

September 17, 2004

Office of Regulations  
Department of Health Services  
MS 0015  
P.O. Box 997413  
Sacramento, CA 95899-7413

Re: Comments on Medi-Cal Estate Recovery Program Definitions, R-22-02E

Dear Sir/Madam:

The following comments are submitted on behalf of California Advocates for Nursing Home Reform.

**1. Section 50960(a)** In its Initial Statement of Reasons, the Department states that it has added a definition of “ ‘Annuity’ . . . to provide the public with a clear understanding of an annuity from which the Department will seek recovery for its claim.” However, the Department’s proposed definition provides anything but a “clear understanding.” In its obvious determination to be all-inclusive, the Department has written a definition that is overbroad – and at the same time still fails to be comprehensive.

The Department’s proposed definition uses the terms, “policy” and “contract”, without defining these terms or explaining the difference. What is a policy? Does a contract purchase a policy? Can a person have a policy without obtaining it through a contract? This definition avoids these questions.

The Department’s definition also uses a hodgepodge of other undefined terms. Almost any commercial contract could be an “investment contract.” If someone buys rental real property that gives the owner the right to receive periodic payments of fixed or variable rents, is that an “annuity”? Certainly not, but it seems to be included under the Department’s definition.

We also strongly recommend that this definition be clarified to specify that it does not include life insurance policies, IRAs and other work-related pension plans and annuities.

The following alternative definition far better accomplishes the Department’s own objectives than the one it has proposed:

For purposes of this article only, “annuity” is defined as a policy or contract granting the right to receive periodic payments, fixed or variable, either for life or for a term of years. “Annuity” includes both commercial and private annuities, and annuities that are purchased with payments that are either single, fixed, or variable. “Annuity” specifically excludes life insurance contracts and/or assets held in retirement accounts (e.g., IRAs, ROTH IRAs, 401(k)s, Defined Benefits, Defined contribution, or other pension or work-related retirement plans.

**2. Section 50960(e)**

The word, “office,” should be “officer.”

**3. Section 50960(f)**

Heirs are not “designated” to receive the decedent’s property. Instead, they are “entitled” to receive it because of their family relationship. If a person is “designated” to receive property, that person may be a “beneficiary,” “legatee,” or “devisee” – but not (at least by virtue of the designation) an “heir.”

**4. Section 50961 (g)**

The language in this section exceeds the scope of recovery permitted under federal law. The first sentence in Section 50961(g) states:

*The Department shall claim against annuities as part of a deceased Medi-Cal beneficiary’s estate.*

In fact, the Department has no such general legal authorization to recover against annuities “as part” of an estate. Some annuities may *not* be “part of an estate,” and therefore not be subject to recovery. Such a circumstance may result from the fact that the deceased Medi-Cal beneficiary did not have any ownership “interest” in the annuity.

According to the federal State Medicaid Manual, the Department is only permitted to recover against “an annuity that was *property* of the deceased Medicaid beneficiary” (emphasis added, Transmittal No. 75, amending Section 3810, B., 4., “Annuities,” Centers for Medicare and Medicaid Services (CMS) of the U.S. Department of Health and Human Services). In addition, the Department’s own definition of “estate” is limited to the “extent of such interest” of the decedent (Section 50960 (d)(1)).

More accurately stated, the Department only has a right to recover against “annuities that are part of” an estate as defined under federal law. As a result, the first sentence of Section 50961(g) should be rephrased as follows:

The Department shall claim against annuities to the extent that they are as part of a deceased Medi-Cal beneficiary’s “estate” (as defined by Section 50960(d)(1)).

Second, the Department purports to be able to claim against annuities “*regardless of the funding source for the annuity.*” This may be technically correct, but is misleading because it suggests that all annuities arising from any funding source are subject to estate recovery.

This is not true. In fact, the decedent may not have a recoverable interest in the annuity *even if he or she personally provided the funding for it.* For example, this might occur if the annuity no longer belonged to the decedent, i.e., it was no longer his or her property at death. In fact, there are a number of situations where recovery would be impermissible or inequitable under the proposed language.

- If another person purchased the annuity based on the life of the annuitant, the Medi-Cal beneficiary has no equity interest in the annuity.
- If the annuitant sold the annuity to another person for full and adequate consideration, there would be no residual interest in the Medi-Cal beneficiary’s estate.
- If the interest in the annuity was already deemed transferred to a third party for the purpose of determining a period of disqualification, then the Department can hardly claim that the annuity interest is a part of the deceased beneficiary’s estate, since the Department had already made a determination that the interest in the annuity was transferred.

## **5. General Comments**

The proposed regulations raise a number of serious questions and tax implications:

- How does the Department intend to deal with the income tax or estate tax obligations on the annuity payments, particularly with regard to an income stream?
- Does the Department intend to value a residual interest in an income stream consistent with valuation for estate tax purposes?
- How does the Department intend to collect from a residual interest in an annuity?

These questions raise serious concerns, not only for a beneficiary of an interest in an annuity, but also for the many insurance companies that have marketed these products in California.

Thank you for the opportunity to comment on these proposed regulations.

Sincerely,

Patricia L. McGinnis  
Executive Director