DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF SOCIAL SERVICES
Statutory Authority: 31 Delaware Code, Chapter 5, Section 512 (31 **Del.C.** Ch. 5, §512)

20330.4.1 Annuities

ORDER

Nature of the Proceedings:

Delaware Health and Social Services ("Department") / Division of Social Services initiated proceedings to amend the Division of Social Services Manual (DSSM) regarding the Long Term Care Program. The proposal gives direction on counting annuities and their stream of income for the eligibility process. 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 March 2005 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by March 31, 2005 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

Summary of Proposed Change

Citation

20 CFR §416.1201(a) - Resources

Summary Of Proposed Change

DSSM 20330.4.1: Adds a new rule that addresses annuities and how they count towards the eligibility process.

Summary of Comments Received with Agency Response with Explanation of Changes

The following public comments were received on the current proposal to amend the Division of Social Services Manual that addresses annuities and how they count towards the eligibility process. DSS received comments on the policy from the State Council for Persons with Disabilities and JNM Financial. DSS considered each comment and respond as follows:

- This regulation would force individuals to try to liquidate an irrevocable and non-assignable investment/ annuity at a substantial loss. The State could consider placing a look-back period on purchases of annuities.

Agency Response: While it is true that Delaware is trying to find ways to save money on program expenditures, that is not the reasoning behind the adoption of this rule. Delaware has discovered that estate planners have exploited a loop hole which allows people to shelter their assets in annuities rather than private pay for the services they need. Medicaid is a medical assistance program for the needy. We have determined there is a secondary market for the purchase of annuities. There are dozens of web sites that will purchase the stream of income generated by an annuity.

We are aware that other states are placing a longer look back period for transfer of assets. Most annuities are purchased immediately before application for Medicaid. They are not subject to a transfer of assets penalty period.

- The Federal regulation which DSS references to support this regulation [20 CFR §416.1201(a)] does not explicitly mention annuities.

Agency Response: This is true this is not a quote from the CFR - rather a direction on how DSS arrived at the summation that the stream of income is a resource.

- The calculation of the annuity's value is somewhat counterintuitive.

Agency Response: The example given in the comment would leave the individual with a zero value for the annuity. This would only benefit the individual at the State's expense.

- Some revocable annuities may include a "hefty" penalty for "cashing in" or termination as well as other administrative or processing fees. This should be included in any calculation of resource value.

Agency Response: DSS allows the sale of resources at the Fair Market Value which would take into account the penalties.

- The last paragraph requires a spouse claiming that an income allowance is inadequate to request a fair hearing. This may lead to unnecessary fair hearings. DSS may wish to allow reconsideration outside the context of fair hearings.

Agency Response: In order to be consistent DSS believes that the only fair and equitable way to decide who should be allowed to protect additional money for the spouse is through the fair hearing process.

Additional comments were received from Roger Waters, DSS Hearing Officer. His suggested changes are intended to make the language of the rules simpler and easier to understand. As a result of the suggestions, DSS made non-substantive grammatical and clarifying language changes throughout the final order regulation indicated by **[bracketed bold type].**

Findings of Fact:

The Department finds that the proposed changes as set forth in the March 2005 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the policies for the Long Term Care Program regarding annuities is adopted and shall be final effective May 10, 2005.

Vincent P. Meconi, Secretary, DHSS , 4/15/05

DSS FINAL ORDER REGULATION #05-21
NEW:

DSSM 20330.4.1 Annuities

An annuity is a financial device that conveys a right to receive periodic payments for life or a fixed number of months or years. While the annuity itself may or may not be an available resource, the stream of income generated by the annuity is a countable asset. **[~~If~~ DSS will determine if]** there is a market to purchase the annuity stream of income**[.]** **[If there is a market, DSS ~~it is considered~~ will consider it]** to be available 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 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. **[~~The~~ DSS will require the** annuity income stream ~~[must]~~ be sold at Fair Market Value **[as a condition of eligibility]**. See DSSM 20350.1.7.

[~~An~~ DSS 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 is not counted as an available resource. However, **[~~the~~ DSS will count the value of the]** income generated from a third party annuity ~~[is counted as income]~~.

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 (5/1/05)