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## Fast-Track Regulation Agency Background Document

<b>Agency name</b>	Department of Medical Assistance Services
<b>Virginia Administrative Code (VAC) citation(s)</b>	12 VAC 30-40-300
<b>Regulation title(s)</b>	Eligibility Conditions and Requirements: Transfer of Resources
<b>Action title</b>	Treatment of Annuities
<b>Date this document prepared</b>	12/13/2016

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

DMAS currently has regulations concerning the transfer of resources for individuals who may intend to apply for Medicaid eligibility. Medicaid's income and resource limits are extremely low and individuals have been known to transfer their resources, for less than fair market value, to enable their Medicaid eligibility qualification. Typically, this is done when individuals are seeking Medicaid coverage of their costs of long term care services (such as nursing home care). This regulatory action adds, to existing text, language requiring that annuities, purchased prior to February 8, 2006, but which are modified after this date, be subject to the existing other requirements set out in 12 VAC 30-40-300 (F)(3).

**Statement of final agency action**

Please provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

I hereby approve the foregoing Regulatory Review Summary entitled Treatment of Annuities with the attached amended regulations (12 VAC 30-40-300) and adopt the action stated therein. I certify that this fast track regulatory action has completed all the requirements of the Code of Virginia § 2.2-4012.1, of the Administrative Process Act.

9/14/2015

Date

/signature/

Cynthia B. Jones, Director

Dept. of Medical Assistance Services

**Legal basis**

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority.

The *Code of Virginia* (1950) as amended, § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. The *Code of Virginia* (1950) as amended, § 32.1-324, authorizes the Director of DMAS to administer and amend the Plan for Medical Assistance according to the Board's requirements. The Medicaid authority as established by § 1902 (a) of the *Social Security Act* [42 U.S.C. 1396a] provides governing authority for payments for services.

The *Deficit Reduction Act of 2005* § 6012(d) (DRA) changed the Medicaid rules for the treatment of annuities. It specified: (i) that Medicaid applicants be required to disclose and describe any interests they or their community spouse had in an annuity; (ii) that the state be named as a remainder beneficiary in the first position unless there is a community spouse and/or a minor or disabled child. If there is a community spouse and/or a minor or disabled child, then the state may be named in the next position after these individuals; (iii) that annuities purchased after February 8, 2006, must be treated as transfers of assets for less than fair market value unless they meet certain criteria, and; (iv) that annuities purchased before February 8, 2006, but modified after that date would be subject to all requirements applicable to annuities purchased after February 8, 2006. Changes beyond the control of the individual would not cause the annuity to be subject to the specified criteria.

When DMAS modified 12 VAC 30-40-300(F) to add subsection (3), (VR22: 23, published July 24, 2006, and effective August 23, 2006), it did not include the requirement listed above at (iv) that annuities purchased before February 8, 2006, but modified after that date would be subject to all requirements applicable to annuities purchased after February 8, 2006.

This action remedies that inadvertent omission and aligns the DMAS' annuity regulations to all of CMS' guidance on the federal DRA requirements.

### Purpose

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. **Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens.** Discuss the goals of the proposal and the problems the proposal is intended to solve.*

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The purpose of this action is to update the Virginia Administrative Code (VAC) to reflect both federal requirements and current practice with regard to annuities purchased after February 8, 2006.

### Rationale for using fast-track process

*Please **explain the rationale for using the fast-track process** in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?*

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This regulatory action is being promulgated as a fast track action because the subject of this regulation is not controversial. DMAS has been following the federal rule contained in this action, and this change conforms the language of the VAC with federal regulations and current Virginia practice.

### Substance

*Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of changes" section below.*

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The section of the State Plan for Medical Assistance that is affected by this action is Eligibility Conditions and Requirements: Transfer of Resources.

DMAS has regulations concerning the treatment of annuities. Individuals who have excess resources, as compared to Medicaid's limits, often use such financial instruments to shelter, or hide, their resources from consideration during the eligibility determination process. Sheltering or transferring resources for less than fair market value can cause an individual's eligibility for Medicaid to be delayed for years depending on dollar value.

These regulations add a provision to 12 VAC 30-40-300(F)(3) at (c) to indicate that the other rules of 12 VAC 30-40-300 apply to changes to annuities after February 8, 2006. Such changes could be: (i) additions of principal; (ii) elective withdrawals; (iii) requests to change the annuity's distribution; (iv) elections to annuitize the contract and; (v) similar actions.

Changes that occur that are beyond the control of the individual, such as a change in law, changes in policies of the insurer, or a change in the terms based on other factors would not cause the annuity to be subject to the other conditions in 12 VAC 30-40-300(F)(3).

### Issues

*Please identify the issues associated with the proposed regulatory action, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.*

In 2012, the U.S. Department of Health and Human Services Office of Inspector General audited Virginia's progress in implementing certain provisions of the DRA's requirements for the handling of annuities. Virginia reported successful implementation of all requirements with the exception of one.

The one, overlooked requirement required that annuities, regardless of their purchase dates, be subject to asset transfer rules if certain transactions take place after February 8, 2006. This regulatory action addresses that previous oversight.

### Requirements more restrictive than federal

*Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.*

There are no requirements more restrictive than federal contained in these recommendations.

### Localities particularly affected

*Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.*

There will be no localities that are more affected than others as these requirements will apply statewide.

### Regulatory flexibility analysis

*Pursuant to § 2.2-4007.1B of the Code of Virginia, please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will*

*accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.*

This regulatory action is not expected to affect small businesses as it does not impose compliance or reporting requirements, nor deadlines for reporting, nor does it establish performance standards to replace design or operational standards.

**Economic impact**

*Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.*

<p><b>Projected cost to the state to implement and enforce the proposed regulation, including:</b>  <b>a) fund source / fund detail; and</b>  <b>b) a delineation of one-time versus on-going expenditures</b></p>	<p>There are no costs to the state related to this regulatory change.</p>
<p><b>Projected cost of the new regulations or changes to existing regulations on localities.</b></p>	<p>None</p>
<p><b>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</b></p>	<p>Only Medicaid members with annuities, who have changed those annuities since February 8, 2006, will be affected by the rule in that they are required to submit to the same rules as those with annuities purchased after February 8, 2006.</p>
<p><b>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected.</b> Small business means a business entity, including its affiliates, that:  a) is independently owned and operated and;  b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>No small businesses will be affected by these regulatory changes.</p>
<p><b>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including:</b>  <b>a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and</b>  <b>b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</b></p>	<p>There are no projected reporting, recordkeeping, administrative, or real estate costs related to this regulation.</p>

<p><b>Beneficial impact the regulation is designed to produce.</b></p>	<p>The regulation is designed to update the Virginia Administrative Code to reflect federal requirements and current practice.</p>
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### Alternatives

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.*

There are no alternatives that would meet the requirements of federal regulations.

### Public participation notice

*If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.*

### Family Impact

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.*

These changes do not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children; nor encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents. It does not strengthen or erode the marital commitment, but may decrease disposable family income depending upon which provider the recipient chooses for the item or service prescribed.

### Detail of changes

*Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please list separately: (1) all differences between the **pre-emergency** regulation and this proposed regulation; and 2) only changes made since the publication of the emergency regulation.*

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Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
30-40-300 F 3 c			Applies the general rules for annuities to those annuities purchased before February 8, 2006, but modified on or after that date.