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ROBERT J. HARBISON, III  
JOHN F. MIZNER, ESQ.  
ROBERT E. NYCE, EXECUTIVE DIRECTOR  
MARY S. WYATTE, CHIEF COUNSEL



PHONE: (717) 783-5417  
FAX: (717) 783-2664  
irrc@irrc.state.pa.us  
<http://www.irrc.state.pa.us>

**INDEPENDENT REGULATORY REVIEW COMMISSION**  
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

September 23, 1999

Honorable Feather O. Houstoun, Secretary  
Department of Public Welfare  
333 Health & Welfare Building  
Harrisburg, PA 17105

Re: IRRC Regulation #14-445 (#2043)  
Department of Public Welfare  
Medical Assistance Estate Recovery Program

Dear Secretary Houstoun:

Enclosed are our Comments on the subject regulation. They are also available on our website at <http://www.irrc.state.pa.us>.

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please contact James M. Smith at 783-5439.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce  
Executive Director

REN:kcg  
Enclosure  
cc: Charles Jones  
Ron Hill  
Thomas Vracarich  
Office of General Counsel  
Office of Attorney General  
Pete Tartline

**COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION**

**ON**

**DEPARTMENT OF PUBLIC WELFARE REGULATION NO. 14-445**

**MEDICAL ASSISTANCE ESTATE RECOVERY PROGRAM**

**SEPTEMBER 23, 1999**

We have reviewed this proposed regulation from the Department of Public Welfare (Department) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to statutory authority, conflict with existing statute, economic impact, reasonableness, need and clarity. We recommend that these Comments be carefully considered as you prepare the final regulation.

**1. Section 258.2. Definitions. – Economic Impact, Reasonableness, Need and Clarity.**

*Estate property*

The definition of “estate property” includes the phrase “real and personal property.” Neither real nor personal property are defined or explained in this regulation. For clarity, the Department should define what constitutes real and personal property, or cross-reference the specific statute in which these terms are defined.

*Personal representative*

The proposed regulation defines “personal representative” as “[A]n executor or administrator of any description.” What is the significance and meaning of an “administrator of any description?” The Department should clarify this phrase within the proposed definition.

*Protectable asset*

The definition of “protectable asset” is unclear. Specifically, it is unclear whether the \$10,000 limit described in Subsections (ii) and (iv) is cumulative or exclusive (i.e., per item). Also, it is impossible to distinguish whether a given item would fall under Subsections (ii) or (iv). The Department should clarify how to interpret the monetary limits.

*Response period*

This definition allows 45 days to respond to a notice requesting a statement of claim. To improve the clarity of the regulation, the Department should include a citation to the statute that prescribes the 45-day response period.

### *Surviving spouse or child*

The definition of "surviving spouse or child" is limited to a spouse or to a child who is blind or totally and permanently disabled. This definition is unclear. Is a sighted child or a child without a total and permanent disability considered a child under this definition? If so, is a person under the age of majority, included in this definition? Finally, for the purpose of this definition, is the age of majority 18 or 21?

## **2. Section 258.3. Property liable to repay the department. - Conflict with Existing Statute and Clarity.**

### *Subsection (a)*

Subsection (a) states all estate property is subject to the Department's claim. The definition of "estate property" includes all property *subject to administration by the personal representative* (emphasis added). A personal representative could also administer exempt property, such as items included in the "family exemption." This subsection should reference the succeeding subsections where these exemptions are set forth.

### *Subsection (c)*

Subsection (c) states that life insurance payable to a "third party" is not subject to the Department's claim. It is unclear whether an "immediate family member," as defined in Section 258.2, would qualify as a "third party." Under what circumstances will life insurance be subject to the Department's claim? "Third party" must be defined.

### *Subsection (d)*

Commentators noted that Subsection (d) would change the status of special testamentary trusts a parent may set up for a child with a disability. To consider this kind of testamentary trust to be a recoverable part of the estate would be counterproductive. The depletion of resources available to care for the child could result in transfer of the cost of care to the Department or another state agency. Therefore, the Department should exempt this kind of testamentary trust from recovery. Could these trusts fall under the postponement provisions for disabled children? The Department should explain the applicability and impact of the regulation on special trusts for disabled children.

### *Subsections (d) and (f)*

Subsections (d) and (f) use the term "estate" which presumably differs from the defined term "estate property." For clarity, the Department should change the defined term in Section 258.2 from "estate property" to "estate or estate property."

### *Subsection (e)*

Subsection (e) states "certain" bank accounts, life insurance and patient accounts are subject to recovery. This implies some of these assets may not be subject to estate recovery. However, the regulation is not specific on which assets are exempt. The regulation should

clearly identify what is, and is not, subject to estate recovery in a cross-reference to 20 Pa.C.S. § 3101 where these assets are listed.

*Subsection (f)*

Several commentators have expressed the concern that the Department does not have the statutory authority to apply the Uniform Fraudulent Transfers Act (UFTA), as recovery of assets is preempted by federal law, 42 U.S.C.A. § 1396p. Assuming the Department does have the statutory authority, its application is not consistent with the pertinent provisions of the UFTA. Senator Hughes and other commentators commented that Subsection (f) provides that all property transfers within one year of death “for less than reasonably equivalent value” are subject to recovery. However, Sections 5104 and 5105 of the UFTA establish several additional conditions that must be satisfied before a creditor can recover against an estate. There appears to be an inconsistency here.

We also question the Department’s authority to apply Subsection (f) in any case. If the Department establishes its statutory authority, we request that the Department explain whether Subsection (f) conflicts with existing federal law, whether a personal representative, or anyone other than a creditor, can recover under the UFTA, and why the application of the UFTA is necessary and reasonable.

A final concern is that Subsection (f) provides for recovery from the estate for assets transferred for less than *reasonably equivalent value* (emphasis added). The Department should add a definition of “reasonably equivalent value,” or cross-reference the statutory provision of the UFTA where this phrase is defined.

**3. Section 258.4. Request for statement of claim. – Statutory Authority, Reasonableness and Clarity.**

*Subsection (a)*

This subsection requires the personal representative of affected decedents to notify the Department and request a statement of claim. To improve the clarity of the regulation, the Department should define “statement of claim” in Section 258.2 *Definitions*.

*Subsection (b)*

This subsection states that if the notice from the personal representative does not fully comply with Subsection (a), the response period will be suspended until a fully complying notice is received. However, this subsection does not specify the method or time frame the Department will use to notify the personal representative that the notice failed to meet the requirements of Subsection (a). Without notification, the personal representative would have no way of knowing that the notice is deficient and the Department’s response period has not begun. In the final regulation, the Department should include its procedures and time frame for notifying a personal representative of a deficient notice and the status of the response period.

### *Subsection (c)*

This subsection states that the Department will rely on a date stamp to conclusively establish the receipt date of all notices from personal representatives and the submission date for the Department's statements of claims. A date stamp may not accurately reflect when a notice was actually delivered, since it could be several days after delivery until the Department stamps the notice. By relying on a date stamp, the Department could extend its response period beyond the 45 days allowed under the statute.

Subsection (a) requires the personal representative to submit notice to the Department by certified mail return receipt. If the Department relies on its own internal date stamp, why would the certified mail requirement in Subsection (a) be necessary? The Department should revise Subsection (c) to rely on the date on the certified mail receipt, instead of its date stamp, to determine the receipt date of notices. If the Department does not elect to rely on the receipt date, it should explain why it is necessary to use a date stamp.

In addition, Section 1412(b) of the Act requires the Department to *submit* its claim within 45 days. The date on the statement of claim may not reflect the actual date on which the Department submits its claim to the personal representative. The Department should revise Subsection (c) to conclusively establish the submission date for a statement of claim, by relying on the postmark, certified mail receipt or meter date.

### *Subsection (d)*

This subsection allows the personal representative to extend the Department's response period to submit a statement of claim. Section 1412(b) of the Act states the following:

... The Department must submit its claim to the executor or administrator within forty-five days of receipt of notice or the claim shall be forfeited.

The Act does not contain any provision for extending the Department's response period by consent of the parties. To the contrary, the time limit is a firm one, with the consequence of forfeiture of the Department's claim if it is not met. Therefore, the Department should delete the provision in Subsection (d), which would allow the personal representative to extend the response period.

### *Subsection (e)*

This subsection permits the Department to issue a statement of claim based on information that has been delivered by telephone, fax machine or electronic mail. However, according to the regulation, when these forms of communication are used by the personal representative, they "will not cause the Department's response period to commence." Why does receipt of the information by alternate means not constitute receipt of notice under Section 1412(b) of the Act? It is inconsistent for the Department to issue a statement of claim based upon information received by alternate means of communication, but not start its response period at the same time the information is received.

We suggest a revision to this subsection indicating that the Department may accept information delivered through alternate means and that the response period begins on the date the information is received. If the Department elects not to start its response period upon receipt of information delivered through alternate means, this subsection should provide for notice to the personal representative. The notice should include a statement that the response period will not commence until the information is resubmitted in accordance with Subsection (a).

*Subsection (f)*

This subsection allows the Department to amend a statement of claim after the close of the response period. We understand that an amendment could improve the accuracy of the claim in cases where medical bills are submitted after the 45-day response period. However, as discussed in relation to Subsection (d), the Act is clear. The Department must submit a claim within 45 days or forfeit its claim. The Act does not authorize the extension of this period to allow for amendment of the Department's claim. Consequently, we see no authority for Subsection (f).

**4. Section 258.5. Computation of claim. - Statutory Authority, Need and Clarity.**

*Subsection (b)*

The phrase "qualified Medicare beneficiaries" should be defined, including any appropriate references to other regulations or statutes.

*Subsections (d) and (e)*

For clarity, the term "capitation payments" should be defined in Section 258.2 *Definitions*.

*Subsection (d)*

Subsection (d) references an example of capitated payment to physicians. It is unclear what example is referenced.

*Subsection (e)*

Subsection (e) is unclear for four reasons. First, according to Subsection (e), insufficient information from a Managed Care Organization (MCO) results in the Department using capitation payments. However, according to Subsection (d), insufficient information from a MCO results in the Department using a fee schedule amount. It is unclear what the determining factor would be between using capitation payments or fee schedules.

Second, Subsection (e) states the Department will use the capitation payments as the amount of its claim until sufficient information is provided to revise the claim using payments made by the MCO or the Department's fee schedule. The statute requires the Department to submit its claim within 45 days, or the claim shall be forfeited. Once the Department submits its claim, does the Department have the authority to change its claim? If so, cite it.

Third, as a practical matter, updating claims would not be reasonable or productive. If the Department submits and later updates its claim, personal representatives could not rely on any statement of claim until the 45 days expire. Why wouldn't the Department simply submit one reliable claim?

Finally, the last sentence describes contractual terms and liabilities between the Department and a MCO. It is unclear what purpose is served by the regulation describing the execution of contract terms once the Department's claim is submitted. This sentence should be deleted.

#### *Subsection (f)*

Subsection (f) invokes a rebuttable presumption that the Department's statement of claim is correct, and shifts the burden of proof to the personal representative to show otherwise by preponderance of the evidence. Since the information in the statement of claim is completely within the Department's control, the shift of the burden of proof to the personal representative is not reasonable. In addition, there are substantial legal questions with this position. Senator Hughes cited several Pennsylvania Supreme Court decisions that establish that the burden of proof rests on the creditor, in this case, the Commonwealth. The Department should cite its authority to shift the burden of proof.

#### **5. Section 258.7. Postponement of collection. – Statutory Authority and Clarity.**

This section outlines the circumstances in which the Department would postpone collection of its claim. However, the *process* of postponement is not included. Does the Department automatically initiate postponement if one or more of the criteria are met? Or is the surviving spouse or child or personal representative required to apply for postponement? For clarity, the Department should outline the process for postponement; who initiates the process, the forms required to postpone collection and the amount of time the Department will take to evaluate the request and render a decision.

#### *Subsection (a)*

Subsection (a) states "The Department will postpone collection of its claim until *the later of one of the following....*" (emphasis added). Does the Department intend that all, or just one, of "the following" must occur? The wording of this subsection should be clarified.

#### *Subsection (c)*

We have a number of questions regarding this subsection. Subsection (c)(2) requires the personal representative to protect the Department's claim by perfecting a security interest on items of personal property with a value greater than \$10,000. Subsection (c)(3) requires the personal representative to establish a trust if the estate contains cash or cash equivalents in an aggregate amount in excess of \$50,000. We request the Department explain how these dollar amounts were selected and how the items are to be appraised.

In Subsection (c)(2), we question how a "properly perfected security interest" would be placed on individual items of the decedent's estate. For example, if the estate contains numerous

items, such as audio-visual equipment, small home appliances, etc., could the Department place security interests upon each of these items? Also, does the Department handle items with a high rate of depreciation (e.g. cars, boats, etc.)?

Subsection (c)(3) contains the term "remainderman." This term is not defined in the regulation. For clarity, the Department should define this term, or cross-reference the statute or regulation where it is defined.

Finally, we also question what "directions" the Department proposes to give pursuant to Subsection (c)(4), where they can be found, and how they will be enforced. If there are other means by which the personal representative is obliged to protect assets, they should be listed in the regulation.

#### *Subsection (e)*

Subsection (e) allows a spouse, adult child or legal representative of a child under 18 to waive postponement of collection. Subsection (a) provides that the Department will cease postponing collection of a claim on "[T]he date any surviving child attains 21 years of age." It is unclear why Subsection (a)(3) uses the age of 21, while Subsection (e) uses the age of 18. The Department should explain why the ages differ, or amend the regulation to make them consistent.

Also, this subsection does not indicate how the waiver process would be initiated, or the conditions under which the Department would allow for postponement. This Subsection should include the criteria and process the Department will use to waive a postponement of collection.

### **6. Section 258.8. Liability of personal representative. - Clarity.**

Subsections (b) and (c) require the personal representative to obtain valuable and adequate consideration for any property that is transferred. The condition of property has a significant effect on its value. Property, such as a vehicle, also depreciates rapidly. What will satisfy the Department that the fair-market value was received for property? The regulation should state what constitutes acceptable documentation for this section.

### **7. Section 258.9 Liability of transferees. - Clarity.**

As noted in the comment on Section 258.8, this section should state what documentation the transferee needs to satisfy the Department's requirement for "fair-market value."

#### *Subsection (a)*

Subsection (a) limits the liability of a transferee to fair market value of the property received. However, Subsection (a) does not account for the amount a transferee may have paid for the property. The regulation should limit liability to the difference between the consideration paid, if any, and the fair market value.



**8. Section 258.10 Undue hardship waivers. –Reasonableness and Clarity.**

Senator Hughes, the Pennsylvania Department of Community and Economic Development, and many other commentators advocate adding an exemption for homes valued at less than \$50,000. The commentators cite many concerns. The regulation, as written, may deter people from using MA home-based services. Also, the regulation may encourage the abandonment of homes. The Department should explain why an exemption was not included in the regulation.

Subsections (b), (c) and (d) provide that the Department *may* find undue hardship if the listed conditions are met (emphasis added). However, as Senator Hughes correctly points out, the Department has no discretion under 42 U.S.C.A. § 1396p(b)(3). That section provides: "The state agency shall establish procedures . . . under which the agency *shall waive* the application of this subsection . . . if such application would work an undue hardship." (emphasis added). Therefore, the Department should change the word "may" to "will" in these subsections. In addition, the Department should list the circumstances that constitute an "undue hardship," as provided in federal regulations or guidelines.

Subsection (b) states, "The Department may find undue hardship and may waive its claim with respect to...an immediate family member of the decedent." Many commentators have questioned the need to limit this section to immediate family members. As defined, the term immediate family member seems too narrow. No allowances are made for grandchildren, nieces, nephews, etc., who have been living in the home. If the current definition is retained, we ask the Department to explain why the term "immediate family member" is not broader in scope.

**9. Section 258.11. Unadministered estates. – Statutory Authority, Reasonableness and Clarity.**

*Subsections (a), (b) and (c)*

These subsections allow a Department employee to administer an estate if there is no personal representative and there are assets available to pay the Department's claim. The Department employee may use legal services provided by the Department's Office of Legal Counsel or may hire private counsel. If Department legal and administrative services are provided to the estate, the Department will charge a "reasonable" fee. We have several concerns with these subsections.

First, we can find no authorization for these provisions in the Act. Furthermore, we question the reasonableness of these subsections. There is an inherent conflict of interest in allowing a Department employee to administer an estate from which the Department is seeking to recover a claim. How could a Department employee challenge the Department's claim in administrative hearings conducted by his or her employer?

In addition, the regulation contains no parameters for how the Department will determine a "reasonable" fee. It is also unclear how undue hardship would be considered.

Unless the Department can demonstrate the statutory authority for these provisions, they should be deleted. If the Department demonstrates the statutory authority for these provisions, the Department should include the parameters it will use to determine a "reasonable" fee.

*Subsection (d)*

This subsection states that the Department will periodically make lists of unadministered estates available to any attorney or member of the public who may want to administer an estate. The Department may also refer unadministered estates to local private counsel. We have several concerns with this subsection.

First, the regulation does not indicate how local counsel will be selected. In addition, the regulation does not contain any details on how these provisions will be implemented. For example, how frequently and through what means will lists be made available? What paperwork must an individual complete to be appointed as administrator? What process does the Department use to refer estates to local counsel? How would undue hardship be considered by the attorney or member of the public? How will conflicts of interest be avoided if the selected counsel, who is compensated under control of the Department, must represent the estate in proceedings before the Department? We request the Department address these questions in the final regulation.

**10. Section 258.12. Administrative enforcement. – Clarity.**

*Subsection (a)*

This subsection provides that "In addition to any other remedies allowed by law," the Department may assess liability upon a personal representative or transferee. Sections 1412(a.1)(1) and (2) of the Act list the circumstances under which a personal representative or transferee may be held liable. The Department should include citations to these sections of the Act in the final regulation.

Furthermore, the phrase "In addition to any other remedies allowed by law..." is vague and confusing. The Department should include citations to the applicable laws or regulations, or delete this phrase. In addition, the Department should specify how the personal representative or trustee will be notified of the Department's assessment of liability.

Also, it is unclear how the personal representative can avoid being assessed if he or she unsuccessfully attempted to recover assets from a transferee. In that instance, which party would have the burden of proof?

**11. Section 258.13. Appeals and jurisdiction. – Statutory Authority, Reasonableness and Clarity.**

Subsections (a) and (b) provide a 30-day time limit for requesting an appeal and the office where the appeal is to be filed. However, no other details of the hearing process are contained in these provisions. In order to avoid confusion, we recommend that Subsection (a) cross-reference the rules and regulations governing the Department's hearing procedures.

We question the Department's statutory authority to claim, in Subsection (c), that the Bureau of Hearings and Appeals has "exclusive jurisdiction" over disputes involving waiver, compromise or postponement of collection. Also, what is the statutory basis or precedent for applying an abuse of discretion standard?

Second, what is the Department's statutory authority for providing, in Subsection (d), that the Bureau of Hearing and Appeals has concurrent jurisdiction with the Courts of Common Pleas over disputes involving computation of claims and assessment of liability? In addition, what is the statutory authority for providing that the filing of an appeal with the Bureau constitutes an irrevocable election to proceed exclusively before the Bureau?

We request the Department explain the statutory authority to supercede the jurisdiction of the Orphan's Courts in the Commonwealth. We also request that the Department explain how Bureau decisions rendered pursuant to Subsections (b) and (c) would be binding on other creditors.