STATE OF MICHIGAN
DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES

Bulletin 2020-36-INS

In the matter of:

Medicaid Annuities
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Issued and entered
this 31st day of August 2020
by Anita G. Fox
Director

This bulletin supersedes Bulletin 2002-06-INS, dated October 14, 2002.

Some companies market annuities in Michigan as financial vehicles that will allow an individual to protect accumulated assets while at the same time allowing the same individual to qualify for Medicaid benefits to cover the cost of long term care in a nursing home. The Department of Insurance and Financial Services monitors these companies to ensure that their activities are in compliance with state and federal law and to protect Michigan consumers from inappropriate advertising and sales of such annuities.

In certain circumstances, using an annuity to transfer assets between spouses or to blind or disabled dependents is not, under current rules, considered to be a divestment - a transfer of assets for less than fair market value - that would disqualify and subject a Medicaid applicant to penalties. Determining whether an annuity purchased for other reasons is a Medicaid divestment depends on whether the annuity was purchased as part of a legitimate retirement plan or whether the ultimate purpose of the purchase was to shelter assets from Medicaid spend-down requirements.

The State Medicaid Manual General Eligibility Requirements published by the United States Department of Health and Human Services to implement Title XIX of the Social Security Act provide instructions that are official interpretations of the law and regulations and binding on state Medicaid agencies. The Medicaid manual, available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927, states that,

> Annuities, although usually purchased in order to provide a source of income for retirement, are occasionally used to shelter assets so that individuals purchasing them can become eligible for Medicaid. In order to avoid penalizing annuities validly purchased as part of a retirement plan but to capture those annuities that abusively shelter assets, a determination must be made with regard to the ultimate purpose of the annuity (i.e., whether the purchase of the annuity constitutes a transfer of assets for less than fair market value). If the expected return on the annuity is commensurate with a reasonable estimate of the life expectancy of the beneficiary, the annuity can be deemed to be actuarially sound. (State Medicaid Manual, Part 3-Eligibility, page 3-3-109.15)

The language cited above clarifies that annuities are considered a divestment if they are purchased to circumvent Medicaid maximum asset limits, and the ultimate purpose of the annuity is to abusively shelter assets. An individual who purchases such an annuity would be subject to penalties under current Medicaid rules.

According to Section 405 of the Michigan Department of Health and Human Services Bridges Eligibility Manual, the purchase of an annuity that is not actuarially sound will be considered a transfer for less than fair market value and will be counted among an applicant's assets and may result in a penalty period in which Medicaid will not pay for certain services. For an annuity to be considered actuarially sound, the person to whom the annuity payments are made during the guarantee period of the annuity (called the annuitant) must be expected to live until the end of the guarantee period. In addition, Section 401 of the Bridges Eligibility Manual states that the purchase or amendment of an annuity by or on behalf of an annuitant who has applied for medical assistance will be considered a transfer for less than fair market value unless the annuity meets all of the following conditions:

- Is commercially issued by a company licensed in the United States and issued by a licensed producer (a person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance)
- Is irrevocable
- Is purchased by an applicant or recipient for Medicaid or their spouse and solely for the benefit of the applicant or recipient or their spouse
- Is actuarially sound and returns the principal and interest within the annuitant's life expectancy
- Payments must be in substantially equal monthly payments (starting with the first payment) and continue for the term of the payout (no balloon or lump sum payments)
- If the annuity was purchased or amended on or after February 8, 2006, the State of Michigan must be named as the remainder beneficiary in the first position, or as the second remainder beneficiary after the community spouse or minor or disabled child, for an amount at least equal to the amount of the Medicaid benefits paid on behalf of the institutionalized individual.

However, if the annuity is considered either an individual retirement annuity under section 408(b) of the Internal Revenue Code (IRC) or deemed an individual Retirement Account under a qualified employer plan under section 408(q) of the IRC and is purchased with proceeds from certain types of accounts, the annuity will not be considered a transfer for less than fair market value and will not be subject to the irrevocability, actuarially sound, and equal monthly payments requirements listed above. The annuity must be purchased with proceeds from a traditional IRA (Section 408(a) of the IRC), certain accounts or trusts established by an employer or certain associations of employees (Section 408(c) of the IRC), a simple retirement account (Section 408(p) of the IRC), a simplified employee pension (Section 408(k) of the IRC), or a Roth IRA (Section 408A of the IRC).

Michigan Administrative Rule 500.1375(1) states that:

> Advertisements shall be truthful and not misleading in fact or by implication.
> The form and content of an advertisement of a policy shall be sufficiently complete and

> clear so as to avoid deception. Whether an advertisement is misleading or deceptive shall be determined from the overall impression that the advertisement may be reasonably expected to create.

Companies using advertising that states, implies, or in any way suggests that an annuity may be used as a vehicle to protect assets from Medicaid asset limitation requirements without including in at least 14-point type a reference to the limited circumstances in which this is acceptable under Medicaid rules, and the definition of "actuarially sound" as set forth in this bulletin, will be considered to be in violation of Rule 500.1375(1). Advertising shall include either the definition and other requirements provided above or the following summary:

> To qualify as an actuarially sound annuity for purposes of determining Michigan Medicaid eligibility, an annuity must meet all of the following requirements:
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> 1. Pay off all value over annuitant's actual or expected lifetime.
> 2. Pay in substantially equal periodic payments.
> 3. Limit any "Guaranteed period" to less than expected lifetime.
> 4. Include no lump sum payment except for remainder of guaranteed equal periodic payments at death.

The Michigan Uniform Trade Practices Act defines several activities as unfair trade practices. These practices can subject insurers to monetary and administrative penalties, including suspension or revocation of a certificate of authority. Issuing marketing material that suggests that actuarially unsound annuities can position assets outside of the limits of Medicaid eligibility requirements violates MCL 500.2005(a) by misrepresenting the benefits or advantages of an insurance policy. It also violates the false advertising provisions of MCL 500.2007 and misrepresentation of policy benefit provisions of MCL 500.2064(1).

In addition, MCL 500.2236(5) grants the Director the authority to disapprove, withdraw approval, or prohibit the issuance, advertising, or delivery of any form if it contains ambiguous or misleading clauses. As the Director becomes aware of annuity contracts that appear to be intended to shelter assets from Medicaid eligibility requirements, the Director will first apply the above definition of "actuarially sound." If a contract does not meet the definition, the Director will prohibit the issuance, advertising, or delivery of the contract unless the insurer can demonstrate that the marketing of the contracts is in no circumstance connected with Medicaid financial planning.

Insurers who have issued inappropriate "Medicaid friendly" annuities have put consumers at risk. Companies who wish to avoid compliance action by the Department of Insurance and Financial Services should consider making a written "no questions asked" rescission offer within 90 days of the date of this bulletin. The rescission should offer to cash out the contract at the current accumulated value with no surrender or other charges deducted.

Contracts such as lump sum payout annuities that are being legitimately sold in other markets must be able to clearly demonstrate that they are not being marketed to individuals considering positioning of assets under Medicaid eligibility requirements.

Additional information regarding Medicaid eligibility is available at the United States Department of

Health and Human Services website, www.medicaid.gov, and the Michigan Department of Health and Human Services website, www.michigan.gov/medicaid.

Any questions regarding this bulletin should be directed to:

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