

TO BE RESCINDED

5160:1-3-22.8 **Medicaid: the disclosure and treatment of annuities for recipients or applicants for medical assistance programs.**

(A) This rule describes the treatment of annuities for recipients or applicants for medical assistance programs.

(B) Definitions.

- (1) "Actuarially sound annuity" means a product designed to pay off the entire asset value over the actual or expected annuitant's lifetime.
- (2) "Annuitant" means the individual who is entitled to receive payment from an annuity.
- (3) "Annuitized" means an annuity providing payments to the individual or other entity.
- (4) An "annuity" provides fixed, periodic payments, either for life or a term of years. When an individual purchases an annuity, he or she generally pays to the entity issuing the annuity a lump sum of money, in return for which he or she is promised regular payments of income for certain amounts. These payments may continue for a fixed period of time or for as long as the individual (or another designated beneficiary) lives. The annuity typically contains a remainder clause under which, if the annuitant dies, the contracting entity converts whatever is remaining in the annuity into a lump sum and pays it to a designated beneficiary.
- (5) "Asset" means all income and resources of the individual and of the individual's spouse, including any income or resources that the individual or such individual's spouse is entitled to but does not receive.
- (6) "Balloon payment" means a lump sum equal to the initial premium minus any distribution paid out prior to the end of the annuity period.
- (7) "Community spouse" is an individual who is not in a medical institution or nursing facility and has an institutionalized spouse, except that neither of two spouses, married to each other, who both request or receive services under a home and community-based services (HCBS) waiver program or program of all inclusive care for the elderly (PACE) is considered to meet this definition.
- (8) "Individual" means an applicant for or recipient of a medical assistance

program.

- (9) "Institutionalized" describes an individual who receives long term care services in a medical institution, a long term care facility, under an HCBS waiver program, or under PACE.
- (10) "Remainder beneficiary" means the individual or entity who will receive the lump sum upon the death of the annuitant or the term of the annuity has expired.
- (11) "Spouse" means a person who is considered legally married to another person under Ohio law.
- (12) "Transaction" means any action taken by the individual or community spouse that changes the treatment of the income or principal of the annuity.

(C) Eligibility criteria.

- (1) For any annuity purchased or annuity transaction completed on or after February 8, 2006, the purchase or transaction must be treated as the disposal of an asset for less than fair market value as outlined in rule 5101:1-39-07 of the Administrative Code unless:
 - (a) The state of Ohio is named as the remainder beneficiary in the first position for the total amount of medical assistance furnished to the individual; or
 - (b) The state of Ohio is named as such a beneficiary in the second position for the total amount of medical assistance furnished to the individual after the community spouse or minor or disabled child, and is named in the first position for the total amount of medical assistance furnished to the individual if such spouse or a representative of such child disposes of any such remainder for less than fair market value.
- (2) The following annuity purchases are not considered a disposal of an asset for less than fair market value for any annuity purchased on or after February 8, 2006:
 - (a) An annuity described in subsection (b) or (q) of section 408 of the Internal Revenue Code of 1986 as in effect on August 31, 2005; or

- (b) An annuity purchased with proceeds from:
 - (i) An account or trust described in subsection (a), (c), or (p) of section 408 of such code,
 - (ii) A simplified employee pension (within the meaning of section 408(k) of such code); or
 - (iii) a Roth IRA described in section 408A of such code; or
- (3) For any annuity purchased on or after February 8, 2006, the purchased annuity must be irrevocable, non-assignable, and actuarially sound as determined by the life expectancy tables published by the office of the actuary of the social security administration in accordance with 26 C.F.R. 20.2031-7, subpart E as in effect on April 1, 2005; and provides for payments in equal amounts during the term of the annuity with no deferral and no balloon payments made.
 - (a) For an annuity to be considered actuarially sound, the total amount of proceeds must be designed to be dispersed in equal monthly payments with no anticipated lump sum payment. The only allowable lump sum payment is the refund provided when the annuitant dies prior to the end of the guaranteed period and paid to the remainder beneficiary.
 - (b) The purchased annuity must not have a balloon payment provision unless the balloon payment designation is for the community spouse.
 - (c) Any annuity not providing fixed, monthly payments will be treated as a countable resource. Once annuitized, the annuity will be considered an exempt resource.
 - (d) Any fixed, monthly payment received from the annuity will be considered as unearned income to the named annuitant as outlined in rule 5101:1-39-16 of the Administrative Code.
- (4) Treatment of annuities purchased prior to February 8, 2006.
 - (a) At any time, any person may use assets of an applicant/recipient to purchase an annuity that names the applicant/recipient as the owner and annuitant under the following conditions.

- (i) The annuity must be purchased from a bank, insurance company, or other person engaged in the business of the sale of commercial annuities to the public.
 - (ii) The annuity may not make payments to other persons during the applicant/recipient's life.
 - (iii) The annuity must provide for all payments to be made during the life of the annuitant. To make this determination, the administrative agency shall use the life expectancy tables published by the office of the actuary of the social security administration in accordance with 26 C.F.R. 20.2031-7, subpart E as in effect on April 1, 2005. If the table indicates that the annuitant will not live as long as the guaranteed period of the annuity, there is an improper transfer. The amount improperly transferred is the sum of all payments that can be made after the expected end of the life of the annuitant. The administrative agency shall determine the penalty in accordance with the rules governing improper transfers unless one of the exceptions in rule 5101:1-39-07 of the Administrative Code is met. The applicant/recipient may also rebut a finding of an improper transfer by establishing that the annuity provides the spouse is the remainder beneficiary, and all remaining payments will occur during the spouse's life as determined by the life expectancy tables published by the office of the actuary of the social security administration in accordance with 26 C.F.R. 20.2031-7, subpart E as in effect on April 1, 2005.
- (b) At any time before the first continuous period of institutionalization of the applicant/recipient, any person may use any amount of assets of a couple or of the applicant/recipient to purchase an annuity that names only the spouse of the applicant/recipient as the owner and annuitant under the following conditions.
- (i) The annuity must be purchased from a bank, insurance company, or other person engaged in the business of the sale of commercial annuities to the public.
 - (ii) The annuity must be purchased before the applicant/recipient's "first continuous period of institutionalization" as defined in rule 5101:1-39-22 of the Administrative Code.

- (iii) The annuity may not make payments to other persons during the spouse's life.
 - (iv) To make this determination, the administrative agency shall use the life expectancy tables published by the office of the actuary of the social security administration in accordance with 26 C.F.R. 20.2031-7, subpart E as in effect on April 1, 2005. If the table indicates that the annuitant will not live as long as the guaranteed period of the annuity, the annuity is considered an improper transfer. The amount improperly transferred is the sum total of all payments that can be made after the expected end of the life of the annuitant. The administrative agency shall determine the penalty in accordance with the rules governing improper transfers unless one of the exceptions in rule 5101:1-39-07 of the Administrative Code is met. The applicant/recipient may also rebut a finding of an improper transfer by establishing that the annuity provides the spouse is the remainder beneficiary, and all remaining payments will occur during the spouse's life as determined by the life expectancy tables.
- (c) At any time before the first continuous period of institutionalization, an applicant/recipient may purchase an annuity naming both the applicant/recipient and the spouse as the owners and annuitants under the following conditions.
- (i) The annuity must be purchased from a bank, insurance company, or other person engaged in the business of the sale of commercial annuities to the public.
 - (ii) The annuity may not make payments to persons other than the applicant/recipient or the spouse while either live.
 - (iii) The annuity may designate a remainder beneficiary only if all annuity payments are expected to be made during the life of either or both of the annuitants. To make this determination, the administrative agency shall use the life expectancy tables published by the office of the actuary of the social security administration in accordance with 26 C.F.R. 20.2031-7, subpart E as in effect on April 1, 2005.
 - (iv) If the table indicates that the annuitants will not live as long as the guaranteed period of the annuity, the annuity is considered an

improper transfer. The amount improperly transferred is the sum total of all payments that can be made under the annuity reduced by the total of all payments that will be paid to the annuitants during their lives as determined by the table.

- (d) At any time after the applicant/recipient's first continuous period of institutionalization, any part of the community spouse resource allowance established under rule 5101:1-39-36.1 or 5101:6-7-02 of the Administrative Code may be used to purchase an annuity for the benefit of any person without an adverse effect on the medicaid eligibility of the institutionalized spouse. However, if the community spouse uses part or all of the community spouse resource allowance to purchase an annuity, and later applies for medicaid, the community spouse as the applicant/recipient will also need to independently satisfy the requirements of this rule.
- (e) At any time after the applicant/recipient's first continuous period of institutionalization, the community spouse resource allowance may be combined with resources in excess of the community spouse resource allowance for the purpose of purchasing an annuity naming both spouses as annuitants. Such a combined purchase is not an improper transfer under the following conditions.
 - (i) The annuity must be purchased from a bank, insurance company, or other person engaged in the business of the sale of commercial annuities to the public.
 - (ii) The annuity may not make payments to persons other than the applicant/recipient or the spouse while either live.
 - (iii) The annuity may designate a remainder beneficiary only if all annuity payments are expected to be made during the life of either or both of the annuitants. To make this determination, the administrative agency shall use the life expectancy tables published by the office of the actuary of the social security administration in accordance with 26 C.F.R. 20.2031-7, subpart E as in effect on April 1, 2005.
 - (iv) If the table indicates that the annuitants will not live as long as the guaranteed period of the annuity, the annuity is considered an improper transfer. The amount improperly transferred is the sum of all payments that can be made under the annuity reduced by the sum of all payments that will be paid to the annuitants during

their lives as determined by the table.

- (v) The periodic payments must be equivalent to each respective spouse's contribution to the original purchase of the annuity. The community spouse must receive a periodic payment that is commensurate with a pro rata contribution to the purchase of the annuity. The amount of the transfer is the total value of all excess payments that are expected to be made over the life of the annuity.
- (f) At any time after the applicant/recipient's first continuous period of institutionalization, the purchase of an annuity for the benefit of a community spouse with the institutionalized spouse's share of resources as established under rule 5101:1-39-36.1 of the Administrative Code is an improper transfer unless permitted as a result of a hearing conducted under rule 5101:6-7-02 of the Administrative Code.
- (g) Any annuity provided for under paragraphs (C)(4)(a) to (C)(4)(k) of this rule that has not been annuitized shall be considered an available resource when completing a resource assessment.
 - (i) An annuity that is making payments in accordance with the provisions in paragraphs (C)(4)(a) to (C)(4)(k) of this rule, at the time of application for medicaid, will not be considered an available resource. However, any payments will be considered unearned income to the annuitant.
 - (ii) An annuity that is not making payments in accordance with the provisions in paragraphs (C)(4)(a) to (C)(4)(k) of this rule, is considered an available resource if the terms of periodic payments can be changed to conform with the provisions in paragraphs (C)(4)(a) to (C)(4)(k) of this rule.
- (h) If an annuity contains a balloon payment provision, the life expectancy tables published by the office of the actuary of the social security administration in accordance with 26 C.F.R. 20.2031-7, subpart E as in effect on April 1, 2005 may not be used. The value of the balloon payment is considered an improper transfer unless rebutted by the applicant/recipient. To rebut the presumption, the applicant must produce clear and convincing medical evidence that the annuitant is expected to actually live past the date of the balloon payment.
- (i) Private annuity agreements are those not purchased from a bank, insurance

company, or other person or entity engaged in the business of the sale of commercial annuities to the public. Assets or resources transferred, used, or otherwise exchanged for a private annuity agreement are considered an improper transfer. However, this is a rebuttable presumption subject to the rules governing improper transfers as delineated in paragraph (D) of rule 5101:1-39-07 of the Administrative Code.

(j) For the purposes of this rule, any improper transfer shall be considered to have occurred on the date of the purchase of the annuity, or on the date after which the terms of periodic payments can no longer be changed to conform with the provisions in paragraphs (C)(4)(a) to (C)(4)(k) of this rule, whichever is later.

(k) If the applicant/recipient or the community spouse is the annuitant of an annuity in which neither individual, at any time, held an ownership interest in the funds used to establish the annuity will not result in an improper transfer if the owner of the annuity fails to make the payments available.

(D) Administrative agency responsibilities.

- (1) The administrative agency must request from the individual a disclosure of any annuity ownership the individual or community spouse has in an annuity for any annuity purchased on or after February 8, 2006 as outlined in rule 5101:1-38-01.2 of the Administrative Code.
- (2) The administrative agency must explain as part of the application process or upon discovery, such provisions which require the state of Ohio to become a remainder beneficiary for any annuity purchased on or after February 8, 2006.
- (3) The administrative agency must verify the remainder beneficiary designation in accordance with rule 5101:1-38-02 of the Administrative Code for any annuity purchased on or after February 8, 2006.

(E) Individual responsibilities.

- (1) The individual is required to supply verification in accordance with Chapter 5101:1-38 of the Administrative Code.
- (2) The individual applying for or receiving long term care services in a long term care facility, under a HCBS waiver program, or under PACE must disclose

any annuity owned by either the institutionalized individual or community spouse.

- (3) The individual applying for or receiving long term care services in a long term care facility, under a HCBS waiver program, or under PACE, or the community spouse must designate the state of Ohio as the remainder beneficiary for any annuity purchased on or after February 8, 2006, as follows:
 - (a) The state of Ohio is named as the remainder beneficiary in the first position; or
 - (b) The state of Ohio is named beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such a child disposes of any such remainder for less than fair market value.
 - (c) The individual is required to provide verification of the remainder beneficiary designation. Failure to provide verification will result in termination or denial for medical assistance as outlined in rule 5101:1-38-02 of the Administrative Code.

(F) Hearing rights.

- (1) The administrative agency must issue proper notice and hearing rights as outlined in division 5101:6 of the Administrative Code.

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Certification

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