

# STATEMENTS OF POLICY

## Title 4—ADMINISTRATION

### PART II. EXECUTIVE BOARD

#### [4 PA. CODE CH. 9]

#### Reorganization of the Department of Labor and Industry

The Executive Board approved a reorganization of the Department of Labor and Industry effective June 9, 1999.

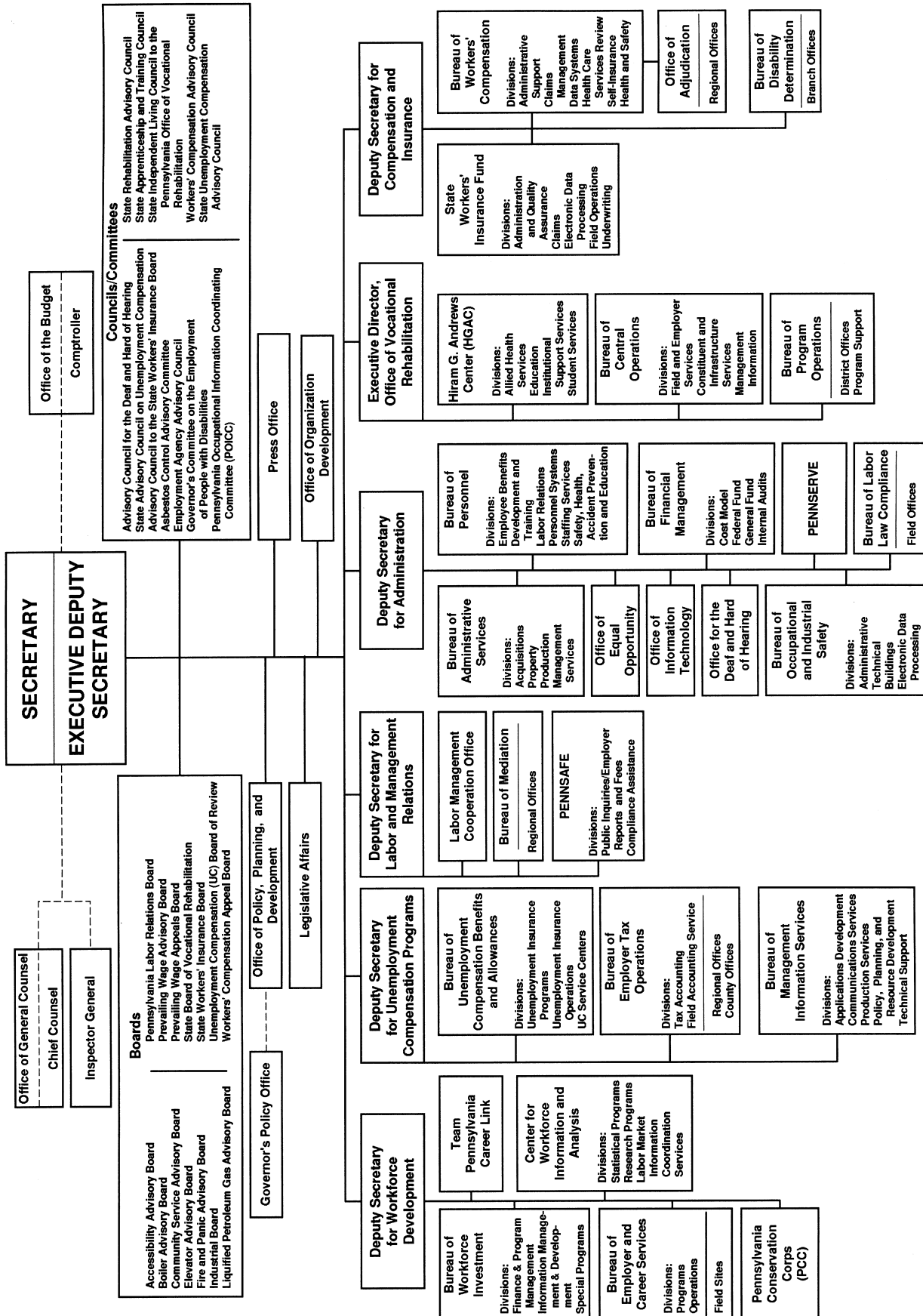
The following organization chart at 29 Pa.B. 3217 (June 26, 1999) is published at the request of the Joint Committee on Documents under 1 Pa. Code § 3.1(a)(9) (relating to contents of *Code*).

*(Editor's Note: The Joint Committee on Documents has found organization charts to be general and permanent in nature. This document meets the criteria of 45 Pa.C.S. § 702(7) as a document general and permanent in nature which shall be codified in the Pennsylvania Code.)*

[Pa.B. Doc. No. 99-1013. Filed for public inspection June 25, 1999, 9:00 a.m.]

---

DEPARTMENT OF LABOR AND INDUSTRY



## Title 55—PUBLIC WELFARE

### DEPARTMENT OF PUBLIC WELFARE

[55 PA. CODE CH. 1187]

#### Capital Component Payments for Postmoratorium Beds

##### *Introduction*

This statement of policy announces the criteria the Department of Public Welfare (Department) will use to evaluate waiver applications and to grant waivers of § 1187.113(a) (relating to capital component payment limitation) to authorize capital component payments for postmoratorium beds, and reaffirms that the nursing facilities that were granted bed moratorium waivers under Chapter 1181 (relating to nursing facility care) continue to receive capital component payments under Chapter 1187 (relating to nursing facility services). This statement of policy is expressly conditioned upon and will take effect only upon the approval of an amendment to the Commonwealth's Medicaid State Plan by the Health Care Financing Administration incorporating this statement of policy into the Commonwealth's approved State Plan.

##### *Background*

The Commonwealth participates in the cooperative Federal-State Medicaid Program established under Title XIX of the Social Security Act, 42 U.S.C.A. §§ 1396—1396r. The Medicaid Program is known in this Commonwealth as the Medical Assistance or MA Program. The Department is the single State agency designated to administer the Commonwealth's MA Program. To fulfill the public purposes of the MA Program, the Department makes payment to certain nursing facilities that enroll in the program and agree to comply with Federal and State statutory, regulatory and administrative directions. While the relationship between providers and the Department is voluntary, it is not based on contract principles. Unlike a contractual relationship, the obligations and program requirements of both the Department and the nursing facility providers arise from statutes, regulations and administrative interpretations.

As the Commonwealth's Medicaid single State agency, the Department is required by Federal law to, among other things, adopt methods and standards that may be necessary to safeguard against the unnecessary utilization of services under the MA Program and to assure that MA payments are consistent with efficiency, economy and quality of service. See 42 U.S.C.A. § 1396a(a)(30)(A). Prior to December 18, 1996, the Department relied, in part, upon the Certificate of Need (CON) process to comply with these Federally prescribed standards.

On December 18, 1996, the State law authorizing the Commonwealth's CON process sunseted. When the law sunseted, the Department issued a series of policy statements announcing the policies and guidelines that it would employ in deciding whether to maintain the existing supply or to permit future expansion, or both, of publicly funded institutional-based long term care services. See 26 Pa.B. 5996 (December 14, 1996), 27 Pa.B. 4005 (August 9, 1997) and 28 Pa.B. 138 (January 10, 1998). These policy statements were premised upon the Department's determination that the existing supply of nursing facility beds generally meets, if not exceeds, the needs of the MA Program. The policy statements reflected the Commonwealth's ongoing commitment to assure the

delivery of quality health care services in a cost effective manner and, consistent with available resources, to have nursing care services available to individuals in their own homes and communities.

In accordance with these policy statements, the Department has permitted limited and controlled growth of MA nursing facility beds and approved capital component payments for replacement beds, when necessary, to assure MA recipient access to nursing facility services. At the same time the Department has nearly doubled the existing supply of home and community-based waiver services for MA recipients who would otherwise need care in an institutional setting and is proceeding with plans to further expand waiver services to an additional 2,000 eligible individuals. The Department has also successfully implemented a long-term care managed care demonstration project in Philadelphia and Allegheny Counties which provides a continuum of care and services to dual eligible persons (persons eligible for both Medicare and Medicaid benefits), age 60 and over, who would otherwise be eligible to receive MA nursing facility services, to support and maintain them for as long as possible in their own homes.

Although the Department has made progress in achieving its policy objectives, the Department has determined that additional changes in its payment methods and standards can be made to further promote the funding and use of home and community-based services. These changes relate to the conditions under which the Department makes capital component payments to MA nursing facility providers.

Since 1982, the Department has imposed, by regulation, a moratorium on the reimbursement of capital costs for new and additional MA nursing facility beds. Under its moratorium regulations, the Department has made capital component payments to a nursing facility for new and additional beds only if: (1) the beds were constructed under a CON or letter of nonreviewability issued on or before August 31, 1982; (2) the beds were constructed under a CON or letter of nonreviewability and the facility was the only nursing facility in the county; or (3) the beds were constructed under a CON or letter of nonreviewability and were replacement beds. See 55 Pa. Code §§ 1181.65(c), 1181.259(r) and 1181.260(a).

When the Department adopted regulations in 1996 to replace its retrospective cost-based payment system with a new case-mix prospective payment system for MA nursing facility services, the Department decided to retain its capital moratorium provisions. See 55 Pa. Code § 1187.113(a). The Independent Regulatory Review Commission (IRRC) and other persons who commented on the regulations during the regulatory review process voiced concerns and objections regarding this decision. In response, the Department noted that, prior to 1991, the Secretary of Public Welfare had granted several requests for waiver of the moratorium regulations to authorize capital component payments for new and additional beds when the Department determined, among other things, that the payments were necessary to ensure that MA recipients in specific geographic areas had access to nursing facility services. Nonetheless, to address IRRC's and the other commentators' concerns and objections, the Department included express authorization in its case-mix regulations for the additional moratorium waivers "as the Department in its sole discretion determines necessary and appropriate." The Department also specified that it would publish a statement of policy specifying the criteria by which it would evaluate and approve applications for the waivers. See 55 Pa. Code § 1187.113(b).

Since the adoption of the case-mix payment methodology, the Department has continued to make capital component payments to those providers granted moratorium waivers under Chapter 1181. To date, however, the Department has not granted any capital moratorium waivers under § 1187.113(b) or issued a statement of policy announcing its waiver criteria. Indeed, in light of its experience in applying the previously published policy statements, the Department has concluded that moratorium waivers are not presently necessary or appropriate to support the construction of additional nursing facility beds or the expansion of the supply of MA certified beds. The Department has also determined, however, that moratorium waivers might be appropriate to the extent that the waivers serve to enhance its efforts to decrease reliance on institutional services thereby enabling additional funding of home and community-based services, and has decided to make changes in its policies to permit the additional waivers.

On April 17, 1999, the Department published an advanced notice announcing the Department's intent to make changes in its payment methods and standards for nursing facility services establishing criteria by which the Department will grant waivers under § 1187.113(b) and reaffirming its Chapter 1181 moratorium waivers under its case-mix payment system. At the same time, the Department made available for public review and comment, a draft policy statement setting forth these changes. The Department also distributed the draft policy statement and discussed and solicited input on the proposed provisions at the Long Term Care Subcommittee of the Medical Assistance Advisory Committee (MAAC) on April 14, 1999; the Consumer Subcommittee of the MAAC on April 21, 1999; and the MAAC meeting on April 22, 1999. The Department received four letters expressing comments on the draft policy statement. All comments received were reviewed and considered by the Department in developing this final statement of policy.

*Policy Regarding the Waiver of Capital Payment Moratorium Under Chapter 1187.*

Under § 1187.113(b), the Department is issuing the policy statement to read as set forth in Annex A. This policy statement announces the criteria which the Department will use to evaluate waiver applications and to grant waivers of § 1187.113(a) to authorize capital component payments to postmoratorium nursing facility beds. This policy statement also reaffirms the Department's intent to continue capital component payments to facilities granted waivers of Chapter 1181 moratorium provisions subject to the terms and conditions under which those waivers were initially granted.

The Department will grant a capital payment moratorium waiver under § 1187.113(b), if the Department determines that the waiver will serve to promote the Department's policy to encourage the growth of home and community-based services available to MA recipients while providing access to necessary and appropriate medical care and services. The Department has determined that a waiver will serve its policy objective only when an applicant demonstrates to the Department's satisfaction that it meets all the criteria set forth in this statement of policy. These criteria are intended to result in cost savings to the Medical Assistance Program by decreasing the number of surplus nursing facility beds, and reducing or eliminating unnecessary operating and administrative expenses, including costs relating to the litigation of payment and participation disputes. The cost savings will give the Department greater flexibility in

diverting its resources from institutional-based care to home and community-based services.

A waiver granted under this policy statement will permit the transfer of capital component payments from an existing premoratorium facility to an existing postmoratorium facility. Except for the reaffirmed Chapter 1181 moratorium waivers, and any additional waivers of § 1187.113(a) authorized and granted under this policy statement, the Department will not grant any waiver of § 1187.113(a), or its predecessor regulations in §§ 1181.65(c), 1181.259(r) and 1181.260(a). This statement of policy does not affect the nursing facility replacement bed statement of policy codified in § 1187.113a(f).

*Comments*

Although this statement of policy became effective on April 17, 1999, the Department will accept and consider comments on this final policy statement. To be considered, comments must be received within 45 days of the date of publication.

Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). Persons who require another alternative should contact Tom Vracarich in the Office of Legal Counsel at (717) 783-2209.

*Contact Person*

Comments and questions regarding this statement of policy should be directed to Tom Jayson, Policy Section, Division of Provider Services, P. O. Box 8025, Harrisburg, PA 17105, (717) 772-2570.

*Effective Date*

This statement of policy took effect on April 17, 1999 or the effective date of an amendment to the Commonwealth's Medicaid State Plan incorporating this statement of policy into the Commonwealth's approved State Plan, whichever date is later.

FEATHER O. HOUSTON,  
*Secretary*

*(Editor's Note: The regulations of the Department, 55 Pa. Code Chapter 1187, are amended by adding a statement of policy in § 1187.113b.)*

**Fiscal Note:** 14-BUL-058. No fiscal impact; (8) recommends adoption.

**Annex A**

**TITLE 55. PUBLIC WELFARE**

**PART III. MEDICAL ASSISTANCE MANUAL**

**CHAPTER 1187. NURSING FACILITY SERVICES**

**Subchapter H. PAYMENT CONDITIONS,  
LIMITATIONS AND ADJUSTMENTS**

**§ 1187.113b. Capital cost reimbursement waivers—  
statement of policy.**

(a) *Scope.* This section applies to any participating provider of nursing facility services that intends to seek capital component payments under this chapter for existing postmoratorium beds in a nursing facility. This section also applies to participating providers who were granted moratorium waivers under Chapter 1181 (relating to nursing facility care).

(b) *Purpose.* The purpose of this section is to announce the criteria that the Department will apply to evaluate and approve applications for capital cost reimbursement waivers of § 1187.113(a) (relating to capital component payment limitation) and to reaffirm that nursing facilities

that were granted waivers under Chapter 1181 continue to receive capital component payments under this chapter. Waivers of § 1187.113(a) will not otherwise be granted except as provided in this section.

(c) *Submission and content of applications.*

(1) An applicant seeking a waiver of § 1187.113(a) shall submit a written application and two copies to the Department at the following address:

Department of Public Welfare  
Bureau of Long Term Care Programs  
P. O. Box 2675  
Harrisburg, PA 17105-2675  
ATTN: MORATORIUM WAIVER REVIEW

(2) The written application shall address the criteria in subsections (d) and (e). If necessary, the application should include supporting documentation.

(d) *Policy regarding additional capital reimbursement waivers.* Section 1187.113(b) authorizes the Department to grant waivers of § 1187.113(a) to permit capital reimbursement as the Department in its sole discretion determines necessary and appropriate. The Department has determined that a waiver of § 1187.113(a) will only be necessary and appropriate when the Secretary or a designee finds that the waiver is in the Department's best interests and will serve to promote the Commonwealth's policy to encourage the growth of home and community-based services available to MA recipients.

(1) The Department will find that a waiver serves to promote the Commonwealth's policy to encourage the growth of MA home and community-based services only if the Department concludes that the following criteria are met:

(i) The application for a waiver is made by or on behalf of a person who has been the legal entity of two MA participating nursing facilities that meet the following conditions:

(A) Have both been owned by the legal entity for at least 3 consecutive years prior to the date of application.

(B) Serve residents from the same primary service area.

(C) Have each maintained an average MA occupancy rate that exceeds the Statewide MA occupancy rate for 3 consecutive years prior to the date of the application.

(D) Are identified in the application.

(ii) The applicant agrees to permanently decertify all beds in and close one of the two nursing facilities identified in its application in consideration of obtaining a waiver to permit capital component payments to the remaining nursing facility identified in the application.

(iii) Closing the nursing facility will not create an access to care problem for day-one MA eligible recipients in the nursing facility's primary service area.

(iv) One or more of the beds decertified as a result of the closing of the nursing facility is a pre-moratorium bed.

(v) The legal entity is willing and able to transfer all residents that are displaced by the closing of the nursing facility to the legal entity's remaining nursing facility, unless the residents choose and are able to be transferred elsewhere.

(vi) The remaining nursing facility has one or more existing postmoratorium beds.

(vii) The applicant agrees that, as a condition of both obtaining and receiving continuing payment pursuant to

the waiver, the remaining nursing facility will achieve and maintain an MA occupancy rate equal to or greater than the county average MA occupancy rate or the combined average MA occupancy rate (over the past 3 years) of the closed nursing facility and the remaining nursing facility, whichever is higher.

(viii) The applicant agrees that, if the waiver is granted, it will notify the Department in writing at least 90 days prior to the sale, transfer or assignment of a 5% or more ownership interest, as defined in section 1124(a)(3) of the Social Security Act (42 U.S.C.A. § 1320a-3(a)(3)), in the remaining nursing facility.

(ix) The legal entity is not disqualified from receiving a waiver under subsection (e).

(x) The applicant agrees that the waiver is subject to revocation under the conditions specified in subsection (f).

(xi) The applicant agrees that the Bureau of Hearings and Appeals affords an adequate, and appropriate forum in which to resolve disputes and claims with respect to the remaining nursing facility's participation in, and payment under, the MA Program, including claims or disputes arising under the applicant's provider agreement or addendum thereto, and that, in accordance with applicable provisions of 2 Pa.C.S. §§ 501—508 and 701—704 (relating to administrative agency law) and §§ 1101.84 and 1187.141 (relating to provider right of appeal; and missing facility's right to appeal and to a hearing), the applicant will litigate claims pertaining to its remaining facility exclusively in the Bureau of Hearings and Appeals, subject to its right to seek appellate judicial review.

(xii) The applicant agrees that it will not challenge the Department's denial of capital component payments to postmoratorium beds in the remaining nursing facility.

(xiii) The MA Program will experience overall cost savings if the waiver is granted.

(xiv) The proposal is otherwise in the best interests of the Department. In determining whether the proposal is in its best interests, the Department may consider the following:

(A) Whether the legal entity has demonstrated a commitment to serve MA recipients. In making this determination, the Department will consider the MA occupancy rate of all nursing facilities related by ownership or control to the legal entity.

(B) Whether the legal entity has demonstrated a commitment to provide and develop alternatives to nursing facility services, such as home and community-based services.

(C) Whether the legal entity is willing to refer all persons (including private pay applicants) who seek admission to the remaining nursing facility to the Department or an independent assessor for pre-admission screening, and to agree to admit only those persons who are determined by that screening to be clinically eligible for nursing facility care.

(D) Other information that the Department deems relevant.

(2) If the Department concludes that the criteria specified in paragraph (1) have been met, the Department will grant a waiver to permit capital component payments to the remaining nursing facility. Capital component payments made pursuant to the waiver shall be limited to the number of postmoratorium beds in the remaining nursing facility as of the date the waiver is granted, or

the number of pre-moratorium beds decertified as a result of the closure of the other nursing facility, whichever number is less.

(e) *Disqualification for past history of serious program deficiencies.* The Department will not grant a waiver of § 1187.113(a) if:

(1) The legal entity, any owner of the legal entity or the nursing facility is currently precluded from participating in the Medicare Program or any state Medicaid Program.

(2) The legal entity or any owner of the legal entity, owned, operated or managed a nursing facility at any time during the 3-year period prior to the date of the application and one of the following applies:

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

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

(iii) The nursing facility was subject to the imposition of sanctions or remedies for residents' rights violations.

(iv) The nursing facility was subject to the imposition of remedies based on the failure to meet applicable Medicare and Medicaid Program participation requirements, and the nursing facility's deficiencies immediately jeopardized the health and safety of the nursing facility's residents; or the nursing facility was designated a poor performing nursing facility.

(f) *Waiver revocation.* The Department will revoke a waiver, recover any funds paid under the waiver, or take other actions as it deems appropriate if it determines that:

(1) The applicant failed to disclose information on its waiver application that would have rendered the legal entity or nursing facility ineligible to receive a waiver under subsections (d) and (e).

(2) The legal entity or nursing facility violate any one or more of the agreements in subsection (d)(1)(ii), (v) and (vii)—(xii).

(g) *Policy regarding capital component payments to participating nursing facilities granted waivers under Chapter 1181.* Waivers of the moratorium regulations granted to nursing facilities under Chapter 1181 remain valid, subject to the same terms and conditions under which they were granted, under the successor regulation in § 1187.113(a).

(h) *Effectiveness of waivers granted under this section.* Waivers authorized under this section will remain valid only during the time period in which this section is in effect.

(i) *Definitions.* The following words and terms, when used in this section, have the following meanings, unless the contents clearly indicates otherwise:

*Applicant*—A person with authority to bind the legal entity who submits a request to the Department to waive § 1187.113(a) to permit capital component payments to a nursing facility provider for post-moratorium beds.

*Day-one MA eligible*—An individual who meets one of the following conditions:

(i) Is or becomes eligible for MA within 60 days of the first day of the month of admission.

(ii) Will become eligible for MA upon conversion from payment under Medicare or a Medicare supplement policy, if applicable.

(iii) Is determined by the Department, or an independent assessor, based upon information available at the time of assessment, as likely to become eligible within 60 days of the first day of the month of admission or upon conversion to MA from payment under Medicare, or a Medicare supplement policy, if applicable.

*Owner*—A person having an ownership interest in a nursing facility enrolled in the MA Program, as defined in section 1124(a) of the Social Security Act.

*Legal entity*—A person authorized as the licensee by the Department of Health to operate a nursing facility that participates in the MA Program.

*Person*—An individual, corporation, partnership, organization, association or a local governmental unit, authority or agency thereof.

*Post-moratorium beds*—Nursing facility beds that were built with an approved CON or letter of nonreviewability dated after August 31, 1982, or nursing facility beds built without an approved CON or letter of nonreviewability after December 18, 1996.

*Pre-moratorium beds*—Nursing facility beds that were built under an approved CON or letter of nonreviewability dated on or before August 31, 1982, and for which the Department is making capital component payments.

*Primary service area*—The county in which the nursing facility is physically located. If the provider demonstrates to the Department's satisfaction that at least 75% of its residents originate from another geographic area, the Department will consider that geographic area to be the provider's primary service area.

[Pa.B. Doc. No. 99-1014. Filed for public inspection June 25, 1999, 9:00 a.m.]