# Regulatory Analysis Form

(Completed by Promulgating Agency)

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*INDEPENDENT REGULATORY REVIEW COMMISSION*

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IRRC

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

(2) Agency Number: 14
Identification Number: 535

IRRC Number: 3019

(3) PA Code Cite:

55 Pa.Code Chapter 1187
55 Pa.Code Chapter 1189

(4) Short Title:

Supplemental Ventilator Care Payment for Medical Assistance Nursing Facilities

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

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(6) 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

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

This proposed regulation changes the Department's methods and standards for payment of Medical Assistance (MA) nursing facility services by providing a new category of supplemental payment to qualified MA nursing facilities effective July 1, 2012.

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

The Department has the authority under the Public Welfare Code (62 P. S. §§ 201(2), 206(2), 403(b) and 443.1).

(9) 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.

This proposed regulation is not mandated by any federal or state law, regulation or court order.

(10) 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 proposed rulemaking is needed to address the financial impact that the implementation of the current Resource Utilization Group III (RUG-III) version 5.12 (RUG v. 5.12) resident classification system and the phase-out of the older RUG v. 5.01 is having on nursing facilities that care for a significant number of MA ventilator-care residents.

Nursing facilities that provide ventilator care for a significant portion of their MA-recipient resident population will benefit by receiving additional reimbursement for providing these medically necessary services. MA recipients will benefit by having assured access to medically necessary nursing facility services and that those services result in quality care that improves the lives of those who receive them.

There are approximately 621 nursing facilities (590 nonpublic and 31 county) in Pennsylvania enrolled in the MA Program; approximately 50 are caring for at least one MA-recipient resident who receives medically necessary ventilator care. Of these 50, approximately nine nursing facilities meet the criteria to qualify for supplemental ventilator care payments. There are approximately 48,596 MA-recipients of which approximately 302 are receiving ventilator care currently residing in those nursing facilities and an average of 79,216 MA recipients who receive nursing facility services in a typical year.

(11) 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?

There are no provisions that are more stringent than Federal law.

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

A number of states such as Illinois, Indiana, Maryland, New Hampshire and North Carolina provide an add-on to the rates for nursing facilities that provide care to their ventilator dependent residents. Pennsylvania will not be competing with other states, as this proposed regulation relates to supplemental payment to qualified MA nursing facilities located in this Commonwealth. This regulation is consistent with the Department's ongoing efforts to ensure that MA recipients continue to receive access to medically necessary nursing facility services.

(13) 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.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

This proposed regulation benefits all MA nursing facilities that care for a significant number of MA-recipient residents who receive medically necessary ventilator care. As a result of the discussions with Special Rehabilitation nursing facilities, the Department published a notice in the *Pennsylvania Bulletin* at 42 Pa.B. 3824 (June 30, 2012), proposing to change its methods and standards for payment of MA nursing facility services to offer a new category of supplemental payment to qualified MA nursing facilities effective July 1, 2012. The Department invited public comment on the proposed changes; two comments were received. Pennsylvania Health Care Association had no objection to this new category of supplemental payment to qualified nursing facilities. The University of Pittsburgh Medical Center Senior Communities appreciates the effort, but suggests that the supplemental payment be increased and provided to any MA nursing facility providing ventilator care. In addition, they suggest including an additional supplemental payment for those requiring both ventilator care and dialysis care.

The Department carefully considered these comments; however there must be qualifying criteria requiring a certain level in the number of MA residents who receive medically necessary ventilator care to promote the service. Also, the payment formula is adequate and the Department does not agree that the payments should be extended to dialysis. The approved State Plan Amendment and the scope of this rulemaking is limited to the change in the methods and standards for payment of MA nursing facility services for ventilator care.

The qualifying criteria will provide additional funds to nursing facilities that provide ventilator care for a significant portion of their MA-recipient resident population. The payment formula provides higher supplemental ventilator care payments to facilities with the highest percent of MA-recipient residents who receive medically necessary ventilator care by providing payment based on the proportion of MA recipients who receive medically necessary ventilator care to total MA-recipient residents. The basis for the maximum supplemental ventilator care per diem of $69 is addressed in #28.

The proposed methodology for the new category of supplemental payment was also shared with the Long-Term Care Delivery System Subcommittee of the Medical Assistance Advisory Committee members on July 20, 2012.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

No one will be adversely affected by the regulation. This proposed regulation will affect MA nonpublic and county nursing facilities that provide ventilator care for a significant portion of their MA-recipient resident population. They will receive additional reimbursement for providing these medically necessary services. MA recipients will benefit by having access to medically necessary nursing facility services and that those services result in quality care that improves the lives of those who receive them.

There are approximately 621 nursing facilities (590 nonpublic and 31 county) in Pennsylvania enrolled in the MA Program; approximately 50 are caring for at least one MA-recipient resident who receives medically necessary ventilator care. There are approximately 48,596 MA-recipients of which approximately 302 are receiving ventilator care currently residing in those nursing facilities and an average of 79,216 MA recipients who receive nursing facility services in a typical year.

Using full year MA-11s (cost reports) available as of July 30, 2012 and grouping the nursing facilities by common ownership, 150 nonpublic nursing facilities had annual receipts of less than $25.5 million and thus were identified as small businesses. See 13 CFR §§ 121.201 (relating to small business size standards) and 121.104 (relating to Small Business Administration calculation of annual receipts). A county nursing facility is not considered a small business by the Small Business Administration since a county nursing facility is controlled by a government entity. Revenue data from cost reports was substituted for revenue data from Federal tax returns in the determination of annual receipts. All nursing facilities enrolled in the MA Program are required to submit an MA-11 form as directed in Chapter 1187, Subchapter F (relating to cost reporting and audit requirements) and Chapter 1189, Subchapter C (relating to cost reporting and audit requirements). Cost reports are typically submitted on an annual basis and cover a 12-month period. They contain financial and statistical report schedules which are used, among other things, in setting per diem rates; Schedule D of the cost report specifically addresses revenues.

Approximately nine nursing facilities meet the criteria to qualify for supplemental ventilator care payments; one of the nine has been identified as a small business. Also, there are no additional reporting requirements under this proposed regulation.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

This proposed regulation will affect MA nonpublic and county nursing facilities that provide ventilator care for a significant portion of their MA resident population by receiving additional reimbursement for providing these medically necessary services. There are approximately 621 nursing facilities that currently participate in the MA Program. Of the 621 nursing facilities, 150 were identified as small businesses. Approximately nine nursing facilities meet the criteria to qualify for supplemental ventilator care payments; one of the nine has been identified as a small business. (see #15 for more details).

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

This proposed regulation will affect all MA nonpublic and county nursing facilities that provide ventilator care for a significant portion of their MA resident population by receiving additional reimbursement for providing these medically necessary services. MA recipients will benefit by having assured access to medically necessary nursing facility services and that those services result in quality care that improves the lives of those who receive them.

Approximately nine nursing facilities meet the criteria to qualify for supplemental ventilator care payments; one of the nine has been identified as a small business.

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

This proposed regulation will benefit the Commonwealth's MA nursing facility residents by continued access to medically necessary nursing facility services while addressing the financial impact on nonpublic and county nursing facilities that care for a significant number of MA ventilator care residents.

(19) 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.

This proposed regulation will not have any cost or savings impact on the regulated community.

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

This proposed regulation will not have any cost or savings impact on local governments.

(21) Provide a specific estimate of the costs and/or savings to the **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.

This change will result in an estimated annual payment of $2.1 million in total funds ($0.956 million in State funds) in Fiscal Year 2012-2013.

(22) For each of the groups and entities identified in items (19)-(21) above, 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.

No new reports, forms, recordkeeping or paperwork are required by this regulation.
The CMI report used to determine the number of MA-recipient residents who receive ventilator care is a report that is already required.

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

| | Current FY Year | FY +1 Year | FY +2 Year | FY +3 Year | FY +4 Year | FY +5 Year |
|---|---|---|---|---|---|---|
| SAVINGS: | $ | $ | $ | $ | $ | $ |
| Regulated Community | | | | | | |
| Local Government | | | | | | |
| State Government | | | | | | |
| Total Savings | | | | | | |
| COSTS: | | | | | | |
| Regulated Community | | | | | | |
| Local Government | | | | | | |
| State Government | $956 | $956 | $956 | $956 | $956 | $956 |
| Total Costs | $956 | $956 | $956 | $956 | $956 | $956 |
| REVENUE LOSSES: | | | | | | |
| Regulated Community | | | | | | |
| Local Government | | | | | | |
| State Government | | | | | | |
| Total Revenue Losses | | | | | | |

(23a) 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 | 540,266 | 728,907 | 737,356 | 765,923 |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

(a) An identification and estimate of the number of small businesses subject to the regulation.
(b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
(c) A statement of probable effect on impacted small businesses.
(d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

(a) The regulation will not have an adverse impact on small businesses. Of the 621 nursing facilities enrolled in the MA Program, 150 were identified as small businesses. (See #15 for more details). This proposed regulation offers additional funding to all MA nursing facilities that provide ventilator care for a significant portion of their MA resident population; there is no adverse impact on any of the 621 MA nursing facilities. Approximately nine nursing facilities meet the criteria to qualify for supplemental ventilator care payments; one of the nine has been identified as a small business.

(b) No new reports, forms, recordkeeping or paperwork by nursing facilities is required under this proposed regulation. The CMI report used to determine the number of MA-recipient residents who receive ventilator care is an existing report. The Department will use this existing report to determine the eligibility of a nursing facility for this additional payment. There are no new requirements for a nursing facility under this regulation.

(c) A small business that has a minimum of 10 MA-recipient residents who receive medically necessary ventilator care, with at least 10% of the facility's MA-recipient resident population receiving medically necessary ventilator care, is eligible for this additional payment. There is no adverse impact on small businesses.

(d) There are no less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. There are no new reports, forms, recordkeeping or paperwork under this proposed regulation. The regulation, instead, benefits nursing facilities that provide ventilator care.

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

This proposed regulation is intended to offer additional funding to any MA nursing facility that provides ventilator care for a significant portion of its MA resident population.

(26) 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.

These regulations conform with applicable State and Federal law as well as the Department's obligations to administer the MA Program in the best interests of MA recipients. The provisions effectively provide access to quality care for MA recipients. Since these regulatory amendments conform with the approved State Plan Amendment, the Department did not consider other regulatory provisions. Since there are no new reports, forms, paperwork or other new requirements under this regulation, it is the least burdensome alternative.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

a) The establishment of less stringent compliance or reporting requirements for small businesses;
b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
c) The consolidation or simplification of compliance or reporting requirements for small businesses;
d) The establishment of performing standards for small businesses to replace design or operational standards required in the regulation; and
e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

The regulation will not have an adverse impact on small businesses. This proposed regulation offers additional funding to all MA nursing facilities that provide ventilator care for a significant portion of their MA resident population. There are no new requirements for a nursing facility under this regulation.

Specifically, no new reports, forms, recordkeeping or paperwork by nursing facilities is required under this proposed regulation. The CMI report used to determine the number of MA-recipient residents who receive ventilator care is an existing report. The Department will use this existing report to determine the eligibility of a nursing facility for this additional payment. Further, there are no new schedules or deadlines of nursing facilities under this regulation.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

The Department compared rates calculated using the April 1, 2012 rate data; one rate calculated as if RUG v. 5.12 was fully implemented and the other rate calculated using the adjusted base rate which is a resident care rate based on the older RUG v. 5.01 grouper. The Department then compared the four nursing facilities with the highest percentage of MA-recipient residents who receive medically necessary ventilator care in the Commonwealth after the rate data was published on the Department's website. As this data is in the public domain, the calculated rates are replicable and testable under the rate setting formula in § 1187.96. (relating to price- and rate-setting computations). The detailed data elements necessary to calculate each of the rates in the study are located at http://www.portal.state.pa.us/portal/server.pt?open=514&objID=748330&mode=2 except that, the budget adjustment factor (BAF) was recalculated to be .88909 to account for expected differences in rate payments in future periods due to the costs of county nursing facilities being excluded from the rate database and full implementation of the RUG v. 5.12 and a BAF of .89295 to account for the differences in rate payments if county costs were excluded and the adjusted base rate was used for all facilities.

Observed, empirical results of the comparison of the two rates for each of the four ventilator care nursing facilities is displayed below. These results show the impact made to the rates with the implementation of the current RUG v. 5.12.

| PROVNAME | % MA Vents | 04/01/12 Rate At 100% RUG v. 5.12 | 04/01/12 Rate At 100% Adjusted Base Rate | Difference |
|---|---|---|---|---|
| ARISTACARE AT MEADOW SPRINGS | 37% | $408.51 | $441.43 | $32.92 |
| FOX SUBACUTE AT CLARA BURKE | 78% | $449.95 | $508.69 | $58.74 |
| FOX SUBACUTE AT MECHANICSBURG | 83% | $433.33 | $590.08 | $156.75 |
| FOX SUBACUTE CENTER | 85% | $436.64 | $515.87 | $79.23 |
| | | | **Median Difference** | $68.99 |

No other data was used in the determination of the impact on rates on nursing facilities with a high percentage of MA-recipient residents who receive medically necessary ventilator care.

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

A. The date by which the agency must receive public comments: 30 days after publication of the proposed regulation

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: February 8, 2014

D. The expected effective date of the final-form regulation: July 1, 2012

E. The date by which compliance with the final-form regulation will be required: July 1, 2012

F. The date by which required permits, licenses or other approvals must be obtained: Not applicable

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

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. In addition, specific regulatory issues raised by members of the Medical Assistance Advisory Committee (MAAC) and the Long-Term Care Delivery System Subcommittee of the MAAC are researched and addressed as needed. The Department will also monitor the impact of this regulation through regular audits and utilization management reviews to determine the effectiveness of the regulations on consumers of long-term care services and the industry.

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**(Pursuant to Commonwealth Documents Law)**

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| Copy below is hereby approved as to form and legality. Attorney General | Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by: | Copy below is hereby approved as to form and legality. Executive or Independent Agencies. |
|---|---|---|
| By: Amy M. Elliott (Deputy Attorney General) | DEPARTMENT OF PUBLIC WELFARE (Agency) | By: SHAWN E SMITH |
| MAY 21 2013 Date of Approval | LEGAL COUNSEL: Edward A. Olney | APR 24 2013 Date of Approval |
| ☐ Check if applicable Copy not approved. Objections attached. | DOCUMENT/FISCAL NOTE NO. 14-535 | (Deputy General Counsel) (~~Chief Counsel, Independent Agency~~) (Strike inapplicable title) |
| | DATE OF ADOPTION: | ☐ Check if applicable. No Attorney General approval or objection within 30 days after submission. |
| | BY: Beverly Mackereth | |
| | TITLE: SECRETARY OF PUBLIC WELFARE (Executive Officer, Chairman or Secretary) | |

## 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]

Supplemental Ventilator Care Payment for Medical Assistance Nursing Facilities

*Statutory Authority*

Notice is hereby given that the Department of Public Welfare (Department), under the authority of the Public Welfare Code (62 P. S. §§ 201(2), 206(2), 403(b) and 443.1), intends to amend the regulation set forth in Annex A.

*Purpose of Regulation*

The purpose of this proposed regulation is to change the Department's methods and standards for payment of Medical Assistance (MA) nursing facility services to offer a new category of supplemental payment to qualified MA nursing facilities effective July 1, 2012.

The proposed rulemaking is needed to address the financial impact that the implementation of the current Resource Utilization Group III (RUG-III) version 5.12 (RUG v. 5.12) resident classification system and the phase-out of the older RUG v. 5.01 is having on nursing facilities that care for a significant number of MA ventilator-care residents.

*Background*

The Department is proposing to offer a new category of supplemental ventilator care payment to qualified MA nonpublic and county nursing facilities that provide medically necessary ventilator care for a significant portion of their MA-recipient resident population. The Department published a public notice announcing this proposed change at 42 Pa.B. 3824 (June 30, 2012). Also, on

September 27, 2012, the Department submitted State Plan Amendment (SPA) 12-030 relating to supplemental ventilator care payments to nonpublic and county nursing facilities to the Centers for Medicare and Medicaid Services (CMS). CMS approved this SPA on December 13, 2012.

Currently, the Department pays for nursing facility services provided to MA-eligible recipients in nonpublic nursing facilities at per diem rates that are computed using the case-mix payment system in the Department's regulations in 55 Pa. Code Chapter 1187, Subchapter G (relating to rate-setting). Beginning July 1, 2010, the payment methodology was changed to phase in, over a 3-year period, use of the RUG v. 5.12 classification system. Prior to July 1, 2010, an earlier version of the RUG-III classification system was used, RUG v. 5.01.

The RUG-III classification systems were developed by the Federal Centers for Medicare and Medicaid Services (CMS) to provide a patient-specific means of identifying the variable health care resources required to care for individuals with different needs by placing residents into groups based on their characteristics and clinical needs. Each group is then assigned a case-mix index (CMI) which is a numerical score intended to reflect the relative resource use of the average resident assigned to the group. See Chapter 1187 (relating to nursing facility services), Appendix A (relating to resource utilization group index scores for case-mix adjustment nursing facility reimbursement system). A resident placed in a group which is assigned a higher CMI has greater needs and, therefore, requires more nursing resources than a resident in a group

assigned a lower CMI. The data source used to classify each resident into a RUG-III group is the Federally approved Pennsylvania (PA) specific minimum data set (MDS) assessment completed at a minimum upon admission and quarterly thereafter for each resident. Once each quarter (February 1, May 1, August 1 and November 1), the residents in the nursing facility's census are identified and the latest classifiable assessment is used to assign each resident to a RUG-III group. See §§ 1187.2 (relating to definitions) and 1187.33 (relating to resident data and picture date reporting requirements). A facility average MA CMI is then calculated and used in the determination of each nonpublic nursing facility's per diem rate as specified in § 1187.96(a)(5) (relating to price- and rate-setting computations). In general, nursing facilities with a high facility average MA CMI receive a higher per diem rate because the residents in their care require more nursing resources.

Currently, under § 1187.96, nursing facility case-mix per diem rates are a combination of a blended resident care rate, an other resident-related rate, an administrative rate and a capital rate. The blended resident care rate uses a portion of both RUG-III versions as it phases in fully to RUG v. 5.12. For rate year 2010-2011, the resident care portion of the per diem rate was calculated using 75% of the RUG v. 5.01 resident care rate and 25% of the RUG v. 5.12 resident care rate. For rate year 2011-2012, the percent split was 50% and 50% and for rate year 2012-2013, the last year of the phase in, only 25% of the older RUG v. 5.01 resident care rate is used in the rate calculation.

Now that RUG v. 5.12 has been implemented and the phase-out of the older RUG v. 5.01 is nearing completion, the Department is addressing concerns related to reimbursement of nursing facilities that serve ventilator care residents.

Although county nursing facilities do not have the same concerns relating to the CMI because their rates are calculated differently under 55 Pa. Code Chapter 1189 (relating to county nursing facility services), the Department is nonetheless making the payment available to county nursing facilities to promote the growth of ventilator care. Making these additional funds available is part of the Department's ongoing efforts to ensure that MA recipients continue to receive access to medically necessary nursing facility services and that those services result in quality care that improves the lives of those who receive them.

*Requirements*

The Department is proposing to offer a new category of supplemental ventilator care payment under 55 Pa.Code § 1187.117 (relating to supplemental ventilator care payments). The supplemental ventilator care payment will be calculated on a quarterly basis and paid to nursing facilities caring for a minimum of ten MA-recipient residents who receive medically necessary ventilator care, with at least 10% of the facility's MA-recipient resident population receiving medically necessary ventilator care. For those nursing facilities meeting both of the threshold criteria on the appropriate picture date, the total supplemental ventilator care payment will be the nursing facility's supplemental ventilator care per diem multiplied by the number of paid MA facility days and therapeutic leave

days. If the Department grants a nursing facility a waiver to the 180-day billing requirement, the MA-paid days billed under the waiver and after the authorization date of the waiver will not be included in the calculation of the supplemental ventilator care payment and the supplemental ventilator care payment amount will not be retroactively revised. Since this payment is a supplemental payment and not part of the case-mix per diem rates, it will not be subject to the budget adjustment factor under 55 Pa. Code § 1187.96 (relating to price- and rate-setting computations).

A nursing facility's supplemental ventilator care per diem would be calculated as follows: ((number of MA-recipient residents who receive medically necessary ventilator care ÷ total MA-recipient residents) × $69) × (the number of MA-recipient residents who receive medically necessary ventilator care ÷ total MA-recipient residents).

The maximum supplemental ventilator care per diem would be $69 for nursing facilities whose percent of MA-recipient residents who received medically necessary ventilator care to total MA-recipient residents equals 100%. This formula results in the provision of higher supplemental ventilator care payments to facilities with the highest percent of MA-recipient residents who received medically necessary ventilator care. These payments are based on the proportion of MA-recipients who received medically necessary ventilator care to total MA-recipient residents.

*Affected Individuals and Organizations*

This proposed rulemaking affects nonpublic and county nursing facilities enrolled in the MA Program.

*Accomplishments and Benefits*

This proposed rulemaking will benefit MA nursing facility residents in this Commonwealth by assuring they will continue to have access to medically necessary nursing facility services and that those services result in quality care that improves the lives of those who receive them.

*Fiscal Impact*

This change will result in an estimated annual payment of $2.1 million in total funds ($0.956 million in State funds) in Fiscal Year 2012-2013.

*Paperwork Requirements*

There are no new or additional paperwork requirements. The CMI Report used to determine the number of MA-recipient residents who receive ventilator care is an existing report.

*Effective Date*

The effective date is July 1, 2012.

*Public Comment*

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rulemaking to Marilyn Yocum, Department of Public Welfare, Office of Long-Term Living, 555 Walnut Street, Forum Place, 6th Floor, Harrisburg, PA 17101-1919 within 30 calendar days after the date of publication of this proposed rulemaking in the *Pennsylvania Bulletin*. Reference Regulation No. 14-535 when submitting comments.

Persons with a disability who require an auxiliary aid or service may submit comments using the Pennsylvania AT&T Relay Service at (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)), on AUG 14 2013, 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 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 the Regulatory Analysis Form prepared by the Department. A copy of this form is available to the public upon request.

Under § 5(g) of the Regulatory Review Act, if the IRRC has any comments, recommendations or objections to any portion of the proposed



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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 H. PAYMENT CONDITIONS, LIMITATIONS AND ADJUSTMENTS**

* * * * *

**§ 1187.117. Supplemental ventilator care payments.**

(a) A supplemental ventilator care payment will be made each calendar quarter, effective July 1, 2012, to nursing facilities subject to the following:

(1) To qualify for the supplemental ventilator care payment, the nursing facility shall satisfy both of the following threshold criteria on the applicable picture date:

(i) The nursing facility shall have a minimum of ten MA-recipient residents who receive medically necessary ventilator care.

(ii) The nursing facility shall have a minimum of 10% of their MA-recipient resident population receiving medically necessary ventilator care.

(2) Under subsection (a)(1), the percentage of the nursing facility's MA-recipient residents who require medically necessary ventilator care will be calculated by dividing the total number of MA-recipient residents who receive medically necessary ventilator care by the total number of MA-recipient residents. The result of this calculation will be rounded to two percentage decimal points.

(3) To qualify as a MA-recipient resident who receives medically necessary ventilator care, the resident shall be listed as an MA resident and have a positive response for the MDS item for ventilator use on the Federally-approved, PA-specific MDS assessment listed on the nursing facility's CMI report for the applicable picture date.

(4) The number of total MA-recipient residents is the number of MA-recipient residents listed on the nursing facility's CMI report for the applicable picture date.

(5) The applicable picture dates and the authorization of a quarterly supplemental ventilator care payment are as follows:

| **Picture Dates** | **Authorization Schedule** |
|---|---|
| February 1 | September |
| May 1 | December |
| August 1 | March |
| November 1 | June |

(6) If a nursing facility fails to submit a valid CMI report for the picture date as provided under § 1187.33(a)(5) (relating to resident data and picture date reporting requirements), the facility cannot qualify for a supplemental ventilator care payment.

(b) A nursing facility's supplemental ventilator care payment is calculated as follows:

(1) The supplemental ventilator care per diem is ((number of MA-recipient residents who receive medically necessary ventilator care/total MA-recipient residents) x $69) x

(the number of MA-recipient residents who receive medically necessary ventilator care/total MA-recipient residents).

(2) The amount of the total supplemental ventilator care payment is the supplemental ventilator care per diem multiplied by the number of paid MA facility and therapeutic leave days.

(c) If the Department grants a nursing facility a waiver to the 180-day billing requirement, then the MA-paid days that may be billed under the waiver and after the authorization date of the waiver will not be included in the calculation of the supplemental ventilator care payment. The Department will not retroactively revise the supplemental ventilator care payment amount.

(d) The paid MA facility and therapeutic leave days used to calculate a qualifying facility's supplemental ventilator care payment under subsection (b)(2) will be obtained from the calendar quarter that contains the picture date used in the qualifying criteria as described in subsection (a).

(e) The supplemental ventilator care payments will be made quarterly in each month listed in subsection (a).

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## CHAPTER 1189. COUNTY NURSING FACILITY SERVICES

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## Subchapter E. PAYMENT CONDITIONS, LIMITATIONS AND ADJUSTMENTS

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### § 1189.105. Incentive payments.

(a) *Disproportionate share incentive payment.*

(1) A disproportionate share incentive payment will be made based on MA paid days of care times the per diem incentive to facilities meeting the following criteria for a 12-month facility cost reporting period:

* * * * *

(c) *Supplemental ventilator care payments.*

(1) A supplemental ventilator care payment will be made each calendar quarter, effective July 1, 2012, to county nursing facilities subject to the following:

(i) To qualify for the supplemental ventilator care payment, the county nursing facility shall satisfy both of the following threshold criteria on the applicable picture date:

(A) The county nursing facility shall have a minimum of ten MA-recipient residents who receive medically necessary ventilator care.

(B) The county nursing facility shall have a minimum of 10% of its MA-recipient resident population receiving medically necessary ventilator care.

(ii) For purposes of paragraph (1), the percentage of the county nursing facility's MA-recipient residents who require medically necessary ventilator care will be calculated by dividing the total number of MA-recipient residents who receive medically necessary ventilator care by the total number of MA-recipient residents. The result of this calculation will be rounded to two percentage decimal points.

(iii) To qualify as a MA-recipient resident who receives medically necessary ventilator care, the resident shall be listed as an MA resident and have a positive response for the MDS item for ventilator use on the Federally-approved, PA-specific MDS assessment listed on the county nursing facility's CMI report for the applicable picture date.

(iv) The number of total MA-recipient residents is the number of MA-recipient residents listed on the county nursing facility's CMI report for the applicable picture date.

(v) The applicable picture dates and the authorization of a quarterly supplemental ventilator care payment are as follows:

| **Picture Dates** | **Authorization Schedule** |
|---|---|
| February 1 | September |
| May 1 | December |
| August 1 | March |
| November 1 | June |

(vi) If a county nursing facility fails to submit a valid CMI report for the picture date as provided under § 1187.33(a)(5) (relating to resident data and picture date

reporting requirements), the facility cannot qualify for a supplemental ventilator care payment.

(2) A county nursing facility's supplemental ventilator care payment is calculated as follows:

(i) The supplemental ventilator care per diem is ((number of MA-recipient residents who receive medically necessary ventilator care/total MA-recipient residents) x $69) x (the number of MA-recipient residents who receive medically necessary ventilator care/total MA-recipient residents).

(ii) The amount of the total supplemental ventilator care payment is the supplemental ventilator care per diem multiplied by the number of paid MA facility and therapeutic leave days.

(3) If the Department grants a county nursing facility a waiver to the 180-day billing requirement, the MA-paid days that may be billed under the waiver and after the authorization date of the waiver will not be included in the calculation of the supplemental ventilator care payment. The Department will not retroactively revise the supplemental ventilator care payment amount.

(4) The paid MA facility and therapeutic leave days used to calculate a qualifying facility's supplemental ventilator care payment under paragraph (2)(ii) will be obtained from the calendar quarter that contains the picture date used in the qualifying criteria as described in paragraph (1).

(5) The supplemental ventilator care payments will be made quarterly in each month listed in paragraph (c)(1).

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# TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE REGULATORY REVIEW ACT

| | |
|---|---|
| **I.D. NUMBER:** | 14-535 |
| **SUBJECT:** | SUPPLEMENTAL VENTILATOR CARE PAYMENT FOR MEDICAL ASSISTANCE NURSING FACILITIES |
| **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

2013 AUG 14 PM 2:58

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## FILING OF REGULATION

| DATE | SIGNATURE | DESIGNATION |
|---|---|---|
| | | *HOUSE COMMITTEE ON HEALTH SERVICS OR HUMAN SERVICES* |
| 8/14/13 | Dan Clues | MAJORITY CHAIR Gene Di Girolamo |
| 8/14/13 | Lynda Perkins | MINORITY CHAIR Angel Cruz |
| | | *SENATE COMMITTEE ON PUBLIC HEALTH & WELFARE* |
| 8/14/13 | Kit Ward | MAJORITY CHAIR Patricia Vance |
| 8/14/13 | C. Fox | MINORITY CHAIR Shirley Kitchen |
| 8/14/13 | H. Cooper | *INDEPENDENT REGULATORY REVIEW COMMISSION* |
| | | ~~*ATTORNEY GENERAL* (for Final Omitted only)~~ |
| 8/14/13 | Samuel Hoon | *LEGISLATIVE REFERENCE BUREAU* (for Proposed only) |