Regulatory Analysis Form

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(1) Agency

Department of Public Welfare
Office of Income Maintenance
Bureau of Policy
Division of Health Services

(2) I.D. Number (Governor's Office Use)

14-478

IRRC Number: 2299

(3) Short Title

Long-Term Care Eligibility Revisions

(4) PA Code Cite

55 Pa. Code Chapters 178 and 181

(5) Agency Contacts & Telephone Numbers

Primary Contact: Ed Zogby 787-4081

Secondary Contact: George Hoover 772-7809

(6) Type of Rulemaking (check one)

X Proposed Rulemaking
Final Order Adopting Regulation
Final Order, Proposed Rulemaking Omitted

(7) Is a 120-Day Emergency Certification Attached?

X No
Yes: By the Attorney General
Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

These proposed regulations amend 55 Pa. Code Chapters 178 and 181 and revise the Medical Assistance (MA) eligibility requirements for applicants and recipients of Long-Term Care (LTC) services. There are four revisions to current policy.

The first revision requires that more resources of an Institutionalized Spouse (IS) in an LTC facility be made available to pay for his or her own cost of LTC services. Current policy permits the IS to set aside additional resources for the Community Spouse (CS) to purchase an annuity that will generate monthly income if the CS does not have monthly income at the protected level. The revision provides that the IS use his or her monthly income to contribute toward the CS who does not have sufficient income and allocates more resources to the IS to use to pay for LTC services.

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(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

Social Security Act, §§ 1917(c) and 1924 (42 U.S.C.A. §§ 1396p(c) and 1396r-5); 62 P.S. §§ 201(2), 403(b), 441.1 and 442.1; 42 CFR §§ 435.725(c)(4)(ii) and 435.832(c)(4)(ii) and (d)

(8) Briefly explain the regulation in clear and nontechnical language. (cont'd.)

The second revision expands the circumstances in which the MA ineligibility penalty period applies and is established for asset transfers that occur when fair market value has not been received. Currently, states must deny payment for Nursing Facility Care (NFC) and LTC services in a community setting for individuals who transfer assets for less than fair market value in the "look-back" period. The look-back period is 36 months prior to the MA application date. For asset transfers involving a trust, the look-back period is 60 months. The penalty period is currently determined by dividing the total cumulative uncompensated value (fair market value that should have been received) of all assets transferred by the current average monthly private pay rate for NFC to arrive at the number of months of ineligibility. If the computation results in a fraction, there is no penalty period assessed for a fraction of a month since Pennsylvania's current methodology rounds down to the whole month and does not impose partial months of ineligibility. States have the option, however, to extend the ineligibility period for part of a month. In addition, current methodology does not impose a penalty period for transfers that are "less than" the current average private pay rate of $5,313.18 except in the case of multiple transfers. This means monthly transfers of less than $5,313.18 per month can occur without affecting MA eligibility. Implementing the partial month option means MA is not responsible for paying for LTC services in a facility or in a community setting for any transfer of assets regardless of the amount.

The third revision limits unpaid medical expenses owed by an MA recipient that will be allowed as a deduction when determining a recipient's contribution toward cost of NFC. The revision limits the total deduction for an outstanding unpaid medical expense to $10,000. Currently, there is no dollar limit on unpaid medical expense deductions.

The fourth revision eliminates an optional deduction that is used when determining a MA recipient's contribution toward cost of NFC. This deduction allows funds for a MA recipient to maintain his or her home if a physician has certified that the recipient's stay in an LTC facility will not exceed 6 months.

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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.

No.

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

These regulations will preserve funds to assure continued benefits for the Federally-mandated eligibility groups.

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

Nonregulation would jeopardize the Department's ability to provide critical health care benefits to the Federally-mandated eligibility groups under the MA Program.

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

These regulations will preserve funds for the Federally-mandated eligibility groups.

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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.)

Approximately 3,794 applicants and recipients of LTC services will be adversely affected. An applicant's eligibility for MA will be postponed until available resources are reduced to the MA eligibility level. Relatives and others who would benefit from an asset transfer by the applicant or recipient could be adversely affected under this proposed amendment. Individuals with excess resources will be denied eligibility for MA until their resources have been reduced to the eligibility limits for the MA Program.

(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.)

None.

(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.

Preliminary drafts of the proposed regulations were shared with the Income Maintenance Advisory Committee (August 2002) and Medical Assistance Advisory Committee (March and August 2002).

(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 Department estimates the Fiscal Year 2002-2003 savings to be $7.001 million ($3.171 million in State funds). Annualized savings are projected at $47.222 million ($21.396 million in State funds).

Stan Rodoff 9-13-02

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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.

(Dollar Amounts in Thousands)

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	$	$	$	$	$	$
Regulated Community						
Local Government						
State Government						
Total Savings	($3,171)	($21,396)	($24,290)	($24,640)	($25,008)	($25,388)
COSTS:	($3,171)	($21,396)	($24,290)	($24,640)	($25,008)	($25,388)
Regulated Community						
Local Government						
State Government						
Total Costs	$0	$0	$0	$0	$0	$0
REVENUE LOSSES:						
Regulated Community						
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 estimates associated with the individual components of this regulation change were calculated as follows:

Income First Rule

These savings estimates were based on data which indicates that annually approximately 840 residents of long term facilities will be ineligible for Medical Assistance benefits under the proposed regulations change. It is estimated that these individuals will remain ineligible for approximately one year, until their excess assets are depleted. These savings estimates are based on the number of ineligibles multiplied by the average Medical Assistance long term care, inpatient and outpatient costs, determined for this population from historical data. The savings estimates assume a one year phase-in, impacting approximately 70 individuals per month. The proposed change will be effective upon publication in the Pennsylvania Bulletin. The above figures reflect a four-month fiscal impact in Fiscal Year 2002-2003.

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(20a) Explain how the estimates listed above were derived. (Cont'd.)

Home Maintenance Deduction

These savings estimates are based on data which indicates that, monthly, approximately 1,136 residents of long-term care facilities use the home maintenance deduction diverted from the nursing facility payment. The current home maintenance deduction is $572.40. The proposed change would eliminate this deduction, resulting in savings to the Medical Assistance Program. Monthly savings estimates are determined by multiplying 1,136 eligibles by the monthly home maintenance deduction. The proposed change will be effective upon publication in the Pennsylvania Bulletin as final rulemaking. The above figures reflect a four-month fiscal impact in Fiscal Year 2002-2003.

Partial Periods of Ineligibility

These savings estimates were based on data which indicates that annually approximately 1,716 individuals receiving long term care services incur a period of ineligibility due to the transfer of assets for less than fair consideration. The proposed change will require that the penalty period include partial periods of ineligibility. These savings estimates are based on average monthly ineligibles of 143 multiplied by 50 percent of the average monthly Medical Assistance cost per case to reflect partial month ineligibility at one-half of a month. The estimates are based on the current monthly cost per case of $3,915, adjusted for annual increases. The proposed change will be effective upon publication in the Pennsylvania Bulletin as final rulemaking. The above figures reflect a four-month fiscal impact in Fiscal Year 2002-2003.

Limit Unpaid Medical Expenses to $10,000

The Medical Assistance Program currently covers the full cost of long-term care while the resident's contribution is diverted to pay all previously incurred medical expenses. Under this proposed change, the unpaid medical expenses will be limited to $10,000 when calculating the resident's cost of care contribution. These savings estimates are based on data which indicates that approximately 0.1 percent of MA recipients currently in nursing facilities have unpaid medical expenses in excess of $10,000. By implementing a $10,000 limit on the unpaid medical expenses deduction, these residents will be required to contribute approximately $1,467 per month to the cost of their care until the previously exempt resource is depleted. These savings estimates are based on the projected monthly number of affected residents multiplied by the projected patient pay amount, adjusted for annual increases. The proposed change will be effective upon publication in the Pennsylvania Bulletin as final rulemaking. The above figures reflect a four-month fiscal impact in Fiscal Year 2002-2003. These estimates assume a phase-in of the impacted individuals of six per month, with an annual maximum of 102.

	FY 02-03	FY 03-04	FY 04-05	FY 05-06	FY 06-07	FY 07-08
MA-Long Term Care	($3,083)	($19,123)	($21,553)	($21,755)	($21,965)	($22,177)
MA-Inpatient	($46)	($1,181)	($1,392)	($1,435)	($1,480)	($1,526)
MA-Outpatient	($42)	($1,092)	($1,345)	($1,450)	($1,563)	($1,685)
TOTAL	($3,171)	($21,396)	($24,290)	($24,640)	($25,008)	($25,388)

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

(Dollar Amounts in Thousands)

Program	FY –3	FY -2	FY -1	Current FY
MA–Inpatient	$392,528	$418,707	$417,512	$396,804
MA–Outpatient	$622,669	$668,586	$705,750	$649,055
MA–Capitation	$1,384,763	$1,487,944	$1,711,084	$2,037,376

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

Implementing these regulations preserves funds necessary to ensure the current level of benefits for recipients in the Federally-mandated eligibility groups of the MA Program.

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

None.

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

None.

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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.

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

These regulations are comparable to other states that use the income first rule under spousal impoverishment provisions and partial month methodology for transfers of assets without receiving fair consideration. Implementing these regulations will not place Pennsylvania's MA Program at a competitive disadvantage but rather help ensure equitable treatment and coverage for the most vulnerable citizens.

(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.

No.

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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.

No.

(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.

None.

(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 anticipated effective date is the date the regulation is published in the *Pennsylvania Bulletin* as final rulemaking.

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

Regulations are evaluated through DPW's Quality Control and Corrective Action agencies.

CDL-1

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

#2299

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality. Attorney General By: _____ (Deputy Attorney General) SEP 24 2002 Date of Approval π 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: _____ DOCUMENT/FISCAL NOTE NO. 14-478 (DPW-OIM-09-02-02) DATE OF ADOPTION: _____ BY: _____ TITLE: Secretary of Public Welfare (Executive Officer, Chairman or Secretary)	Copy below is hereby approved as to form and legality. Executive or Independent Agencies. BY: _____ SEP 20 2002 Date of Approval (Deputy General Counsel) ~~(Chief Counsel, Independent Agency)~~ ~~(Strike inapplicable title)~~ π Check if applicable. No Attorney General approval or objection within 30 days after submission.

NOTICE OF PROPOSED RULEMAKING
DEPARTMENT OF PUBLIC WELFARE
OFFICE OF INCOME MAINTENANCE
BUREAU OF POLICY

[55 PA CODE CHAPTER 178]
Resource Provisions for Categorically NMP-MA and MNO-MA
[55 PA CODE CHAPTER 181]
Income Provisions for Categorically Needy NMP-MA and MNO-MA

STATUTORY AUTHORITY

The Department of Public Welfare (Department) proposes to amend the regulations set forth in Annex A under the authority of §§ 201(2), 403(b), 441.1 and 442.1 of the Public Welfare Code, Act of June 13, 1967 (P.L. 31, No. 21) (62 P.S. §§ 201(2), 403(b), 441.1 and 442.1); §§ 1917(c) and 1924 of Title XIX of the Social Security Act (42 U.S.C.A. §§ 1396p(c) and 1396r-5); and Federal regulations for post-eligibility treatment of income of institutionalized individuals found in 42 CFR §§ 435.725(c)(4)(ii) and (d) and 435.832(c)(4)(ii) and (d).

PURPOSE

The purpose of this rulemaking is to codify rules that revise the Medical Assistance (MA) eligibility requirements for applicants and recipients in need of long-term care (LTC) services both in the community and in an institutional setting. This proposed rulemaking revises the financial requirements to qualify for MA payment for LTC services and post-eligibility calculation of the amount of income the MA recipient in LTC facilities is required to contribute toward the cost of institutional care.

BACKGROUND

The Department is committed to administering an efficient and effective MA program. The Department wants to ensure access to quality health care for its most vulnerable citizens, including those who require LTC services.

Over the past year, Pennsylvania, as well as many other states, has experienced a significant increase in costs under the MA Program. No immediate relief is in sight. This fiscal pressure has required states to examine closely all expenditures and evaluate and prioritize what programs can continue to be fully funded.

The Department has taken steps to contain costs in past years through the implementation of managed care and the institution of management controls to avoid payments for services not medically necessary. Despite these changes, expenses in the MA Program continue to grow.

MA is a means-tested Federal-State funded program designed to provide health care benefits to individuals with limited income and resources. While the Federal government provides a baseline of what eligibility groups must be covered and what benefits must be provided in order for states to receive Federal financial participation,

states may choose to expand eligibility to additional groups as well as provide additional services. Historically, Pennsylvania has adopted most of the eligibility and service options under Federal law and exercised various options to use less restrictive methodologies to determine eligibility. As a result, Pennsylvania is administering one of the most generous MA Programs in the country.

In reviewing program areas to help reduce the significant growth in expenditures, the Department has compared its current MA Program requirements with the requirements the Federal government mandates as well as what other states provide. As a result of this comparison, options were identified that would bring Pennsylvania's program more in line with the Federal baseline as well as closer to what other states provide.

Despite the increasing costs, the Department, unlike its counterparts in other states, has not limited service coverage. Instead, Pennsylvania's approach has been to try to protect benefits for those in greatest financial need while looking at those areas of the program where individuals have some existing income or resources to pay for at least part of their care.

Current escalating cost in the MA Program compels the Department to make changes that will control costs without compromising access to LTC services. While taking steps to reduce coverage causes concern, taking less drastic action at this point to minimize growth now will hopefully mitigate the need to limit coverage or eliminate entire eligibility groups. These revisions target eligibility rules that are more generous than required by Federal statute or regulation. Under current policy, some individuals are able to divert available resources to avoid paying for LTC. These regulations will help maintain the current level of coverage for current recipients and require those with available resources to assume greater financial responsibility for their care.

This proposed rulemaking implements four changes to current policy related to eligibility for services for LTC under the MA Program. The first revision changes the method of computing available income and resources between spouses by implementing the Income-First Rule. This includes an expansion of the definitions to delineate the terms used to implement the Income-First Rule. (55 Pa. Code §§ 178.2 and 178.124(b)(2).) The second revision expands the circumstances when the ineligibility period for services for LTC under the MA Program when an applicant or recipient transfers a resource and fair market value is not received. (55 Pa. Code §§ 178.104(d) and 178.174(d).) The third revision limits the amount of unpaid medical

expenses owed by an MA recipient that is allowed as an income deduction when determining contribution toward the cost of LTC services. (55 Pa. Code § 181.452(d)(5)(iii).) The final revision eliminates an optional income deduction that is currently provided for maintenance of a home when the LTC recipient's stay in the LTC facility is expected to be less than six months. (55 Pa. Code § 181.452(d)(6).)

INCOME-FIRST RULE

Background

The Medicare Catastrophic Coverage Act of 1988 (MCCA) (42 U.S.C.A. § 1396r-5) included provisions that protect the spouse living at home (called the community spouse (CS)) from having her resources depleted when the other spouse (called the institutionalized spouse (IS)) is admitted to an LTC facility. Until the MCCA, Federal standards often left a spouse living at home destitute, the couple's assets drained to qualify the spouse in the institution for MA. The provisions in MCCA responded to this problem. MCCA added § 1924 to Title XIX of the Social Security Act, codified at 42 U.S.C.A. § 1396r-5, revising the MA statutory standards for providing the CS with additional income to bring her up to the protected level. These requirements are known as the "spousal

impoverishment" provisions. These provisions govern the treatment of assets (income and resources) of the couple for determining MA eligibility and allow for the provision of additional income to the CS.

42 U.S.C.A. § 1396r-5 requires that a resource assessment be completed when one spouse is admitted to an LTC facility. The total available resources owned by the couple, both jointly and individually, on the date of admission are determined. A determination is made of the CS's share of the couple's total resources, generally one-half of the total subject to the minimum and maximum resource standards consistent with § 1924(c) of the Social Security Act. (42 U.S.C.A. § 1396r-5(c).) The remaining resources are considered available to the IS.

In addition to preserving resources for the CS, the requirements of MCCA were designed to ensure that the CS has sufficient income to meet basic monthly needs. Section 1924(d) of the Social Security Act, as codified at 42 U.S.C.A. § 1396r-5(d), requires the establishment of a minimum monthly maintenance needs allowance for the CS. The minimum monthly maintenance needs allowance is an annually updated figure set to a level that is $1/12^{th}$ of 150% of the official Federal poverty level for a family of two. If the CS's income

is less than the minimum monthly maintenance needs allowance, states may adopt a method to permit the amount of the shortfall to be met from the income or resources of the IS in accordance with §§ 1924(d)(1)(B) and (f)(2)(A)(iii) of the Social Security Act, 42 U.S.C.A. §§ 1396r-5(d)(1)(B) and (f)(2)(A)(iii).

The Department's current regulations provide that the income-first method is to be used for providing the CS with additional income to bring her up to the protected level. (55 Pa. Code §§ 178.124(b) and 181.452.) This income transfer must occur before additional resources can be protected to provide the CS with income. Current regulations, however, do not conform to current practice which is based on the provisions of a settlement agreement in Hurly v. Houstoun, C. A. No. 93-3666 (U. S. Dist. Ct. E. D. Pa.) In Hurly, plaintiffs challenged the Department's regulations implementing § 1924(d) of the Social Security Act, contending that the income-first rule did not comply with Federal law. As a result of a settlement reached between plaintiffs and the Department in June 1996, the Department revised its procedures. The Department uses an "annuity rule" which permits the couple to use resources to purchase an annuity that will provide the CS with the additional income that she is permitted. At the time the Hurly settlement was reached, there were no Federal regulations to interpret the Federal statute.

On September 7, 2001, the U.S. Department of Health and Human Services issued a notice of proposed rulemaking allowing states to choose either the income-first or resource-first method to determine how the CS will be provided with additional income. (66 FR 4676.) Thereafter, the United States Supreme Court decided that the income-first rule was a reasonable interpretation of § 1924(d) of the Social Security Act. (42 U.S.C.A. § 1396r-5.) Wisconsin Department of Health and Family Services v. Blumer, 534 U. S. 952 (2002). Based upon these developments, the Department will restore the income-first policy which is set forth in the current regulations including certain technical amendments to improve clarity.

Proposed Amendment

This proposed rulemaking eliminates Pennsylvania's Annuity Rule procedure and implements the income-first method when determining how the CS is provided with additional income – the Federal term is the "CS monthly income allowance." Using the income-first rule takes into account the anticipated monthly contribution of income from the IS to the CS to bring the CS's income up to the protected income level. The monthly contribution of income from the IS to the CS is considered before any additional resources can be allocated to the CS for the

purpose of generating income. These resources are intended to be used to help pay for the cost of long-term care services until the IS is eligible for MA. This method eliminates the option for a couple to automatically preserve additional resources to purchase an annuity to generate monthly income for the CS.

PARTIAL MONTH(S) OF INELIGIBILITY

Background

Section 1917 of the Social Security Act (42 U.S.C.A. § 1396p(c)) requires a period of ineligibility for MA coverage of LTC services when the applicant or recipient or his or her spouse transfers resources for less than fair market value within a specified look-back period. The period of ineligibility is called the penalty period or disqualification period. The length of the penalty period is calculated by dividing the uncompensated value of all transferred assets by the current average monthly rate for private nursing facility care (NFC) at the time of application for MA. States have the choice of not imposing a penalty period for transfers of less than a full month. Pennsylvania is using full months and rounding down when the calculation results in a fraction.

Proposed Amendment

This proposal expands the circumstances in which an MA ineligibility period for payment of long-term care services will result from a transfer of an asset that occurs when fair market value has not been received. Currently, existing regulations do not require a penalty period for a transfer of an asset that is less than the average monthly rate for private NFC and for a partial penalty period of less than one month when the calculation of the period of ineligibility for payment of LTC services results in a fraction of a month. A penalty will be imposed under these proposed regulations for a transfer of asset that is less than the average monthly rate and for a partial penalty period. This proposal will require that an individual be responsible for paying for LTC services equal to the entire amount of the asset that was transferred for less than fair market value if a penalty is imposed due to failure to receive fair market value. Any transfer of assets, regardless of the amount, will be evaluated to determine if an individual will be denied payment of long-term care services.

LIMIT ON UNPAID MEDICAL EXPENSES

Background

An MA recipient who is residing in an LTC facility is required to contribute to the cost of LTC by using monthly income after deductions in accordance with 42 CFR §§ 435.725(c)(4)(ii) and 435.832(c)(4)(ii). Deductions include expenses for medical or remedial care recognized under State law but not covered under the State's MA plan. These deductions are subject to allowable limits the State may establish. Current regulations in 55 Pa. Code § 181.452(d)(5)(ii) permit these deductions regardless of the amount of the expense when determining the amount of income an MA recipient must contribute toward the cost of LTC services. The medical expense is deducted from the MA recipient's income in the calendar month the medical expense is paid by the MA recipient.

Proposed Amendment

This proposal sets a limit of $10,000 for an outstanding unpaid medical expense that can be used as an allowable medical expense deduction when calculating an MA recipient's contribution toward cost of care. The $10,000 limit

is a reasonable limit approximately equal to three months of NFC at the MA rate. The limit is intended to encourage individuals who are potentially eligible for MA to apply for MA on a timely basis to prevent a medical expense debt to a long-term care facility at the private rate.

ELIMINATION OF THE HOME MAINTENANCE DEDUCTION

Background

States have the option of providing a home maintenance allowance deduction when determining contribution toward cost of NFC in accordance with 42 CFR §§ 435.725(d) and 435.832(d). This deduction is allowed if a physician has certified that the resident will likely return home within six months.

Proposed Amendment

This proposal eliminates the home maintenance allowance as an allowable deduction when determining an MA recipient's contribution toward cost of NFC.

It is estimated that these proposed amendments will affect approximately 3,794 individuals applying for or receiving LTC under the MA Program.

NEED FOR PROPOSED RULEMAKING

This proposed rulemaking is necessary to revise the MA eligibility requirements for applicants and recipients requesting LTC MA in order to address the significant growth in costs in the MA Program.

SUMMARY OF REQUIREMENTS

I. The following are regulations that apply to applicants and recipients for LTC services both in the community and in an institutional setting:

Sections 178.104(d) and 178.174(d). These subsections are proposed to expand the circumstances in which there could be a period of MA ineligibility for LTC services due to a transfer of assets without receiving fair market value and increase the disqualification period. In accordance with 42 U.S.C.A. § 1396p(c), an applicant or recipient of MA or spouse of an applicant who transfers an asset without receiving fair market value could be subject to a period of ineligibility for payment of LTC services under the MA Program.

Currently, there is no disqualification or penalty period of less than one month. Consequently, a transfer of assets with a value at less than the average monthly pay rate for private NFC without receiving fair market value does not result in a penalty period for payment of LTC services. This revision expands the circumstances for a penalty period. Under the proposed change, a partial month penalty period may be imposed for an asset transfer that is less than the average monthly pay rate for private NFC.

In addition, the change extends the penalty period to include a partial month when the calculation to determine the penalty period yields a fraction. This revision will make applicants and recipients responsible for more of the cost of their LTC services both in institutional settings and for those LTC services received in a residential setting. Applicants and recipients will be responsible for paying toward the cost of LTC services the amount equivalent to the cost of the asset that was transferred without receiving fair market value.

II. The following are regulations that apply to applicants and recipients for LTC services in an institutional setting:

A. Section 178.2. This section has been expanded to include additional terms that are used to define various income standards and allowance amounts. These standards/amounts are applied to the provisions that govern the treatment of assets (income and resources) of a couple when one spouse is admitted to a long-term care facility.

B. Section 178.124(b)(2). This paragraph is modified to incorporate the change in the method of providing the CS with additional income to bring her up to the protected level when one spouse is admitted to a long-term care facility. Currently, the couple has the option to use available resources to purchase an annuity that will generate monthly income for the CS if the CS's monthly income is less than the protected income level established by Federal law. This revision will require that if the CS's own monthly income which includes interest income generated by the resources that are protected for the CS is less than the protected income level, a contribution of monthly income can be provided from the IS. This revision does not eliminate the

provision that protects the CS's income level; it is changing how the CS will receive that monthly income. If the CS's monthly income including the determined contribution of monthly income from the IS is less than the protected income level, the IS can continue to use available resources to purchase an annuity to generate monthly income for the CS.

C. Section 181.452(d)(5). This paragraph is revised to include a limitation on the total amount that is allowable as a medical and remedial expense deduction when determining an MA recipient's contribution toward cost of care. Currently, any medical or remedial expense, regardless of the amount, is an allowable deduction when determining an MA recipient's contribution toward cost of care. This change will limit the total deduction allowed for outstanding medical and remedial expenses to $10,000. See 42 CFR §§ 435.725(f) and 435.832(f).

D. Section 181.452(d)(6). This paragraph is deleted to remove the income deduction that is given for maintenance of an MA recipient's home for short-term stays in an LTC facility when determining contribution toward cost of care. See 42 CFR §§ 435.725(d) and 435.832(d).

AFFECTED INDIVIDUALS AND ORGANIZATIONS

This proposed rulemaking will affect applicants and recipients who are requesting or receiving LTC services, both in the community and in an institutional setting. Applicants and recipients will be responsible for paying more toward the cost of LTC.

ACCOMPLISHMENTS/BENEFITS

This proposed rulemaking will continue to allow the Department to provide MA benefits to the Commonwealth's Federally-mandated eligibility groups, while providing sound fiscal management of the Commonwealth's limited resources.

FISCAL IMPACT

COMMONWEALTH: The Department estimates the Fiscal Year 2002-2003 savings to be $7.001 million ($3.171 million in State funds).

PUBLIC SECTOR: There is a potential cost to county LTC facilities with residents who incur an outstanding unpaid medical expense for LTC services.

PRIVATE SECTOR: There is a potential cost to private LTC facilities with residents who incur outstanding medical expense for LTC services in excess of $10,000 before becoming eligible for MA. Individuals may be responsible to pay more for LTC services under the income-first rule.

PAPERWORK REQUIREMENTS

No additional forms or paperwork will be required to implement this change in the regulations. Current forms and workbook pages will continue to be used.

EFFECTIVE DATES

These regulations will be effective upon publication in the Pennsylvania Bulletin as final rulemaking.

SUNSET DATE

There is no sunset date. The Department monitors regulations through its Quality Control and Corrective Action agencies.

PUBLIC COMMENT PERIOD

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed amendments to the Department of Public Welfare, Edward J. Zogby, Director, Bureau of Policy, Room 431, Health and Welfare Building, Harrisburg, Pennsylvania 17120, (717) 787-4081, within 30 days after the publication in the Pennsylvania Bulletin. Comments received within the 30 calendar days will be reviewed and considered in the preparation of the final-form regulations. Comments received after the 30-day comment period will be considered for 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 § 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), the Department submitted a copy of these proposed amendments on SEP 25 2002 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 rulemaking, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

Under § 5(g) of the Regulatory Review Act, if the Commission has any objections to any portion of the proposed regulation, it will notify the Department within ten days of the close of the Committees' review period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Act specifies detailed procedures for review, prior to final publication of the regulation, of objections raised by the Department, the General Assembly and the Governor.

cc: Legislative Reference Bureau

Annex A

TITLE 55. PUBLIC WELFARE

PART II. PUBLIC ASSISTANCE MANUAL

Subpart D. DETERMINATION OF NEED AND AMOUNT OF ASSISTANCE

CHAPTER 178. RESOURCE PROVISIONS FOR CATEGORICALLY NMP-MA AND MNO-MA

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Subchapter A. GENERAL PROVISIONS FOR MA RESOURCES COMMON TO ALL CATEGORIES OF MA

GENERAL PROVISIONS FOR MA RESOURCES

* * * * *

§ 178.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

CSMMNA—Community Spouse Monthly Maintenance Needs Amount —The income needed by the community spouse to prevent the community spouse from being impoverished according to Federal standards. This figure is based on the community spouse's monthly shelter expense and the minimum and maximum monthly maintenance need allowances.

* * * * *

Excess Shelter Amount—The resulting amount of the community spouse's monthly shelter expense that exceeds the shelter expense allowance.

* * * * *

MAMMNA—Maximum Monthly Maintenance Need Allowance— The maximum amount of income permitted to be protected to prevent the community spouse from being impoverished, as established under 42 U.S.C.A. § 1396r-5(d)(3)(c). A revision to the amount required by Federal law and regulations is published annually as a notice in the Pennsylvania Bulletin.

* * * * *

MIMMNA—Minimum Monthly Maintenance Need Allowance— The minimum amount of income permitted to be protected to prevent the community spouse from being impoverished, as established under 42 U.S.C.A. § 1396r-5(d)(3)(A) and (B),

which is 1/12th of 150% of the official income poverty limit for a family of two. A revision to the amount required by Federal law and regulations is published annually as a notice in the Pennsylvania Bulletin.

MMNA—Monthly Maintenance Need Allowance—The amount of income that the institutionalized spouse can contribute to the community spouse.

Monthly Shelter Expense—The monthly cost for housing, including:

(i) Rent, mortgage payment, including principal and interest, property taxes and property insurance.

(ii) Maintenance charge for a condominium or cooperative less the utility allowance described in subparagraph (iii).

(iii) One of the two standard utility allowances (SUAs) specified in § 501.7(a)(1) and (2) (relating to treatment of income).

(iv) Telephone allowance specified in § 501.7(a)(3).

(v) Homeless shelter allowance specified in § 501.7(a)(4).

* * * * *

Shelter Expense Allowance— Thirty percent of the minimum monthly maintenance need allowance. A revision to the amount required by Federal law and regulations is published annually as a notice in the Pennsylvania Bulletin.

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Subchapter B. AGED-, BLIND- AND DISABLED-RELATED CATEGORIES OF MA

* * * * *

DISPOSITION OF PROPERTY AND FAIR CONSIDERATION PROVISIONS FOR THE AGED-, BLIND- AND DISABLED-RELATED CATEGORIES OF MA

* * * * *

§ 178.104. Disposition of assets and fair consideration provisions for transfers on or after July 30, 1994.

* * * * *

(d) The [number of months] period of ineligibility for [the institutionalized] an individual who is applying for, or receiving MA for NFC as defined in § 178.2 (relating to definitions), including services in an ICF/MR facility, or a level of care in an institution equivalent to NFC, or home or community-based waiver services furnished under a Title XIX waiver and who disposes of assets for less than FMV begins in the month of transfer if the date does not occur during an existing period of ineligibility. The period of ineligibility shall be [equal to]:

(1) The number of months, including partial months, arrived at by dividing the total cumulative UV of all assets transferred by the individual or the individual's spouse on or after the look-back date divided by the average monthly cost to a private patient of NFC in effect in the Commonwealth at the time of application.

(2) A partial month if the total cumulative UV of all assets transferred by the individual or the individual's spouse on or after the look-back date, divided by the average monthly cost to a private patient of NFC in effect in the Commonwealth at the time of application results in a fraction.

* * * * *

RESOURCE ELIGIBILITY REQUIREMENTS FOR AN

INSTITUTIONALIZED SPOUSE WITH A COMMUNITY SPOUSE

* * * * *

§ 178.124. Resource eligibility for the institutionalized spouse.

* * * * *

(b) *Allowance revision.* The community spouse resource allowance may be revised if either spouse establishes at a Departmental hearing, based on evidence acceptable to the Department, that:

* * * * *

(2) [Income generated by the community spouse resource allowance is not sufficient to raise the community spouse's income to the monthly standard community spouse maintenance need allowance amount described in § 181.452(c)(2)(ii) (relating to posteligibility determination of income available from an MA eligible person toward his cost of care). The Department hearing officer will establish a resource amount adequate to assure that the community spouse has income up to the community spouse maintenance need allowance amount. This applies only if the institutionalized spouse actually gives the community spouse

maintenance need allowance to the community spouse.] Additional monthly income is needed for the community spouse and is calculated as follows:

(i) The community spouse's total gross monthly income is calculated by adding the following:

(A) The total gross monthly earned income includes earned income specified in §§ 181.91 – 181.96 (relating to types of earned income counted for the aged, blind and disabled categories).

(B) The total gross monthly unearned income includes unearned income specified in § §181.101 – 181.109 (relating to types of unearned income counted for the aged, blind and disabled categories). Interest and other income generated by the community spouse resource determined under § 178.123 are included as unearned income of the community spouse.

(ii) All monthly shelter costs of the community spouse are added together to arrive at a total monthly shelter expense.

(iii) If the total monthly shelter expense exceeds the shelter expense allowance, the excess shelter amount is added to the MIMMNA to arrive at the CSMMNA. The excess shelter amount plus the MIMMNA cannot exceed the MAMMNA except as provided in subparagraph (vii).

(iv) If the total monthly shelter expense is equal to or less than the shelter expense allowance, the MIMMNA is the CSMMNA.

(v) If the community spouse's total gross monthly income determined in subparagraph (i) is equal to or greater than the CSMMNA determined in subparagraph (iii) or (iv), the community spouse is not in need of an MMNA unless subparagraph (vii) applies.

(vi) If the community spouse's total monthly income determined in subparagraph (i) is less than the CSMMNA determined in subparagraphs (iii) or (iv), the difference is the MMNA, unless subparagraph (vii) applies.

(vii) The MMNA may exceed the CSMMNA determined in subparagraph (iii) or (iv) if:

(A) A greater amount is ordered through a court order under 42 U.S.C.A. § 1396r-5(d)(5), or

(B) A greater amount is determined as a result of a Department hearing decision in which either spouse establishes that the community spouse needs income greater than the MMNA due to exceptional circumstances resulting in significant financial duress.

(viii) If the institutionalized spouse's total gross monthly income as described in § 181.452(a) (relating to posteligibility determination of income available from an MA eligible person toward cost of care) less allowable deductions in § 181.452(d) is not sufficient to raise the community spouse's income to the MMNA described in subparagraph (vi), or unless subparagraph (vii) applies, the resource allowance as determined under § 178.123 may be revised:

(A) Through the fair hearing process, if the Department hearing officer establishes a resource amount adequate to assure that the community spouse has income up to the MMNA, and

(B) If the institutionalized spouse actually gives the MMNA to the community spouse.

* * * * *

Subchapter C. TANF-RELATED AND GA-RELATED CATEGORIES OF MA

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DISPOSITION OF PROPERTY AND FAIR CONSIDERATION PROVISIONS FOR THE [AFDC] TANF- AND GA-RELATED CATEGORIES OF MA

* * * * *

§ 178.174. Disposition of assets and fair consideration provisions for transfers on or after July 30, 1994.

* * * * *

(d) The [number of months] period of ineligibility for [the institutionalized] an individual who is applying for, or receiving MA for NFC as defined in § 178.2 (relating to definitions), including services in an ICF/MR facility, or a level of care in an institution equivalent to NFC, or home or community-based waiver services furnished under a Title XIX waiver and who

disposes of assets for less than FMV begins in the month of transfer provided that the date does not occur during an existing period of ineligibility. The period of ineligibility shall be [equal to]:

(1) The number of months, including partial months, arrived at by dividing the total, cumulative [uncompensated value] UV of the assets transferred by the individual or the individual's spouse, on or after the look-back date, divided by the average monthly cost to a private patient of [nursing facility services] NFC in effect in this Commonwealth at the time of application.

(2) A partial month if the total cumulative UV of all assets transferred by the individual or the individual's spouse on or after the look-back date, divided by the average monthly cost to a private patient of NFC in effect in this Commonwealth at the time of application results in a fraction.

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CHAPTER 181. INCOME PROVISIONS FOR

CATEGORICALLY NEEDY NMP-MA AND MNO-MA

* * * * *

Subchapter D. POSTELIGIBILITY DETERMINATION OF ELIGIBILITY

FOR MA PAYMENT TOWARD COST OF CARE IN INSTITUTIONS

POSTELIGIBILITY DETERMINATION PROVISIONS

* * * * *

§ 181.452. Posteligibility determination of income available from an MA eligible person toward the cost of care.

* * * * *

(d) The following amounts are deducted from the MA eligible person's total gross income identified in subsection (a) for persons in the aged, blind and disabled-related categories, or subsection (b) for persons in the TANF-related or GA-related categories and adjusted as applicable by the treatment of Veterans Administration benefits under subsection (c) for all MA eligible persons in the following order:

* * * * *

(5) The following medical expenses which are not subject to payment by a third party are deducted in the calendar month the medical expenses are paid[.]:

* * * * *

(iii) [Expenses paid by the MA eligible person for necessary] Necessary medical or remedial care recognized under State statutes or regulations but not covered under the MA Program, subject to a total deduction limit of $10,000.

[(6) An amount for maintenance of a single MA eligible person's home if a physician has certified that he is likely to return to his home within a 6-month period from the date he entered the facility. When this deduction is given, it may not be deducted for more than one 6-consecutive month period. The maintenance need amount for the single person is the MA income limit for one person in Appendix A. A home is defined as the residence maintained by the MA eligible person before he entered the facility and to which he plans to return. If a person is discharged and subsequently returns to a facility, the single MA eligible person is eligible for a new 6 consecutive month period for this deduction if a physician certifies that the person is likely to return to his home within a 6-month period from the date of admittance to the facility.]

* * * * *

PLEASE RETURN TO:
Independent Regulatory Review Commission
14th Floor, Harristown II

TRANSMITTAL SHEET FOR REGULATIONS SUBJ
REGULATORY REVIEW ACT

I.D. NUMBER: 14-478

SUBJECT: Resource Provisions for Categorically NMP-MA & MNO-MA and Income Provisions for Categorically Needy NMP-MA and MNO-MA

AGENCY: DEPARTMENT OF PUBLIC WELFARE

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
9/25		HOUSE COMMITTEE ON HEALTH & HUMAN SERVICES
9/25/02		
		SENATE COMMITTEE ON PUBLIC HEALTH & WELFARE
9/25		
9/25/02	Elena Pagán	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
9-25		LEGISLATIVE REFERENCE BUREAU

September 25, 2002