**Testimony**
**Engrossed Senate Bill 2072 – Department of Human Services**
**House Human Services Committee**
**Representative Weisz, Chairman**
**March 7, 2011**

Chairman Weisz, members of the Human Services Committee, I am Julie Leer, an attorney with the Department of Human Services. The Department is here today to support Engrossed Senate Bill No. 2072. The Department is also offering an additional amendment.

This bill relates to requirements for annuities relative to Medicaid eligibility. Federal statute (42 U.S.C. 1396r-5) provides for an asset assessment of a couple's assets at the point one of them begins receiving long-term care to establish a share of the couple's assets for each spouse. Under federal law, the share for each spouse is equal to half of the couple's countable assets. The amount that the community spouse (the spouse not receiving long-term care) is allowed to retain is subject to certain limits. The couple's assets in excess of those limits are identified as assets that are available to meet the needs of the spouse receiving long-term care, including the payment to the facility at which the spouse is receiving care. The community spouse is also allowed to keep a higher amount of income.

Some couples choose to purchase irrevocable annuities to provide for income for the community spouse and to attempt to reduce the amount of assets that are available to be spent on the care of the spouse receiving long-term care services. Federal statutes provide that the asset values of these annuities are countable assets in determining whether the community spouse is within the allowed asset limit. This also prevents a

couple from sheltering excess assets.

Through NDCC section 50-24.1-02.8, more of a community spouse's share of the assets was protected if it was needed to increase the income of the community spouse. This was accomplished by enacting statutes to exclude as an asset, certain annuities that meet specific criteria.

During a phone call with Centers for Medicare and Medicaid Services (CMS) in the summer of 2010, CMS pointed out that North Dakota's annuity statute places no limit on how much of a couple's assets may be used to purchase the annuities described above. This creates the potential for all of the couple's assets, including the institutionalized spouse's share, to be converted into an annuity. Because these annuities are excluded assets for purposes of determining the eligibility of the spouse needing care, these couples become Medicaid eligible while retaining a potentially substantial amount of their assets in the annuity.

Medicaid has begun to receive applications from couples in which virtually all of the couple's assets are used to fund an annuity for the community spouse. The spouse receiving long-term care services becomes immediately eligible for Medicaid without spending any of the couple's assets toward the cost of care, including the amount typically identified as the share attributable to the spouse needing care. The proposed amendment is necessary to avoid a sizeable fiscal impact on the Medicaid program.

Here's an example:

> A couple owns a farm on which the community spouse resides, and they have $500,000 in liquid assets. The farm is not counted as an

available asset, so only the $500,000 in liquid assets are considered. Each spouse's share is $250,000. Federal statutes allow the community spouse to keep $109,560, and the institutionalized spouse is allowed to retain $3000 in assets. The remaining amount is available to cover the cost of care for the institutionalized spouse. State statutes allow the community spouse to purchase an annuity to guarantee more income for the community spouse. Under the current statute the community spouse could use all of the "excess" assets, $387,440 ($500,000 less $109,560 and $3,000 for each spouse), to purchase an annuity, and the institutionalized spouse would be immediately eligible for Medicaid. Under the proposed legislation, the amount the community spouse could apply toward the purchase of an annuity would be limited to the community spouse's share of the couple's assets, in this example $250,000. The remaining $247,000 in excess assets would be available to pay for the institutionalized spouse's care.

The potential fiscal impact if the bill as it passed the Senate is not adopted depends on the number of couples who take this approach and the amount of assets they own. Because this information is not known, a fiscal impact cannot be determined at this time. An example of potential costs is found in four recent applications for couples who have used this strategy. These four couples were able to retain an additional $267,000 in their annuities instead of paying that amount toward their care costs. If there is no change to the statute, the Department believes more couples will avail themselves of the annuity option to make them eligible for Medicaid sooner. With more than 300 of these applications on average per year, this will likely result in an increasingly large fiscal

impact.

The change in subsection 6 limits the amount of a couple's assets that can be used to fund an annuity for the community spouse. The amount that can be used is limited to one half of the couple's assets or the community spouse's share. The changes to subsection 1 are simply to define terms used to prevent ambiguity and to provide clarification.

The bill was amended in the Senate to add the emergency clause.

The additional amendment being offered today is in response to discussions between the Department, a representative of New York Life Insurance Company (New York Life), and a representative of the American Council of Life Insurers (ACLI). The representatives of New York Life and the ACLI approached the Department after the Senate Human Services Committee had acted on the bill with a concern that North Dakota state law was inconsistent with a guidance issued by CMS. After discussing this and confirming with CMS that the guidance previously issued is still valid, the Department prepared the amendment that is being offered. Consistent with the CMS guidance, the proposed amendment provides that transfers into a revocable or assignable annuity under section 50-24.1-02.8 would not be considered a disqualifying transfer.

I would be happy to try to answer any questions that you may have.