

## INITIAL STATEMENT OF REASONS

Title XIX of the Social Security Act provides for the federal Medicaid Program, administered in California by the Department of Health Services (Department), as the California Medical Assistance (Medi-Cal) Program. The Medi-Cal Program provides qualified low-income persons (primarily families with children and the aged, blind, or disabled) with health care services. Within the federal statutes, regulations, and policies, each State adopts regulations: 1) establishing eligibility standards; 2) determining the type, amount, duration, and scope of services; 3) setting the rate of payment for services; and 4) administering the program.

The Estate Recovery (ER) Program was established in 1981 as a part of the Medi-Cal Program in the Department. The ER Program is one of several controls adopted by Congress and the Legislature to mitigate Medi-Cal costs following passage of the California Welfare and Institutions (W&I) Code section 14009.5. State legislation was amended in 1994 to respond to federal legislation (Omnibus Reconciliation Act of 1993), which changed individual state ER programs from permissive to mandatory, requiring recovery from the estates of certain deceased Medi-Cal beneficiaries. Title 42, United States Code (USC), section 1396p requires the Department to seek recovery from the estates of deceased Medi-Cal beneficiaries for certain services received on or after the individual's 55<sup>th</sup> birthday, including nursing facility services, home and community based services, and related hospital and prescription drug services. This federal law also allows states to recover for other services as specified under their State Plan. In California, these include all payments for health care premiums and services provided to Medi-Cal beneficiaries after their 55<sup>th</sup> birthday. The Department's claim against the estate of a deceased Medi-Cal beneficiary is limited to the value of the decedent's assets or the amount of the medical services paid by Medi-Cal, whichever is less.

As specified in state and federal law, the ER Program provides statutory exemptions from estate claims for certain heirs, dependents, or survivors. The state does not make a claim:

- During the lifetime of the surviving spouse; however, upon the death of a surviving spouse the Department shall claim against the estate for either the amount paid by Medi-Cal for services to the predeceased spouse or the value of assets received by the surviving spouse, whichever is less.
- When the deceased beneficiary is survived by a child under the age of 21, or by a child of any age who is blind or disabled within the meaning of the Social Security Act.
- For Medi-Cal services received before the beneficiary's 55<sup>th</sup> birthday, except in the case of an individual who had been an inpatient in a nursing facility.

Additionally, if a dependent, heir, or survivor believes that payment of the Department's claim would cause an undue hardship, he or she may apply for waiver of the claim, in whole or in part. Consistent with the provisions of Title 22, California Code of Regulations (CCR), section 50963, instructions for requesting a hardship waiver are sent with each ER claim and are directed to the heir(s) of the estate. The heir(s) may choose to pay the claim through the assets of the estate, may challenge the amount of the claim, or may choose to apply for a hardship waiver. The Department initiates collection activities in those cases where an heir does not meet the mandatory exemption or hardship criteria and/or where all opportunities for appeal have been exhausted. The ER Program works with the heir(s) to facilitate repayment, and often delays collection until assets have been liquidated, or arranges a repayment agreement to allow repayment of the claim over a specified period of time, based on the heir's ability to pay.

On an annual basis, the ER Program claims against the estates of approximately 4,000 deceased Medi-Cal beneficiaries, recovering approximately \$50 million per year. These recovered funds are returned to the Medi-Cal Program to continue the provision of benefits to other eligible Medi-Cal beneficiaries.

Title 22 CCR, sections 50960-50965, were adopted to implement, interpret, and make specific the state and federal laws governing ER activities for the Medi-Cal Program. These sections address ER activities related to: definitions, estate claims, notification, undue hardship criteria, and estate hearings. Over the last several years, there has been increasing sensitivity regarding ER activities with concerns expressed by advocacy groups and legislators over perceived inequities in the ER Program, caused by inadequate regulations, which result in the inconsistent application of policies. In an April 1999 review (page 19) of the ER Program by the Health Care Financing Administration, now called Centers for Medicare and Medicaid Services (CMS), it was recommended that ER policy having a direct impact on the public be promulgated via the State's regulatory process.

Title 22 CCR, section 50960, currently contains the term "other arrangement" within the definition of "estate." In the February 15, 2001 federal State Medicaid Manual Update, Page 3-9-7, CMS clarified that states, such as California, which have adopted the expanded definition of estate may seek recovery from annuities (as an other arrangement) after the State meets applicable state and federal law for appropriate notice and due process. In addition, pursuant to a recent settlement agreement and permanent injunction in the case of *California Advocates for Nursing Home Reform et al. v. Diana M. Bontá, et al.* (2003) 106 Cal. App. 4<sup>th</sup> 498 ("CANHR"), the Department is required to amend regulations to specify annuities as an asset in the definition of estate and remove the term "other arrangement," which is accomplished by this emergency regulatory action.

Title 22 CCR, section 50961, has been amended to specify how the Department will recover from annuities as part of a deceased Medi-Cal beneficiary's estate. This amendment provides clarification for attorneys, estate planners, insurance agents, and the general public that, while assets may be exempt for purposes of obtaining eligibility, federal and state laws require the recovery of certain Medi-Cal expenditures from estates of deceased Medi-Cal beneficiaries, and permit recovery from annuities.

These emergency regulatory amendments may affect a small number of small businesses that provide financial and estate planning services, but the majority of annuities are issued by financial institutions (such as banks, trusts, savings and loan associations, etc.), which are excluded by Government Code Section 11341.610 from the definition of small business. Sellers of annuities will be able to continue business, but should now inform the public that assets in an annuity purchased after September 1, 2004 would be subject to recovery of Medi-Cal expenditures upon the death of the Medi-Cal beneficiary annuitant. Annuities that were purchased before the effective date will continue to not be subject to the Department's ER claim.

Overall, these amendments provide clarity and enable the Department to consistently administer and implement the ER mandates of federal and state law. They also enhance the efficiency, effectiveness, and equity of the ER Program, which in turn will better accomplish the Department's mission of protecting the overall health and well being of all Californians.

This emergency regulatory action amends Title 22 CCR, sections 50960 and 50961. In developing the proposed ER regulations, Departmental staff met with subject matter experts within staff, and with estate attorneys, and advocacy groups. As a result of those efforts, these regulations provide the public with a clear understanding of ER processes.

The specific purpose and rationale for each amendment is provided below.

### **Amend Section 50960**

New subsection (a) adds "Annuity" to the definitions in this section. As a result, former subsections (a) through (e) are re-designated (b) through (f). The order in which the definitions for "estate" and "equity interest" has been reversed so they are listed in alphabetical order. The definition of "applicant" has been amended in order to clarify that the meaning is restricted to an heir, dependent, or survivor of the decedent. The words "or reduction" were removed from (b) and (e) since the applicant only applies for a waiver of his or her proportionate share of the Department's claim, not for a reduction of their share of the claim. In addition, for

consistency purposes, a nonsubstantive change to insert the word “only” in new subsections (c), (e), and (f) is proposed to complete the phrase “for purposes of this article only.”

The definition of “Annuity” is added to provide the public with a clear understanding of an annuity from which the Department will seek recovery for its claim. This definition is necessary because of the variety of ways in which an annuity can be structured.

In subsection (d) the term "other arrangement" has been deleted from the definition of “estate” because it lacks clarity. The settlement agreement in *CANHR* also requires this deletion. Language added to this subsection specifies that only annuities purchased on or after September 1, 2004 will be affected by this emergency regulatory action. This will assure that persons who have previously invested in annuities are not affected, as well as provide appropriate notice for those who are considering an annuity purchase. Additionally, minor amendments to this subsection were made to conform existing terms of "individual" and "deceased individual" to "decedent," the term used in federal law.

Attorneys have questioned the Department’s authority to seek recovery for an estate claim against an annuity. The February 15, 2001 federal State Medicaid Manual Update, Page 3-9-7, addresses annuities. It provides the following authority: States may collect against an annuity that was the property of the deceased Medicaid beneficiary if the State probate law is used to define estate and it includes annuities, or, if the State uses the expanded definition of estate found at section 3810.B.2. When using the expanded definition of estate, an annuity is considered an “other arrangement.” When a State uses the expanded definition of estate, this provision is effective for deaths or estates that are opened 90 days after the publication of this manual provision and after the State meets applicable state and federal law for appropriate notice and due process. California has adopted the expanded definition of estate in regulations.

### **Amend Section 50961**

New subsection (g) under Estate Claims specifies that an annuity, annuity payments, or distributions that become assets of a Medi-Cal beneficiary’s estate will be subject to recovery by the Department for reimbursement of Medi-Cal expenditures. The authority for this regulatory change is stated above; i.e., is based on federal law and the State's use of the expanded definition of estate. This subsection also specifies how and when the Department’s claim shall be recovered from an annuity. Because the Department does not wish to impose a penalty upon the heirs of the estate for an early withdrawal, it is stated that the Department’s claim will be recovered as of the date the annuity payments or distributions are designated to be made. It further clarifies that the Department’s

claim will apply to the amount of the annuity, annuity payments or distributions, regardless if the annuity was funded by the Medi-Cal beneficiary, by the decedent's employer, from a structured settlement as a result of litigation, or paid by another individual or entity.

**Amend Authority and Reference Sections of 50960 and 50961**

Title 42 USC, section 1396p(b), has been removed from the "authority" citation because federal law is not self-implementing and may not be authority for state regulatory action. However, it has been added to the "reference" citation as it is being implemented by this regulation. W&I Code section 14043.75 has been added to the "authority" citation as it provides the authority for this emergency regulatory action. The reference citation is amended to include the settlement agreement and permanent injunction issued by the California Superior Court in *California Advocates for Nursing Home Reform et al. v. Diana M. Bontá, et al.* (2003), because it pertains to the state's recovery from an annuity as part of an estate.

Specific to Section 50960, the reference to *Citizens Action League v. Kizer* (9<sup>th</sup> Cir. 1989) 887 F. 2d 1003, 1006 (Kizer) has been deleted. Kizer established the definition of "estate" to be limited to the common law definition for decedents who died prior to October 1, 1993. Pursuant to the Omnibus Reconciliation Act of 1993, Congress provided an expanded definition of "estate," which California has adopted into regulations and incorporated into its Estate Recovery Program; consequently, the 1989 reference is no longer relevant. In addition, a non-substantive amendment to add the year (1995) to the reference of *Belshé v. Hope* has been made.