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

December 5, 2002

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

Re: Regulation #14-478 (IRRC #2299)  
Department of Public Welfare  
Resource Provisions for Categorically NMP-MA  
and MNO-MA; Income Provisions for Categorically  
Needy NMP-MA and MNO-MA

Dear Secretary Houstoun:

Enclosed are the Commission's Comments which list objections and suggestions for consideration when you prepare the final version of this regulation. These Comments are not a formal approval or disapproval; however, they specify the regulatory criteria which have not been met.

The Comments will soon be available on our website at [www.irrc.state.pa.us](http://www.irrc.state.pa.us). If you would like to discuss them, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce  
Executive Director  
evp  
Enclosure

cc: Honorable George T. Kenney, Jr., Majority Chairman, House Health and Human Services Committee

Honorable Frank L. Oliver, Democratic Chairman, House Health and Human Services Committee

Honorable Harold F. Mowery, Jr., Chairman, Senate Public Health and Welfare Committee

Honorable Vincent J. Hughes, Minority Chairman, Senate Public Health and Welfare Committee

Nia Wilson, Legal Counsel, House Health and Human Services Committee

Stanley Mitchell, Chief Counsel, House Health and Human Services Committee

**Comments of the Independent Regulatory Review Commission**

**on**

**Department of Public Welfare Regulation No. 14-478**

**Resource Provisions for Categorically NMP-MA and MNO-MA; Income Provisions for Categorically Needy NMP-MA and MNO-MA**

**December 5, 2002**

We submit for your consideration the following objections and recommendations regarding this regulation. Each objection or recommendation includes a reference to the criteria in the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) which have not been met. The Department of Public Welfare (Department) must respond to these Comments when it submits the final-form regulation. If the final-form regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

- 1. General. – Disapproval by a standing committee; Policy decision requiring legislative review; Protection of the public health and safety; Economic and fiscal impact; Feasibility.**

*Disapproval by the House Health and Human Services Committee; Policy decision requiring legislative review*

The House Health and Human Services Committee (House Committee) disapproved the proposed amendments. The House Committee's concerns were explained in a letter dated October 10, 2002. The House Committee found the amendments detrimental to senior citizens and stated "There is no doubt that, dependent on the limited resources and earnings available to them, impoverishment for the community spouse would be inevitable."

The Senate Public Health and Welfare Committee (Senate Committee) submitted a letter opposing a portion of this rulemaking. In their letter dated November 25, 2002, the Senate Committee objected "to the proposal to eliminate the home maintenance deduction." Further comments on this issue are contained in **Comment 7**.

We agree with both the House and Senate Committees' concerns and herein state our objections.

*Protection of the Public Health and Safety; Potential hardship on the Community Spouse*

Under the "resource first" model, a Community Spouse (CS) can retain and invest resources from the Institutionalized Spouse (IS) to bring his or her income to the federal mandated minimum. When the IS dies, the CS will still be able to rely on those resources for income. Under the "income first" model, more of these resources will be spent by the IS to spend down to

meet the Medical Assistance (MA) program's eligibility requirements. This could result in a dramatic reduction in the CS' income when the IS dies.

Many commentators do not believe the regulation will achieve the projected savings and will present a severe hardship on the CS. Comments submitted by elder law attorneys provide examples of the potential hardship for ISs and CSs. These examples point to situations where individuals would possibly lose their residences, as well as substantial amounts of their life savings, if the Commonwealth adopted the "income first model." The Department should address the impact on individuals that would result from moving from the resource first model to the income first model.

### *Economic impact; Feasibility*

The House Committee stated that "rather than being a Medical Assistance cost containment measure, this regulation will force more seniors into poverty, resulting in their reliance on public assistance for survival." The incomplete fiscal data in the Preamble and the Regulatory Analysis Form (RAF) does nothing to refute this statement. The information provided simply does not reflect the full impact of the proposed amendments.

Specifically, we have four major concerns in the area of economic impact: the financial impact on the CS; the financial impact on a temporarily institutionalized individual due to the deletion of the deduction for maintenance of their home; the financial impact on the Commonwealth in terms of additional demand for services for an impoverished CS or temporarily institutionalized individual who loses their home; and the impact on the projected savings for the Commonwealth of the purchase of annuities by CSs and ISs to protect financial resources. These issues are discussed in more detail in Comments 5, 6 and 7.

### **2. Clarity of the amendments in relation to other regulations and statutes - Consistency with existing regulations and statutes; Clarity.**

Several commentators stated the amendments are similar to existing provisions in the United States Code, but vary in the use of terms and application of those terms. The Department should review the amendments in conjunction with federal regulations and statutes. In addition, some commentators cited inconsistency with the Pennsylvania Code. The Department should make the final-form regulation consistent with the federal and state requirements.

### **3. Effective date - Implementation procedures; Clarity.**

This regulation is unclear regarding how parties will be affected once the final-form version is promulgated. Will the implementation of this rulemaking be tied to the initial date of application? The Department should add a section to this regulation outlining the timeline for implementation and compliance with this regulation.

**4. Section 178.2. Definitions. – Clarity.**

*“MAMMNA,” “MIMMNA” and “shelter expense allowance”*

These definitions contain substantive provisions. However, substantive provisions in definitions are not enforceable. Therefore, these substantive provisions should be moved to the body of the regulation.

**5. Section 178.124. Resource eligibility for the institutionalized spouse. – Economic and fiscal impact; Reasonableness; Feasibility.**

This section includes the formulas for calculating the monthly income for a CS. We have a number of concerns and questions.

*Spousal refusal*

First, this proposed rulemaking would require the CS to spend-down assets to qualify the IS for MA. In some cases, the CS may refuse to make these amounts available to an IS, due to the potential impoverishment of the CS. The rulemaking does not address this situation. The Department should include procedures dealing with CS refusal in the final-form regulation.

*Interest income*

Second, how will the amount of interest be determined? Subsection (b)(2)(i)(B) includes “Interest and other income generated by the community spouse resource...are included as unearned income of the community spouse.” The Department should develop a mechanism for determining the interest rate it will use to calculate the CS’ unearned income toward the CS’ MMNA in the final-form regulation. Rather than specifying a fixed rate in the regulation, the Department should tie the rate to a published index such as the interest rate on T-bills.

*Treatment of SSI income*

Third, Section 178.124(b)(2)(viii) states that the IS’ income consists of the IS’ total gross monthly income as defined in Section 181.452(a) of the regulation. Section 181.452(a) incorporates Section 181.101 of the Department’s regulations. This section includes social security income (SSI) as total gross monthly income for the IS. Section 178.124(b)(2)(viii) requires the total gross monthly income of the IS be attributed to the CS for the purposes of calculating the CS’ MMNA.

Section 407(a) of the Social Security Act (42 U.S.C. § 407) (Act) states:

The right of any person to any future payment under this title [42 USCS §§ 401 et seq.] shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title [42 USCS §§ 401 et seq.] shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

The Second Circuit Court of Appeals in *Robbins v. DeBuono*, 218 F.3d 197 (2<sup>nd</sup> Cir. 2000) held that the assignment of the IS' SSI to a CS is in violation of Section 407(a) of the Act. Both *Robbins* and Section 407(a) appear to prohibit the transfer of SSI. The Department should explain its authority for allowing the transfer of the IS' SSI benefits or modify its regulations to exclude them.

*Annuity purchase*

Finally, commentators pointed out that the ability to purchase an actuarially sound immediate annuity to protect financial resources would deprive the Commonwealth of the savings it hopes to realize by implementing this regulation. The Department should add language specifying how it will treat these annuities and explain whether it considered these annuities when calculating the projected savings of this proposed regulation.

**6. Section 178.174. Disposition of assets and fair consideration provisions for transfers on or after July 30, 1994. – Economic and fiscal impact; Reasonableness.**

*Subsection (d)*

Paragraphs 178.174(d)(1) and (2) require reporting of all assets transferred by an individual or an individual's spouse. We have three questions. First, do these paragraphs apply to post eligibility transfers? Second, it would appear that any transfer by a CS would impact the IS' eligibility for MA. Is this what the Department intended? The Department should explain.

Finally, is there a de minimus exception to Subsection (d)? Commentators have pointed out examples where small transfers of assets could trigger reporting requirements, which would in turn trigger partial month ineligibility penalties. In the examples given, the penalties in some cases would amount to less than a day of eligibility. The Department should explain the need for these reporting requirements and how the benefits outweigh the costs. The Department also should consider adding a de minimus exception to this subsection in the final-form regulation.

**7. Section 181.452. Posteligibility determination of income available from an MA eligible person toward the cost of care. – Economic and fiscal impact; Protection of the public health and safety; Reasonableness; Clarity.**

This section sets forth deductions from an MA eligible person's total gross income. We have two questions.

*Subparagraph (d)(5)(iii)*

First, this subparagraph allows a total deduction limit of \$10,000 for necessary medical or remedial care not covered under the MA Program. The Department should explain how the \$10,000 amount was determined, and the basis for including this required amount.

Additionally, the Department acknowledges in the Preamble that there will be potential costs to county and private Long Term Care facilities for residents who incur an outstanding unpaid medical expense. Has the Department quantified these costs?

*Deletion of Paragraph (d)(6)*

Second, this paragraph allowed a home maintenance deduction for short nursing home stays. The proposed rulemaking deletes this deduction. The elimination of this paragraph could leave individuals without enough financial resources to care for or keep their homes. The Department should explain why the deletion of this deduction is in the public interest.