

Regulatory Analysis Form		This space for use by IRRC 59 JUL -9 AM 10:05 McGinley IRRC Number: 2043	
(1) Agency Department of Public Welfare			
(2) I.D. Number (Governor's Office Use) 14-445 a.L.			
(3) Short Title Medical Assistance Estate Recovery Program			
(4) PA Code Cite 62P.S. §1412		(5) Agency Contacts & Telephone Numbers Prim. Charles Jones 772-6257 Sec. a. Contact: Ron Hill 772-6604	
(6) Type of Rulemaking (check one) Proposed Rulemaking <input checked="" type="checkbox"/> Final Order Adopting Regulation Final Order, Proposed Rulemaking Omitted		(7) Is a 120-Day Emergency Certification Attached? No	
(8) Briefly explain the regulation in clear and nontechnical language. The purpose of these regulations is to establish rules for operation of the Medical Assistance (MA) Estate Recovery Program. This program recovers from the estates of persons the cost of medical assistance paid for all nursing facility services, home and community based services and related hospital and prescription drug services provided upon their reaching age fifty-five and thereafter.			
(9) State the statutory authority for the regulation and any relevant state or federal court decisions. The legal basis of this chapter is the following statutory provisions (1) Section 201 of the Public Welfare Code (62 P.S. § 201 (2).) (2) Section 1412 of the Public Welfare Code (62 P.S. § 1412). (3) Section 1410 of the Public Welfare Code (62 P.S. § 1410).			

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(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

The regulations are mandated by the requirement of the Federal Medicaid Program found at 42 U.S.C. §1396p(b)(1)

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

The M.A. Estate Recovery Program has been in operation since August 15, 1994. These regulations are needed to provide guidance with respect to issues not directly addressed by the Federal and State statutes and to resolve ambiguities in the statutory language.

(12) State the public health, safety, environmental or general welfare risks associated with nonregulation.

There are none.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

The Commonwealth, specifically the M.A. Program will benefit through the increase of revenue generated by the M.A. Estate Recovery Program. This revenue will help ensure the continued financing of long term care and community based services under the Medical Assistance Program. The M.A. Estate Recovery Program has generated approximately \$25.3 million dollars from its inception through November of 1997. These regulations will also benefit all participants in the estate administration process, including attorneys, title companies, and heirs, by providing clear guidance regarding what is required so that uncertainty and litigation is reduced.

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- (14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

The heirs of deceased MA recipients whose inheritance is reduced are adversely impacted by the estate recovery program. The program has been in effect since August, 1994 and these regulations will not increase the number of persons adversely affected. In the first two years of operation (state fiscal years 1995-96 and 1996-97), the MA Estate Recovery Program settled 4,173 cases.

- (15) List the persons, groups or entities that will be required to comply with the regulation.

(Approximate the number of people who will be required to comply.)

The persons, groups or entities that will be required to comply with these regulations are: attorneys administering estates, estate executors, courts, heirs of deceased M.A. recipients, Title Companies, nursing home administrators and staff of the Department of Public Welfare.

- (16) Describe the communications with and input from the public in the development and drafting of the regulation.

List the persons and/or groups who were involved, if applicable.

These regulations are the direct result of Act 49 of 1994 and Act 20 of 1995 which amended the Public Welfare Code. The regulations were developed in-house by Department of Public Welfare staff based on experience encountered during the first two years of the program's operations. Provisions were also developed based on input received from affected Department of Public Welfare program offices and also from outreach efforts involving affected groups (i.e. Area Agencies on Aging, Title Companies, elder law attorneys)

- (17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

Not applicable.

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(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

Not applicable.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

The purpose of this proposed regulation package is to codify a previously published Notice of Rule Change which announced that the Department is required to recover Medical Assistance (MA) payments from the probate estates of certain deceased recipients. This recovery applies to MA payments for specific services provided on or after August 15, 1994.

This change is required by the Omnibus Reconciliation Act of 1993 (OBRA) which amended section 1917 (b) (1) of the Social Security Act. The amendment mandates that states recover correctly paid MA claims from the probate estates of certain individuals. The Department will recover only from the estates of individuals aged fifty-five years or older at the time of death. In addition, the Department will only recover reimbursement paid for nursing facility services, home and community-based services, and related hospital and prescription drug services.

It has been estimated that \$15,200 million (\$7.105 million in State funds) will be recovered during Fiscal Year 1997-1998. Previous fiscal notes have included administrative costs for this program. However, the Third Party Liability (TPL) Section now feels that these costs have been fully absorbed into the day-to-day functions of their section and there is no direct administrative costs associated with this program.

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(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Comm.						
Local Government						
State Government	(\$7,105)	(\$7,744)	(\$8,441)	(\$9,201)	(\$10,029)	(\$10,932)
Total Savings	(\$7,105)	(\$7,744)	(\$8,441)	(\$9,201)	(\$10,029)	(\$10,932)
COSTS:						
Regulated Comm.						
Local Government						
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Costs	\$0	\$0	\$0	\$0	\$0	\$0
REVENUE LOSSES:						
Regulated Comm.						
Local Government						
State Government						
Total Revenue Losses	\$0	\$0	\$0	\$0	\$0	\$0

(20a) Explain how the cost estimates listed above were derived.

The savings estimate is based on actual recoveries received to date in the MA-Long Term Care, Inpatient and Outpatient appropriations. The Medicaid Estate Recovery Program has generated approximately \$25.3 million dollars from its inception through November 1997.

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(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
MA Long Term Care - STATE	\$593,822	\$648,550	\$591,910	\$617,252
MA Inpatient - STATE	\$551,811	\$452,180	\$436,941	\$403,716
MA Outpatient - STATE	\$722,422	\$792,293	\$798,836	\$649,620

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

This proposed regulation package will benefit the Department due to an offset in the MA-Long Term Care, Inpatient, and Outpatient State Fund obligators.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

Other alternatives, e.g. Departmental Bulletins and guidelines are not binding and there is no way to enforce them. Given that the M.A. Estate Recovery Program is a federal mandate, regulations are the best alternative to ensure compliance.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

There are no other regulations to address the M.A. Estate Recovery Program. Therefore, these proposed regulations have been submitted to establish a regulatory basis for the Program.

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(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

No. The regulations establish the minimum program required by Federal law.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

The issue of competitive disadvantage with other states is not applicable to these regulations. Each state is mandated to establish minimum estate recovery requirements for their Medical Assistance Programs.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

There will not be any public hearings scheduled.

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(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

The estate personal representative will be required to provide notice to the Department when they determine that a decedent meets the Estate Recovery Program liability criteria.

The estate personal representatives will be responsible to meet the following requirements to protect assets for recovery when the Department postpones collection of its' claim:

- Place mortgages or other recorded encumbrances in favor of the Department for real property
- Place perfected security interests against items of personal property with an aggregate fair market value of ten thousand (\$10,000) in favor of the Department.
- Establish trusts for cash or cash equivalent assets in an aggregate amount in excess of fifty thousand dollars (50,000).

The estate personal representatives will be required to provide the Department with a decree of distribution at the time an estate is settled for an Medical Assistance decedent.

The estate personal representative will be able to file waiver requests in cases where the Department claim causes undue hardship on the decedent's heirs.

There are no prescribed forms or reports required by these regulations.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

There are undue hardship provisions related to residences occupied by immediate family members and income producing assets which allow for the waiver of the Department's claim.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The regulations become effective upon publication in the Pennsylvania Bulletin as final rulemaking.

(31) Provide the schedule for continual review of the regulation.

The Department will review the regulations on an ongoing basis. The reviews will be conducted in conjunction with feedback obtained from interactions with the affected public and the Department's experiences gained through programs operations.

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

99 JUL -9 AM 10:05

RENEWAL SECTION

#2043

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to
form and legality. Attorney General

BY: [Signature]
(Deputy Attorney General)

JUN 28 1999

Date of Approval

☐ Check if applicable.
Copy not approved. Objections
attached.

Copy below is hereby certified to be a true and correct copy
of a document issued, prescribed or promulgated by:

DEPARTMENT OF PUBLIC WELFARE
(Agency)

LEGAL COUNSEL: Ruth D. Brown

DOCUMENT/FISCAL NOTE NO. #14-445

DATE OF ADOPTION: _____

BY: [Signature]

TITLE: SECRETARY
(Executive Officer, Chairman or Secretary)

Copy below is hereby approved as to
form and legality. Executive, Independent
Agency

BY: _____

2/1/99
Date of Approval

(Deputy General Counsel)
(Chief Counsel, Independent Agency)
(Strike inapplicable title)

☐ Check if applicable. No Attorney Gen-
eral approval or objection within 30
days after submission.

DEPARTMENT OF PUBLIC WELFARE
OFFICE OF ADMINISTRATION

[55 PA. CODE CH. 258]

Medical Assistance Estate Recovery Program

Statutory Authority

The Department of Public Welfare (Department), Office of Administration, proposes to add a new Chapter 258 to 55 Pa. Code to implement a Medical Assistance Estate Recovery Program as set forth in Annex A.

The Department is proposing this new chapter under the authority of sections 201(2), 1410, and 1412 of the Public Welfare Code (62 P.S. §§201(2), 1410, 1412).

Need for the Regulations

The purpose of these proposed regulations is to interpret and implement section 1412 of the Public Welfare Code (62 P.S. §1412) which requires the Department to establish and implement a Medical Assistance estate recovery program. The proposed amendments will implement requirements of the Federal Medicaid Program (42 U.S.C. §1396p(b)(1)), which mandate that each State operate an estate recovery program.

Title XIX of the Social Security Act (42 U.S.C. §§1396 - 1396u) established the Medicaid program in 1965 as a cooperative Federal-State program through which various health care services are provided to poor and needy individuals. Under Title XIX, a participating state must designate a "single state agency" to administer or supervise the administration of the State Medicaid program. 42 U.S.C. §1396a(a)(5). The designated state agency must prepare a medical assistance plan consistent with Federal law and regulations and submit it to the Health Care Financing Administration (HCFA) of the United States Department of Health and Human Services (DHHS), for approval. Upon approval of its plan by HCFA, the State becomes eligible for Federal matching funds for reimbursement of the cost of specific types of medical care and services. 42 U.S.C. §1396a.

The Commonwealth participates in the Title XIX Medicaid program. The Department is designated the single State agency responsible for administration of the Commonwealth's Medicaid program which is known as the Medical Assistance (MA) program.

Public Law 103-66 amended Title XIX to add a requirement that participating States establish and implement a program to recover Medical Assistance payments from the probate estates of certain individuals. (42 U.S.C. §1396p(b)(1).) In order to comply with this Federal mandate, the Legislature amended the Public Welfare Code in 1994 to authorize creation and implementation of the estate recovery program. (62 P.S. §1412)(Act of June 16, 1994, P.L. 319, No. 49 as amended by the Act of June 30, 1995, P.L. 129, No. 20). The estate recovery program has been in operation in Pennsylvania since August 15, 1994. Notice of Rule Change was published in the Pennsylvania Bulletin at 24 Pa.B. 1916 on May 13, 1995. During the period of its operation, many questions have arisen as to interpretation and procedures under the statute. These regulations are needed to supply guidance with respect to issues not directly addressed by the Federal and State statute, and to resolve ambiguities in the statutory language. Conforming

changes to 55 Pa. Code Chapter 178 at Section 178.1(h) and Chapter 257 at Section 257.21(b) will be made when those chapters are revised.

Significant Provisions

The scope of the regulations is established by §258.1 (Policy). Although the Legislature has authorized the Governor to adopt a broad estate recovery program, the Department has generally elected to establish the minimum program required by Federal law consistent with the policy of Executive Order 1996-1. The Department will recover only from the estates of persons aged fifty-five years or older at the time assistance was received. The Department will restrict its recovery efforts to obtaining reimbursement for the following types of medical assistance: nursing facility services, home and community based services, and related hospital and prescription drug services and will not seek reimbursement for other services. The Department will also restrict its recovery efforts to property which passes through a decedent's estate. Accordingly, property held jointly with a right of survivorship, Totten trust bank accounts, and property held in trust at time of death will generally not be subject to estate recovery.

Section 1412 of the Public Welfare code uses the term "probate estate" to define the scope of estate recovery, and in Pennsylvania, the term "probate" generally refers to a proceeding involving a will. See 20 Pa.C.S. §3131. However, the Federal statute requires Pennsylvania to include all assets included in an estate as defined for purposes of "State probate law". Nationally, the term "probate" has a much broader meaning. See e.g. Black's Law Dictionary (4th Ed. 1968). We believe it is clear from the Federal statute, as well as from Federal interpretative materials, that intestate estates are subject to the estate recovery program. The Legislature's intent was to conform to federal law and accordingly, the Department has adopted an interpretation which includes property passing by intestacy in its definition of "estate property". (§258.2. Definitions).

The Department has not included permanently institutionalized persons under the age of fifty-five within the estate recovery program. In Regional Medicaid Letter 95-42, the Federal government clarified that recovery from such persons is not required unless a state has a process for determining that persons under age 55 are permanently institutionalized. The Department does not have such a process. The above-noted services provided to such persons upon reaching age fifty-five and thereafter will be subject to the estate recovery program.

Property which is not included in a decedent's estate is generally not subject to the estate recovery program. It is not improper or illegal for individuals to structure their financial affairs to avoid application of the estate recovery program. However, the Pennsylvania Uniform Fraudulent Transfer Act (12 Pa.C.S. §5101 et seq.) limits the ability of individuals to transfer property for less than reasonably equivalent value. Section 258.3(f) provides that property which can be recovered for the benefit of an estate under the Pennsylvania Uniform Fraudulent Transfer Act is subject to the Department's estate recovery claim. Additionally, Section 258.3(f)

establishes a rebuttable presumption that property which is transferred for less than reasonably equivalent value within one year prior to death is subject to recovery under the Pennsylvania Uniform Fraudulent Transfer Act.

Pennsylvania law authorizes the direct transfer of wages, small bank accounts, certain life insurance proceeds and patient care account balances directly to family members or funeral directors. (20 Pa.C.S. §3101). The Department will not object to the direct transfer of funds to funeral directors to pay for burial expense. However, the Department's claim to these assets is ahead of that of family members. Section §258.3(e) provides that family members who receive such money remain answerable to the Department.

Section 1412 of the Public Welfare Code (62 P.S. §1412) places the burden of insuring payment of the Department's claim upon the personal representative. The Department has provided instructions to personal representative in §258.4 of the regulations regarding obtaining a statement of claim. Section 258.5 of the regulation outlines how the Department's claim is computed.

Section 1412 of the Public Welfare Code (62 P.S. §1412) adopts the priority scheme of 20 Pa. C.S. §3392. This priority scheme is mirrored in §258.6. The regulation also clarifies that the Department's claim against assets subject to 20 Pa. C.S. §3101 is superior to that of family members but inferior to certain funeral expenses.

Federal law requires that the Department postpone the collection of reimbursement whenever the decedent has a surviving spouse, minor child, or blind or disabled child. In §258.7 of the regulations, the Department has attempted to balance the statutory right of these surviving relatives to use property during the postponement period with the Department's right to eventual collection once the postponement period expires. The regulation generally provides that certain property will be preserved and protected during the postponement period and that eligible survivors may use the property. In the case of cash and cash equivalents, the eligible survivors may consume income, pay medical bills, and with court approval, consume principal. Additionally, the Department has decided that it would not be cost-effective to attempt to protect certain property during the postponement period. Thus, for example, where an estate contains less than fifty thousand (\$50,000) dollars in cash or cash equivalents, the Department will not attempt to protect those assets. Lesser amounts of cash and cash equivalents do not generally produce significant amounts of income and any attempt by the Department to protect such assets would result in a burdensome number of requests for access to the principal to pay the living expenses of eligible survivors. No interest will be charged on the Department's claim during the postponement period.

Section 1412 imposes personal liability upon both personal representatives and transferees when the Department's claim is not paid. The regulations at §258.8 and §258.9 explain the conditions upon which personal liability will be imposed upon personal

representatives and transferees. If specified procedures are followed, the court order approving distribution of estate assets will usually discharge the personal representative from potential liability to the Department. In addition, to protect purchasers and to insure the marketability of real estate title, a special provision in the regulations provides that real estate, which is sold in the normal course of estate administration, will pass free from any claim by the Department. (§258.9(c)).

Federal law requires that the Department make provisions for undue hardship waivers in accordance with standards set by the Federal government. (42 U.S.C. §1396p(b)(3)). The Department has adopted hardship criteria suggested in HCFA's State Medicaid Manual. (§258.10). Additionally, the Department has given itself discretion to waive claims, compromise claims, and postpone collection under other circumstances.

Occasionally, the Department learns of significant estates where no administrator has been appointed. In such cases, the Department may authorize one of its employees to be appointed as administrator (§258.11). Additionally, the Department may make available lists of unadministered estates to encourage attorneys and others to administer these estates.

Appeals regarding the estate recovery program will generally be adjudicated by the Department's Bureau of Hearings and Appeals. (§258.12). Common pleas courts will have concurrent jurisdiction to adjudicate disputes regarding the amount of the Department's claim. Common pleas courts may not determine undue hardship or otherwise exercise discretion vested in the Department.

Affected Individuals, Groups and Organizations

Affected persons include attorneys administering estates, courts, and heirs of decedents.

Accomplishments/Benefits

These regulations will increase compliance by estates with the Federally mandated estate recovery requirements and will decrease confusion regarding those requirements.

Fiscal Impact

Public Sector

Commonwealth

The estate recovery program has generated in excess of \$25.3 million since its inception in August 1994. The Department anticipates that these regulations will slightly increase revenues due to better compliance with estate recovery requirements.

Local Government

These regulations may impact the process of estate administration in the courts of common pleas. However, no significant impact is expected.

Private Sector

General Public

The estate recovery program results in an increase of revenue to the Commonwealth and helps to ensure continued financing of long term care services under Medical Assistance at the expense of heirs and beneficiaries of deceased individuals. Additionally, the costs of administering estates are increased. This increase in cost is not believed to be significant.

Paperwork Requirements

The estate recovery program affects the paperwork requirements for the Commonwealth and the general public because additional paperwork is required to obtain and provide statements of claim. However, there is no reasonable alternative to the increased paperwork. These regulations do not increase paperwork beyond that required since August 15, 1994.

Effective Date

Immediately upon publication of a Final Rulemaking.

Sunset Date

A sunset date is not anticipated because the underlying statute is permanent.

Public Hearings

No public hearings concerning these proposed regulations are planned.

Public Comment Period

Interested persons are invited to submit written comments, suggestions, or objections,

regarding the proposed regulations to Department of Public Welfare, Charles Jones, Acting Chief, Third Party Liability Section, P.O. Box 8486, Harrisburg, PA 17105, (717) 772-6247 within 30 days after the date of publication of this notice in the *Pennsylvania Bulletin*. All comments received within 30 calendar days will be reviewed and considered in the preparation of the final regulations. Comments after the 30-day comment period will be considered for any subsequent revisions of these regulations.

Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (Voice users).

Regulatory Review Act

Under section 5(a) of the Regulatory Review Act (71 P.S. §745.5(a)), the Department submitted a copy of these proposed regulations on JUL 8 1999 to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare. In addition to submitting the proposed regulations, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the agency in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

If IRRC has objections to any portion of the proposed regulations, it will notify the Department within 10 days of the expiration of the Committees' review period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for the review of objections raised, prior to final publication of the regulations, by the Department, the General Assembly, and the Governor.

Annex A

TITLE 55. PUBLIC WELFARE

PART II. PUBLIC ASSISTANCE MANUAL

CHAPTER 258. MEDICAL ASSIST ESTATE RECOVERY PROGRAM

§258.1 Policy.

(a) This chapter applies to the estates of Medical Assistance (MA) clients who were fifty-five years of age or older at the time that MA was received and who died on or after August 15, 1994 and who received Medical Assistance on or after August 15, 1994. It does not apply to individuals who received MA before they reached fifty-five years of age, and whose MA eligibility terminated before reaching age fifty-five.

(b) The estate of a MA client who was fifty-five years or older at the time that MA was received is liable to repay the Department for the amount of MA paid for all nursing facility services, home and community based services, and related hospital and prescription drug services provided upon their reaching age fifty-five and thereafter. Only Medical Assistance services provided on or after August 15, 1994 are subject to the Estate Recovery Program. The above-noted services provided prior to August 15, 1994 are not subject to the estate recovery program.

§258.2. Definitions

Cash equivalent assets -- Stocks, bonds, notes, bank accounts, mutual fund shares and other financial instruments convertible into cash.

Decedent -- A deceased MA client who was fifty-five years of age or older at the time that MA was received.

Decree of Distribution -- An instrument by which heirs receive property of a deceased. It is the final determination of the parties to a proceeding.

Department -- The Department of Public Welfare.

Department's claim -- The claim of the Department computed and made under this chapter.

Estate property -- All real and personal property of a decedent which is subject to administration by a decedent's personal representative, whether actually administered or not.

Facility of payment clause - Provision which authorizes the direct payment to an individual.

Family exemption -- The exemption provided by 20 Pa. Section 3121.

Home and Community Based Services -- A broad array of Medicaid services provided to an individual to avoid institutionalization under the waiver authority of Section 1915(c) of the Social Security Act.

Immediate Family Member -- Spouse, child, parent, or sibling.

Income Producing Asset -- Property which is used in a trade or business such as a family farm, family business or rental property. The term excludes cash, stocks and bonds, mutual fund shares, or other marketable financial instruments.

MA -- Medical Assistance.

Nursing Facility Services - General, hospital based, and county nursing facility services and services provided in an intermediate care facility for the mentally retarded.

Perfected liens -- A claim or charge on a property for payment of a debt, for which the person owed such debt has taken the necessary legal steps required to secure his interest in the subject property.

Personal Representative -- An executor or administrator of any description.

Postponement Period -- The period during which the Department will defer collection of its claim.

Primary Residence -- The principal home of the decedent at the time of death or prior to admission to a nursing facility.

Protectable Asset -- An asset which must be preserved and protected for eventual payment of the Department's claim after the postponement period. Protectable assets are:

- (i) real estate and all improvements thereto.
- (ii) items of personal property with a fair market value in excess of ten-thousand (\$10,000.00) dollars.
- (iii) cash and cash equivalent assets of an estate with an aggregate value in excess of fifty thousand (\$50,000) dollars.

(iv) other property with a fair market value in excess of ten thousand dollars (\$10,000.00).

Related hospital and prescription drug services -- Hospital and prescription drug services received by a decedent:

- (i) while the client was a resident in a nursing facility or was receiving home and community based services;
- (ii) while the client was on temporary leave from a nursing facility;
- (iii) subsequent to a transfer from a nursing facility to a hospital.

Response period -- The period during which the Department must respond to a notice requesting a statement of claim. The response period is forty-five calendar days unless extended in accordance with these regulations.

Surviving spouse or child -- The surviving spouse of a decedent or a child who is blind or totally and permanently disabled, as determined under the standards of the Supplemental Security Income (SSI) program operated under Title XVI of the Social Security Act, 42 U.S.C. §1382 et. seq.

Testamentary trust -- Trust created by the will of a decedent.

Transferee -- An individual or entity, other than a personal representative, possessing or receiving property subject to the Department's claim. Both initial and subsequent recipients of property are transferees.

§258.3. Property Liable to Repay the Department

- (a) All estate property is subject to the Department's claim.
- (b) Property held by a decedent and another at the time of death as joint tenants with rights of survivorship, or as tenants by the entireties, is not subject to the Department's claim.
- (c) The proceeds of life insurance on the decedent which is directly payable to a third party is not subject to the Department's claim. However, life insurance which is payable to the decedent's estate is subject to the Department's claim even if the life insurance policy contains a facility of payment clause.
- (d) Assets placed in trust prior to the death of the decedent, including irrevocable burial reserves, are not subject to the Department's claim so long as the assets are not payable to

the decedent's estate. Trust assets and burial reserve proceeds which are or become payable to the decedent's estate are subject to the Department's claim. Assets designated for a testamentary trust are subject to the Department's claim.

(e) Property within the scope of 20 Pa. C.S. §3101 (Payments to family and funeral directors), including unpaid wages, certain bank accounts, certain life insurance, and patient care accounts, are subject to the Department's claim.

(f) Notwithstanding paragraph (b), (c) and (d) of this section, any property which a personal representative could recover for the benefit of the estate under the Uniform Fraudulent Transfers Act, 12 Pa. C.S. §5101 et seq is subject to the Department's claim. For purposes of this chapter, the Department will presume that any transfer of assets which a decedent made within one year of death for less than reasonably equivalent value is recoverable for the estate.

§258.4. Request for Statement of Claim

(a) The personal representative of the estate of any decedent who was fifty-five years of age or older at the time of death has a duty to ascertain whether the decedent received MA services during the five years preceding death and, if so, will give notice to the Department requesting a statement of claim. The five-year time frame is for notification purposes only and does not limit the Department's claim. Effective August 15, 1994 the amount of Medical Assistance paid for services rendered after August 15, 1994 to an individual 55 years of age or older is subject to the Department's claim. The notice shall be mailed by certified mail return receipt to the address of the Department specified by §258.14. The notice shall include, at a minimum, the following information:

- (1) a statement that the personal representative is requesting a statement of claim against the estate of the decedent;
- (2) the decedent's name;
- (3) the decedent's last address;
- (4) the decedent's date of birth;
- (5) the decedent's date of death;
- (6) the decedent's social security number; and
- (7) the personal representative's name, address, and telephone number.

(b) The Department will submit a statement of claim to the personal representative within the response period. If the notice from the personal representative is mailed to the

incorrect address, or does not otherwise fully comply with subsection (a), the response period shall be suspended until a fully complying notice is received. If the Department fails to submit a statement of claim to the personal representative within the response period, the Department's claim shall be forfeited.

(c) The Department's Third Party Liability Section will date stamp all notices from personal representatives when received. The date stamp shall conclusively establish the date of the Department's receipt of the notice. The Department will also date all statements of claim. The date on the statement of claim shall conclusively establish the Department's submission date for the statement of claim, regardless of any postmark date.

(d) A personal representative may extend the Department's response period. Additionally, if the last date of the response period falls on a weekend, state holiday, or other day that the offices of the Third Party Liability Section are closed, the response period shall be extended until the next business day.

(e) The Department may, in its discretion, issue a statement of claim based upon information received via telephone, facsimile machine, or electronic mail. However, use by the personal representative of such alternative forms of communication shall not cause the Department's response period to commence.

(f) The Department may amend a statement of claim after the response period has elapsed. The amended claim shall relate back to the date of the original statement of claim.

§258.5 Computation of Claim

(a) The Department's claim with respect to a decedent shall consist of the total of all MA payments made with respect to the decedent for nursing facility services, home and community based services, and related hospital and prescription drug services rendered on or after August 15, 1994.

(b) Premium payments and cost-sharing for decedents who were Qualified Medicare Beneficiaries shall be included in the statement of claim for the period of time the decedent received nursing facility services, home and community based services, or related hospital and prescription drug services rendered on or after August 15, 1994.

(c) If the decedent was a surviving spouse or child, the Department's statement of claim shall include the Department's claim against a previously deceased spouse or parent deferred by the Department during the postponement period.

(d) With respect to claims against third parties for the costs of Medical Assistance services delivered through a Managed Care Organization (MCO) contract, the Department will recover the actual payment to the hospital or other medical provider for the service. In the event

that no specific payment is earmarked by the MCO for the service, such as in the example of a capitated payment to physicians, the Department will recover its fee schedule amount for the service.

(e) If the MCO fails to provide the Department with information necessary to compute the statement of claim within contractual deadlines, the Department will use the amount of the capitation payments made to the MCO since the date of the injury as its claim against the third party until sufficient information is provided to compute a statement of claim in accordance with paragraph (d). In any case where the Department is forced to use the capitation payment to compute its statement of claim, the MCO will be liable to the Department for the amount of the Department's diminished recovery in accordance with the terms of the MCO's contract with the Department.

(f) There shall be a rebuttable presumption that the Department's statement of claim is correct. The burden of proof is upon the personal representative to show that the Department's statement of claim is incorrect by a preponderance of evidence.

(g) The Department will not reduce its claim on account of attorneys' fees or other costs incurred by the estate to obtain or liquidate assets. These costs may be treated as expenses of administration of the estate.

§258.6 Priority of the Department's Claim

(a) The Department's claim shall be entitled to priority under 20 Pa. C.S. §3392(3) to the extent it includes payment for services rendered within six months of death. Otherwise, the Department's claim shall be paid under 20 Pa. C.S. §3392(6).

(b) The Department's claim against deposit accounts and patient care accounts subject to 20 Pa. C.S. §3101 shall be subordinate to reasonable funeral expenses and to those claims having priority over the Department under 20 Pa. C.S. §3392.

(c) The Department's claim against assets subject to 20 Pa. C.S. §3101 shall be superior to that of family members and any person receiving money pursuant to said provision of law shall be answerable to the Department.

(d) The Department's claim is subordinate to the family exemption and to perfected liens on specific property.

§258.7. Postponement of Collection

(a) The Department will postpone collection of its claim until the later of

(1) the death of any surviving spouse,

(2) the death of any child who is blind or totally and permanently disabled, as determined under the standards of the Supplemental Security Income (SSI) program, or

(3) the date any surviving child attains age 21.

(b) The personal representative has a duty to insure protection of the Department's claim during the postponement period.

(c) The personal representative will be deemed to have complied with his responsibilities to protect the Department's claim during the postponement period if, after liquidating such assets as is appropriate and paying all expenses of administration and claims against the estate, the personal representative takes one or more of the following actions until the Department's claim is fully protected, or until all protectable assets are protected.

(1) If the decedent's estate contains real estate, the personal representative shall cause a mortgage or other recorded encumbrance to be placed against the real estate in favor of the Department.

(2) If the decedent's estate contains individual items of personal property with an aggregate fair market value in excess of ten thousand dollars (\$10,000), the personal representative shall cause a properly perfected security interest to be placed against the items of personal property in favor of the Department.

(3) If the estate contains cash or cash-equivalents in an aggregate amount in excess of fifty thousand dollars (\$50,000.00), the personal representative shall cause said money to be placed in trust, with terms and trustees approved by the Department. Said trust shall name the Department as remainderman and shall allow the spouse and/or child, as appropriate, to consume income without court approval, shall allow the consumption of principal to pay reasonable medical expenses of the spouse and/or child, and shall allow the consumption of principal for the benefit of the spouse and/or child with court approval. The personal representative may serve as trustee and a reasonable trustee fee may be provided by the trust document.

(4) If the decedent's estate contains protectable assets which are not adequately protected by the procedures provided in paragraphs (1) through (3), the personal representative shall request and follow the directions of the Department.

(d) No interest is charged on the Department's claim during the postponement period.

(e) Postponement of collection may be waived by a spouse, adult child, or legal representative of a child under the age of 18.

§258.8 Liability of Personal Representative

(a) The personal representative has a duty to insure that the Department's claim is adequately presented to the Court and, unless the Department's claim is postponed, to pay the Department's claim after payment of all superior claims.

(b) The personal representative is personally liable to pay the Department's claim if property subject to the Department's claim, and not subject to postponement of collection, is transferred without valuable and adequate consideration to a heir or other person having a lower priority claim, without satisfaction of the Department's claim.

(c) Where the Department's claim is postponed, the personal representative is personally liable if property subject to the Department's claim is transferred without valuable and adequate consideration to a heir or other person having a lower priority claim, without protecting the Department's claim.

(d) A decree of distribution will discharge the liability of the personal representative to the Department only if:

(1) the Department is served with a copy of the proposed distribution at least thirty (30) days in advance of court approval; and

(2) the court records show that the personal representative made the inquiry required by §258.4 and obtained a statement of claim, if appropriate;

and

(3) the court records show that any claim of the Department was presented to the Court and paid, or that there were insufficient assets to pay the Department's claim, and

(4) the Department is served with a copy of the final distribution order and paid all amounts that it is due.

(e) Notwithstanding paragraph (d), a decree of distribution will not discharge the liability of the personal representative to the Department if the petition for distribution fails to disclose the existence of property subject to the Department's claim, or if the personal representative refuses to present and pay the Department's claim.

§258.9. Liability of Transferees

(a) A transferee is liable to pay the Department's claim when they receive property subject to the Department's claim for which they did not pay valuable and adequate consideration

(i.e. fair market value) for said property. The transferee's liability is limited to the fair market value of the property received.

(b) When the Department's claim is postponed, any transferee is personally liable to pay the Department's claim if the transferee receives property subject to the Department's claim and the transferee fails to protect the Department's claim during the postponement period.

(c) The arms length sale of the decedent's real property at fair market value by the personal representative to a party unrelated to the decedent or the personal representative shall be deemed to be supported by valuable and adequate consideration.

§258.10. Undue Hardship Waivers

(a) The Department will waive its claim in cases of undue hardship.

(b) The Department may find undue hardship and may waive its claim with respect to the real and personal property constituting the primary residence of a decedent and an immediate family member of the decedent, if they:

(1) have continuously resided in the residence for at least two years immediately preceding the decedent's receipt of nursing facility services; and

(2) have no other alternative permanent residence; and

(3) have annual gross family income that does not exceed one hundred percent of the Federal poverty guidelines.

(c) The Department may find undue hardship and may waive its claim with respect to an income-producing asset if an immediate family member of the decedent:

(1) utilizes the asset to generate the primary source of income for his household; or

(2) would have a gross family income of less than one hundred percent of the Federal poverty guideline without use of the asset.

(d) The Department may find undue hardship and may postpone collection of its claim until:

(1) the death of a sibling who has an equity interest in the property and has been living in the house for at least two years prior to the death of the decedent; or

(2) upon the disposition of the property by the sibling living in the house.

(e) The Department has exclusive authority to waive its claim, compromise its claim, or postpone collection, in other circumstances where undue hardship exists, or where collection is not cost-effective, as determined by the Department on an individual case-by-case basis.

(f) All waiver requests must be submitted to the following address: Estate Recovery Program, P.O. Box 8486, Harrisburg, PA 17105-8486.

§258.11. Unadministered Estates

(a) The Department may cause one of its employees to administer an estate if no administrator has been appointed and assets may exist to pay the Department's claim.

(b) The Department's Office of Legal Counsel may provide legal services to an estate if a Departmental employee has been designated to administer the estate. Alternatively, the administrator may employ private counsel.

(c) The Department will charge the estate a reasonable fee, as an expense of administration, if administration services and attorney services are provided to the estate by Commonwealth employees.

(d) The Department may periodically develop lists of unadministered estates which may have assets. Such lists will be made available to any attorney or member of the public who may desire to seek appointment as administrator. The Department may also, in its sole discretion, refer unadministered estates to local private counsel to administer the estate.

§258.12. Administrative Enforcement

(a) In addition to any other remedies allowed by law, the Department may administratively assess liability upon a personal representative or transferee in accordance with §258.8 and §258.9. Such assessment may be appealed pursuant to §258.13, relating to appeals.

(b) A final administrative order in any proceeding to assess liability against a personal representative or transferee shall be binding upon the parties in any subsequent judicial proceeding to enforce the administrative order.

§258.13. Appeals and Jurisdiction

(a) Any personal representative, transferee, or family member adversely affected by a decision of the Department under these regulations may appeal to the Department's Bureau of Hearing and Appeals within thirty (30) days of the date the affected person is notified of the decision.

(b) An appeal shall be mailed to the Bureau of Hearings and Appeals, Department of Public Welfare, P.O. Box 2675, Harrisburg, PA 17105.

(c) The Bureau of Hearings and Appeals has exclusive jurisdiction over disputes involving a request for waiver, compromise, or postponement of collection. Such appeals shall be reviewed by the Bureau under an abuse of discretion standard. The Bureau's decision is binding on all parties, subject to the Secretary's reconsideration and appellate review.

(d) The Bureau of Hearings and Appeals has concurrent jurisdiction with the courts of common pleas over disputes involving the computation of the Department's claim or assessment of liability against a personal representative or transferee. However, if the personal representative or transferee files an appeal with the Bureau of Hearings and Appeals, such filing shall be deemed to be an irrevocable election to proceed exclusively before the Bureau. The Bureau's decision is binding upon all parties, subject to the Secretary's reconsideration and appellate review.

§258.14. Service on the Department

The address for requesting a statement of claim, or for serving legal papers on the Department is: Third Party Liability Section, Department of Public Welfare, Estate Recovery Program, P.O. Box 8486, Harrisburg, PA 17105-8486.

PLEASE RETURN TO:
INDEPENDENT REGULATORY REVIEW COMMISSION
14TH FLOOR, HARRISTOWN II
TRANSMITTAL SHEET FOR REGULATORY REVIEW ACT

I.D. NUMBER: 14-445
SUBJECT: Medical Assistance Estae Recovery Program
AGENCY: DEPARTMENT OF PUBLIC WELFARE

99 JUL -9 AM 10: 05

RECEIVED
INDEPENDENT REGULATORY REVIEW COMMISSION

TYPE OF REGULATION

- X Proposed Regulation
Final Regulation
Final Regulation with Notice of Proposed Rulemaking Omitted
120-day Emergency Certification of the Attorney General
120-day Emergency Certification of the Governor
Delivery of Tolled Regulation
a. With Revisions b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
7/9/99	Karen Schaffer	HOUSE COMMITTEE ON HEALTH & HUMAN SERVICES
7/9/99	Kendy Saeffels	
7/9/99	Kristi Kelson	SENATE COMMITTEE ON PUBLIC HEALTH & WELFARE
7/9/99	Debi Johnson	
7/9/99	Kenn C. Stinner	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
7/9/99	Mayra Garas	LEGISLATIVE REFERENCE BUREAU

June 30, 1999