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Proposed Regulation Agency Background Document

Agency name	DEPT OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation	12VAC30-40-290 and 40-300
Regulation title	Eligibility Conditions and Requirements
Action title	Treatment of Annuities in Medicaid Eligibility Determination
Document preparation date	

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

The *Omnibus Budget Reconciliation Act of 1993 (OBRA)* amended Section 1917(c) of the *Social Security Act* and established Section 1917(d) to set forth rules wherein transfers of assets and trusts must be considered in determining eligibility for Medicaid. The rules adopted by the Department of Medical Assistance Services (DMAS) in response to *OBRA 1993* addressed trusts but not specifically, annuities, and particularly not annuities with end-point balloon payments. Therefore, current Medicaid eligibility rules are not clear relative to the consideration of annuities in the eligibility determination process. The policy does not clearly state that an annuity is considered a legal instrument or device similar to a trust. Consequently, DMAS has begun to see the increasing use of annuities, especially those structured to have large balloon payments, being used by individuals as a method of sheltering their assets and resources in order to impoverish themselves sufficiently to qualify for Medicaid eligibility. Qualifying for Medicaid eligibility enables these individuals to protect their assets for heirs while enjoying the benefits of Medicaid covered long term care services, particularly nursing facility care.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

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 aforementioned sections 1917(c) and (d) of the *Social Security Act* permit policies regulating the use of annuities as vehicles used to shelter assets which could otherwise be available to individuals for their own purchase of long term care services.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal and the problems the proposal is intended to solve.

This regulatory action is not expected to have a direct effect on the health, safety, and welfare of either Medicaid recipients or the citizens of the Commonwealth. It will, however, have an indirect affect by preventing individuals, who could afford to purchase their own long term care services, from using public funds thereby releasing the use of such funds for the truly impoverished.

This regulatory action is proposed to reduce the sheltering of assets through purchases of annuities by individuals as a means to impoverish themselves to enable their qualification for Medicaid eligibility. Such Medicaid eligibility permits these individuals, who could afford to pay for their own long term care services, to obtain such services with public funds while passing along their protected assets to their heirs. This proposed action will establish rules to eliminate the loophole that currently exists.

Annuities are usually purchased in order to provide a source of income for retirement. However, they are also sometimes used to shelter assets so that the purchaser of the annuity or the purchaser's spouse can qualify for Medicaid. This regulatory package will eliminate the abusive sheltering of assets through the purchase of annuities in order to achieve Medicaid eligibility when those individuals who purchase annuities have the ability to pay for such care themselves.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)

This current proposed regulation is the same regulation previously published by the Agency as a Fast-Track regulation. The Agency received more than ten objections to the previous Fast-Track regulation, and therefore, pursuant to the requirements of Va. Code § 2.2-4012.1, that Fast-Track regulation concerning Treatment of Annuities in Medicaid Eligibility Determination did not become effective. As permitted under § 2.2-4012.1, the Agency is following up the failed Fast-Track with this proposed regulation, which proposes the exact same changes as the previous Fast-Track.

The sections of the State Plan for Medical Assistance affected by this suggested amendment are Eligibility Conditions and Requirements, Transfer of Resources and More Liberal Methods of Treating Income and Resources (Attachment 2.6A, Supplements 8b and 9 (12VAC 30-40-290 and 40-300)).

Federal Medicaid law defines assets as: all monies received and everything owned.

Federal Medicaid law defines resources as: cash and any other personal or real property than an individual (or spouse, if any) owns; has the right, authority, or power to convert to cash (if not already cash); and is not legally restricted from using for his/her support and maintenance.

Federal Medicaid law defines 'patient pay' as that portion of the individual's costs of long term care (usually nursing facility care) that the individual pays. Such patient pay amounts reduce the amount that Medicaid must contribute to the nursing facility for the cost of care for the individual.

Historically, Medicaid programs across the nation have increasingly observed individuals transferring their financial resources in order to deliberately impoverish themselves. Such resource transfers permits these individuals to secure the needed long-term care services, typically nursing facility care, while protecting their estates for their heirs. Such actions violate both the intent and spirit of Medicaid law that was originally designed to provide health care services for poor persons. These actions have come to be more prevalent as life expectancies have increased and as the costs of long term care have steadily increased.

One consequence of these nationwide trends was the passage by Congress, in 1993, of the Omnibus Budget Reconciliation Act (OBRA 1993). One important provision of OBRA 1993 were restrictions on the transferring of resources that were codified at Title XIX, § § 1917 (c) and (d).

As permitted by federal law, Medicaid currently disregards as a countable resource the value of an annuity, if the expected return on the annuity is actuarially sound, or is commensurate with a reasonable estimate of the life expectancy of the beneficiary. So long as the return on the annuity is commensurate with the annuitant's statistical life expectancy, the transfer is deemed a fair market value transaction and the payments from the annuity, no matter how large, are viewed as income and not as assets. If the amount of money transferred into an annuity is large, the Commonwealth will be paying for the long-term care of an individual who has the ability to pay for such care himself. As long as an annuity pays out its' full principal plus interest during an individual's life expectancy, the annuity is actuarially sound. If the individual lives to

his full statistical life expectancy, the state and federal governments are not harmed because the income from the annuity will become part of the patient pay amount and accordingly reduce medical assistance payments to the long-term care provider. However, only a certain percentage of individuals will live as long as or longer than their statistical life expectancy. The remainder of individuals will die before reaching their statistical life expectancy. In these cases, the Commonwealth does not receive in income the full value of the purchase price of the annuity under the current regulations. Thus, the Commonwealth loses that part of the purchase price. The effect is the same as if the lost portion were to be given away without a transfer of asset penalty.

In recent years, the Department has seen an increasing incidence of the purchase of annuities by applicants for Medicaid long-term care services. Many of the annuities are from an insurance company or bank; however, others are classified as “private annuities” or agreements between two individuals where assets other than cash are involved. Many of these annuities are actuarially-sound based on life expectancy tables, however, they do not generate equal monthly payments based on the principal and oftentimes are set up wherein the beneficiary receives small annual payments of interest only and a final large balloon payment at the annuity’s maturity date.

DMAS proposes to define, for Medicaid eligibility purposes, an annuity to be a contract reflecting payment to an insurance company, bank, or other registered or licensed entity by which one receives fixed, non-variable payments, with no balloon-end-point payments, on an investment for a lifetime or a specified number of years. In addition to defining an annuity, these regulations address how an annuity will be evaluated as an asset/resource for Medicaid purposes. The regulations provide that:

- An annuity containing a balloon payment will be considered an available resource.
- A commercial (non-employment related) annuity purchased by or for an individual using that individual’s assets will be considered an available resource unless it meets all of the following criteria. The annuity: (1) is irrevocable; (2) pays out principal and interest in equal monthly installments (no balloon payment) to the individual over the total number of months that equals the actuarial life expectancy of the annuitant; (3) names the Commonwealth of Virginia as the residual beneficiary of funds remaining in the annuity, not to exceed the amount of any Medicaid funds expended for the individual during his lifetime for Medicaid covered services and, (4) is issued by an insurance company, bank, or other registered or licensed entity approved to do business in the Commonwealth of Virginia, or, if issued in a jurisdiction other than the Commonwealth, is licensed to do business in the jurisdiction in which the annuity is established. Payments from the annuity to the Commonwealth cannot exceed the total amount of funds for long-term care services expended on behalf of the Medicaid recipient.
- Annuities issued prior to the effective date of these regulations which do not provide for pay out of principal and interest in equal monthly installments and for which documentation is received from the issuing company that the “pay out” arrangements cannot be changed, will be considered to meet these new requirements once amended to name the Commonwealth of Virginia as the residual beneficiary of funds remaining in the annuity, not to exceed the amount of any Medicaid funds expended on the individual during his lifetime.

Under these proposed regulations, annuities that contain a balloon payment will be counted as an available asset/resource. Annuities that feature a balloon payment have increased in popularity as a means to sheltering assets because such annuities pay out small amounts initially. This allows the owner to qualify for Medicaid since annuitized payments are considered income, not assets, under Medicaid rules. At the end of the contract period, the owner is due the remainder of the guaranteed payout of the annuity, which can be a large lump sum. If the owner remains alive at the contract's end, he could purchase another balloon annuity, effectively sheltering his assets again.

If an annuity is revocable, it can be redeemed or sold by the individual and its market value counted as a resource in determining the individual's Medicaid eligibility. These funds are available to the individual and the individual's assets should be utilized to pay for the individual's long-term care costs prior to the expenditure of public funds that are intended to provide services to the truly needy.

Compelling individuals to name the Commonwealth as a remainder beneficiary to their annuities narrows the loophole that currently exists. Under the proposed regulation, an individual will remain able to utilize annuities as a tool to turn his assets into an income stream for the care of himself or his community spouse; however, the individual will not be able to hide excess assets or remove them from the reach of the Commonwealth by placing them in an annuity. In essence, the Commonwealth is seeking to treat remaining annuity payments as excess assets belonging to the individual and asking for remaining funds to revert to the Commonwealth when they are no longer of use to the individual or his spouse.

The fair market value of annuities with the Commonwealth as a named remainder beneficiary will continue to depend on actuarial soundness. The expected return on the annuity must be commensurate with a reasonable estimate of life expectancy of the annuitant. Annuities with the Commonwealth as a beneficiary that are not actuarially sound will be deemed transfers for less than fair market value. Such annuities may cause ineligibility for the Medicaid payment of long term care services.

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 the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

The primary advantage to the Commonwealth of these suggested regulatory changes is to close a current loophole that results in Virginia Medicaid currently covering the cost of nursing home care for individuals who have the ability to pay for their own care but who have transferred their assets into annuities. Findings indicate that annuities are a major source of asset-sheltering activities to help persons qualify for Medicaid coverage of their long-term care expenses and these regulations are an effort to address this growing problem.

There are no disadvantages to the general public in the implementation of these suggested changes, and the Department projects no negative issues in implementing these proposed changes. There are disadvantages to the public and the Commonwealth of not making these changes: wealthy persons will continue to shelter their assets and rely on the public funding of their long-term care services. These changes will assist the Commonwealth in its efforts to ensure that public funds appropriated for medical care are expended in the manner for which they were intended – to provide a wide range of high-quality medical services to the truly needy.

For those public persons who wish to shelter their assets for the benefit of their heirs, and their elder care attorneys who provide them with legal advice, such individuals are not expected to agree with this suggested change. These persons are expected to object, as they want the public funds of Medicaid to pay for their long term care services while their heirs reap the benefits of their estates. Attorneys who specialize their practices in elder care and estate planning are expected to object because these changes would be likely to reduce the numbers of persons for whom they could create such annuities and therefore reduce their billing fees.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

<p>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</p>	<p>None. Local departments of social services (DSS) currently determine Medicaid eligibility and will continue to do so. Annuities that are owned by applicants and recipients are currently evaluated by local DSS eligibility workers to determine actuarial soundness even though their value as a resource is not considered in eligibility determinations.</p>
<p>Projected cost of the regulation on localities</p>	<p>Same as above.</p>
<p>Description of the individuals, businesses or other entities likely to be affected by the regulation</p>	<p>Individuals who purchase annuities to shelter assets so that they can qualify for Medicaid and elder law attorneys and estate planners who have aggressively used annuities to shelter resources.</p>
<p>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. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>Unknown. Currently, annuities are not counted as a resource in determining Medicaid eligibility so long as the annuity is actuarially sound.</p> <p>Because this action targets individuals and not business entities, it is not expected to have any impact on small businesses.</p>
<p>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</p>	<p>None. This regulation in no way prohibits the purchase of annuities. Rather, it allows the Medicaid program to recover costs paid by the program in situations where individuals purchased annuities to shelter assets and achieve Medicaid eligibility.</p>

This regulation is an effort to curb the growing use of annuities to shelter assets of individuals seeking Medicaid funding for their long-term care costs. Statistics on the number of individuals who have taken advantage of the existing loop-hole are unknown because current Medicaid rules do not allow for the counting of the value of the annuity as a resource so long as the

annuity is actuarially sound based on the statistical life expectancy of the annuitant. Other state Medicaid programs have identified the growing use of annuity purchases as tools to shelter assets in order to achieve Medicaid eligibility and this regulation is an effort to prevent such abuse in the Commonwealth.

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.

There are no viable alternatives. In the absence of Medicaid regulations to address the counting of annuities as resources, individuals will continue to be able to shelter resources through the purchase of annuities and establish Medicaid eligibility for payment of their long-term care needs.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

During the publication of the Fast-Track Regulatory package, DMAS received identical comments from 8 law firms that were signed by 19 attorneys objecting to the adoption of the regulations and suggesting the need for exceptions. DMAS also received comments from three registered voters in the Commonwealth who stated their objection to the adoption of the regulations but who provided no suggested changes to the proposed regulations. DMAS has not made any changes in the proposed regulations as a result of the comments received on the previous fast-track regulations.

The comments were as follows:

1. The term “individual” needs to be changed to “owner” and the individual from whom reimbursement is sought should be clarified.

DMAS response: In determining eligibility for Medicaid payment of long-term care services, the program requires that the resources of the applicant and his spouse must be evaluated. Therefore, the use of the term “owner” may be misconstrued when determining whose resources must be evaluated. Medicaid policy requires the counting of the resources of the individual and his spouse at the time of the eligibility determination.

2. The regulations should apply prospectively, not retrospectively, to the annuity purchase date since Medicaid applicants would be unable to change previously purchased annuities to comply with the new regulations.

DMAS response: The regulations address such situations. Medicaid applicants or recipients who own annuities issued prior to the effective date of the new regulations will be considered to meet the new requirements once the annuity is amended to name the Commonwealth as a residual beneficiary and documentation is provided

that the pay-out arrangements cannot be changed. In situations where pay-out arrangements cannot be changed, there is always a provision for changing the beneficiary.

3. "Fixed" vs. "Variable" Annuities. An annuity should not be considered an available resource simply because it has a variable rate of return, amount of installment payment or frequency of installment payment.

DMAS response: Medicaid eligibility is based on a snapshot of a moment in time. It is not the intent of the Medicaid program to protect an individual's resources in anticipation of inflation. An individual's own resources should be utilized to pay for the cost of his long-term care prior to expenditure of public funds.

4. "Commercial" vs. "Private" Annuities. There are valid reasons for an individual to purchase a private annuity rather than a commercial annuity. For example, a family member might be willing to offer more favorable terms than a commercial annuity.

DMAS Response: A private annuity is an agreement between two parties. The investment is not issued by an entity approved to do business in or authorized to sell annuities in the Commonwealth and there are no regulations governing such actions. The regulations are intended to ensure that annuities are purchased from licensed or regulated entities and that promissory notes are not held out to be private annuities.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability.

This regulatory action will have no negative effects on the institution of the family or family stability. It will not increase or decrease disposable family income or erode the marital commitment. It will not discourage economic self-sufficiency, self-pride, or the assumption of family responsibilities.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
12VAC 30-40-290		None	For annuities that meet the criteria contained in 12VAC 30-40-300, item F., the amount of funds in the annuity account will be disregarded as countable resources in determining Medicaid eligibility.
12VAC 30-40-300		None	<p>Annuities are defined, for Medicaid purposes, to be a contract or agreement by which one receives fixed, non-variable payments on an investment for a lifetime or a specified number of years.</p> <p>An annuity containing a balloon payment will be considered an available resource.</p> <p>Annuities will be considered to be available resources unless they: (1) are irrevocable; (2) pay out principal and interest in equal monthly installments (no balloon payment) to the individual over the total number of months that equals the actuarial life expectancy of the annuitant; (3) names the Commonwealth of Virginia as the residual beneficiary of any funds remaining in the annuity, not to exceed any Medicaid funds expended on the individual during his lifetime; and, (4) is issued by an insurance company, bank or other registered or licensed entity approved to do business in the Commonwealth of Virginia, or if issued in a jurisdiction other than the Commonwealth of Virginia, is issued by an entity licensed to do business in the jurisdiction in which the annuity is established.</p> <p>Annuities issued prior to the effective date of these regulations which do not provide for pay out of principal and interest in equal monthly installments and for which documentation is received from the issuing company that the “pay</p>

			out” arrangements cannot be changed, will be considered to meet the new requirements once amended to name the Commonwealth of Virginia as the residual beneficiary of funds remaining in the annuity, not to exceed any Medicaid funds expended on the individual during his lifetime.
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Currently, Medicaid regulations disregard as a countable resource the value of an annuity, if the expected return on the annuity is actuarially sound, or is commensurate with a reasonable estimate of the life expectancy of the beneficiary. So long as the return on the annuity is commensurate with the annuitant’s life expectancy, the transfer is deemed a fair market value transaction and the payments from the annuity, no matter how large, are viewed as income and not as assets. As long as an annuity pays out its’ full principal plus interest during an individual’s life expectancy, the annuity is actuarially sound.