is as follows:

Par 1 and
Par 2 or
Par 3 or
Par 4 or
Par 5 or
Par 6

SCPD recommends the following format:

Par 1 and
Par 2
- Subpart a or
- Subpart b or
- Subpart c or
- Subpart d or
- Subpart e or
- Subpart f.

Agency Response: DMMA considered your recommendation and has decided to retain the format as proposed.

Findings of Fact:

The Department finds that the proposed changes as set forth in the November 2006 *Register of Regulations* should be adopted.

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

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

DMMA FINAL ORDER REGULATION #07-16

Revisions:

20330 Countable Resources Computation
20330.1 Vehicles

Vehicles are defined as automobiles, boats, travel trailers, motorcycles etc. The current market value of a vehicle is the average price that it will sell for (based on year, make, model and condition) on the open market in a certain geographic area. Current market value can be determined by using the NADA book (trade in value) or a written appraisal from a disinterested, knowledgeable source. One vehicle may be excluded under Section 20310.5. Only one vehicle may be excluded for a married couple.

If NO vehicle is excluded per Section 20310.5, up to $4650 of the CMV of ONE vehicle is excluded. If the CMV exceeds $4650, the excess counts as a resource, unless the vehicle can be excluded under some other provision (i.e., co-owner refuses to sell). It is unlikely the $4650 exclusion will be used. This is because most vehicles are used for either a medical problem or for essential daily activities and can be excluded per Section 20310.5.

Any vehicle an individual owns in addition to the vehicle that was totally or partly excluded (up to $4650), is a resource in the amount of its equity value. The equity value is the CMV minus amount owed on the vehicle. The

exclusion is applied in the manner most advantageous to the individual. If one of two vehicles can be excluded as necessary for medical treatment, the exclusion is applied to the vehicle with the greater equity value regardless of which vehicle is used to obtain medical treatment.

20330.2 Financial Institutions Accounts

Financial institution accounts which include savings accounts, checking accounts, certificates of deposit, etc., are an individual's resource if the individual owns the account and can use the funds for his or her support and maintenance. We determine whether an individual owns the account and can access the funds by looking at how the account is titled.

If an individual is designated as sole owner by the account title, all of the funds are that individual's resource unless legal restrictions preclude the owner from using the funds for his or her support and maintenance. We do not provide an opportunity for the owner of an individually-held account to rebut the presumption of 100% ownership.

If the account is in the name of a Medicaid applicant/recipient and another Medicaid applicant/recipient, assume all account funds belong to each individual in equal shares. If the account is in the name of a Medicaid applicant/recipient and another individual who is not applying for Medicaid or who is not a Medicaid recipient, then assume all of the funds belong to the Medicaid applicant/recipient.

If the applicant or recipient disagrees with the ownership presumption on jointly-held accounts, we give the individual the opportunity to rebut the presumption. Rebuttal is a procedure which permits an individual to furnish evidence and establish that some or all of the funds in a jointly-held account do not belong to him or her. Obtain the individual's statement on a form containing the penalty clause regarding who owns the funds, why there is a joint account, who has made deposits to and withdrawals from the account, and how withdrawals have been spent. Inform the individual that he or she must submit the following evidence within 30 days:

- a corroborating statement from the other account holder(s). If the other account holder is incompetent or a minor, have the individual submit a corroborating statement from anyone aware of the circumstances surrounding establishment of the account; account records showing deposits, withdrawals and interest paid for the months that ownership is an issue; if the individual owns none of the funds, evidence showing that he or she can no longer withdraw funds from the account; if the individual owns only a portion of the funds, evidence showing removal from the account of the individual's funds or removal of the funds owned by the other account holder(s) and redesignation of the account.

Any funds that the evidence establishes were owned by the other account holder(s) are not and were not the individual's resources. The effect of a successful rebuttal is retroactive as well as prospective.

20330.3 Promissory Notes, Loans and Property Agreements

A loan is an advance from a lender to a borrower that the borrower must repay, with or without interest. Loan proceeds are not income to the borrower because of the borrower's obligation to repay. Any portion of the borrowed funds that the borrower does not spend is a countable resource if retained into the month following the month of receipt.

If the Medicaid applicant is the owner of a promissory note, loan, or property agreement (mortgage), assume the value of the agreement is its outstanding principal balance unless the individual furnishes reliable evidence that it has a current market value of less than that or no current market value at all. If the note, loan or mortgage is not salable, it has no current market value.

If the outstanding principal balance plus other countable resources exceeds the resource limit, inform the individual that DSS/Medicaid will use the outstanding principal balance in determining resources unless the individual submits within 30 days the following information.

a. evidence of a legal bar to the sale of the agreement

b. an estimate from a knowledgeable source (financial institution, bank, real estate broker) showing the current market value of the agreement is less than its outstanding principal balance. The estimate must show the name, title and address of the source.

Payments received against the principal balance are not income. They are conversion of a resource. The portion of the payment which represents interest is unearned income.

20330.4 Retirement Funds

Retirement funds are annuities or work-related plans for providing income when employment ends, such as pensions, individual retirement accounts (IRA), disability, Keogh plans and some profit sharing plans.

The value of a retirement fund is the amount of money that an individual can currently withdraw. If there is a penalty for early withdrawal, the fund's value is the amount available after the penalty deduction. Any taxes due are not deductible in determining the fund's value. A retirement fund is not a resource if an individual must terminate employment in order to obtain any payment.

If an individual is eligible for periodic retirement benefits, the individual must apply and accept the periodic benefit. If the individual has a choice between periodic benefits and a lump sum, the individual must choose the periodic benefits.

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 **[~~asset~~ income]**. The applicant must demonstrate to ~~DSS~~ DMMA that ~~will determine if there is~~ a market to purchase the annuity stream of income does not exist. If ~~there is~~ a market exists, ~~DSS~~ DMMA will consider the annuity to be an ~~it to be~~ available resource. ~~for the applicant's or spouse's support and maintenance.~~ See 20 CFR 416.1201 (a).

[~~To calculate the value of the annuity's stream of income, DSS~~ DMMA ~~will use the amount at which the annuity was originally purchased and subtract all payments received to date. The remainder is the value of the annuity's income stream.~~] ~~DSS~~ DMMA will require the annuity income stream be sold at Fair Market Value as a **[~~condition of eligibility~~ resource]**. See DSSM 20350.1.7 **[Fair Market Value (FMV)]**.

~~DSS~~ 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, ~~DSS~~ 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.

8 DE Reg. 1617 (5/01/05)

20330.4.1.B

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

[As a condition of eligibility, ~~A~~ a]n 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 **[~~total purchase price~~ fair market value]** of the annuity minus any income received to date will be counted as a resource.

20330.4.1.B.1

[~~As a condition of eligibility, the~~ 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 **[~~annuitant. Unless~~ 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. **[~~The applicant/ recipient may be held liable for the issuer's failure to respond to the agency's request for information. Should the issuer not respond to agency requests in a timely manner, it will be assumed that a transfer of assets has occurred and the applicant/recipient's Medicaid benefits may be denied and or terminated.~~]**

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. **[~~Any annuities which bring the community spouse's total income allowance over the maximum monthly needs allowance will be counted in the resource calculation. The total purchase price~~ 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 State of Delaware, Department of Health and Social Services, Division of Medicaid and Medical Assistance, is named as the remainder beneficiary in the first position for the total amount of medical assistance paid on behalf of the individual; or~~

~~3. The State of Delaware, Department of Health and Social Services, Division of Medicaid and Medical Assistance, is named as the remainder beneficiary after the community spouse or minor or disabled child as defined in 1917(c)(2)(A)(ii) and who is named in the first position; or~~]

[~~4.~~ 2.] The annuity is an Individual Retirement Annuity (IRA) as described in Section 408(b) of the Internal Revenue Code of 1986; or

[~~5.~~ 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

[~~6.~~ 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.

20330.5 Stocks

Shares of stock represent ownership in a business corporation. Their value shifts with demand and may fluctuate widely. If the stock has co-owners, assume that each owner owns an equal share of the value of the stock and that the owner can sell them at current value. Broker fees do not reduce the value that stocks have as resources. Obtain a copy of the stock certificate or most recent statement of account from the firm that issued or is holding the stock.

The value of a stock as a resource is its current market value. The current market value of a stock is its closing price on any given day and can usually be found in a regular or financial newspaper. A closing price of 22 3/ 4 equals $22.75. The values of over-the-counter stocks are shown on a "bid" and "asked" basis. For example, "18, bid, 19 asked." Use the bid price as the current market value. The "par value" or "stated value" shown on some stock certificates is not the market value.

The stock of some corporations is held within close groups and traded very infrequently. The sale of such stock is often handled privately and is subject to restrictions. The evidence for this kind of stock can be a written

statement from the firm's accountants giving their best estimate of the stock's value and the basis for the estimate, such as most recent sale, most recent offer from outsiders, current market value of assets less any debts on them, etc.

A stock option is the right to sell or buy stock at a specified price by a specified date. A stock option controls 100 shares of stock, but options are quoted on the price per share. Options come due and are quoted for each January, April, July and October. A closing price of 1/4 equals $25.00.

20330.6 Mutual Fund Shares

"Mutual Fund" is a term that encompasses a wide range of investments. It is a pool of assets (stocks, bonds, etc.) managed by an investment company. A mutual fund share represents ownership interest in this pool as opposed to a particular stock or bond. The documentation guidelines for stocks also apply to mutual funds. Many newspapers contain a separate table showing the values of funds not traded on an exchange.

20330.7 U.S. Savings Bonds

U.S. Savings Bonds are obligations of the Federal Government. They are not transferable and can only be sold back to the Federal Government. Normally, they cannot be redeemed for six months after the issue date specified on the face of the bond. For Series EE, and I Savings Bonds, the redemption period has been extended to 12 months. They are not resources during the retention period. They become resources (not income) as of the 7th or 13th month. A bond may not roll over or renew in order to prolong the minimum retention period. Actual redemption (converting to cash) of one bond is required before purchasing a new bond. However, the U.S. Treasury regulation authorizes the Commission of Public Debt to waive the regulatory provisions pertaining to U.S. Savings bonds including the redemption period in order to "relieve any person or persons of unnecessary hardship". A request for a refund because the person now requires Nursing Home care and so needs the funds used to purchase the bonds may constitute hardship. A written request to the Commissioner of Public Debt requesting a waiver to the redemption period is all that is required. The bondholder may simultaneously tender the bond(s) for redemption. If the Treasury receives the bond(s) and grants the waiver, it will issue the individual a check. At that point, the individual would have a countable resource in the amount of the check.

The individual in whose name a U.S. Savings Bond is registered owns it. The Social Security Number shown on a bond is not proof of ownership. The co-owners of a bond (bond titled AND/OR) own equal (50%) shares of the redemption value of the bond. The bond may show an owner followed by POD (proof of death) and another name. This is a survivorship type of bond. The name of the first individual owns 100% of the bond. The second individual will own 100% of the bond upon the death of the first individual.

Physical possession of a U.S. Savings Bond is a requirement for redeeming it. This is true for sole or joint ownership. If an individual alleges that he or she cannot submit a bond because a co-owner or other individual will not relinquish physical possession of the bond, obtain a signed statement from the co-owner or the other individual that he or she: has physical possession of the bond; will not allow the applicant to cash the bond; and if co-owner, will not cash the bond and give the applicant his or her share.

The Table of Redemption Values for U.S. Savings Bonds is used to determine the value of a bond. These are available from a local bank. The bank will need the series, denomination, date of purchase or issue date. After the mandatory 6-month retention period, the value of a series H or HH bond is its face value.

8 DE Reg. 1313 (3/1/05)

20330.8 Municipal, Corporate and Government Bonds

A bond is a written obligation to pay a sum of money at a specified future date.

A municipal bond is the obligation of a State or a locality (county, city, town, village, or special purpose authority such as a school district).

A corporate bond is the obligation of a private corporation. Corporations sell corporate bonds to raise capital. Corporate bonds are issued in two forms: registered, which pay interest to their registered owner; and bearer or coupon bonds, which pay interest to whomever holds the bond. Zero coupon bonds do not pay current interest. The accrued interest is paid at maturity.

A government bond, distinct from a U.S. Savings Bond, is a transferable obligation issued or backed by the Federal Government. They include Treasury bills, notes and bonds, and Federal agency securities, such as Federal Home Loan Mortgage Corporation (FREDDIE MAC) and Government National Mortgage Association (GINNIE MAC).

Bonds are negotiable and transferable. Their value as a resource is their current market value. The redemption value, which is available only at maturity, is immaterial. The documentation for these bonds is similar to stocks.

20330.9 Uniform Gifts to Minors Act

Delaware has adopted the Uniform Gifts to Minors Act (UGMA) which permits making gifts to minors that are free of tax burdens. The UGMA is sometimes called the Uniform Transfers to Minors Act (UTMA).

Under Delaware UGMA law:

- An individual may make an irrevocable gift of money or other property to a minor. If such a gift is made, then;
- The gift, plus any earnings it generates, is under the control of a custodian until the child reaches the age of majority established by State law;
- The custodian has discretion to provide to the minor or spend for the minor's support, maintenance, benefit or education as much of the assets as he/she deems equitable; and
- The child automatically receives control of the assets upon reaching the age of majority (his/her 18th birthday). At this time, the UGMA property becomes a countable asset for the purpose of program eligibility.

UGMA property including any additions or earnings is not income to the minor. However, any disbursements from the UGMA account to the minor will be considered income to the minor.

Verification

DSS will verify all allegations of existence of a UGMA gift by obtaining a copy of the document of ownership (e.g., deed, certificate of deposit, savings account, etc.) or other written document from the issuing source. If there is no document designating a UGMA gift, then the asset will be considered a countable resource.

8 DE Reg. 1712 (6/1/05)

10 DE Reg. 1601 (04/01/07) (Final)