

Regulatory Analysis Form

(Completed by Promulgating Agency)



IRRC

Intergovernmental Review Council

SECTION I: PROFILE

(1) Agency:
Department of Public Welfare/Department of Aging
Office of Long-Term Living

(2) Agency Number:

Identification Number:

2880

IRRC Number:

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(3) Short Title:
Participation Review Process for Medical Assistance Nursing Facilities

(4) PA Code Cite:
55 Pa.Code Chapter 1187
55 Pa.Code Chapter 1189

(5) Agency Contacts (List Telephone Number, Address, Fax Number and Email Address):

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Phone: (717) 772-2549

(6) Primary Contact for Public Comments (List Telephone Number, Address, Fax Number and Email Address) – Complete if different from #5:

Yvette Sanchez-Roberts
Email gsanchez-r@state.pa.us
Phone: (717) 265-7569

(All Comments will appear on IRRC'S website)

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(7) Type of Rulemaking (check applicable box):

- Proposed Regulation
- Final Regulation
- Final Omitted Regulation
- Emergency Certification Regulation;
- Certification by the Governor
- Certification by the Attorney General

(8) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

This regulation establishes the process for nursing facilities to submit requests to enroll in the Medical Assistance (MA) Program, add MA beds to their existing complement or transfer MA beds to an affiliated facility. The regulation describes the criteria that the Department will apply in determining whether to approve such requests. This process had previously been implemented through a Statement of Policy. The criteria are designed to ensure that MA participants have access to medically necessary nursing facility services while promoting a more balanced long-term living system in Pennsylvania.

(9) Include a schedule for review of the regulation including:

- A. The date by which the agency must receive public comments: 30 days after publication as proposed rulemaking
- B. The date or dates on which public meetings or hearings will be held: _____
- C. The expected date of promulgation of the proposed regulation as a final-form regulation: September 24, 2011
- D. The expected effective date of the final-form regulation: upon final publication
- E. The date by which compliance with the final-form regulation will be required: upon final publication
- F. The date by which required permits, licenses or other approvals must be obtained: N/A

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

The Department will review the regulation on an ongoing basis to ensure compliance with Federal and state law and to assess the appropriateness and effectiveness of the regulation.

SECTION II: STATEMENT OF NEED

(11) State the statutory authority for the regulation. Include specific statutory citation.

The Department has the authority to promulgate regulations to establish the process and criteria to review and respond to requests for increases in Medical Assistance-certified beds under the authority of section 443.1(8) of the Public Welfare Code (62 P.S. § 443.1(8)).

(12) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

Act 2007-16 mandates that the Department establish regulations regarding nursing facility participation review. (62 P.S. § 443.1(8)).

(13) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

This regulation is needed to comply with section 443.1(8) of the Public Welfare Code (62 P.S. § 443.1(8)), which was enacted by Act 16 of 2007. The process established by the proposed regulation assures that the MA program is administered in the best interest of MA recipients and in compliance with applicable federal and state law. Nursing facilities will benefit by having a more reliable, transparent process for seeking additional MA beds. MA participants will benefit by having assured access to medically necessary nursing facility services and a more balanced long-term living system.

There are approximately 593 non-public nursing facilities and 32 county nursing facilities in Pennsylvania enrolled in the MA Program. There are approximately 48,558 MA recipients currently residing in those nursing facilities and an average of 56,498 MA recipients who receive nursing facility services in a typical year.

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(14) If scientific data, studies, references are used to justify this regulation, please submit material with the regulatory package. Please provide full citation and/or links to internet source.

There were no formal studies or references used to justify this regulation.

(15) Describe who and how many will be adversely affected by the regulation. How are they affected?

No one will be adversely affected by the regulation. Nursing facilities that are enrolled MA Providers or wish to become MA Providers and the MA recipients who are or may receive services from those facilities will be beneficially affected by this regulation. Facilities will benefit by having a more reliable, transparent process for seeking additional MA beds. MA recipients will also benefit by having assured access to medically necessary nursing facility services and a more balanced long-term living system.

(16) 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.

There are approximately 625 nursing facilities that currently participate in the MA program. Should they choose to seek additional MA beds or to transfer MA beds to an affiliated facility, they would be required to comply with this regulation. In addition, the small number of nursing facilities in Pennsylvania who do not currently participate in the MA program would be required to comply with this regulation if they seek to enroll in the program in the future.

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SECTION III: COST AND IMPACT ANALYSIS

(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. Explain how the dollar estimates were derived.

The cost to nursing facilities for complying with the requirements of submitting a bed request for approval to the Department are estimated to be equivalent to the costs of submitting an exception request under the current Statement of Policy. Therefore, the Department does not expect any costs or savings to the regulated community.

(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. Explain how the dollar estimates were derived.

This regulation is not expected to have any cost or savings impact on local governments. To the extent that counties operate nursing facilities that participate in the MA program, their costs of complying with the participation review process should they elect to seek an increase of their MA bed complement are estimated to be equivalent to the costs that would be borne under the existing Statement of Policy.

(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. Explain how the dollar estimates were derived.

The Department does not expect any additional costs or savings to state government associated with the implementation of the regulation. The staff time that will be required to administer the participation review process at the Department is equivalent to the staff time that is currently expended in the implementation of the Statement of Policy.

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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:	\$0	\$0	\$0	\$0	\$0	\$0
Regulated Community						
Local Government						
State Government						
Total Savings	0	0	0	0	0	0
COSTS:						
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) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
Long-Term Care	692,585	672,597	540,266	584,081

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(21) Explain how the benefits of the regulation outweigh any cost and adverse effects.

Both nursing facilities and the Department will benefit from the security of having enforceable standards that control the participation review process. MA recipients will benefit from the assurance that they will have adequate access to medically necessary nursing facility services. These benefits outweigh the requirements of collection of data by facilities submitting bed/bed transfer requests.

(22) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

On November 1, 2008, the Department published a notice in the *Pennsylvania Bulletin* proposing to amend the original Statement of Policy that was published on January 10, 1998. The Department invited public comment on the proposed changes to the Statement of Policy. Written comments were received from the Pennsylvania Health Care Association (PHCA), the Pennsylvania Association of Non-profit Homes (PANPHA), Mount Hope Nazarene Retirement Community and a nursing home administrator in a Continuing Care Retirement Community.

On April 3, 2010, the Department published the final Amended Statement of Policy in the *Pennsylvania Bulletin* as well as its responses to the public comments. Also, on April 22, 2010 an advance draft of the proposed Nursing Facility Participation Review regulations were shared with the Medical Assistance Advisory Committee and the Long Term Care Subcommittee members. Comments received on or before May 3, 2010 were reviewed prior to the final draft of the proposed regulation. The draft was also sent to the Pennsylvania Association of County Affiliated Homes, the Pennsylvania Association of Non-profit Homes, the Pennsylvania Health Care Association and the Hospital and Healthsystems Association of Pennsylvania.

(23) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

The Department drafted these regulations to conform with applicable state and federal law as well as its obligations to administer the MA program in the best interests of MA recipients. The proposed regulation represents the least burdensome acceptable alternative among various methods of allocating MA beds to requesters. Also, the provisions effectively support the goals of the Department by providing access to quality of care for MA recipients.

(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 regulations.

Federal standards for the Medicaid program do not impose more stringent requirements regarding the approval of bed requests. Pursuant to section 1902 of the Social Security Act, participating states must assure Medicaid care and services will be provided in an efficient and

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economic manner and in a manner consistent with simplicity of administration and the best interests of the recipients. The proposed regulations are designed to comply with these general requirements.

(25) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

This proposed regulation is consistent with the Department's ongoing efforts to ensure that MA recipients continue to receive access to medically necessary nursing facility services. Pennsylvania will not be competing with other states, as this regulation controls the participation of MA nursing facilities that are located in the Commonwealth.

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

This regulation will not affect existing or proposed regulations of the Department or other state agencies.

(27) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

Section 1187.167(a) of the proposed regulation describes the required content of an applicant's bed request; however, there are no required forms or reports required of facilities. Pursuant to section 1187.169(d), the Department will compile a data book for each review period and post the data book and a list of bed requests online. The information collected is limited to that necessary for an effective review of the expansion of MA beds in a manner consistent with state and federal law and the Commonwealth's goals. By making information available online, the regulation promotes public access in an efficient and cost-effective manner.

(28) 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.

These regulations do not have any special provisions developed to meet the needs of affected groups such as minorities, elderly, small businesses or farmers. A significant majority of the MA recipients receiving care in a nursing facility are older adults, and the overall impact of the regulation on that group is beneficial.

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FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

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<p>Copy below is hereby approved as to form and legality. Attorney General</p> <p><i>[Signature]</i></p> <p>By: _____ (Deputy Attorney General)</p> <p><u>OCT 15 2010</u> Date of Approval</p> <p><input type="checkbox"/> Check if applicable Copy not approved. Objections attached.</p>	<p>Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p><u>DEPARTMENT OF PUBLIC WELFARE</u> (Agency)</p> <p>LEGAL COUNSEL: <u>Mary Frances Grabowski</u></p> <p>DOCUMENT/FISCAL NOTE NO. <u>14-524</u></p> <p>DATE OF ADOPTION: _____</p> <p>BY: <u>Harriet Dick</u></p> <p>TITLE: <u>SECRETARY OF PUBLIC WELFARE</u> (Executive Officer, Chairman or Secretary)</p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies</p> <p><i>[Signature]</i></p> <p>BY: _____</p> <p><u>Andrew C. Clark</u> <u>SEP 21 2010</u> Date of Approval</p> <p>(Deputy General Counsel) (Chief Counsel, Independent Agency) (Strike inapplicable title)</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
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NOTICE OF PROPOSED RULEMAKING

DEPARTMENT OF PUBLIC WELFARE

OFFICE OF LONG-TERM LIVING

[55 Pa.Code Chapter 1187 Nursing Facility Services]
[55 Pa.Code Chapter 1189 County Nursing Facility Services]

Participation Review Process for Medical Assistance Nursing Facilities

Statutory Authority

The Department of Public Welfare (Department) under the authority of section 443.1(8) of the Public Welfare Code (62 P.S. § 443.1(8)), intends to adopt the regulation set forth in Annex A.

Purpose of Regulation

The purpose of this proposed rulemaking is to provide nursing facilities and other interested persons with enforceable rules that the Department will use in exercising its authority to manage the enrollment and participation of nursing facilities as providers in the Medical Assistance (MA) Program. The regulation amends the existing provisions regarding nursing facility participation codified in 55 Pa. Code Chapters 1187 and 1189.

The proposed rulemaking is needed to implement Act 16 of 2007 (Act 16). Act 16 required that the Department propose regulations to establish the process and criteria for reviewing and responding to requests by nursing facilities to enroll in the MA Program or increase certified MA bed complements in a manner that is consistent with applicable Federal and State law. This legislation followed the Pennsylvania Commonwealth Court's decision in *Eastwood Nursing and Rehabilitation Center v. Department of Public Welfare*, 910 A.2d 134 (2006). In *Eastwood*, the Court held that the Department's 1998 Statement of Policy regarding its treatment of requests by facilities to increase MA beds was a "binding norm" and, therefore, unenforceable

because it had not been promulgated in accordance with the Commonwealth Documents Law.

The proposed rulemaking identifies the factors that the Department will use to evaluate bed requests and establishes a more transparent, standardized process for the submission of bed requests and bed transfer requests that is consistent with applicable federal law. The proposed rulemaking also promotes a more balanced long-term living system in Pennsylvania. The overall goal of the proposed rulemaking is to serve the best interests of MA recipients by supporting the growth of Home and Community-Based Services (HCBS), which consumers prefer as a setting for long-term living services, while ensuring that MA recipients continue to have access to medically necessary nursing facility services.

Background

In response to *Eastwood Nursing and Rehabilitation Center v. Department of Public Welfare*, 910 A.2d 134 (2006), the General Assembly amended the Public Welfare Code to require, as a condition of participation in the MA Program, that county and nonpublic nursing facilities seek and obtain advance written approval from the Department to enroll in the program or, if already enrolled, to increase existing certified bed complements. See the Act of June 30, 2007 (P.L. 33, No. 16) (Act 16), Section 1; (62 P.S. § 443.1(8)). Pending the adoption of regulations or until September 30, 2011, Act 16 directed the Department to review pending and future requests for enrollment or expansion in accordance with the process and guidelines contained in the original 1998

Statement of Policy. It authorized the Department to amend the Statement of Policy, after soliciting public comments, if the Department determined such changes to the Statement of Policy would “facilitate access to medically necessary nursing facility services or . . . assure that long-term living care and services under the MA Program will be provided in a manner consistent with applicable Federal and State law, including Title XIX of the Social Security Act.” 62 P.S. § 443.1(8). Finally, the Act required the Department to propose regulations that would establish the process and criteria for responding to increases in MA-certified beds.

On November 1, 2008, the Department published a notice in the *Pennsylvania Bulletin* proposing to amend the original Statement of Policy. The Department invited public comment on the proposed changes to the Statement of Policy. Written comments were received from four commentators. On April 3, 2010, the Department published the final Amended Statement of Policy in the *Pennsylvania Bulletin*, as well as its responses to the public comments.

This proposed rulemaking will fulfill the final mandate of Act 16 by establishing regulations for the procedures and criteria that will apply to MA bed requests. The process established by the proposed rulemaking, defined as “participation review,” will assure that the MA Program is administered in the best interest of MA recipients and in compliance with applicable federal and state law.

Requirements

This proposed rulemaking will establish a process for nursing facilities to submit requests to the Department to enroll in the MA Program or expand their existing complement of MA beds. The 1998 Statement of Policy for nursing facility exception requests started from the general presumption that there was an adequate supply of nursing facility beds for MA recipients and that nursing facilities bore the burden of demonstrating that an increase should be permitted. The 1998 Statement of Policy suggested that facilities submitting requests for exceptions include information such as feasibility studies for the expansion project, whether the facility would take day-one MA recipients, the extent to which MA recipients and technology-dependent MA recipients have access to services in the area, the facility's record as a Medicaid and Medicare provider, and whether there were alternatives such as increased HCBS to meet the demand for care. The final amended Statement of Policy published April 3, 2010 introduced measures to make the consideration of bed requests more efficient and transparent for the public, eliminated obsolete provisions that referred to the former Certificate of Need program, and set procedures for the Department's review of requests to transfer beds between facilities.

The proposed rulemaking builds on the guidelines established in the final amended Statement of Policy and, will institute the following requirements:

Bed Transfer Requests

The proposed rulemaking distinguishes between bed requests, in which a facility seeks to increase the overall number of beds in the MA Program by enrolling as a new MA provider or increasing their existing complement of MA-certified beds, and bed transfer requests, in which one facility promises to decertify and close MA beds if the Department approves an increase in MA beds at another nearby facility. Section 1187.173 (relating to criteria for the approval of bed transfer requests) establishes an expedited review process and separate criteria for approval of bed transfer requests. These criteria will assure that transfers achieve neutrality in terms of MA recipient access to nursing facility care and the Department's costs. For example, under the proposed rulemaking, the facility receiving the additional beds must agree to maintain an MA Day-One admission rate equal to or greater than the rate of the facility surrendering the beds or another rate agreed-to by the Department, and neither facility may benefit from an increase in reimbursement as a result of a change in its peer group. The proposed rulemaking will also assure that the bed transfer process is consistent with the Commonwealth's ongoing efforts to rebalance the long-term living system by noting that requests may be denied if there are alternatives to the transfer, such as an increase in HCBS. These requirements are necessary to ensure that the MA Program is administered in a manner consistent with Federal and State law and in the best interest of MA recipients.

Bed Requests by a Continuing Care Retirement Community (CCRC)

The proposed rulemaking defines a “Closed-Campus Continuing Care Retirement Community” as an entity that has a nursing facility component located on the same campus of its other CCRC living units and that only admits residents of the CCRC. The proposed rulemaking will also establish additional requirements that apply to bed requests submitted by a closed-campus CCRC. Under the proposed rulemaking, the CCRC must include in its application an overview of the entity’s long-term living services; appropriate documentation from the Pennsylvania Department of Insurance; and copies of the entity’s standard resident agreements, disclosure statement, and marketing materials. Section 1187.175 (relating to criteria for the approval of closed-campus CCRC bed requests) establishes the criteria for the approval of a bed request by a closed-campus CCRC. In addition, the proposed rulemaking will establish a number of the new requirements for this category of bed requests, such as assurances that the CCRC provides MA waiver services to its residents of independent living and that the growth of HCBS on campus rather than additional nursing facility beds is not a viable alternative. The proposed rulemaking will also prohibit approval of closed-campus CCRC bed requests where the ratio of independent living units to nursing facility beds is less than 17 to 1.

Other Bed Requests

Section 1187.177 (relating to criteria for the approval of bed requests other than bed transfer requests or closed-campus CCRC bed requests) identifies the criteria that

the Department will use in its consideration of bed requests other than bed transfer requests and closed-campus CCRC bed requests. Under the proposed rulemaking, the Department will only approve requests if (1) the requests contain the information required in section 1187.167(a); (2) the additional MA beds are needed in the area to maintain or improve access to medically necessary nursing facility services; (3) the facility will serve MA Day-One recipients, maintain a specified MA occupancy rate, employ welfare or MA recipients and the addition of beds will be economically feasible; and (4) there are no disqualifying circumstances relating to facility or owner compliance. The Department will determine whether there is a need for additional MA beds based on factors including the average annual overall occupancy rates of providers in the primary service area or county and whether there are systemic barriers that prevent MA recipients from accessing existing MA beds. As described in § 1187.177(c), the Department will not approve a request if it determines that it would negatively affect the goal of rebalancing the long-term living system or that there are alternatives that would be less costly, more efficient or more appropriate, such as additional HCBS.

The Participation Review Process

The proposed rulemaking will enhance the transparency of the MA bed approval process by establishing a standard set of data elements (availability of MA nursing facilities, availability of HCBS and demographic data) that the Department will consider for each request. Under § 1187.169 (relating to review and public process of bed requests), a “data book” compiled for each review period will be made available by the Department online. The Department will also post a list of bed requests that are under

consideration on a semi-annual basis and accept public comments. Each month, the Department will post a list of the bed transfer requests and closed-campus CCRC requests received the previous month and will also accept written public comments related to these requests. These processes will bolster public understanding of the participation review process and provide additional resources for nursing facilities.

Affected Individuals and Organizations

This regulation affects nonpublic and county nursing facilities that currently participate in the MA Program or plan to enroll in the MA Program. MA recipients who choose to receive care in a nursing facility may also be affected.

Accomplishments and Benefits

The proposed rulemaking provides clear guidance to nursing facilities who seek to enroll in the MA Program or expand their current complement of MA beds. The regulation gives nursing facilities notice of the standards that will be applied to such requests so that they can better plan their operations in the long-term. Both nursing facilities and the Department will benefit from the security of having enforceable standards that control the participation review process. MA recipients will benefit from the assurance that they will have adequate access to medically necessary nursing facility services. Finally, the proposed rulemaking also accomplishes the mandate of Act 16 by promulgating a regulation to control the participation review process.

Fiscal Impact

No cost to the Commonwealth, local government, nursing facility providers or MA recipients is anticipated as a result of this regulation.

Paperwork Requirements

This proposed rulemaking contains paperwork requirements for the Commonwealth and for nursing facilities who apply for enrollment in the MA Program or an expansion of their existing MA bed complement. There are no required forms associated with the new regulation. Each application submitted by a nursing facility to the Department must include the information listed in §1187.167 (relating to contents and submission of bed requests). The time required to comply with these requirements is estimated to be equivalent to that required to comply with the submission of exception requests under the existing Statement of Policy.

Effective Date

This regulation is effective upon final publication in the *Pennsylvania Bulletin*.

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rulemaking to the Department at the following address: Yvette Sanchez-Roberts, Bureau of Policy & Strategic Planning, Commonwealth of Pennsylvania, Department of Public Welfare/Department of Aging, Office of Long-Term Living, 555 Walnut Street, Forum Place, 5th Floor, Harrisburg, PA 17101-1919 or RA-PartReview@state.pa.us within 30 calendar days after the date of publication of this proposed rulemaking in the *Pennsylvania Bulletin*. Reference Regulation No. 14-524 when submitting comments.

Persons with a disability who require an auxiliary aid or service may submit comments by using the AT&T Relay Service at 1-800-654-5984 (TDD users) or 1-800-654-5988 (voice users).

Regulatory Review Act

Under Section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on **OCT 22 2010** the Department submitted a copy of this proposed rulemaking 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 the IRRC and the Committees with a copy of a Regulatory Analysis Form prepared by the Department. A copy of this form is available to the public upon request.

Under Section 5(g) of the Regulatory Review Act, if the IRRC has any comments, recommendations or objections to any portion of the proposed regulation, it may notify the Department and the Committees within 30 days after the close of the public comment period. Such notification shall specify the regulatory review criteria that have not been met. The Regulatory Review Act specifies detailed procedures for review by the Department, the General Assembly and the Governor, of any comments, recommendations or objections raised, prior to final publication of the regulation

ANNEX A

TITLE 55. PUBLIC WELFARE

PART III. MEDICAL ASSISTANCE MANUAL

CHAPTER 1187 NURSING FACILITY SERVICES

Subchapter C. NURSING FACILITY PARTICIPATION

* * * * *

§1187.21. Nursing facility participation requirements.

In addition to meeting the participation requirements established in Chapter 1101 (relating to general provisions), a nursing facility shall meet the following requirements:

* * * * *

(5) The nursing facility shall meet the requirements of Subchapter L (relating to nursing facility participation requirements and review process).

* * * * *

Subchapter L. NURSING FACILITY PARTICIPATION REQUIREMENTS AND REVIEW PROCESS

§ 1187.161 Applicability.

These provisions apply to applicants as defined in § 1187.163 (relating to definitions).

§ 1187.163. Definitions.

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

Applicant-- A legal entity or a person authorized by and acting on behalf of a legal entity who submits a bed request to the Department.

Bed request-- A request by an applicant for the Department's approval to increase the number of MA-certified beds in a subject facility that is a provider or a request by an applicant to increase the number of MA-certified beds in the MA Program by enrolling a subject facility as a new provider.

Bed transfer request-- A bed request in which all of the following conditions apply:

(i) The applicant seeks the Department's approval to increase the number of MA-certified beds in a provider.

(ii) The applicant represents that, if the Department approves the request, at least the same number of MA-certified beds will be decertified and closed at a different provider.

(iii) The providers are located in the same county, or the driving distance between providers is no greater than 25 miles if both providers are in MSA Level A, as specified by the Federal Office of Management and Budget in the OMB Bulletin No. 99-04, or no greater than 50 miles in all other cases.

Closed - Campus Continuing Care Retirement Community - An entity certified as a continuing care retirement community (CCRC) by the Department of Insurance in

accordance with the Continuing-Care Provider Registration and Disclosure Act (40 P.S. § § 3201—3225) that meets all of the following conditions:

- (i) The CCRC has a nursing facility component that is located on the same campus as the CCRC's independent living units and identified in the CCRC's Disclosure Statement and Resident Agreement under the CCRC Act.
- (ii) The CCRC's nursing facility component only admits individuals who have completed both of the following:
 - (A) Paid the CCRC's entrance fee.
 - (B) Entered into an enforceable Resident Agreement with the CCRC that is effective for a period of not less than 30 days and that provides the individual the right to occupy the CCRC's independent living units.
- (iii) The CCRC does not market its nursing facility component directly to the general public.

Closed-campus CCRC bed request - A bed request submitted by a closed-campus CCRC in which the subject facility is the CCRC's nursing facility component.

Legal entity—One of the following:

- (i) A person who is a licensee of a licensed nursing facility, as authorized by the Department of Health of the Commonwealth.

(ii) A person proposing to develop or construct a long-term care nursing facility as defined in Chapter 8 of the Health Care Facilities Act (35 P. S. §§ 448.801—448.821).

MA – Medical Assistance.

MA Day-One admission rate. --The quotient of the number of MA Day-One recipients admitted to the subject facility during a fiscal year, divided by the total number of individuals admitted to the nursing facility during the same fiscal year.

MA Day-One recipient - An individual who is eligible for nursing facility services under the MA Program or who becomes eligible for nursing facility services under the MA Program within 60 days of the date of the individual's admission to a nursing facility.

MA occupancy rate - The quotient of the total MA days of care reported in an MA cost report, divided by the total actual days of care reported in the same MA cost report.

Nonpublic nursing facility – A nursing facility other than a County nursing facility or a facility owned or operated by the State or Federal government.

Overall occupancy rate - The quotient of the total actual days of care reported in an MA cost report, divided by the total available days of care reported in the same MA cost report.

Owner - A person having an ownership or control interest, as defined in section 1124(a) of the Social Security Act (42 U.S.C.A. § 1320a-3(a)), in subject facility.

Person - A natural person, corporation (including associations, joint stock companies and insurance companies), partnership, trust, estate, association, the Commonwealth, and any local government unit, authority and agency thereof.

Primary service area – One of the following:

- (i) The county in which the subject facility is or will be physically located.
- (ii) The geographic area from which the subject facility draws or is expected to draw at least 75% of its resident population, as determined by the Department.

Proposed project – Any one of the following:

- (i) An increase in the number of licensed beds in a provider.
- (ii) The construction of a new county or nonpublic nursing facility if there is an expectation that the facility will become a provider.
- (iii) The enrollment of a county or nonpublic nursing facility as a provider.

Provider - A licensed county or nonpublic nursing facility that is certified and enrolled as a nursing facility provider in the MA Program.

Receiving provider – The provider identified in a bed transfer request which will increase

the number of its MA-certified beds if the bed transfer request is approved. The receiving provider is the subject facility of the bed transfer request.

Related party – A person who is or would be identified as a related party in a subject facility's MA cost report if the person were to provide goods, services or property to the subject facility.

Specialized medical services. – Services that require staffing with advance training and need-specific equipment, including services needed by an individual who has severe dementia or traumatic brain injury or who requires a respirator for survival, or who receives bed side hemodialysis. Specialized medical services are not routinely provided in general nursing facilities and do not include the services of a dedicated Alzheimer's unit or infection isolation wing, osteopathic treatment or similar services.

Subject facility – An existing or proposed county or nonpublic nursing facility identified on a bed request that will increase the number of its licensed nursing facility beds or enroll as a provider in the MA Program if the bed request is approved.

Surrendering provider – The provider identified on a bed transfer request which will decertify and close at least the same number of MA-certified beds as the receiving provider identified in the same bed transfer request, if the request is approved.

§ 1187.165. Enrollment in the MA Program and expansion of existing providers.

(a) As a condition of participation in the MA Program, an applicant shall submit a bed request to the Department and obtain the Department's advance written approval before increasing the number of MA-certified beds in a subject facility that is a provider, or before applying for the enrollment of a subject facility as a new provider.

(b) As a condition of participation in the MA Program, an applicant shall submit its bed request to the Department prior to commencing a proposed project that involves the construction of a new nursing facility or an expansion of an existing nursing facility.

§ 1187.167. Contents and submission of bed requests.

(a) Required contents. An applicant's bed request shall contain the following information:

(1) Ownership information.

(i) The applicant shall provide the name and address of each person who is any of the following:

(A) The applicant, and a description of the applicant's involvement in the proposed project.

(B) The legal entity of the subject facility.

(C) An owner of the subject facility.

(D) A related party involved in the proposed project and a description of the related party's involvement with the project.

(ii) For each person identified, the applicant shall specify whether:

(A) The person is a spouse, parent, child or sibling of another person identified.

(B) During the 3-year period preceding the bed request, the person is or was an owner of a nursing facility, whether or not located in the Commonwealth, and if so the name and address of each such nursing facility.

(2) Project overview.

(i) The applicant shall provide an overview of the proposed project which includes a description of the population and primary service area the applicant intends to serve.

(ii) The applicant shall include a narrative and supporting documentation addressing each criterion in §§ 1187.173, 1187.175 and 1187.177 (relating to criteria for the approval of bed transfer requests; criteria for the approval of a closed-campus CCRC bed requests; and criteria for the approval of bed requests other than bed transfer requests or closed-campus CCRC bed requests), as applicable, and indexed to the criterion being addressed.

(3) Financial information.

(i) The applicant shall provide a feasibility or market study and financial projections prepared for the project that identify all of the following:

(A) Project costs.

(B) Sources of project funds.

(C) Projected revenue sources by payor type.

(D) Specific assumptions used and expected occupancy rates by payor type.

(ii) The applicant shall provide independent audited or reviewed financial statements of the subject facility for the most recent year prior to the fiscal year in which the bed request is filed. If such financial statements are not available for the subject facility, the applicant shall provide independent audited or reviewed financial statements of the legal entity or parent corporation of the subject facility for the most recent year prior to the fiscal year in which the bed request is filed.

(4) Compliance history. For each person identified in the ownership information section of the bed request as specified under paragraph (1), an applicant shall specify whether or not any of the following applies, and, if so, the applicant shall attach copies of all documents relating to the applicable action, including notices, orders or sanction letters received from the Federal Centers for Medicare and Medicaid Services or any state Medicaid, survey or licensing agency:

(i) The person is currently precluded, or at any time during the 3-year period preceding the bed request, was precluded from participating in the Medicare Program or any state Medicaid Program.

(ii) The person is or, at any time during the 3-year period preceding the date of the bed request, was a party to, or the owner of a party to a Corporate Integrity Agreement with the Department or the Federal government.

(iii) The person owned, operated or managed a nursing facility, including the subject facility, and, at any time during the 3-year period preceding the date of the bed request, one of the following applies:

(A) The facility was precluded from participating in the Medicare Program or any state Medicaid Program.

(B) The facility had its license to operate revoked or suspended.

(C) The facility was subject to the imposition of civil monetary penalties, sanctions or remedies for resident rights violations.

(D) The facility was subject to the imposition of remedies based on the failure to meet applicable Medicare and Medicaid Program participation requirements, and the facility's deficiencies were graded as Immediate Jeopardy to Resident Health and Safety.

(E) The facility was designated a Special Focus Facility by the Federal Centers for Medicare and Medicaid Services, indicating a poor performing facility.

(5) Closed-campus CCRC bed request information. In addition to the information specified in paragraphs (1) – (4), an applicant submitting a closed-campus CCRC bed request shall include all of the following information:

(i) An overview of the mission of the CCRC and the services offered by the CCRC, including the community-based services provided by the CCRC and the number of independent, personal care, and assisted living units available in which to provide those services.

(ii) A copy of the Certificate of Authority issued by the Department of Insurance.

(iii) A copy of the CCRC's standard resident's agreement for each component of the CCRC's continuum.

(iv) A copy of the CCRC's disclosure statement.

(v) A copy of all marketing materials related to the CCRC.

(6) Certification and authority.

(i) A bed request shall be signed by the applicant.

(ii) The applicant shall certify that the representations made and the information provided in the bed request are true and correct to the best of the applicant's knowledge, information and belief.

(iii) If the applicant is a person other than the legal entity of the subject facility, the applicant shall certify that the applicant is authorized to submit the bed request on behalf of the legal entity and that the legal entity has reviewed and approved the contents of the bed request.

(b) Optional information. In addition to the required content specified under subsection (a), an applicant may include in its bed request whatever information the applicant feels is relevant to or supports its bed request.

(c) Submission. An applicant shall submit an original and two copies of its bed request to the Department.

§ 1187.169. Review and public process relating to bed requests.

(a) Groups. Except as specified in subsection (b), the Department will consider bed requests in two groups, as follows:

(1) Group One will consist of bed requests received January 1 through June 30. Subject to subsection (c), the Department will use its best efforts to issue decisions on Group One by the following December 31.

(2) Group Two will consist of bed requests received from July 1 through December 31. Subject to subsection (c), the Department will use its best efforts to issue decisions on Group Two by the following June 30.

(b) Bed transfer requests. The Department will consider bed transfer requests in the order in which they are received. Subject to subsection (c), the Department will issue decisions on those requests on an ongoing basis.

(c) Expedited review. If an applicant demonstrates to the satisfaction of the Department that good cause exists, the Department, within its sole discretion, may expedite its review and respond to a bed request before the target date; provided that the Department will not respond prior to the close of the applicable public comment period specified in subsection (d).

(d) Public process.

(1) Data book. The Department will compile and make available online a workbook for each review period containing the following:

(i) Data relating the availability and cost of MA nursing facility services Commonwealth-wide and by county.

(ii) Data relating to the availability and cost of home and community-based services Commonwealth-wide and by county.

(iii) Commonwealth and County demographic data.

(2) Publication of and public comment period for bed requests. Following the close of each 6-month request period, the Department will post online a list of bed requests, other than bed transfer requests and closed-campus CCRC bed requests, included in the group under consideration. The Department will make

copies of the requests in that group available for review by the public during regular business hours, and will accept written comments related to the requests in the group for a 30-day period following the date that the notice is posted online.

(i) The Group One list will be posted online on or before July 31.

(ii) The Group Two list will be posted online on or before January

31.

(3) Publication of and public comment period for bed transfer requests and closed-campus CCRC bed requests. No later than 15 calendar days following the last day of each calendar month, the Department will post online a list of the bed transfer requests and closed-campus CCRC bed requests received by the Department during that calendar month. The Department will make copies of the requests listed for that calendar month available for review by the public during regular business hours, and will accept written comments related to the requests for a 15-calendar-day period following the date that the list is posted online.

§ 1187.171. Information and data relevant to bed requests.

In reviewing an applicant's bed request, the Department will consider the information provided by the applicant and any public comments received on the request. In addition, the Department may consider information contained in the Department's books and records or obtained from persons other than the applicant that is relevant to the applicant's bed request, including the following:

(1) Data relating to the overall occupancy rates of MA nursing facilities in the primary service area identified in the bed request, the county in which the subject facility is or will be located, and, in the case of a bed transfer request, the county in which the surrendering provider is located.

(2) Data relating to the MA Day-One admission rates and the MA occupancy rates of MA nursing facilities in the primary service area identified in the bed request, the county in which the subject facility is or will be located, and, in the case of a bed transfer request, the county in which the surrendering provider is located.

(3) Data relating to the availability of home and community-based services in the primary service area identified in the bed request, the county in which the subject facility is or will be located, and, in the case of a bed transfer request, the county in which the surrendering provider is located.

(4) Data relating to the demographics of the primary service area identified in the bed request, the county in which the subject facility is or will be located, and, in the case of a bed transfer request, the county in which the surrendering provider is located.

(5) Data relating to admissions and discharges at MA nursing facilities in the primary service area identified in the bed request, the county in which the subject facility is or will be located, and, in the case of a bed transfer request, the county in which the surrendering provider is located.

(6) Data relating to the compliance history of the subject facility and the persons identified in the ownership information section of the bed request, as

specified under § 1187.167(a)(1) (relating to contents and submission of bed requests).

(7) If the applicant is proposing to provide specialized medical services in the subject facility, data relating to the availability of those services in the primary service area identified in the bed request the county in which the subject facility is or will be located, and, in the case of a bed transfer request, the county in which the surrendering provider is located.

§ 1187.173. Criteria for the approval of bed transfer requests.

(a) Upon consideration of the information specified in § 1187.171 (relating to consideration of bed requests), the Department may approve a bed transfer request only if all of the following are satisfied:

(1) The bed transfer request contains the information required in § 1187.167(a) (relating to contents and submission of bed requests).

(2) The receiving provider agrees to achieve and maintain an MA Day-One admission rate that is equal to or greater than the surrendering provider's MA Day-One admission rate or such other MA Day-One admission rate as may be agreed-to by the Department.

(3) The decrease in beds at the surrendering provider will not result in access barriers to nursing facility services for MA recipients.

(4) The increase in beds at the receiving provider will maintain or improve access to medically necessary nursing facility services for MA recipients.

(5) Neither provider will receive an increase in reimbursement as a result of a change in its peer group if the bed transfer request is approved.

(6) If the proposed bed transfer will result in a change or changes in peer group assignments under this chapter for the surrendering or receiving facility, the change will not have a negative effect on the MA Program, on MA recipients or on other facilities which are members of the affected peer group.

(7) Approval of the bed transfer request will not result in increased costs to the MA Program.

(8) None of the circumstances specified in § 1187.167(a)(4) applies.

(b) The Department may deny a bed transfer request even if the conditions specified in subsection (a) are satisfied if the Department determines one of the following:

(1) Approval of the request would negatively affect the Department's goal to rebalance the Commonwealth's publicly-funded long-term living system to create a fuller array of service options for MA recipients.

(2) There are alternatives to the transfer of beds, such as an increase in home and community-based services, that would be less costly, more efficient or more appropriate in assuring that long-term living care and services will be provided under the MA Program in a manner consistent with applicable Federal and State law.

§1187.175. Criteria for the approval of closed-campus CCRC bed requests.

(a) The Department may approve a closed-campus CCRC bed request only if all of the following are satisfied:

(1) The closed-campus CCRC bed request contains the information required in § 1187.167(a) (relating to contents and submission of bed requests).

(2) The closed-campus CCRC shall be enrolled as an MA waiver provider and shall provide MA waiver services to its individuals residing in the CCRC's residential living units.

(3) The closed-campus CCRC shall have a written policy that allows individuals who are admitted to CCRC's independent living units to remain in their independent living unit and receive home and community-based services.

(4) The ratio of CCRC's independent living units to its nursing facility beds must be equal to or less than 17 independent living units to 1 nursing facility bed.

(5) The closed-campus CCRC and the legal entity of the subject facility of closed campus CCRC request shall agree in a form acceptable to the Department to close and decertify any additional MA-certified beds that are approved through this process if the CCRC no longer meets the definition of a closed-campus CCRC.

(6) None of the circumstances specified in § 1187.167(a)(4) applies.

(b) The Department may deny a closed-campus CCRC bed request even if the conditions specified in subsection (a) are satisfied if the Department determines one of the following:

(1) Approval of the request would negatively affect the Department's goal to rebalance the Commonwealth's publicly-funded long-term living system to create a fuller array of service options for MA recipients.

(2) There are alternatives to nursing facility beds such as an increase in home and community-based services, that would be less costly, more efficient or more appropriate in assuring that long-term living care and services will be provided under the MA Program in a manner consistent with applicable Federal and State law.

§1187.177. Criteria for the approval of bed requests other than bed transfer requests or closed-campus CCRC bed requests

(a) The Department may approve a bed request, other than a bed transfer request or a closed-campus CCRC bed request, only if all of the following are satisfied:

(1) The bed request contains the information required in § 1187.167(a) (relating to contents and submission of bed requests).

(2) The additional MA-certified nursing facility beds are needed in the primary service area or the county in which the subject facility is located to maintain or improve MA recipients' access to medically necessary nursing facility services based on any of the following:

(i) The existing MA-certified bed capacity in the primary service or the county in which the subject facility is or will be located is insufficient to assure that MA recipients have access to medically necessary nursing facility services.

(ii) Systemic barriers prevent MA recipients from accessing the existing MA-certified bed capacity in the primary service or the county in which the subject facility is or will be located.

(iii) The applicant is proposing to admit and serve MA recipients who require specialized medical services in the subject facility and MA recipients do not have access to such specialized medical services in the existing MA-certified bed capacity in the primary service area or the county in which the subject facility is or will be located.

(3) The legal entity agrees, in a form acceptable to the Department, to all of the following:

(i) The subject facility will admit and serve MA Day-One recipients.

(ii) The subject facility will maintain an MA occupancy rate that equals or exceeds the average MA occupancy rate of MA nursing facilities in the county in which subject facility is or will be located or, in the case of a subject facility that is proposing to offer specialized medical services, such MA occupancy rate as may be agreed-to by the Department.

(iii) The construction and operation of the new or additional beds will be economically and financially feasible without the receipt of MA fixed property capital component payments, and it is not entitled to MA capital component payments for fixed property related to the new or additional beds.

(iv) The legal entity will employ welfare or MA recipients in its subject facility.

(4) None of the circumstances specified in § 1187.167(a)(4) applies.

(b) In determining whether a need for additional MA-certified beds exists under subsection (a), the following will apply:

(1) MA-certified bed capacity shall be deemed sufficient if the average annual overall occupancy rates of providers in the primary service area and county in which the subject facility is or will be located is 95% or less, based on the most recent MA cost report data submitted by those providers.

(2) If the average annual overall occupancy rates of providers in the primary service area or county in which the subject facility is located exceeds 95%, based on the most recent MA cost report data submitted by those providers, the Department will consider the following information in assessing whether a need for additional MA-certified beds exists:

(i) The total number of MA-certified nursing facility beds in the primary service area.

(ii) The total number of licensed nursing facility beds in the primary service area.

(iii) The annual overall occupancy rates of providers in the primary service area based on the most recent MA cost report data submitted by those providers.

(iv) The annual actual bed days in the primary service area for the most recent 3-year period including the most recent cost report period, as submitted by nursing facility providers in the primary service area.

(3) No systemic barrier that prevents MA recipients from accessing MA-certified bed capacity will be deemed to exist if the average MA occupancy rate and the average MA Day-One admission rate of providers in the primary service area and county in

which the subject facility is or will be located are above the Statewide average rates or within one percentage point below the Statewide rates.

(c) The Department may deny a bed request even if the conditions specified in subsection (a) are satisfied if the Department determines one of the following:

(1) Approval of the request would negatively affect the Department's goal to rebalance the Commonwealth's publicly-funded long-term living system to create a fuller array of service options for MA recipients.

(2) There are alternatives to the bed request, such as an increase in home and community-based services, that would be less costly, more efficient or more appropriate in assuring that long-term living care and services will be provided under the MA Program in a manner consistent with applicable Federal and State law.

§1187.179. Time lines for completion of approved projects.

(a) If the Department approves a bed request, the approved project shall be completed in sufficient time so that the beds may be licensed, certified and available for occupancy within 3 years from the date of the Department's decision, or by such other date as may be agreed to by the Department.

(b) The provider will make documentation available upon the Department's written request at any time and for so long as the nursing facility is an MA provider, as may be necessary to demonstrate compliance with the terms of the approved exception request.

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CHAPTER 1189 COUNTY NURSING FACILITY SERVICES

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Subchapter A. GENERAL PROVISIONS

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§1189.3. Compliance with regulations governing noncounty nursing facilities.

(a) Unless a specific provision of this chapter provides to the contrary, the following subchapters of Chapter 1187 ([related] relating to nursing facility services) are applicable to county nursing facilities:

* * * * *

(6) Subchapter L (relating to nursing facility participation requirements and review process).

* * * * *

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE REGULATORY REVIEW ACT

I.D. NUMBER: 14-524

RECEIVED
IRRC

SUBJECT: Participation Review Process for Medical Assistance Nursing Facilities

2010 OCT 22 P 3:35

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

X 10/22/10 *[Signature]*

HOUSE COMMITTEE ON HEALTH & HUMAN SERVICES

X 10/22/10 *[Signature]*

MAJORITY CHAIRMAN Frank Oliver

X 10/22/10 *[Signature]*

SENATE COMMITTEE ON PUBLIC HEALTH & WELFARE

X 10/22/10 *[Signature]*

MAJORITY CHAIRMAN Patricia Vance

10/22/10 *[Signature]*

INDEPENDENT REGULATORY REVIEW COMMISSION

~~ATTORNEY GENERAL (for Final Omitted only)~~

10/22/10 *[Signature]*

LEGISLATIVE REFERENCE BUREAU (for Proposed only)