State of California
Office of Administrative Law

NOTICE OF APPROVAL OF EMERGENCY REGULATORY ACTION
Government Code Section 11349.3
OAL Matter Number: 2015-0818-01
OAL Matter Type: Regular (S)

In re:
Department of Health Care Services
Regulatory Action:
Title 22, California Code of Regulations

Adopt sections: [Blank]
Amend sections: 50961, 50962, 50963
Repeal sections: [Blank]

The Department of Health Care Services (Department) proposed this action to amend sections 50961, 50962, and 50963 of title 22 of the California Code of Regulations, which pertain to the Department's authority to recover Medi-Cal funds from a beneficiary's estate. the proposed amendments update the existing regulations so that the provisions of estate recovery, estate recovery deferrals, and claims of substantial hardship resulting from estate recovery applies equally to married couples, registered domestic partners, and legal unions performed in other jurisdictions. The proposed action also substantially revises DHCS Form 6195, Application for Hardship Waiver, which is incorporated by reference in sections 50962 and 50963.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 1/1/2016.

Date: September 3, 2015

[Original Signed]
Richard L. Smith
Senior Attorney

For: DEBRA M. CORNEZ, Director

Original: Jennifer Kent
Copy: Lori Manieri

[Stamp]
[REGULAR]

STATE OF CALIFORNIA – OFFICE OF ADMINISTRATIVE LAW
NOTICE PUBLICATION/REGULATIONS SUBMISSION

STD. 400 (REV. 01-2013)
OAL FILE NUMBERS
NOTICE FILE NUMBER: **Z-** 2014-0826-04
REGULATORY ACTION NUMBER: 2015-0818-01S
EMERGENCY NUMBER: [Blank]

For use by Office of Administrative Law (OAL) only
NOTICE: [Blank]

REGULATIONS: [Date Stamp]
2015 AUG 18 P 1:38
OFFICE OF ADMINISTRATIVE LAW

For Use by Secretary of State Only
[Date Stamp]
ENDORSED - FILED in the office of the Secretary of State
of the State of California
SEP -3 2015
2:11 PM

AGENCY WITH RULEMAKING AUTHORITY: Department of Health Care Services
AGENCY FILE NUMBER (if any): DHCS-08-012

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE: [Blank]
   TITLES: [Blank]
   FIRST SECTION AFFECTED: [Blank]
2. REQUESTED PUBLICATION DATE: [Blank]
3. NOTICE TYPE
   Notice re Proposed Regulatory Action: [Blank]
   Other: [Blank]
4. AGENCY CONTACT PERSON: [Blank]
   TELEPHONE NUMBER: [Blank]
   FAX NUMBER (Optional): [Blank]

OAL USE ONLY
ACTION ON PROPOSED NOTICE
Approved as Submitted: [Blank]
Approved as Modified: [Blank]
Disapproved/Withdrawn: [Blank]

NOTICE REGISTER NUMBER: 2014, 37Z
PUBLICATION DATE: 09/12/2014

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)
1a. SUBJECT OF REGULATIONS: Estate Recovery
1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBERS:
[Blank]
2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLES AND SECTIONS **(Including Title 26, if toxics related)**
SECTIONS AFFECTED **(List all section numbers individually. Attach additional sheet if needed.)**
ADOPT: [Blank]
AMEND: 50961, 50962 and 50963
REPEAL: [Blank]
TITLES: 22

3. TYPE OF FILING
Regular Rulemaking (Gov. Code Section 11346): [Checked]
Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code Sections 11349.3, 11349.4): [Blank]
Emergency (Gov. Code, Section 11346.1(b)): [Blank]
Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code Sections 11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute: [Blank]
Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, Section 11346.1): [Blank]
Emergency Readopt (Gov. Code, Section 11346.1(h)): [Blank]
File & Print: [Blank]
Changes Without Regulatory Effect (Cal. Code Regs., Title 1, Section 100): [Blank]
Print Only: [Blank]
Other (Specify): [Blank]

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs, Title 1, Section 44 and Gov. Code Section 11347.1): July 15, 2015 through July 30, 2015

5. EFFECTIVE DATE OF CHANGES (Gov. Code, Sections 11343.4, 11346.1(d)); Cal. Code Regs, Title 1, Section 100):
Effective January 1, April 1, July 1, or October 1 (Gov. Code Section 11343.4(a)): [Checked]
Effective on filing with Secretary of State: [Blank]
Section 100 Changes Without Regulatory Effect: [Blank]
Effective other (Specify): [Blank]

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY.
Department of Finance (Form STD. 399) (SAM Section 6660): [Checked: Check mark crossed out per agency request]
Fair Political Practices Commission: [Blank]
State Fire Marshal: [Blank]
Other (Specify): [Blank]

7. CONTACT PERSON: Lori Manieri
TELEPHONE NUMBER: 916-650-6825
FAX NUMBER (Optional): [Blank]
EMAIL ADDRESS (Optional): lori.manieri@dhcs.ca.gov

8. **I certify that the attached copy of the regulations is a true and correct copy of the regulations identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**
SIGNATURE OF AGENCY HEAD OR DESIGNEE: [Original Signed]
TYPED NAME AND TITLE OF SIGNATORY: Jennifer Kent, Director
DATE: 8/17/15

For use by Office of Administrative Law (OAL) only

[Date Stamp]
ENDORSED APPROVED
SEP 03 2015
Office of Administrative Law

METHOD OF INDICATING CHANGES

This Accessible PDF version reflects the Office of Administrative Law approved regulation text (including15-Day changes) and includes the phrase [begin underline] at the beginning of each addition, [end underline] at the end of each addition, [begin strikethrough] at the beginning of each deletion, and [end strikethrough] at the end of each deletion.

A standard PDF version of this Office of Administrative Law approved regulation text is also available on the Department's Office of Regulations Internet site.

(1) Amend Section 50961 to read:

§ 50961. Estate Claims.

(a) The Department shall claim against the estate of a decedent, or against any recipient of the decedent's property by distribution or survival, an amount equal to the lesser of:

(1) All payments made by the Medi-Cal program on behalf of the decedent, except for those payments specified under subsection (c) that are not included in the claim; or,

(2) The decedent's equity interest in the property at the time of death (to the extent of such interest).

(b) All payments made by the Medi-Cal program on behalf of decedents:

(1) Age 65 and older, who died prior to July 11, 1994, shall include all payments made for services provided at age 65 and older;

(2) Age 65 and older, who died on or after July 11, 1994, shall include all payments made from age 65 and older, in addition to any payments made from age 55 to 64 that were paid on or after October 1, 1993;

(3) Age 55 to 64, who died on or after July 11, 1994, shall include only those payments made on or after October 1, 1993.

(c) The Department's claim shall include all payments made by the Medi-Cal program on behalf of the decedent, including nursing facility and other long-term care services, home and community based services, inpatient/outpatient services, durable medical equipment, related hospital and prescription drug services, health care and insurance premiums, and payments to managed care plans. The Department's claim

shall not include payments made for personal care services provided under In-Home Support[begin underline]ive[end underline] Services, or the cost of premiums, co-payments[begin underline],[end underline] and deductibles paid on behalf of [begin underline]Qualified Medicare Beneficiaries (QMBs), Specified Low-Income Medicare Beneficiaries (SLMBs), Qualifying Individuals, Qualified Disabled and Working Individuals, QMB Plus, and SLMB Plus who are categorized as groups of dual eligibles as defined by Section 2602(f) of the Patient Protection and Affordable Care Act of 2010 (Pub. L. No. 111-148).[end underline] [begin strikethrough]~~either Qualified Medicare Beneficiaries or Specified Low Income Medicare Beneficiaries (QMB/SLMB).~~ [end strikethrough]

(d) [begin underline]An exemption from t[end underline] [begin strikethrough]~~T~~he Department[begin underline]'s claim exists [end underline] [begin strikethrough]~~shall provide an exemption of the claim~~[end strikethrough] in any of the following circumstances:

(1) Where the decedent was under age 55 when the [begin underline]Medi-Cal [end underline]services[begin underline], as specified in subsection (c), [end underline]were [begin strikethrough]~~provided~~[end strikethrough] [begin underline]received[end underline], [begin strikethrough]~~unless~~[end strikethrough][begin underline]except if [end underline]the [begin strikethrough]~~decedent was an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution;~~ [end strikethrough][begin underline]individual is/was an inpatient in a nursing facility, intermediate care facility for individuals with intellectual disabilities, or other medical institution, and both of the following conditions are met:

(A) The provisions under Title 22, California Code of Regulations, Section 50428

apply to the individual; and

(B) The individual spends for costs of medical care all but a minimal amount of his/her income required for personal needs.

(2) During the lifetime of a surviving spouse; [begin underline], after the documentation specified in paragraphs (A) and (B), below, is submitted to, and approved by, the Department at the address specified in Section 50966(a). However, upon the death of the surviving spouse, the Department shall assert its claim against the estate of the surviving spouse, in accordance with subsections (a), (b) and (c) of this section.

(A) Proof that the surviving spouse was married to the decedent at the time of death; and

(B) Proof of identity of the surviving spouse including name, social security number, and date of birth.

(3) During the lifetime of a surviving person, as specified in subsections (b) and (c) of Section 50963, who qualifies for a waiver due to a substantial hardship. However, upon the death of the surviving person, the Department shall assert its claim against the estate of the surviving person, in accordance with subsections (a), (b) and (c) of this section. [end underline]

[begin strikethrough]~~(3)~~[end strikethrough][begin underline](4)[end underline] When, as of the date of decedent's death, there is a surviving child of the decedent who is under age 21, and who can provide the Department with the documentary evidence specified in Section 50966(a)(2), to the address specified in Section 50966(a);

[begin strikethrough]~~(4)~~ [end strikethrough][begin underline](5)[end underline] When, as of the date of the Department's notice of claim, there is a surviving child of the decedent who is blind, or disabled, within the meaning of Section 1614 of the [begin

underline]F[end underline][begin strikethrough]f[end strikethrough]ederal Social Security Act (42 USC Section 1382c), and who qualifies for a claim exemption under Section 50966.

(e) The Department shall waive the proportionate share of its claim against any applicant who qualifies for a waiver due to a substantial hardship, as specified in Section 50963(a).

(f) The Department shall not enforce collection of the proportionate share of [begin strikethrough]an estate[end strikethrough] [begin underline]its[end underline] claim for any applicant who is awaiting the resolution of a hardship waiver request or an estate hearing. However, the Department shall enforce collection of its claim from the remaining dependent(s), heir(s), or survivor(s) for his or her proportionate share of the claim.

(g) The Department shall reduce its claim in accordance with Section 50453.7(b) for insurance benefits received under the California Partnership for Long-Term Care.

(h) The Department shall claim against annuities as part of a decedent's estate. The Department's claim shall be recovered from the value of an annuity, annuity payments, or distributions receivable by any person or entity from the date the annuity payments or distributions are designated to be made. The Department's claim shall apply to the annuity, annuity payments, or distributions regardless of the funding source for the annuity.

(i) Where the decedent made an irrevocable transfer of a remainder interest in property with a retained life estate, the Department's claim shall not apply against the life estate or the remainder interest. Where the decedent held a life estate and made a revocable transfer of the remainder interest in the property, the Department's claim shall apply to the fair market value of the property as if title to the property had remained

solely with the decedent. Where the decedent made a revocable transfer of a remainder interest in property and made an irrevocable grant of a life estate in the property, the Department's claim shall apply to the fair market value of the remainder interest. Where the decedent made a revocable transfer of a remainder interest in property and made a revocable grant of a life estate in the property, the Department's claim shall apply to the fair market value of the property as if title to the property had remained solely with the decedent.

(j) The Department's claim shall not apply against property interests that the decedent irrevocably transferred before death.

(k) A voluntary post death lien shall be proposed, in accordance with Section 50965, to secure the unpaid portion of the Department's claim until the claim is paid in full.

[begin strikethrough]~~(l)~~[end strikethrough][begin underline](l)[end underline] Except for claims governed by Probate Code Sections 9203 and 19203, the Department shall charge simple interest, at the rate of seven percent per annum, on the unpaid portion of its claim until the claim is fully satisfied.

(1) Where there has been no claim exemption sought pursuant to Section 50961(d) or a substantial hardship waiver requested in accordance with Section 50963, simple interest shall begin to accrue on the date of notice of claim or the date of distribution, whichever is later.

(2) Where a claim exemption has been sought pursuant to Section 50961(d) or a substantial hardship waiver has been requested in accordance with Section 50963, simple interest shall begin to accrue on the 15th day following the date of the final determination of the claim exemption or substantial hardship waiver request.

NOTE: Authority cited: Section 20, Health and Safety Code; and Sections 10725 and 14124.5, Welfare and Institutions Code. Reference: Sections 1382[begin strikethrough] ~~(c)~~[end strikethrough] [begin underline],1396p(a)[end underline] and 1396p(b), 42 USC; Section 14009.5, Welfare and Institutions Code; Sections 9203 and 19203, Probate Code; [begin underline]Sections 297, 297.5, 299.2 and 308, Family Code; Sections 1916-1 and 3287, Civil Code; California Constitution, Article I, Sections 1 and 7 and Article XV, Section 1;[end underline] *Belshé v. Hope* (1995) 33 Cal. App. 4th 161; *Dalzin v. Belshé* (N.D. Cal. 1997) 993 F. Supp. 732; *California Advocates for Nursing Home Reform v. Bontá* (2003) 106 Cal. App. 4th 498; [begin strikethrough]~~and California Constitution, Article 15, Section 1~~[end strikethrough] [begin underline]*Shewry v. Begil* (2005) 128 Cal.App.4th 639*; In re Marriage Cases* (2008) 43 Cal.4th 757; *Perry v. Brown* (9th Cir. 2013) 725 F.3d 1140; Section 2602(f) of the Patient Protection and Affordable Care Act of 2010, (Pub. L. No. 111-148); Section 115, Medicare Improvements for Patients and Providers Act of 2008 (Pub. L. No. 110-275); *Hollingsworth v. Perry* (2013) 570 U.S. 12-144; and *United States v. Windsor* (2013) 570 U.S. 12-307[end underline].

(2) Amend Section 50962 to read:

§ 50962. Notification.

(a) No Change

(b) No Change

(c) The Department shall provide written notice to the person handling the decedent's estate, which includes the following:

(1) – (2) No Change

(3) An Application for Hardship Waiver, form DHCS 6195 (~~8/07~~ 05/15)

(d) No Change

(e) No Change

NOTE: Authority cited: Section 20, Health and Safety Code; and Sections 10725 and 14124.5, Welfare and Institutions Code. Reference: Section 1396p(b), 42 USC; Section 14009.5, Welfare and Institutions Code; Sections 215, 1215, 9202 and 19202, Probate Code; [begin strikethrough]~~and~~[end strikethrough] *California Advocates for Nursing Home Reform v. Bontá* (2003) 106 Cal. App. 4th 498[begin underline]; *In re Marriage Cases* (2008) 43 Cal.4th 757; *Perry v. Brown* (9th Cir. 2013) 725 F.3d 1140; *Hollingsworth v. Perry (2013) 570 U.S. 12-144; and United States v. Windsor (2013) 570 U.S. 12-307*. [end underline]

(3) Amend Section 50963 to read:

§ 50963. Substantial Hardship Criteria.

(a) The Department shall waive an applicant's proportionate share of the claim if the applicant can demonstrate through submission of [begin strikethrough]~~a written, completed~~[end strikethrough] [begin underline]an[end underline] Application for Hardship Waiver, form DHCS 6195 ([begin strikethrough]~~8/07~~[end strikethrough] [begin underline]05/15[end underline]) [begin underline]and documentation to substantiate hardship[end underline], or, if applicable, at an estate hearing, that enforcement of the Department's claim would result in substantial hardship to the applicant. In determining the existence of substantial hardship, the Department shall waive an applicant's proportionate share of the claim if one or more of the following [begin underline]criteria[end underline][begin strikethrough]~~factors~~[end strikethrough] apply:

(1) When allowing the applicant to receive the inheritance from the estate would enable the applicant to discontinue eligibility for public assistance payments and/or medical assistance programs; or,

(2) When the estate property is part of an income-producing business, including a working farm or ranch, and recovery of medical assistance expenditures would result in the applicant losing his or her primary source of income; or,

(3) When an aged, blind, or disabled applicant has continuously lived in the decedent's home for at least one year prior to the decedent's death and continues to reside there, and is unable to obtain financing to repay the State. The applicant shall apply to obtain financing, for an amount not to exceed his or her proportionate share of the claim, from a financial institution as defined in Probate Code Section 40. The applicant shall provide the Department with a denial letter(s) from the financial

institution; or,

(4) When the applicant provided care to the decedent for two or more years that prevented or delayed the decedent's admission to a medical or long-term care institution. The applicant must have resided in the decedent's home during the period care was provided and continue to reside in the decedent's home. The applicant must provide written medical substantiation from a licensed health care provider(s), which clearly indicates that the level and duration of care provided prevented or delayed the decedent from being placed in a medical or long-term care institution; or,

(5) When the applicant transferred the property to the decedent for no consideration; or,

(6) When equity in the real property is needed by the applicant to make the property habitable, or to acquire the necessities of life, such as food, clothing, shelter or medical care.

(b) [begin underline]A substantial hardship exists during the lifetime of a surviving registered domestic partner for domestic partnerships that were created in this state. The Department shall defer collection of the entire claim during the lifetime of a surviving registered domestic partner, after the documentation specified in paragraphs (1) and (2), below, is submitted to, and approved by, the Department at the address specified in Section 50966(a). However, upon the death of the surviving registered domestic partner, the Department shall assert its claim against the estate of the surviving registered domestic partner, in accordance with subsections (a), (b) and (c) of Section 50961. [end underline]

(1) [begin underline]A copy of the Declaration of Domestic Partnership, filed with the Secretary of State; and[end underline]

(2) [begin underline]Proof of identity of the surviving registered domestic partner including name, social security number, and date of birth. [end underline]

(c) [begin underline]A substantial hardship exists during the lifetime of a surviving person of a legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction and is recognized as a valid domestic partnership in this state pursuant to Family Code section 299.2. The Department shall defer collection of the entire claim during the lifetime of a surviving person of a legal union, after the documentation specified in paragraphs (1) and (2), below, is submitted to, and approved by, the Department at the address specified in Section 50966(a). However, upon the death of the surviving person of a legal union, the Department shall assert its claim against the estate of the surviving person of a legal union, in accordance with subsections (a), (b) and (c) of Section 50961. [end underline]

(1) [begin underline]A copy of a filed document that is substantially equivalent to the Declaration of Domestic Partnership; and[end underline]

(2) [begin underline]Proof of identity of the surviving person of a legal union including name, social security number, and date of birth. [end underline]

[begin strikethrough]~~(b)~~[end strikethrough] [begin underline](d)[end underline] A substantial hardship shall not exist when the decedent or applicant created the hardship by using estate planning methods to divert or shelter assets in order to avoid estate recovery.

[begin strikethrough]~~(c)~~[end strikethrough] [begin underline](e)[end underline] To the extent that there currently is, or later becomes, any conflict between the preceding criteria and the standards that may be specified by the Secretary of the Department of Health and Human Services, the federal standards shall prevail.

[begin strikethrough]~~(d)~~[end strikethrough] [begin underline](f)[end underline] The Department shall provide written notification to the applicant of its decision regarding the hardship waiver application ~~within 90 days of the application's submission~~ within 90 days of the submission of the application.

[begin strikethrough]~~(e)~~[end strikethrough] [begin underline](g)[end underline] If an application for hardship waiver is denied, the Department shall provide the applicant with notice of the right, the address, and the timeframe to request an estate hearing, at the time it provides notice of its decision.

[begin strikethrough]~~(f)~~[end strikethrough] [begin underline](h)[end underline] The Department shall issue its decision on an applicant's hardship waiver application prior to and independent of its consideration of a voluntary post death lien.

NOTE: Authority cited: Section 20, Health and Safety Code; and Sections 10725 and 14124.5, Welfare and Institutions Code. Reference: Section 1396p(b), 42 USC; Section 40, Probate Code; [begin strikethrough]~~and~~[end strikethrough] Section 14009.5, Welfare and Institutions Code; [begin underline]Sections 297, 297.5, 298, 298.5, 299.2 and 308, Family Code; California Constitution, Article I, Sections 1 and 7;[end underline] State Medicaid Manual HCFA-Pub. 45-3, Transmittal No. 65 §3810; ~~and~~ *California Advocates for Nursing Home Reform v. Bontá* (2003) 106 Cal. App. 4th 498[begin underline]; *In re Marriage Cases* (2008) 43 Cal.4th 757; *Perry v. Brown* (9th Cir. 2013) 725 F.3d 1140; *Hollingsworth v. Perry* (2013) 570 U.S. 12-144; and *United States v. Windsor* (2013) 570 U.S. 12-307[end underline].