

# RULES AND REGULATIONS

## Title 55—PUBLIC WELFARE

### DEPARTMENT OF PUBLIC WELFARE

#### [55 PA. CODE CH. 258]

#### Medical Assistance Real Estate Recovery

The Department of Public Welfare (Department), by this order, under the authority of sections 201(2), 1410 and 1412 of the Public Welfare Code (62 P. S. § 201(2), 1410 and 1412) (act) adds Chapter 258 (relating to MA estate recovery) to implement a Medical Assistance (MA) estate recovery program to read as set forth in Annex A.

Notice of proposed rulemaking was published at 29 Pa. B. 3888 (July 24, 1999).

#### *Need for the Regulations*

The purpose of these regulations is to interpret and implement section 1412 of the act that requires the Department to establish and implement an MA estate recovery program. The regulations will implement requirements of the Federal Medicaid Program (42 U.S.C.A. § 1396p(b)(1)), which mandate that each state operate an estate recovery program.

Title XIX of the Social Security Act (42 U.S.C.A. §§ 1396—1396v) established the Medicaid program in 1965 as a cooperative Federal-state program through which various health care services are provided to individuals who are poor and needy. Under Title XIX, a participating state shall designate a single state agency to administer or supervise the administration of the state Medicaid program. See 42 U.S.C.A. § 1396a(a)(5). The designated state agency shall prepare an MA plan consistent with Federal law and regulations and submit it to the Health Care Financing Administration (HCFA) of the United States Department of Health and Human Services (DHHS), for approval. Upon approval of its plan by HCFA, the state becomes eligible for Federal matching funds for reimbursement of the cost of specific types of medical care and services. See 42 U.S.C.A. § 1396a.

The Commonwealth participates in the Title XIX Medicaid program. The Department is designated as the single State agency responsible for administration of the Commonwealth's Medicaid program, which is known as the MA program.

Pub.L. No. 103-66 amended Title XIX to add a requirement that participating states establish and implement a program to recover MA payments from the probate estates of certain individuals. See 42 U.S.C.A. § 1396p(b)(1). To comply with this Federal mandate, the General Assembly amended the act in 1994 to authorize creation and implementation of the estate recovery program. See section 1412 of the act. The estate recovery program has been in operation in this Commonwealth since August 15, 1994. Notice of rule change (NORC) was published at 25 Pa.B. 1916 (May 13, 1995). During the period of its operation, many questions have arisen as to interpretation and procedures under the statute. These regulations are needed to supply guidance with respect to issues not directly addressed by the Federal and State statute and to resolve ambiguities in the statutory language. Conforming changes to §§ 178.1(h) and 257.21(b) (relating to general policy on MA resources common to all categories of MA; and policy) will be made when those chapters are revised.

#### *Affected Individuals, Groups and Organizations*

Affected persons include attorneys administering estates, courts and heirs of decedents.

#### *Accomplishments/Benefits*

These regulations will increase compliance by estates with the Federally mandated estate recovery requirements and will decrease confusion regarding those requirements. These regulations will result in increased recovery amounts currently pending collection as unadministered estates. These regulations encourage and support the use of home and community based services by permitting undue hardship waivers for persons who live in the home with the individual and provide care and support to the individual to prevent or delay admission to a nursing facility. These regulations encourage family and friends to help maintain the home while an individual receives home and community based services, or while an individual is in a nursing facility, by permitting undue hardship waivers for the person to recover maintenance expenses for the home.

#### *Scope*

This chapter applies to the estates of deceased individuals who received MA for nursing facility services, home and community based services or related hospital and prescription drug services, who were 55 years of age or older at the time that MA was received, who died on or after August 15, 1994, and who received MA on or after August 15, 1994. This chapter does not apply to individuals who received MA before 55 years of age, and whose MA eligibility terminated before 55 years of age.

Although the General Assembly has authorized adoption of a broad estate recovery program, the Department has generally elected to establish the minimum program required by Federal law consistent with the policy of Executive Order 1996-1. The Department will recover only from the estates of persons who were 55 years of age or older at the time assistance was received. The Department will restrict its recovery efforts to obtaining reimbursement for the following types of MA: nursing facility services, home and community based services and related hospital and prescription drug services. The Department will not seek reimbursement for other services. The Department will also restrict its recovery efforts to property that passes through a decedent's estate. Accordingly, property held jointly with a right of survivorship, Totten trust bank accounts and property held in trust at time of death will generally not be subject to estate recovery.

Section 1412 of the act uses the term "probate estate" to define the scope of estate recovery, and in this Commonwealth, the term "probate" generally refers to a proceeding involving a will. See 20 Pa.C.S. § 3131 (relating to place of probate). However, the Federal statute requires the Commonwealth to include all assets included in an estate as defined for purposes of "State probate law." Nationally, the term "probate" has a much broader meaning. See for example *Black's Law Dictionary* (4th Ed. 1968). It is clear from the Federal statute, as well as from Federal interpretative materials, that intestate estates are subject to the estate recovery program. The Legislature's intent was to conform to Federal law and accordingly, the Department has adopted an interpretation, which includes property passing by intestacy in its definition of "estate property."

*Paperwork Requirements*

These regulations require no added paperwork from that which is required in the existing estate recovery program. The estate recovery program requires paperwork to obtain and provide statements of claim. However, there is no reasonable alternative to the paperwork. These regulations do not increase paperwork beyond that required since August 15, 1994.

*Summary of Public Comment and Changes*

Written comments, suggestions and objections regarding the proposed regulations were requested within a 30-day period following the publication of proposed rulemaking at 29 Pa.B. 3888. A total of 25 letters were received by the Department within the 30-day public comment period, in response to the proposed rulemaking. In addition, the Independent Regulatory Review Commission (IRRC) and the Senate Minority Chairperson of the Public Health and Welfare Committee submitted comments on the proposed regulations. The majority of the comments submitted on the regulations were from IRRC. The public comments submitted centered around several issues including testamentary trusts, the Pennsylvania Uniform Fraudulent Transfer Act, postponement of collections, undue hardship waivers, unadministered estates and due process. Following is a summary of the major comments received and the Department's response to those comments. A summary of the major changes from proposed rulemaking is also included.

*§ 258.2. Definitions.*

*Relocation of definitions*

Several definitions were relocated to the body of the chapter. If a term to be defined is used in only one section of the regulations, the term should be defined in the appropriate section. This makes it easier for the reader to find the definition at the location of use, rather than have the reader flip to the beginning of the regulations to find the definition of a term.

The definition of "cash equivalent assets" was relocated within the definition of protectable assets. The definition of "estate property" was relocated to § 258.3(a) (relating to property liable to repay the Department). The definition of "facility of payment clause" was relocated to § 258.3(c). The definition of "family exemption" was relocated to § 258.6(d) (relating to priority of the Department's claim). The definition of "immediate family member" was relocated and is now listed specifically in § 258.10(c) (relating to undue hardship waivers). The definition of "income producing asset" was relocated to § 258.10(c). The definition of "perfected liens" was revised, a new term of "properly perfected security interests" is used and the definition was relocated to § 258.7(c)(2) (related to postponement of collection). The definition of "testamentary trust" was relocated to § 258.3(d).

*Elimination of definitions*

Several definitions were eliminated since they are not used in the regulations. In accordance with *Pennsylvania Code* requirements, definitions may include only terms used in the chapter. The terms "primary residence" and "surviving spouse or child" were therefore deleted.

*Definition of "fair market value"*

IRRC suggested clarification of "fair market value."

*Response*

The Department added a definition to clarify the meaning of "fair market value."

*Definition of "nursing facility services"*

The Department clarified that "nursing facility services" include intermediate care facilities for persons with other related conditions. The term "intermediate care facility for persons with other related conditions (ICF/ORC)" is derived from 42 CFR 483.400—483.480.

*Definition of "personal representative"*

IRRC requested clarification of the phrase "administrator of any description."

*Response*

The Department clarified that this is broad and encompassing and includes all types and forms of executors and administrators.

*Definition of "protectable asset"*

IRRC requested clarification of monetary limits and whether the limits are cumulative or exhaustive.

*Response*

The Department agrees that this was unclear as proposed, and has dropped the proposed subparagraph (iv) relating to other property in excess of \$10,000. Subparagraph (ii) has been revised to indicate that this applies to an individual item with a fair market value in excess of \$10,000.

*Definition of "real and personal property"*

IRRC suggested adding a new definition of "real and personal property."

*Response*

In response to the request of IRRC, this definition was added. This definition is intentionally broad so that this definition will remain valid as any other laws related to "real and personal property" are written or changed.

*Definition of "response period"*

IRRC requested adding the statutory reference prescribing the 45-day response period.

*Response*

This statutory reference to section 1412(b) of the act was added to § 258.4(b) (relating to request for statement of claim) in the section of the regulations where the 45-day period is addressed. Since it is a substantive requirement and not a definition, the requirement for the 45-day period was relocated from the definition of "response period" to the body of § 258.4(b).

*Definition of "statement of claim"*

IRRC suggested adding a definition of "statement of claim."

*Response.*

This new definition was added.

*Definition of "surviving spouse or child"*

IRRC requested clarification of "surviving spouse or child" and asked about the age of the surviving child.

*Response*

The Department agrees that this definition was unclear and inaccurate and has deleted this from the definitions since it is no longer used in the regulations. This term was used to specify requirements for the postponement of collections. Section 258.7 specifies the applicability of the postponement of collections for surviving relatives. As

specified in § 258.7, there is no age limit for a child with a disability, and the age of the surviving child without a disability is 21 years of age.

*§ 258.3. Property liable to repay the Department.*

*Subsection (a).* IRRC suggested changing the term from “estate” to “estate property.” IRRC suggested referencing other subsections where exemptions are set forth.

*Response*

The Department has added a sentence explaining the concept of estate recovery. The Department has not included cross-references to the exceptions because the references would not add clarity to the regulations.

*Subsection (c).* IRRC requested clarification of third party.

*Response*

The Department has revised this subsection to delete the reference to third party and clarify the circumstances under which life insurance is subject to the Department’s claim.

*Subsection (e).* IRRC and one commentator suggested that testamentary trusts for disabled children of any age be exempt from the Department’s claim.

*Response*

This new exemption was added. The Department agrees that those trusts should be exempt for estate recovery.

*Subsection (f).* IRRC requested clarification as to which assets are exempt with a cross reference to 20 Pa.C.S. § 3101 (relating to payments to family and funeral directors).

*Response*

The proposal does cross reference 20 Pa.C.S. § 3101. The Department deleted the listing of the specific examples and will rely on the referenced statute.

*Proposed subsection (f).* IRRC, the Senate Minority Chairperson of the Public Health and Welfare Committee and several private attorneys submitted extensive comments relating to the application of 12 Pa.C.S. §§ 5101–5110 (relating to Pennsylvania Uniform Fraudulent Transfer Act) (UFTA). They questioned the Department’s legal authority to apply this requirement, suggested inconsistency with the UFTA, requested clarification of less than equivalent value and offered general objections to this section.

*Response*

After careful consideration, the Department has deleted this subsection in its entirety. The Department believes that the interpretation of the UFTA in the context of estate recovery is more properly left to the courts. This deletion is not meant to imply that the Department concurs with the commentators’ position that the UFTA does not apply to transfers of assets made by MA recipients. However, the extent to which the UFTA applies in individual cases can only be determined through appropriate legal proceedings.

*Subsection (g).* The Department added a new subsection (g) to specify exemptions from estate recovery for special populations in accordance with HCFA’s State Medicaid Manual amendments, Transmittal 75, issued January 11, 2001, relating to exemptions for special populations.

*§ 258.4. Request for statement of claim.*

*Subsection (a).* IRRC suggested adding a definition of “statement of claim.”

*Response*

This change was made.

*Subsection (a).* IRRC asked why a certified mail date is necessary to establish the date of the notice from the personal representative. IRRC suggested that the Department permit communication by alternate means to submit notices. Two other commentators suggested that all forms of communication be subject to same rules.

*Response*

An accurate, written date is necessary to clearly establish and track the date of receipt by the Department. The receipt date starts the Department’s 45-day clock in preparing the statement of claim. The Department amended this section to permit a notice requesting a statement of claim to be submitted to the Department by facsimile or electronic mail, in addition to certified mail, in order to make it easier for a personal representative to submit a notice. Notices by telephone are not acceptable as an official notice, since written documentation is required and there is no method to accurately record the date the information was submitted. The date on the certified mail receipt, electronic mail or facsimile document will start the Department’s 45-day clock.

The proposed subsection (e) related to receipt of information by alternate means was deleted as it allowed Departmental discretion and it did not allow the 45-day clock to start.

A new paragraph (8) specifying what must be sent with the request for a statement of claim was added to require documentation of the value of the estate. This is needed to apply for the exemption in § 258.10(f) (relating to undue hardship waivers) to exempt estates with a gross value of \$2,400 or less from estate recovery.

*Subsection (b).*

IRRC requested that procedures and time frames be established to specify what happens if a personal representative does not submit accurate and complete information.

*Response*

If the Department finds an error or missing information in the notice by the personal representative, the Department’s Third Party Liability Unit makes a telephone call or sends a written notice to the personal representative or his attorney notifying him of the error or missing information. This notice will include notice to the personal representative that the 45-day clock will not start until the Third Party Liability Unit receives the corrected or missing information.

*Subsection (c).* IRRC suggested that the Department should not rely on its own internal date stamp for documentation of receipt of a notice from a personal representative.

*Response*

The Department concurs and will use the certified mail receipt date, date on the electronic mail or date on a facsimile document as the official receipt date of the notice of the personal representative.

*Subsection (d).* This section was revised to clarify the date as the issuance date of the statement of claim, versus the submission date.

*Subsection (e).* IRRC interprets section 1412(b) of the act regarding the 45-day Departmental response period as a firm one that cannot be altered by regulation.

*Response*

The Department has applied standard rules of statutory construction regarding the computation and application of time limits. There are numerous cases when statutory deadlines are interpreted to mean the next business day following a date that falls on a weekend or holiday.

This regulation also provides the personal representative with the opportunity to request an extension of the Department's time period if desired. An extension of the time period might be requested by the personal representative if they know they have outstanding documentation they want to be considered when the Department's prepares the statement of claim. Nothing in the statute prohibits a personal representative from waiving the 45-day limit.

It is well-settled that individuals can waive a statutory or constitutional right when waiver is not contrary to public policy. *Morgan Signs, Inc. v. Pa. Dept. of Transportation*, 676 A.2d 1284 (Pa. Cmwlth. 1996). In this instance, the General Assembly's intent in enacting the 45-day limit was to insure that the estate recovery program did not unduly delay the estate administration process. However, it is sometimes the case that estate administration is delayed for other reasons, and an extension of time granted to the Department will not have any impact. In these situations, the personal representative will often request or consent to an extension.

*Subsection (f)*. IRRC questioned the Department's legal authority to amend a statement of claim after it has been issued and the 45-day time period has passed.

*Response*

The Department has added clarification to this subsection to explain the circumstances under which the Department will amend a claim. This will occur only if there is new or updated information relating to the statement of claim. For example, additional medical bills or funeral expenses, or updated property lists or appraisals could be submitted to the Department after the original statement of claim is prepared. The Department will amend its claim to be fair to the personal representative and to prepare an accurate statement of claim. The Department does not believe this violates the 45-day time period in section 1412(b) of the act, since a statement of claim was prepared in accordance with the statute. The statute does not preclude amendment of a claim. The concept of an amendment being timely, because it relates back to an original document, is an established legal concept. Thus for example, a civil complaint may be amended after the statute of limitations has expired if it does not introduce a new cause of action. *Laursen v. General Hospital of Monroe County*, 494 Pa. 238, 431 A.2d 237 (1981). Likewise, a claim against an estate may be amended if it does not introduce a new cause of action. *Cepull v. Borland*, 81 D & C 527, 34 Westmoreland 79 (1952). A similar rule exists in bankruptcy. *In re: Kolstad*, 928 F. 2d 171 (5 th Cir. 1991). The Department believes the General Assembly intended that a similar rule apply to estate recovery.

*§ 258.5. Computation of claim.*

*Subsection (b)*. IRRC suggested adding a definition of "qualified Medicare beneficiary."

*Response*

This definition was added.

*Subsection (c)*. IRRC suggested adding a definition of "capitation payment." IRRC commented that the proposed subsection (e) relating to MCOs was unclear.

*Response*

The Department revised this section to include the new requirements in HCFA's State Medicaid Manual amendments, Transmittal 75, issued January 11, 2001, relating to managed care.

The Department deleted the proposed subsection (e) as it was no longer necessary and conflicted with the new subsection (c).

The Department deleted the proposed subsection (c) relating to postponement since this concept is adequately and appropriately addressed in § 258.7.

*Subsection (d)*. IRRC and the Senate Minority Leader of the Public Health and Welfare Committee stated that it is not reasonable to shift the burden of proof to the personal representative to show that the Department's claim is not correct; they also questioned the Department's legal authority to adopt this requirement.

*Response*

The Department has considered this comment and decided to delete this proposed section because the Department lacks authority to regulate the burden of proof in orphans' court. Case law provides that while a creditor has the burden of proving its claim, the Department's records are entitled to a presumption of correctness. See *Cameron's Estate*, 130 A.2d 173 (Pa. 1957).

*§ 258.7. Postponement of collection.*

IRRC requested that the Department include its internal operating process for initiating, reviewing and making a decision on postponement requests.

*Response*

The Department will develop internal operating procedures to manage postponement requests.

*Subsection (a)*. IRRC questioned the use of "the later of one of the following." IRRC requested adding the statutory citation for the Supplemental Security Income Program. One commentator suggested that claims should be permanently waived for those specified in this section, rather than postponed.

*Response*

The language is correct as proposed. This means until the last of any of these occur. For example, if there is a surviving spouse and an adult child who has a disability, the claim is postponed until both the spouse and adult child are deceased.

The citation for the Supplemental Security Income Program was added.

The Department considered permanent waivers versus postponement as suggested, but this section is based on section 1917(b)(2) of the Social Security Act (42 U.S.C.A. § 1396p(b)(2)) that addresses the temporary postponement of collection.

Paragraph (4) was relocated from § 258.10(d) so that all the postponement clauses was located together. The period of time was corrected to "1 year" to coincide with section 1917p(a)(2)(c) of the Social Security Act.

*Subsection (c)*. IRRC and another commentator suggested that this allows the Department to take enforcement action on an unripe claim. IRRC questioned how the dollar amounts were determined, how appraisals would be done and how a properly perfected security interest would be placed on the property. IRRC also requested the addition of a definition of "remainderman." Another commentator requested that the \$10,000 limit be applied to

individual items rather than the total of all items. IRRC asked the Department to specify the directions of the Department in subsection (c)(4).

*Response*

The Department is required by Federal law to postpone collection of its claim against certain property, but the Department does not have authority to simply forgive the claim. The Department has tried to balance the right of heirs to use property subject to postponement with the interest of the Commonwealth and Federal government in obtaining ultimate repayment from that property.

The Department revised and relocated the definition of "properly protected security interest" in subsection (c)(2) to clarify how security interests are placed on property. This is a legal process governed by Article 9 of the Uniform Commercial Code, 13 Pa.C.S. §§ 9101—9507.

The Department made the change to subsection (c)(2) as requested by the commentator to consider the \$10,000 amount for each individual item as opposed to the total value of all property. A properly perfected security interest will be placed only on an individual item valued in excess of \$10,000, but not for any item valued at \$10,000 or less.

The amounts specified in subsection (c)(2) and (3) are reasonable amounts based upon cost effectiveness for the Department to recover MA dollars. Appraisals to determine the value of the property items are undertaken by the executor or administrator of the estate.

The Department added a definition of "remainderman" to subsection (c)(3) where the term is used.

The Department revised subsection (c)(4) to clarify that the personal representative shall appropriately protect assets by an appropriate method. Appropriate methods might include noting the Department's interest on a certificate of title. The Department decided not to list examples in the regulations as this provision is intended to deal with novel or unusual circumstances.

*Subsection (f).* The Department added a new subsection (f) to clarify that the Department's claim is subject to collection at the end of the postponement period.

*Subsection (e).* IRRC asked why the age in subsection (e) is 18 years of age and in subsection (a)(3) it is 21 years of age. IRRC also requested that the Department specify the procedures for waivers.

*Response*

The age in subsection (a)(3) is taken directly from the Federal statute, which prescribes the age at 21 years of age. See 42 U.S.C.A. § 1396p(a)(2)(B). The age in subsection (e) is specified as "under 18 years of age" since the term "adult child" used in this subsection legally covers a person who is age 18 years of age and older. The age specification in this paragraph clarifies that a child under 18 years of age needs a legal representative acting on his behalf.

There is no waiver procedure or process. This simply allows an heir to turn over property to the Department prior to the end of the official postponement period. This is at the full discretion of the heir.

*§ 258.8. Liability of personal representative.*

IRRC suggested that the Department state what is acceptable documentation of fair market value. One commentator suggested that subsection (d) discourages resolution of small estates by family settlements. One com-

mentator suggested that the personal representative should be held to a negligence standard versus strict liability.

*Response*

The Department added a definition of "fair market value." Acceptable documentation might be a real estate appraisal.

Family settlements are only appropriate when they do not prejudice the rights of creditors. There is nothing to prevent the use of a family settlement agreement if the Department's claim is satisfied.

A stringent standard for personal representative conduct is appropriate given the fiduciary relationship undertaken by the representative relative to the estate and its creditors.

*§ 258.9. Liability of transferees.*

IRRC asked what is acceptable documentation for fair market value and suggested that the transferee be limited to the difference between the amount paid for an asset and the fair market value.

*Response*

The Department added a definition of "fair market value." Acceptable documentation might be a real estate appraisal.

The Department made the requested change to limit the difference between the amount paid for an asset and the fair market value. The Department clarified that the transferee's liability is limited to the fair market value of the property that was not protected.

*§ 258.10. Undue hardship waivers.*

*Subsection (b).* IRRC and the Senate Minority Leader of the Public Health and Welfare Committee requested that the language for the granting of undue hardship waivers be changed from "may" which is discretionary, to "will" which is mandatory. Five other commentators also requested clarification of the vagueness of waiver criteria and requested waivers be granted if the guidelines are met.

*Response*

The Department agrees and has made this change from "may" to "will" throughout this section relating to hardship waivers. Waivers must be granted if all of the criteria are met. Waiver criteria have been revised to be clear and precise.

*Subsection (b).* IRRC, the Senate Minority Leader of the Public Health and Welfare Committee and three other commentators suggested that the criteria for undue hardship waivers be extended to apply beyond immediate family members.

*Response*

This change was made to extend the waiver criteria to include not only immediate family, but also extended family and nonrelatives.

*Subsection (b).* The Senate Minority Leader of the Public Health and Welfare Committee and one other commentator suggested that an amendment be made to include home and community based services, as well as nursing facility services.

*Response*

This change was made. Home and community based services were added in subsection (b)(1) and (3).

*Subsection (b).* IRRC, the Senate Minority Leader of the Public Health and Welfare Committee and 17 other commentators suggested that a homestead exemption of a specific amount such as \$50,000. The homestead exemption means that no MA would be recovered for the value of the home, if the decedent leaves a home valued at \$50,000 or less.

#### *Response*

The Department spent considerable time researching and meeting with the Intergovernmental Council on Long Term Care and others regarding this issue. When completing a thorough review of the public comments and talking with many consumer, advocacy and provider organizations, the Department found that the homestead exemption was suggested for five main reasons: a) to reduce urban blight and abandonment of homes; b) the right for heirs to inherit something from decedent's estate; c) concern over refusal of home and community based services due to fear of self or spouse losing home; d) a desire to settle the many unadministered estates now in limbo with no recovery paid; and e) a reward for family, extended family and nonrelatives who moved into home and provided care and support to delay or prevent admission to a nursing home.

Many different alternatives were reviewed and considered. The following four alternatives best address the concerns of the commentators: 1) There would be a homestead exemption of a specified amount, for homes of modest value (based on appraised value of home). This means that if the decedent owned a home at the time of his death, valued at or below a specific dollar amount, the heir would keep the home and no recovery would be made on the sale/value of the home. If the home is valued above the specific amount, the entire value of the home would be subject to recovery; 2) There would be a flat exemption of a specified amount, for estates of any value, not based on home ownership. This would apply for all heirs and estates regardless of the value of the estate, the income of the heirs or the value of any home. The first specified amount of any estate, based on the net value of an estate of any value would not be subject to recovery; 3) Waiver criteria would be revised to expand opportunities for extended family and nonrelatives living with and caring for person to be considered for a hardship waiver; and 4) There would be an exemption for estates valued below a specified amount (such as \$2,000).

The Department weighted the pros and cons of each of these four alternatives and considered cost implications for each. While the homestead exemption option was the favored option of those submitting public comments, as the Department met with external stakeholders this option was not necessarily the preferred option, since it was applicable to only some of the estates and only some of the reasons given for the requested change. When meeting with external stakeholders, their concerns narrowed to three: 1) the fear of losing one's home while receiving home and community based services or the fear of a surviving spouse losing the home; 2) the need to settle unadministered estates and recover added potential revenue; and 3) the desire to reward persons who moved into the home with the decedent to provide care.

The Department found no evidence to support the notion that a homestead exemption would decrease the number of abandoned homes in urban areas. There is no data in this Commonwealth or in other states to suggest that urban blight is the result of, or related to, estate recovery. The Department reviewed the HCFA's State Medicaid Manual amendments, Transmittal 75, issued

January 11, 2001, relating to a homestead exemption. While the HCFA transmittal provides additional clarification as to how a homestead exemption might be calculated, the HCFA continues to provide this as an option for states to consider. Very few states have chosen to adopt the homestead exemption option.

The concern that individuals will lose their homes if they receive MA services or that their surviving spouses will lose their home is unwarranted. The Department and the external stakeholders agree that a broad based public education program is needed to explain to potential users of MA that they will never lose their homes while receiving MA and that their surviving spouses, minor children or adult children with disabilities will never lose the home. The Department will soon publish and disseminate a brochure on the estate recovery program to explain that people will not lose their homes as a result of the estate recovery program

The Department also considered the cost impact for the four alternatives. Both the homestead exemption and the flat exemption for estates of any value are estimated to result in substantial loss of recovery dollars. Dollars recovered through the estate recovery program are used to directly fund other individuals in need of home and community based services or nursing facility care. Every \$1 million recovered through the estate recovery program provides services to approximately 70 home and community based slots or 140 individuals living in home and community based settings annually.

The Department made several major changes to address the concerns of the commentators relating to the hardship waivers. First, the Department extended the provision that had limited waivers to immediate family members to include not only extended family, but nonrelatives as well.

Next, the waiver criterion that allowed waivers to be granted only for persons who had an annual gross income that does not exceed 100% of the Federal Poverty Guidelines was deleted. This permits anyone to receive a waiver regardless of family income. Although not requested by commentators, this change was made to support and encourage persons to provide live-in care and support to individuals, regardless of the person's income level.

Third, the Department substituted a new waiver criterion, to replace the proposed poverty guideline requirement, with a requirement that the person living in the home with the decedent provided care or support to the decedent during which time the decedent needed care or support in order to remain at home. This is similar to the provision in § 178.101 (relating to disposition of property and fair consideration provisions for transfers during the period of January 4, 1991, through July 29, 1994), which requires a son or daughter to have provided care for a 2-year period prior to the transfer of property. This will support and encourage the use of home and community based services by permitting the individual to remain at home for as long as possible. Use of home and community based services not only provides individuals with the opportunity and choice to stay at home, but also save taxpayer dollars, since home and community based services are a less expensive option than nursing facility care.

Fourth, the Department added an exemption from estate recovery for administered estates valued at \$2,400 or less (§ 258.10(f)). This exemption will apply to about half of the estate recovery claims filed by the Depart-

ment. No waiver process would be applied. The estates valued at \$2,400 or less will simply be exempted. Exemption amounts of between \$5,000 and \$2,000 were studied for fiscal impact. With an exemption of \$5,000, the State share loss to the estate recovery program, and hence the reduction to the Commonwealth's long-term care appropriation, would be slightly over \$1 million. With an exemption of \$2,400, the State share loss will be about \$500,000, which can be absorbed by the other potential revenue-increasing components to the regulations.

The combination of these four major changes to the regulations, coupled with an education campaign relating to the estate recovery program, will address the majority of the stakeholder concerns related to undue hardship waivers. The Department further addresses the concern relating to unadministered estates in § 258.11 (relating to unadministered estates).

*Subsection (c).* Although not specifically requested, the Department raised the income level from 100% to 250% of the Federal poverty guidelines for the gross family income allowed for income producing asset-related waivers. The Department made this change to allow a spouse or other family member to have a reasonable income outside the family farm or business, and still permit the waiver for the family farm or business.

The Department also extended the term "immediate family member" as proposed to include grandchildren of the decedent.

*Subsection (d).* The definition of "income producing asset" was relocated from § 258.2 to subsection (d) so that readers can easily find the definition where the term is actually used.

*Subsection (e).* This new subsection was added to allow persons who paid expenses to maintain a decedent's vacant home while the decedent was in a nursing facility, or during receipt of home and community based services, to be reimbursed for the home maintenance costs. Maintenance costs include real estate taxes, utility bills, home repairs and home maintenance such as lawn care and snow removal necessary to keep the property in adequate condition for the decedent to return home or to live in the home.

This may indirectly address some of the concern about abandoned properties. If a person knows that if he spends his own money to maintain a family or friend's home, he can recover his maintenance expenses from the estate at a later date, perhaps he will be more willing to maintain the home in good condition.

*Subsection (g).* This new subsection was added to clarify that a person who is eligible for a postponement of collection in § 258.7 is not precluded from also seeking a permanent undue hardship waiver under this section, as long as all the undue hardship waiver criteria are met.

*§ 258.11(a). Unadministered estates.*

IRRC raised questions of the Department's legal authority to either refer cases of unadministered estates outside this Commonwealth for settlement or to handle the cases of unadministered estates directly. IRRC raised the concern of conflict of interest if the Department handled the settlement of estates. IRRC requested clarification of reasonable fees. One commentator requested clarification of the role of outside attorneys. One commentator objected to referral of unadministered estates to outside attorneys because it would result in unfair and inequitable application of estate recovery.

*Response*

The Department spent considerable time and effort to resolve not only the concerns of the commentators, but also to address a major concern it has with the existing estate recovery program. There are numerous unadministered estates sitting in limbo in the Department's Office of Legal Counsel. While estates sit in limbo, no recovery is made, resulting in loss of recovery dollars and any real estate title remains under a cloud. The case remains "on the books" and continues to be tracked in the estate recovery program. While the new exemption for estates valued under \$2,400 will reduce the number of unadministered estates, there will continue to be cases pending and needing resolution.

The Department has revised subsection (a), to refer unadministered estates to the probate and estate sections of local county bar associations. This will facilitate the resolution of unadministered estates and provide a central location in each county where information regarding those estates may be obtained. The administration of estates by private attorneys will not result in an unequal application of the estate recovery program as the commentator suggested. The local attorneys will simply file the necessary paperwork to settle the estate. They will not administer the estate recovery program.

Lists of unadministered estates will be sent periodically to the local bar associations. The frequency will depend on the number of pending cases. For example, Philadelphia County Bar Association may receive a list of pending cases monthly, while a smaller county may receive notice of cases on an ad hoc basis as they occur. It is expected that this provision will permit the settlement of a large percent of currently unadministered estates. This will result in a higher amount of MA dollars recovered, which can be used to provide home and community based services, and a reduction in the tracking paperwork for the estate recovery program.

As requested, the Department has specified the maximum administration and attorney fee that can be charged. These fees are based on existing rates generally charged by private probate and estate attorneys, providing that a fair amount may be charged for handling even very small estates.

In response to the perceived potential conflict of interest for the Department to settle estates directly, this may be done legally by any creditor. While there may be a conflict of interest between the role of a personal representative and that of a creditor, the same kind of conflict exists when an inheriting child or spouse serves in the role of personal representative. Indeed, substantial conflict of interest is inherent in the estate administration system. As a creditor of the estate, the Department has express authority to administer estates under 20 Pa.C.S. § 3155(b)(4) (relating to persons entitled). A private creditor may file and administer an estate to recover outstanding bills. It is extremely rare that the Department's Office of Legal Counsel has the staff time or a reason to settle an unadministered estate directly; however, the Department wants to make clear the procedures that would apply should it desire to do so. The same fee requirements that apply to an outside attorney would apply to the Department.

*§ 258.12(a). Administrative enforcement.*

IRRC requested clarification of "other remedies allowed by law" and suggested that citations to other laws be added. IRRC suggested that the Department clarify how the personal representative will be notified of the assess-

ment of liability and the right to appeal. One commentator suggested that this creates two different forums for actions, conflicts with existing laws and creates notice and due process problems for transferees.

*Response*

The Department added clarification that the personal representative will be notified in writing of the assessment of liability and the right to appeal the decision in accordance with § 258.13 (relating to appeals and jurisdiction).

As suggested by IRRC, the Department has added citations to section 1412(a.1)(1) and (2) of the act.

The Department does not agree with the commentator who raised legal concerns with this section. The Department has successfully used this process for over 50 years. This is much simpler process than to have all cases go to the court of common pleas.

*§ 258.13. Appeals and jurisdiction.*

IRRC suggested adding a cross-reference to the rules governing the appeal procedure. IRRC questioned the Department's authority to claim exclusive jurisdiction and the use of the abuse of discretion standard. IRRC and the Senate Minority Public Health and Welfare Committee questioned the Department's authority to claim concurrent jurisdiction with the court of common pleas and to supercede the jurisdiction of the orphan's courts. IRRC and the Senate Minority Public Health and Welfare Committee requested that the error of law standard be used instead of the abuse of discretion standard.

*Response*

The Department has added a reference to the applicable hearing and appeals regulations. The Department clarified subsection (c) regarding the abuse of discretion standard to clarify that it is not a function of the hearing officer to substitute his discretion for that of the Third Party Liability Section of the Department, but rather to review the legal sustainability for that discretion. Where discretion is not involved, the hearing officer is expected to decide the case de novo.

The Department did not change the statement in subsection (c) that the Department has exclusive jurisdiction over issues of waiver, compromise or postponement of a claim. This is the usual standard for review of discretionary actions of an administrative agency. However, the Department recognizes that courts retain jurisdiction to determine whether the Department has a valid claim within the framework of the estate administration process.

The Department clarified subsection (d) to eliminate the requirement that filing with the Bureau of Hearing and Appeals (Bureau) is deemed as an election to proceed exclusively before the Bureau. The Department clarified that the decision is binding upon all parties participating before the Bureau. The Department understands that there could be cases where the court of common pleas applies and the Department would defer. However, the Department would encourage the use of the Bureau to resolve disputes when possible to reduce court time and costs.

*Fiscal Impact*

*Public Sector—Commonwealth*

The annual recovery amount the estate recovery program has generated in calendar year 2000 was approximately \$20 million. Forty-four percent of the amount recovered (the State share) goes directly into the long-

term care appropriation to provide home and community based services and nursing home services to qualified individuals. For every \$1 million recovered through estate recovery, approximately 70 home and community based slots or 141 individuals in home and community based settings are served annually.

The Department anticipates a negligible cost impact as a result of these regulations. The total estate recovery collection amount will be reduced with the implementation of the new exemption for estates valued at \$2,400 or less and by the implementation of the new waiver provision providing for waivers for persons living in the home and caring for decedent. However, this cost will be offset by increased revenues due to improved program efficiency resulting in better compliance with estate recovery requirements, in collection of recovery moneys now pending in unadministered estates, collection at the end of postponement periods where applicable, active enforcement of the new regulations and as a result of the Department's new public education campaign.

*Public Sector—Local Government*

These regulations may impact the process of estate administration in the courts of common pleas. In particular, these regulations clarify the duties and responsibilities of personal representatives. However, no significant impact is expected because the changes to the process of estate administration are minimal.

*Private Sector—General Public*

The estate recovery program results in an increase of revenue to the Commonwealth and helps to ensure continued financing of long term care services under MA. These regulations reduce the amount of inheritance an heir would have received, if the decedent received MA for nursing home or home and community based services. With the exception of a home of a decedent, this inheritance amount is minimal since the decedent is required to spend down most assets prior to becoming eligible for MA services.

*Effective Date*

This chapter is effective February 1, 2002.

*Sunset Date*

A sunset date is not anticipated because the underlying statute is permanent.

*Regulatory Review Act*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on June 29, 2001, the Department submitted a copy of these final-form regulations to IRRC and to the Chairpersons of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare.

Under section 5(c) of the Regulatory Review Act, the Department provided IRRC and the committees with copies of all comments received during the public comment period. The Department has also provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request. In preparing the final-form regulations, the Department has considered all comments received from the public, IRRC and the Committees.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), on July 19, 2001, these final-form regulations were deemed approved by the House Committee on Health and Human Services and the Senate



Committee on Public Health and Welfare. Under section 5.1(e) of the Regulatory Review Act, IRRC met on August 23, 2001, and approved the final-form regulations.

#### Findings

The Department finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) These final-form regulations are necessary and appropriate for the administration of sections 201(2), 1410 and 1412 of the act.

#### Order

The Department, acting under the act, orders that:

(a) The regulations of the Department, 55 Pa.Code, are amended by adding §§ 258.1—258.14 to read as set forth in Annex A.

(b) The Secretary of the Department has submitted this order and Annex A to the Office of General Counsel and the Office of the Attorney General for review and approval as to legality and form as required by law. The Office of General Counsel and the Office of the Attorney General have approved this order and Annex A as to legality and form.

(c) The Secretary of the Department shall certify and deposit this order and Annex A with the Legislative Reference Bureau as required by law.

(d) This order takes effect on February 1, 2002.

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 31 Pa.B. 5211 (September 8, 2001).)

FEATHER O. HOUSTON,  
Secretary

**Fiscal Note:** 14-445. No fiscal impact; (8) recommends adoption.

### Annex A

## TITLE 55. PUBLIC WELFARE

### PART II. PUBLIC ASSISTANCE MANUAL

#### Subpart G. RESTITUTION AND REIMBURSEMENT

#### CHAPTER 258. MEDICAL ASSISTANCE ESTATE RECOVERY

|         |  |
|---------|--|
| Sec.    |  |
| 258.1.  | Policy.                                  |
| 258.2.  | Definitions.                             |
| 258.3.  | Property liable to repay the Department. |
| 258.4.  | Request for statement of claim.          |
| 258.5.  | Computation of claim.                    |
| 258.6.  | Priority of the Department's claim.      |
| 258.7.  | Postponement of collection.              |
| 258.8.  | Liability of personal representative.    |
| 258.9.  | Liability of transferees.                |
| 258.10. | Undue hardship waivers.                  |
| 258.11. | Unadministered estates.                  |
| 258.12. | Administrative enforcement.              |
| 258.13. | Appeals and jurisdiction.                |
| 258.14. | Service on the Department.               |

#### § 258.1. Policy.

(a) This chapter applies to the estates of individuals who received MA for nursing facility services, home and community based services or related hospital and prescription drug services, who were 55 years of age or older at the time that MA was received, who died on or after

August 15, 1994, and who received MA on or after August 15, 1994. This chapter does not apply to individuals who received MA before reaching 55 years of age and whose MA eligibility terminated before reaching 55 years of age.

(b) The estate of a an individual who was 55 years or older at the time that MA was received is liable to repay the Department for the amount of MA paid for all nursing facility services, home and community based services and related hospital and prescription drug services provided from the time the individual was 55 years of age and thereafter. Only MA services provided on or after August 15, 1994, are subject to estate recovery.

#### § 258.2. Definitions.

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

*Decedent*—A deceased individual who was 55 years of age or older at the time that MA was received.

*Decree of distribution*—An instrument by which heirs receive the property of a decedent. It is the final determination of the parties to a proceeding.

*Department's claim (claim)*—The claim of the Department computed and made under this chapter.

*Fair market value*—The price for which that property would be expected to sell on the open market.

*Home and community based services*—A broad array of Medicaid services provided to a decedent to avoid institutionalization under the waiver authority of section 1915(c) of the Social Security Act (42 U.S.C.A. § 1396n(c)).

*Nursing facility services*—General, hospital based, and county nursing facility services and services provided in an intermediate care facility for the mentally retarded or for persons with other related conditions.

*Personal representative*—An executor or administrator of a decedent's estate. This includes executors and administrators of any type or description.

*Postponement period*—The period during which the Department will defer collection of its claim.

*Protectable asset*—An asset which shall be preserved and protected for eventual payment of the Department's claim after the postponement period. The term includes:

(i) Real estate and all improvements thereto.

(ii) An item of personal property with a fair market value in excess of \$10,000.

(iii) Cash and cash equivalent assets of an estate with an aggregate value in excess of \$50,000. Cash equivalent assets are stocks, bonds, notes, bank accounts, mutual fund shares and other financial instruments convertible into cash.

*Real and personal property*—Any property in which a decedent had an ownership interest.

*Related hospital and prescription drug services*—Hospital and prescription drug services received by a decedent as follows:

(i) While the decedent was a resident in a nursing facility or was receiving home and community based services.

(ii) While the decedent was on temporary leave from a nursing facility.

(iii) Subsequent to a transfer from a nursing facility to a hospital.

*Response period*—The period during which the Department will respond to a notice requesting a statement of claim.

*Statement of claim*—A computation of the amount of MA paid for all nursing facility services, home and community based services and related hospital and prescription drug services provided from the time the decedent was 55 years of age and thereafter.

*Transferee*—An individual or entity, other than a personal representative, possessing or receiving property subject to the Department's claim. This includes both the initial and any subsequent recipients of property if the property is transferred more than once.

**§ 258.3. Property liable to repay the Department.**

(a) All estate property is subject to the Department's claim. Estate property includes all real and personal property of a decedent which is subject to administration by a decedent's personal representative, whether actually administered or not administered.

(b) Property held by a decedent and another at the time of death as joint tenants with rights of survivorship, or as tenants by the entireties, is not subject to the Department's claim.

(c) Life insurance which is payable to the decedent's estate is subject to the Department's claim, even if the life insurance policy contains a facility of payment clause. A facility of payment clause is a provision which authorizes direct payment to a person. The proceeds of life insurance on the decedent which is directly payable to a beneficiary is not subject to the Department's claim.

(d) Assets placed in trust prior to the death of the decedent, including irrevocable burial reserves, are not subject to the Department's claim if the assets are not payable to the decedent's estate. Trust assets and burial reserve proceeds which are or become payable to the decedent's estate are subject to the Department's claim. Assets designated for a testamentary trust are subject to the Department's claim. A testamentary trust is a trust created by the will of the decedent.

(e) A trust which meets the requirements of § 178.7(f) (relating to treatment of trust amounts for all categories of MA for trusts established on or after July 30, 1994) is not subject to the Department's claim.

(f) Property within the scope of 20 Pa.C.S. § 3101 (relating to payments to family and funeral directors), is subject to the Department's claim.

(g) The following special populations are exempt from estate recovery:

(1) Certain income, resources and property of Native American Indians and Alaska Natives. Exempt items include:

(i) Interests in and income derived from Tribal land and other resources currently held in trust status and judgment funds from the Indian Claims Commission and the United States Claims Court.

(ii) Ownership interest in trust or nontrust property, including real property and improvements including the following:

(A) Property located on any Federally recognized Native American Indian Tribe's reservation, Pueblo or Colony, including former reservations in Oklahoma, Alaska Native regions established by Alaska Native Claims Settlement Act and Indian allotments or near a

reservation as designated and approved by the Bureau of Indian Affairs of the United States Department of the Interior.

(B) For any Federally-recognized Tribe not described in clause (A), property located within the most recent boundaries of a prior Federal reservation.

(C) Protection of nontrust property described in clauses (A) and (B) is limited to circumstances when it passes from an Native American Indian as defined in section 4 of the Indian Health Care Improvement Act (25 U.S.C.A. § 1603) to one or more relatives by blood, adoption or marriage, including Native American Indians not enrolled as member of a Tribe and non-Indians, such as spouses and stepchildren that their culture would nevertheless protect as family members; to a Tribe or Tribal organization; or to one or more Native American Indians.

(iii) Income left as a remainder in an estate derived from property protected in subparagraph (ii) that was either collected by a Native American Indian, or by a Tribe or Tribal organization and distributed to Native American Indians, as long as the individual can clearly trace it as coming from the protected property.

(iv) Ownership interests left as a remainder in an estate in rents, leases, royalties, or usage rights related to natural resources including extraction of natural resources or harvesting of timber, other plants and plant products, animals, fish and shellfish resulting from the exercise of Federally-protected rights, and income either collected by a Native American Indian, or by a Tribe or Tribal organization and distributed to Native American Indians derived from these sources as long as the individual can clearly trace it as coming from protected sources.

(v) Ownership interests in or usage rights to items not covered by subparagraphs (i)—(iv) that have unique religious, spiritual, traditional or cultural significance or rights that support subsistence or a traditional life style according to applicable Tribal law or custom.

(2) Government reparation payments to special populations.

**§ 258.4. Request for statement of claim.**

(a) The personal representative has a duty to ascertain whether the decedent received MA services during the 5 years preceding death and, if so, give notice to the Department requesting a statement of claim. The 5-year time frame is for notification purposes only and does not limit the Department's claim. Effective August 15, 1994, the amount of MA paid for services rendered after August 15, 1994, to an individual 55 years of age or older is subject to the Department's claim. The notice shall be sent by certified mail return receipt, facsimile machine or electronic mail to the address of the Department specified in § 258.14 (relating to service on the Department). The notice shall include the following:

(1) A statement that the personal representative is requesting a statement of claim against the estate of the decedent.

(2) The decedent's name.

(3) The decedent's last address.

(4) The decedent's date of birth.

(5) The decedent's date of death.

(6) The decedent's Social Security Number.

(7) The personal representative's name, address and telephone number.

(8) Written documentation of the gross value of the decedent's estate.

(b) The Department will submit a statement of claim to the personal representative within the response period of 45-calendar days in accordance with section 1412(b) of the Public Welfare Code (62 P.S. § 1412(b)) relating to repayment from probate estates. If the notice from the personal representative is mailed to the incorrect address, or does not otherwise fully comply with subsection (a), the response period shall be suspended until a fully complying notice is received. If the Department fails to submit a statement of claim to the personal representative within the response period, the Department's claim is forfeited.

(c) The certified mail receipt date, facsimile receipt date or the electronic mail receipt date verifies the receipt date of the notice from the personal representative.

(d) The Department will date the statements of claim. The date on the statement of claim shall establish the Department's issuance date of the statement of claim.

(e) A personal representative may extend the Department's response period. Additionally, if the last date of the response period falls on a weekend, Commonwealth holiday or other day that the offices of the Department are closed, the response period shall end on the next business day.

(f) The Department may amend a statement of claim after the response period has elapsed if there is new or updated information relating to the statement of claim. The amended statement of claim shall relate back to the date of the original statement of claim.

#### § 258.5. Computation of claim.

(a) The Department's claim with respect to a decedent shall consist of the total of all MA payments made with respect to the decedent for nursing facility services, home and community based services and related hospital and prescription drug services rendered on or after August 15, 1994.

(b) Premium payments and cost-sharing for decedents who were qualified Medicare beneficiaries shall be included in the statement of claim for the period of time the decedent received nursing facility services, home and community based services or related hospital and prescription drug services rendered on or after August 15, 1994. A qualified Medicare beneficiary is an individual whose Medicare copayments, premiums or deductibles only are paid by the MA program.

(c) With respect to a claim for the costs of MA services delivered through a Managed Care Organization (MCO) contract, the Department's claim will be based on the amount the Department paid to the MCO on behalf of the decedent.

(d) The Department will not reduce its claim on account of attorneys' fees or other costs incurred by the estate to obtain or liquidate assets. These costs may be treated as expenses of administration of the estate.

#### § 258.6. Priority of the Department's claim.

(a) The Department's claim is entitled to priority under 20 Pa.C.S. § 3392(3) (relating to classification and order of payment) to the extent it includes payment for services rendered within 6 months of death. Otherwise, the Department's claim shall be paid under 20 Pa.C.S. § 3392(6).

(b) The Department's claim against deposit accounts and patient care accounts subject to 20 Pa.C.S. § 3101 (relating to payments to family and funeral directors) is

subordinate to reasonable funeral expenses and to those claims of creditors having priority over the Department under 20 Pa.C.S. § 3392.

(c) The Department's claim against assets subject to 20 Pa.C.S. § 3101 shall be superior to that of family members and any person receiving money under that provision of law shall be answerable to the Department.

(d) The Department's claim is subordinate to the family exemption and to perfected liens on specific property. A family exemption is the exemption provided by 20 Pa.C.S. § 3121 (relating to when available).

#### § 258.7. Postponement of collection.

(a) The Department will postpone collection of its claim until the last of one of the following occurs:

(1) The death of any surviving spouse.

(2) The death of any child who is blind or totally and permanently disabled, as determined under the standards of the Supplemental Security Income (SSI) program in the Social Security Act. See 42 U.S.C.A. § 1382.

(3) The date any surviving child is 21 years of age.

(4) The death of, property transfer by or vacating of the property by a sibling who has an equity interest in the property and who has been living in the home for at least 1 year prior to the death of the decedent.

(b) The personal representative has a duty to insure protection of the Department's claim during the postponement period.

(c) The personal representative will be deemed to have complied with his responsibilities to protect the Department's claim during the postponement period if, after liquidating the assets as appropriate and paying all expenses of administration and superior claims of creditors against the estate, the personal representative takes one or more of the following actions until the Department's claim is fully protected, or until all protectable assets are protected.

(1) If the decedent's estate contains real estate, the personal representative shall cause a mortgage or other recorded encumbrance to be placed against the real estate in favor of the Department.

(2) If the decedent's estate contains one or more individual items of personal property with a fair market value in excess of \$10,000, the personal representative shall cause a properly perfected security interest to be placed against the items of personal property in favor of the Department. A properly perfected security interest is a lien on property for payment of a debt, for which the necessary legal steps, as specified in 13 Pa.C.S. §§ 9101—9507 (relating to the Uniform Commercial Code), have been taken to make the lien valid and enforceable against all third parties.

(3) If the estate contains cash or cash-equivalents in an aggregate amount in excess of \$50,000, the personal representative shall cause that money to be placed in trust, with terms and trustees approved by the Department. The trust shall name the Department as remainderman and shall allow the spouse or child, or both, to consume income without court approval, shall allow the consumption of principal to pay reasonable medical expenses of the spouse or child, or both, and shall allow the consumption of principal for the benefit of the spouse or child, or both, with court approval. The personal representative may serve as trustee and a reasonable trustee fee may be provided by the trust document. A

remainderman is a person entitled to receive money in a trust, upon termination of the trust.

(4) If the decedent's estate contains protectable assets which are not adequately protected by the procedures in paragraphs (1)—(3), the personal representative shall appropriately protect the assets by another method, as approved by the Department.

(d) No interest is charged on the Department's claim during the postponement period.

(e) Postponement of collection may be waived by a spouse, adult child or legal representative of a child under 18 years of age.

(f) The Department's claim is subject to collection at the end of the postponement period.

**§ 258.8. Liability of personal representative.**

(a) The personal representative has a duty to insure that the Department's claim is adequately presented to the court and, unless the Department's claim is postponed, to pay the Department's claim after payment of all superior claims of creditors.

(b) The personal representative is personally liable to pay the Department's claim if property subject to the Department's claim, and not subject to postponement of collection, is transferred without valuable and adequate consideration to an heir or other person having a lower priority claim of a creditor, without satisfaction of the Department's claim.

(c) When the Department's claim is postponed, the personal representative is personally liable if property subject to the Department's claim is transferred without valuable and adequate consideration to an heir or other person having a lower priority claim of a creditor, without protecting the Department's claim.

(d) A decree of distribution will discharge the liability of the personal representative to the Department only if the following conditions are met:

(1) The Department is served with a copy of the proposed distribution at least 30 days in advance of court approval.

(2) The court records show that the personal representative made the inquiry required by § 258.4 (relating to request for statement of claim) and obtained a statement of claim, if appropriate.

(3) The court records show that any claim of the Department was presented to the court and paid, or that there were insufficient assets to pay the Department's claim.

(4) The Department is served with a copy of the final distribution order and paid all amounts that it is due.

(e) Notwithstanding subsection (d), a decree of distribution will not discharge the liability of the personal representative to the Department if the petition for distribution fails to disclose the existence of property subject to the Department's claim, or if the personal representative refuses to present and pay the Department's claim.

**§ 258.9. Liability of transferees.**

(a) A transferee is liable to pay the Department's claim when he receives property subject to the Department's claim for which he did not pay fair market value. The transferee's liability is limited to the difference between the fair market value of the property that was not

protected and the amount of money received by the estate in exchange for the transfer, if any.

(b) When the Department's claim is postponed, a transferee is personally liable to pay the Department's claim if the transferee receives property subject to the Department's claim and the transferee fails to protect the Department's claim during the postponement period. The transferee's liability is limited to the fair market value of the property that was not protected.

(c) The arms length sale of the decedent's real property at fair market value by the personal representative to a party unrelated to the decedent or the personal representative shall be deemed to be supported by valuable and adequate consideration.

**§ 258.10. Undue hardship waivers.**

(a) The Department will waive its claim in cases of undue hardship.

(b) The Department will find undue hardship and will permanently waive its claim with respect to the primary residence of a decedent if the person requesting the undue hardship waiver meets all of the following conditions:

(1) The person has continuously resided in the primary residence of the decedent for at least 2 years immediately preceding the decedent's receipt of nursing facility services, or, for at least 2 years during the period of time which Medicaid-funded home and community based services were received.

(2) The person has no other alternative permanent residence.

(3) The person has provided care or support to the decedent for at least 2 years during the period of time that Medicaid-funded home and community based services were received by the decedent, or for at least 2 years prior to the decedent's receipt of nursing home services during which time the decedent needed care or support to remain at home

(c) The Department will find undue hardship and will permanently waive its claim with respect to an income-producing asset if a spouse, child, parent, sibling or grandchild of the decedent meets both of the following:

(1) The asset is used to generate the primary source of income for the household.

(2) There would be a gross family income of less than 250% of the Federal poverty guideline without use of the asset.

(d) An income producing asset is property which is used in a trade or business such as a family farm, family business or rental property, excluding cash, stocks and bonds, mutual fund shares or other marketable financial instruments.

(e) The Department will find undue hardship and will permanently waive from the amount of the Department's recovery, an amount equal to the necessary and reasonable expenses for maintaining the decedent's home while the decedent was receiving home and community based services or maintaining decedent's vacant home while the decedent was in a nursing facility. Necessary and reasonable expenses for maintaining the home include real estate taxes, utility bills, home repairs and home maintenance such as lawn care and snow removal necessary to keep the property in condition for the decedent to return home or to sell at fair market value. Creditors are not eligible to request a waiver under this subsection.

(f) The Department will find undue hardship and will permanently waive its claim for administered estates with a gross value of \$2,400 or less, if there is an heir.

(g) A spouse, parent, child or sibling of the decedent who receives a postponement of collection in accordance with § 258.7 (relating to postponement of collection) is not precluded from receiving an undue hardship waiver if the criteria in subsection (b), (c), (e) or (f) are met.

(h) The Department has exclusive authority to waive its claim, compromise its claim, or postpone collection, in other circumstances when undue hardship exists, or when collection is not cost-effective, as determined by the Department on an individual case-by-case basis.

(i) Waiver requests shall be submitted to the following address: Estate Recovery Program, Post Office Box 8486, Harrisburg, Pennsylvania 17105-8486.

#### § 258.11. Unadministered estates.

(a) The Department will provide information regarding unadministered estates to the probate and estate section of local county bar associations so that those estates can be administered by willing attorneys under the sponsorship of the bar association as a public service and under the authority of 20 Pa.C.S. § 3155(b)(5) (relating to persons entitled). When appropriate, the Department will authorize a member of this local county bar association to obtain letters of administration on the Department's behalf under 20 Pa.C.S. § 3155(b)(4). A reasonable administrator's commission and attorney's fee may be charged to the estate as expenses of administration, but may not exceed a combined fee of \$1,000, or 6% of the gross assets of the estate, whichever is greater.

(b) The Department may cause one of its employees to administer an estate if no administrator has been appointed and assets may exist to pay the Department's claim.

(c) The Department's Office of Legal Counsel may provide legal services to an estate if a Departmental employee has been designated to administer the estate. Alternatively, the administrator may employ private counsel.

(d) The Department will charge the estate a reasonable administrator's commission and attorney's fee as expenses of administration not to exceed a combined fee of \$1,000, or 6% of the gross assets of the estate, whichever is greater, if administrative or attorney services are provided to the estate by Commonwealth employees.

#### § 258.12. Administrative enforcement.

(a) In addition to any other remedies allowed by law, the Department may administratively assess liability upon a personal representative or transferee in accordance with §§ 258.8 and 258.9 (relating to liability of personal representative; and liability of transferees) under section 1412 of the Public Welfare Code (62 P. S. § 1412(a.1)(1) and (2)). A personal representative or transferee will be notified in writing of the assessment of liability and the right to appeal this decision in accordance with § 258.13 (relating to appeals and jurisdiction).

(b) A final administrative order in any proceeding to assess liability against a personal representative or transferee shall be binding upon the parties in any subsequent judicial proceeding to enforce the administrative order.

#### § 258.13. Appeals and jurisdiction.

(a) A personal representative, transferee or family member adversely affected by a decision of the Department under this chapter may appeal to the Department's

Bureau of Hearing and Appeals in accordance with Chapter 275 (relating to appeal and fair hearing and administrative disqualification hearings), within 30 days of the date the affected person is notified of the decision.

(b) An appeal shall be mailed to the Bureau of Hearings and Appeals, Department of Public Welfare, Post Office Box 2675, Harrisburg, Pennsylvania 17105.

(c) The Bureau of Hearings and Appeals has exclusive jurisdiction over disputes involving a request for waiver, compromise or postponement of collection. Appeals involving the exercise of the Department's discretion shall be reviewed by the Bureau of Hearings and Appeals under an abuse of discretion standard, otherwise the Bureau of Hearings and Appeals shall review the matter de novo.

(d) The Bureau of Hearings and Appeals has concurrent jurisdiction with the courts of common pleas over disputes involving the computation of the Department's claim or assessment of liability against a personal representative or transferee. The Bureau's decision is binding upon all parties participating before the Bureau of Hearings and Appeals, subject to the Secretary's reconsideration and appellate review.

#### § 258.14. Service on the Department.

The address for requesting a statement of claim or for serving legal papers on the Department is: Third Party Liability Section, Department of Public Welfare, Estate Recovery Program, Post Office Box 8486, Harrisburg, Pennsylvania 17105-8486.

[Pa.B. Doc. No. 01-1957. Filed for public inspection November 2, 2001, 9:00 a.m.]

## DEPARTMENT OF PUBLIC WELFARE

[55 PA. CODE CH. 1187]

### Disproportionate Share Incentive Payments

The Department of Public Welfare (Department), Office of Medical Assistance Programs, by this order adopts amendments to § 1187.111 (relating to disproportionate share incentive payments). The amendment is set forth in Annex A and is adopted under the authority of section 201(2) of the Public Welfare Code (62 P. S. § 201(2)) (act).

Notice of proposed rulemaking is omitted in accordance with section 204(1)(iv) and (3) of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1204(1)(iv) and (3)) (CDL) and 1 Pa. Code § 7.4(1)(iv) and (3). Those provisions provide that an agency may omit notice of proposed rulemaking when the amendment relates to Commonwealth grants or benefits or where circumstances render it impractical, unnecessary or contrary to public interest. Notice of proposed rulemaking is omitted since this regulatory amendment involves an increase to Medical Assistance (MA) payments to qualifying nursing facilities that are already aware of this change.

#### *Purpose of the Amendment*

This amendment will increase the disproportionate share incentive payments to qualified nursing facilities effective for the periods January 1, 2000, through June 30, 2003, only. The disproportionate share incentive payment shall be increased to equal two times the disproportionate share per diem incentive calculated in accordance with § 1187.111(c).

*Need for the Amendment*

A disproportionate share incentive payment is made to MA participating nursing facilities having an annual overall occupancy rate of at least 90% of the total available bed days and an MA occupancy rate of at least 80% based on MA paid days of care times the per diem incentive to facilities.

The Intergovernmental Transfer (IGT) Agreement for Fiscal Year 1999-2000 provides that for the period January 1, 2000, to June 30, 2003, the disproportionate share incentive payment to qualified nursing facilities shall be increased to equal two times the disproportionate share per diem incentive calculated in accordance with § 1187.111(c).

*Requirements*

Section 1187.111 is being amended to provide increased disproportionate share incentive payments effective for the periods January 1, 2000, to June 30, 2003.

*Affected Organizations*

MA participating nursing facilities which have an annual overall occupancy rate of at least 90% of the total available bed days, and an MA occupancy rate of at least 80%, are eligible to receive disproportionate share incentive payments.

*Fiscal Impact*

*Public Sector*

*The Commonwealth*

The Department will see an increase in moneys being paid to eligible nursing facilities due to doubling the disproportionate share incentive payments for the periods January 1, 2000, to June 30, 2003.

*Political Subdivisions*

No impact is anticipated.

*Private Sector*

No impact is anticipated.

*General Public*

No impact is anticipated.

*Paperwork Requirements*

There should be no increase in paperwork requirements.

*Effective Date*

This amendment shall take effect on January 1, 2000.

*Sunset Date*

There is no sunset date for this section.

*Public Comments*

Although this section is being adopted without prior notice, interested persons are invited to submit their written comments within 30 days from the date of this publication for consideration by the Department as to whether the amendment should be revised. The comments should be sent to the Department of Public Welfare, Office of Medical Assistance Programs, Attention: Regulations Coordinator, Room 515 Health and Welfare Building, Harrisburg, PA 17105.

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.

*Regulatory Review*

Under section 5.1(c) of the Regulatory Review Act (71 P. S. § 745.5a(c)), on September 4, 2001, the Department submitted a copy of this amendment with proposed rulemaking omitted on 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. On the same date, the final-omitted regulation was submitted to the Office of the Attorney General for review and approval under the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506)

Under section 5.1(d) of the Regulatory Review Act, on September 24, 2001, this final-omitted regulation was deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, on October 18, 2001, IRRC met and approved the final-omitted regulation.

*Findings*

The Department finds that:

(1) Notice of proposed rulemaking is omitted because this regulation relates to Commonwealth grants and benefits and notice of proposed rulemaking is unnecessary and contrary to the public interest under section 204(1)(iv) and (3) of the CDL and 1 Pa. Code § 7.4(1)(iv) and (3).

(2) The adoption of this final-omitted regulation in the manner provided in this order is necessary and appropriate for the administration and enforcement of the act.

*Order*

The Department, acting under the authority of the act, orders that:

(a) The regulations of the Department, 55 Pa.Code Chapter 1187, are amended by amending § 1187.111 to read as set forth in Annex A.

(b) The Secretary of the Department shall submit this order and Annex A to the Attorney General and General Counsel for approval as to legality and form as required by law.

(c) The Secretary of the Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect on January 1, 2000.

FEATHER O. HOUSTON,  
*Secretary*

*(Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 31 Pa.B. 6120 (November 3, 2001).)

**Fiscal Note:** 14-470 (1) Increased program costs to the General Fund. There will be increased program costs to the State. (2) Implementing Year 2000-01 is \$4,999,000; (3) 1st Succeeding Year 2001-02 is \$5,084,000; 2nd Succeeding Year 2002-03 is \$5,222,000; 3rd Succeeding Year 2003-04 is \$2,697,000; (4) 1999-00 Program—\$793,246,000; 1998-99 Program—\$693,625,000; 1997-98 Program—\$721,631,000; (7) MA—Long Term Care; (8) recommends adoption. Costs are budgeted into the MA—Long Term Care appropriation.

## Annex A

## TITLE 55. PUBLIC WELFARE

## PART III. MEDICAL ASSISTANCE MANUAL

## CHAPTER 1187. NURSING FACILITY SERVICES

Subchapter H. PAYMENT CONDITIONS,  
LIMITATIONS AND ADJUSTMENTS

## § 1187.111. Disproportionate share incentive payments.

(a) 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:

(1) The nursing facility shall have an annual overall occupancy rate of at least 90% of the total available bed days.

(2) The nursing facility shall have an MA occupancy rate of at least 80%. The MA occupancy rate is calculated by dividing the MA days of care paid by the Department by the total actual days of care.

(b) The disproportionate share incentive payments will be based on the following for year 1 of implementation:

|         | Overall<br>Occupancy | MA<br>Occupancy<br>(y) | Per Diem<br>Incentive |
|---------|----------------------|------------------------|-----------------------|
| Group A | 90%                  | $\geq 90\% y$          | \$2.50                |
| Group B | 90%                  | $88\% \leq y < 90\%$   | \$1.70                |
| Group C | 90%                  | $86\% \leq y < 88\%$   | \$1.00                |
| Group D | 90%                  | $84\% \leq y < 86\%$   | \$0.60                |
| Group E | 90%                  | $82\% \leq y < 84\%$   | \$0.30                |
| Group F | 90%                  | $80\% \leq y < 82\%$   | \$0.20                |

(c) For each year subsequent to year 1 of implementation, disproportionate share incentive payments as described in subsection (b) will be inflated forward using the Health Care Financing Administration Nursing Home Without Capital Market Basket Index to the end point of the rate setting year for which the payments are made.

(d) These payments will be made annually within 120 days after the submission of an acceptable cost report provided that payment will not be made before 210 days of the close of the nursing facility fiscal year.

(e) For year 1 of implementation only, facilities with a June 30 cost report year end will receive a disproportionate share payment based on the January 1 through June 30 time period.

(f) For the period January 1, 2000, to June 30, 2003, the disproportionate share incentive payment to qualified nursing facilities shall be increased to equal two times the disproportionate share per diem incentive calculated in accordance with § 1187.111(c).

(1) For the period commencing January 1, 2000, through June 30, 2000, the increased incentive shall apply to cost reports filed for the fiscal period ending December 31, 1999, or June 30, 2000.

(2) For the period commencing July 1, 2000, through June 30, 2001, the increased incentive shall apply to cost reports filed for the fiscal period ending December 31, 2000, or June 30, 2001.

(3) For the period commencing July 1, 2001, through June 30, 2002, the increased incentive shall apply to cost reports filed for the fiscal period ending December 31, 2001, or June 30, 2002.

(4) For the period commencing July 1, 2002, through June 30, 2003, the increased incentive shall apply to cost reports filed for the fiscal period ending December 31, 2002, or June 30, 2003.

[Pa.B. Doc. No. 01-1958. Filed for public inspection November 2, 2001, 9:00 a.m.]

## DEPARTMENT OF PUBLIC WELFARE

## [55 PA. CODE CH. 1187]

## Principles for Rate and Price Setting

The Department of Public Welfare (Department), Office of Medical Assistance Programs, by this order adopts an amendment to § 1187.95 (relating to general principles for rate and price setting). The amendment is set forth in Annex A and is adopted under the authority of section 201(2) of the Public Welfare Code (62 P. S. § 201(2)).

Notice of proposed rulemaking is omitted in accordance with section 204(1)(iv) and (3) of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1204(1)(iv) and (3)) (CDL) and 1 Pa. Code § 7.4(1)(iv) and (3). Section 204(1)(iv) and (3) of the CDL and § 7.4(1)(iv) and (3) provide that an agency may omit notice of proposed rulemaking when the amendment relates to Commonwealth grants or benefits or when circumstances render it impractical, unnecessary or contrary to public interest.

*Purpose of Amendment*

This amendment will extend the time frame for transition payments to county nursing facilities for the period January 1, 1999, to June 30, 2003, only. The transition payments concern Commonwealth benefits to Medical Assistance (MA) recipients residing in county nursing facilities. The transition payments were negotiated between the Department and the County Commissioner Association of Pennsylvania (CCAP). CCAP membership consists of all affected county nursing facilities who are aware of, and in agreement with, the transition payments provided by this rulemaking.

*Need for Amendment*

The Intergovernmental Transfer (IGT) agreement for FY 1997-1998 provides that a transition rate for county nursing facilities shall be extended to include the period January 1, 1999, to June 30, 1999. The IGT agreement for FY 1998-1999 provides that a transition rate for county nursing facilities shall be extended to include the period July 1, 1999, through June 30, 2003. Based on these IGT agreements, State Plan Amendments were submitted and approved. Transmittal number 99-007—*Extension of County Transition Rates from January 1, 1999 through June 30, 1999* (approved by the Health Care Financing Administration (HCFA) on June 30, 1999) and Transmittal number 99-009—*Extension of County Nursing Facility Transition Rates for the Period July 1, 1999 through June 30, 2003* (approved by HCFA on December 22, 1999).

*Requirements*

Section 1187.95 is being amended to include the extension of the transition payments for county nursing facilities from January 1, 1999, through June 30, 2003.

*Affected Organizations*

County nursing facilities participating in the MA program are eligible to receive transition payments.

*Fiscal Impact*

*Public Sector*

*The Commonwealth*

The Department will see a continuation of the transition payments to county nursing facilities through June 30, 2003.

*Political Subdivisions*

No impact is anticipated.

*Private Sector*

No impact is anticipated.

*General Public*

No impact is anticipated.

*Paperwork Requirements*

There should be no increase in paperwork requirements.

*Effective Date*

This amendment is effective January 1, 1999.

*Sunset Date*

There is no sunset date for this amendment.

*Public Comments*

Although this regulation is being adopted without prior notice, interested persons are invited to submit their written comments within 30 days from the date of this publication for consideration by the Department as to whether the amendment should be revised. The comments should be sent to the Department of Public Welfare, Office of Medical Assistance Programs, Attention: Regulations Coordinator, Room 515 Health and Welfare Building, Harrisburg, PA 17105.

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.

*Regulatory Review*

Under section 5.1(c) of the Regulatory Review Act (71 P. S. § 745.5a(c)), on September 4, 2001, the Department submitted a copy of this amendment with proposed rulemaking omitted 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. On the same date, the final-omitted regulation was submitted to the Office of the Attorney General for review and approval under the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506).

In accordance with section 5.1(d) of the Regulatory Review Act, on September 24, 2001, this final-omitted regulation was deemed approved by the Committees. Under 5.1(e) of the Regulatory Review Act, on October 18, 2001, IRRC met and approved the final-omitted regulation.

*Findings*

The Department finds that:

(1) Notice of proposed rulemaking is omitted because this regulation relates to Commonwealth grants and

benefits and notice of proposed rulemaking is unnecessary and contrary to public interest under sections 204(1)(iv) and (3) of the CDL and the regulation thereunder, 1 Pa. Code § 7.4(1)(iv) and (3).

(2) The adoption of this amendment in the manner provided in this order is necessary and appropriate for the administration and enforcement of the act.

*Order*

The Department, acting under the authority of the act, orders that:

(a) The regulations of the Department, 55 Pa.Code Chapter 1187, are amended by amending § 1187.95 to read as set forth in Annex A.

(b) The Secretary of the Department shall submit this order and Annex A to the Attorney General and General Counsel for approval as to legality and form as required by law.

(c) The Secretary of the Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect January 1, 1999.

FEATHER O. HOUSTOUN,  
*Secretary*

*(Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 31 Pa.B. 6120 (November 3, 2001).

**Fiscal Note:** 14-468. (1) General Fund; (2) Implementing Year 2000-01 is \$2,641,000; (3) 1st Succeeding Year 2001-02 is \$1,584,000; 2nd Succeeding Year 2002-03 is \$1,056,000; 3rd Succeeding Year 2003-04 is \$0; 4th Succeeding Year 2004-05 is \$0; 5th Succeeding Year 2005-06 is \$0; (4) 1999-00 Program—\$693,625,000; 1998-99 Program—\$721,631,000; 1997-98 Program—\$617,252,000; (7) MA—Long Term Care; (8) recommends adoption. Funds are included in the budget for this purpose.

**Annex A**

**TITLE 55. PUBLIC WELFARE**

**PART III. MEDICAL ASSISTANCE MANUAL**

**CHAPTER 1187. NURSING FACILITY SERVICES**

**Subchapter F. COST REPORTING AND AUDIT REQUIREMENTS**

**§ 1187.95. General principles for rate and price setting.**

(a) Prices will be set prospectively on an annual basis during the second quarter of each calendar year and be in effect for the subsequent July 1 through June 30 period.

(1) Peer group prices will be established for resident care costs, other resident related costs and administrative costs.

(2) If a peer group has an even number of nursing facilities, the median peer group price determined will be the arithmetic mean of the costs of the two nursing facilities holding the middle position in the peer group array.

(3) If a nursing facility changes bed size or MSA group, the nursing facility will be reassigned from the peer group used for price setting to peer group based on bed certification and MSA group as of April 1, for rate setting.

(4) The Department will announce, by notice submitted for recommended publication in the *Pennsylvania Bulletin*



and suggested codification in the *Pennsylvania Code* as Appendix B, the peer group prices for each peer group.

(b) Rates will be set prospectively each quarter of the calendar year and will be in effect for 1 full quarter. Net operating rates will be based on peer group prices as limited by § 1187.107 (relating to limitations on resident care and other resident related cost centers). The nursing facility per diem rate will be computed as defined in § 1187.96(e) (relating to price and rate setting computations).

(1) Resident care peer group prices will be adjusted for the MA CMI of the nursing facility each quarter and be effective on the first day of the following calendar quarter.

(2) For the period of January 1, 1996, through June 30, 1996, each county owned and operated nursing facility, as defined in § 1187.2 (relating to definitions), receiving a county nursing facility rate as of June 30, 1995, will be provided a transition rate. The transition rate for each county nursing facility for January 1, 1996, through June 30, 1996, will be the higher of the facility case-mix rate for that quarter or a December 31, 1995, facility blended rate.

(i) The blended rate is calculated by multiplying the skilled/heavy care rate on file as of December 31, 1995, by the number of skilled/heavy care days as reported in the county nursing facility's most recently accepted cost report; multiplying the intermediate care rate on file as of December 31, 1995, by the number of intermediate care days reported in the county nursing facility's most recently accepted cost report; summing these products and dividing that sum by the number of skilled care, heavy care and intermediate care days as reported in the county nursing facility's most recently accepted cost report.

(ii) The rate established in subparagraph (i), will be trended forward 3 months from January 1, 1996, to March 31, 1996, by a factor equal to the HCFA Nursing Home Without Capital Market Basket Index as published in the second quarter 1995 issue of the DRI McGraw-Hill publication "Health Care Costs."

(3) For the period July 1, 1996, through June 30, 1997, transition rates for county nursing facilities will be the higher of the case-mix rate for each respective quarter or a facility blended rate calculated in accordance with paragraph (2)(i) and (ii), trended forward 9 months from April 1, 1996, to December 31, 1996, by a factor equal to the HCFA Nursing Home without Capital Market Basket Index as published in the fourth quarter 1995 issue of the DRI McGraw-Hill publication "Health Care Costs."

(4) For the period July 1, 1997, through June 30, 1998, transition rates for county nursing facilities will be the higher of the case-mix rate for each respective quarter or the facility transition rate identified in paragraph (3), trended forward 12 months from January 1, 1997, to December 31, 1997, by a factor equal to the HCFA Nursing Home without Capital Market Basket Index as published in the fourth quarter 1996 issue of the DRI McGraw-Hill publication "Health Care Costs."

(5) For the period July 1, 1998, through December 31, 1998, transition rates for county nursing facilities will be the higher of the case-mix rate for each respective quarter or the facility transition rate identified in paragraph (4),

trended forward 9 months from January 1, 1998, to September 30, 1998, by a factor equal to the HCFA Nursing Home without Capital Market Basket Index as published in the fourth quarter 1997 issue of the DRI McGraw-Hill publication "Health Care Costs."

(6) For the period January 1, 1999, through June 30, 1999, transition rates for county nursing facilities will be the higher of the case-mix rate for each respective quarter or the facility transition rate identified in paragraph (5), trended forward 6 months from January 1, 1999, to June 30, 1999, by a factor equal to the HCFA Nursing Home without Capital Market Basket Index as published in the fourth quarter 1998 issue of the DRI McGraw-Hill publication "Health Care Costs."

(7) For the period July 1, 1999, through June 30, 2000, transition rates for county nursing facilities will be the higher of the case-mix rate for each respective quarter or the facility transition rate identified in paragraph (6), trended forward 9 months by a factor equal to the HCFA Nursing Home without Capital Market Basket Index as published in the fourth quarter 1998 issue of the DRI McGraw-Hill publication "Health Care Costs."

(8) For the period July 1, 2000, through June 30, 2001, transition rates for county nursing facilities will be the higher of the case-mix rate for each respective quarter or the facility transition rate identified in paragraph (7), trended forward 12 months by a factor equal to the HCFA Nursing Home without Capital Market Basket Index as published in the fourth quarter 1999 issue of the DRI McGraw-Hill publication "Health Care Costs."

(9) For the period July 1, 2001, through June 30, 2002, transition rates for county nursing facilities will be the higher of the case-mix rate for each respective quarter or the facility transition rate identified in paragraph (8), trended forward 12 months by a factor equal to the HCFA Nursing Home without Capital Market Basket Index as published in the fourth quarter 2000 issue of the DRI McGraw-Hill publication "Health Care Costs."

(10) For the period July 1, 2002, through June 30, 2003, transition rates for county nursing facilities will be the higher of the case-mix rate for each respective quarter or the facility transition rate identified in paragraph (9), trended forward 12 months by a factor equal to the HCFA Nursing Home without Capital Market Basket Index as published in the fourth quarter 2001 issue of the DRI McGraw-Hill publication "Health Care Costs."

(11) For the period January 1, 1996, through June 30, 1996, general nursing facilities other than hospital-based, special rehabilitation and county nursing facilities, will be provided a transition rate. The transition rate for each general nursing facility for each calendar quarter during the time period January 1, 1996, through June 30, 1996, will be the higher of the facility case-mix rate for that quarter or a July 1, 1994, facility blended rate. The facility blended rate is a composite of the skilled care and intermediate care interim per diem rates in effect on July 1, 1994, weighted by the reported MA days associated with the respective acuity levels.

[Pa.B. Doc. No. 01-1959. Filed for public inspection November 2, 2001, 9:00 a.m.]

# Title 58—RECREATION

## GAME COMMISSION [58 PA. CODE CH. 137] Collection of Fox Urine

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission), at its October 2, 2001, meeting, adopted the following change:

Amend § 137.31 (relating to possession of live wildlife) by limiting the number of live foxes that may be taken from the wild for the purpose of collecting fox urine, and establishing guidelines relating to same, as well as sanitation and housing specifications.

This amendment was adopted under the authority of 34 Pa.C.S. (relating to the Game and Wildlife Code) (code).

Notice of proposed rulemaking appears at 31 Pa.B. 4654 (August 25, 2001).

### 1. Introduction

To better manage the number of live foxes being collected and held from the wild, the Commission at its June 12, 2001, meeting proposed, and at its October 2, 2001, meeting finally amended § 137.31 placing a limit on the number of foxes that can be held for urine collection purposes and providing for sanitation and housing of those foxes. The possession of live foxes for urine collection by a permittee under § 137.31(a)(1) is an exception to subsection (a), which makes it unlawful to take or possess live wildlife taken from the wild. The adopted change limits the number of live foxes that can be held for urine collection to five and imposes sanitation and housing requirements. These changes were adopted under authority contained in section 2901(b) of the code (relating to authority to issue permits).

### 2. Purpose and Authority

As is indicated in the Introduction of this Preamble, § 137.31(a) makes it unlawful to possess live wildlife taken from the wild. Section 137.31(a)(1) currently makes an exception for a person to possess live foxes taken from a wild state in this Commonwealth, under a permit issued for the collection of fox urine. The adopted changes limit this exception to five foxes and imposes sanitation and housing requirements.

Section 2901(b) of the code permits the Commission to adopt regulations to properly manage game and wildlife and control activities performed under a permit. This section provides the authority for the adopted changes.

### 3. Regulatory Requirements

The adopted change will limit the number of live foxes a permittee may keep under the current exception provision of § 137.31 and impose sanitation and housing requirements.

### 4. Persons Affected

Persons wishing to keep live foxes may be affected by the adopted change.

### 5. Comment and Response Summary

No official comments were received regarding this adopted change.

### 6. Cost and Paperwork Requirements

The adopted change may result in a small additional cost in complying with the housing and sanitation requirements. There will be no additional paperwork.

### 7. Effective Date

The adopted change will be effective on final publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

### 8. Contact Person

For further information regarding this change, contact David E. Overcash, Director, Bureau of Law Enforcement, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

### Findings

The Commission finds that:

(1) Public notice of intention to adopt the administrative amendment adopted by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 469, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The adoption of the amendment of the Commission in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statute.

### Order

The Commission, acting under authorizing statute, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapter 137, are amended by amending § 137.31 to read as set forth in Annex A.

(b) The Executive Director of the Commission shall submit this order and Annex A to the Legislative Reference Bureau as required by law.

(c) This order shall take effective upon final publication in the *Pennsylvania Bulletin*.

VERNON R. ROSS,  
*Executive Director*

**Fiscal Note:** Fiscal Note 48-133 remains invalid for the final adoption of the subject regulation.

### Annex A

## TITLE 58. RECREATION PART III. GAME COMMISSION CHAPTER 137. WILDLIFE

### § 137.31. Possession of live wildlife.

(a) It is unlawful for a person to possess live wildlife taken from a wild state within this Commonwealth except:

(1) A permit to possess no more than five live foxes may be issued to a person for the sole purpose of collecting fox urine. The permit to possess live fox will expire on the last day of the fox-trapping season. Any foxes held under the authority of this permit shall be euthanized and may be pelted and the pelt may be sold. No fox held under the authority of this permit may be released into the wild.

(2) A person lawfully operating under the authority of a permit issued in accordance with the act is excluded from this section.

(3) Sanitation and housing specifications for foxes held under authority of this permit shall be in accordance with §§ 147.283 and 147.285(4)(xvii) (relating to sanitation; and specifications).

(b) A person violating this subchapter will be subject to the penalties provided in section 2307 of the act (relating to unlawful taking or possession of game or wildlife).

[Pa.B. Doc. No. 01-1960. Filed for public inspection November 2, 2001, 9:00 a.m.]

**GAME COMMISSION**  
**[58 PA. CODE CHS. 141 AND 147]**  
**Special Permits for Hunting and Trapping**

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission), at its October 2, 2001, meeting, adopted the following changes:

Amend §§ 141.41 and 141.43 (relating to general; and deer). With advent of the new special firearms deer season, the Commission needs to ensure that hunters participating in the new season wear the required day-light fluorescent orange-colored material and that trappers dispatching legally trapped furbearers with firearms during this season use only a .22 caliber rimfire. This can be accomplished by adding special firearms deer season to §§ 141.41(2) and 141.43(f).

Amend § 147.146 (relating to sale of inedible wildlife parts). The act of December 21, 1998 (P. L. 1274, No. 166) (Act 166) amended 34 Pa.C.S. § 2312 (relating to buying and selling game) giving the Commission authority to authorize by regulation the buying and selling of inedible parts of game and wildlife as it deems appropriate. This can be accomplished by adding § 147.146.

These amendments were hereby adopted under the authority of 34 Pa.C.S. (relating to the Game and Wildlife Code) (code).

*Amendments to §§ 141.41(2) and 141.43(f)*

*1. Introduction*

In recent years, the Commission has established seasons and bag limits, through § 139.4 (relating to seasons and bag limits for the license year). In the seasons and bag limits adopted this year on April 10, 2001, the Commission adopted a 3-day special deer season and in final-form regulations adopted at the June 12, 2001, meeting, designated a special firearms season. To provide for hunter safety, the Commission at its June 12, 2001, meeting proposed, and at its October 2, 2001, meeting adopted the requirements of wearing 250 square inches of fluorescent orange-colored material on the head, chest and back, and the use of only .22 caliber rimfire firearms to dispatch trapped furbearers during the special firearms season.

These amendments are adopted under authority contained in section 2102(a) of the code (relating to regulations), which permits the Commission to promulgate regulations as it deems necessary and appropriate concerning "...the ways, manner, methods and means of hunting or furtaking and the health and safety of persons who hunt or take wildlife...."

*2. Purpose and Authority*

As was indicated in the Introduction, the adopted amendments will require deer hunters during the special firearms season to wear a minimum of 250 square inches of fluorescent orange-colored material under § 141.41(2). The material shall be worn on the head, chest and back combined so it is visible in a 360° arc. Additionally, the adopted changes will allow only the use of .22 caliber rimfire firearms to dispatch legally trapped furbearers during the special firearms season under § 141.43(f).

Section 2102(a) of the code directs the Commission to promulgate regulations relating to the ways, manner and means of hunting or furtaking. This section provides the authority for these adopted changes.

*3. Regulatory Requirements*

The adopted amendments will require persons hunting to wear fluorescent orange-colored material, and allow only the use of .22 caliber rimfire firearms to dispatch trapped furbearers during the special firearms season.

*4. Persons Affected*

Persons hunting for deer or furtaking during the special firearms season will be affected by the adopted amendments.

*5. Comment and Response Summary*

No official comments were received regarding these adopted amendments.

*6. Cost and Paperwork Requirements*

The adopted amendments should not result in any additional cost or paperwork.

*Amendment to § 147.146*

*1. Introduction*

By Act 166, section 2312 of the code (relating to buying and selling game) was amended to authorize the Commission by regulation to allow the buying and selling of inedible parts of game and wildlife as it deems appropriate. Under that authorization, the Commission at its June 12, 2001, meeting proposed, and at its October 2, 2001, meeting adopted final-form amendments relating to the sale of inedible wildlife parts. The adoption includes wildlife lawfully taken within this Commonwealth that has been mounted, tanned or completely prepared for study or display. Under the adoption, a permittee may sell inedible wildlife parts under limited circumstances.

This amendment is adopted under the authority contained in section 2102(a) of the code authorizing the Commission to promulgate the regulations as it deems necessary and appropriate concerning game or wildlife and section 2312(c)(2) of the code authorizing the Commission by regulation to authorize the buying and selling of inedible parts of game and wildlife as it deems appropriate.

*2. Purpose and Authority*

As indicated in the Introduction, the adoption would authorize a permittee to sell inedible wildlife parts under limited circumstances and would require a permit at a cost of \$5. Section 2102(a) of the code authorizes the Commission to promulgate regulations it deems necessary and appropriate concerning game or wildlife, and section 2312(c)(2) of the code authorizing the Commission by regulation to authorize the buying and selling of inedible parts of game and wildlife, provide authority for this adoption.

3. *Regulatory Requirements*

The adopted amendment would authorize the issuance of permits for the sale of inedible wildlife parts valid for 120 days.

4. *Persons Affected*

Persons wishing to sell inedible wildlife and wildlife parts may be affected by the adopted amendment.

5. *Comment and Response Summary*

No official comments were received regarding this adopted amendment.

6. *Cost and Paperwork Requirements*

The adopted amendment will result in a new permit and a fee of \$5. The permit fee offsets administrative costs of the new permit requirement.

*Effective Date*

The adopted amendments will be effective on final-form publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

*Contact Person*

For further information regarding this change, contact David E. Overcash, Director, Bureau of Law Enforcement, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

*Findings*

The Commission finds that:

(1) Public notice of intention to adopt the administrative amendments adopted by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The adoption of the amendments of the Commission in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statute.

*Order*

The Commission, acting under authorizing statute, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapters 141 and 147, are amended by amending §§ 141.41 and 141.43 and adding § 147.146 to read as set forth in Annex A.

(b) The Executive Director of the Commission shall submit this order and Annex A, and deposit them with the Legislative Reference Bureau as required by law.

(c) This order shall take effect upon final publication in the *Pennsylvania Bulletin*.

VERNON R. ROSS,  
*Executive Director*

**Fiscal Note:** Fiscal Note 48-134 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 58. RECREATION

PART III. GAME COMMISSION

CHAPTER 141. HUNTING AND TRAPPING

Subchapter C. BIG GAME

§ 141.41. General.

It is unlawful to:

(1) Hunt for big game birds or animals with arrows other than those tipped with broadheads of a cutting-edge design.

(2) Hunt for or assist to hunt for deer, bear or elk during the regular firearms season or special firearms season without wearing a minimum of 250 square inches of daylight fluorescent orange-colored material. The material shall be worn on the head, chest and back combined so it is visible in a 360° arc.

(3) Hunt for deer, bear or elk through the use of any muzzleloading handgun.

§ 141.43. Deer.

(a) *Archery season.* It is unlawful while hunting deer with a bow and arrow or crossbow during the archery season to:

(1) Possess a firearm.

(2) Take a deer with a device not provided for in the act or this title.

(3) Move about or relocate during that portion of the archery deer season that is concurrent with any flintlock muzzleloading season (antlerless only) that precedes the regular firearms season for deer or is concurrent with the fall turkey season without wearing a minimum of 250 square inches of daylight fluorescent orange-colored material. The material shall be worn on the head, chest and back combined so it is visible in a 360° arc.

(4) Be on stand and stationary during that portion of the archery deer season that is concurrent with any flintlock muzzleloading season (antlerless only) that precedes the regular firearms season for deer or is concurrent with the fall turkey season without placing a band containing a minimum of 100 square inches of daylight fluorescent orange-colored material, in lieu of the required 250 square inches, within 15 feet of their location so it is visible in a 360° arc.

(b) *Flintlock muzzleloading and muzzleloading season.* Firearms lawful for use are original muzzleloading single-barrel long guns manufactured prior to 1800, or a similar reproduction of an original muzzleloading single-barrel long gun which:

(1) Is .44 caliber or larger and has open sights.

(2) Propels single-projectile ammunition.

(c) *Ignition.* Flintlock mechanisms shall consist of a hammer containing a naturally occurring stone which is spring propelled onto an iron or steel frizzen which, in turn, creates sparks to ignite a priming powder.

(d) *Prohibitions.* It is unlawful to:

- (1) Use manmade materials attached to the hammer or frizzen to create sparks.
  - (2) Use telescope, aperture or peep sights.
  - (3) Use or possess single projectile ammunition other than specified in subsection (b)(2).
  - (4) Hunt, take or attempt to take deer through the use of a device not specifically described in this subsection.
  - (5) Hunt for or assist to hunt for deer during any flintlock muzzleloading or muzzleloading season that precedes the regular firearms season for deer without wearing a minimum of 250 square inches of daylight fluorescent orange-colored material on the head, chest and back combined so that it is visible in a 360° arc.
- (e) *Archery, special firearms, flintlock muzzleloader and muzzleloader seasons.* When archery, special firearms, flintlock muzzleloader or muzzleloader seasons run concurrently, holders of any of the appropriate licenses or stamps may cooperate if pertinent provisions of this section and the act are met.
- (f) *.22 caliber rimfire required for furbearers.* When using a firearm only a .22 caliber rimfire may be used to dispatch legally trapped furbearers during the regular or special firearms deer seasons.

#### CHAPTER 147. SPECIAL PERMITS

##### Subchapter H. PROTECTED SPECIMEN

###### § 147.146. Sale of inedible wildlife parts.

- (a) Wildlife lawfully taken within this Commonwealth that has been mounted, tanned or completely prepared for study or display in accordance with generally accepted taxidermy procedures may be sold if one of the following conditions is met:
- (1) The original owner is deceased.
  - (2) The original owner's assets are being liquidated.
- (b) Before selling a specimen, a permit shall be obtained from a Commission officer.
- (c) An executed copy of the permit application (PGC-12) shall list the items to be sold. The permit is valid for 120 days.
- (d) The fee for a permit issued under this section is \$5.
- (e) The original owner of a specimen may donate the specimen to a wildlife conservation organization, which may then sell the specimen without a permit for fund raising purposes.
- (f) Second and subsequent owners of wildlife parts acquired in accordance with section 2312(c)(1) of the act (relating to buying and selling of game) may sell the parts if included as part of a manufactured or finished product.
- (g) Second and subsequent owners of deer hides acquired in accordance with section 2312(c)(1) of the act may buy and sell the deer hides. Deer capes may only be sold by the original owner.
- (h) A person violating this section shall be subject to the penalties provided in section 2312 of the act.

[Pa.B. Doc. No. 01-1961. Filed for public inspection November 2, 2001, 9:00 a.m.]

#### GAME COMMISSION [58 PA. CODE CH. 147] Special Permits

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission), at its October 2, 2001, meeting, adopted the following changes:

Amend § 147.701 (relating to general) by adding paragraph (10) to provide for a permit to be issued to persons who wish to assist persons who are hunting or trapping bobcats. Since bobcat hunting-trapping permits are available on a limited basis by drawing, they are difficult to obtain. A person acting as a guide for or assisting a person with a bobcat permit to take a bobcat would be hunting without a license. The creation of a bobcat guide permit would allow holders of the guide permit to lawfully assist bobcat hunting-trapping permit holders in the taking of bobcats.

Amend Chapter 147, Subchapter T (relating to commercial wildlife pest control). Since the current Game and Wildlife Code (34 Pa.C.S.) became effective in 1987, there have been provisions for a commercial wildlife pest control permit but no corresponding regulations to clearly define the application process and activities of permit holders.

These amendments were adopted under the authority of 34 Pa.C.S. (relating to the Game and Wildlife Code).

##### *Amendment to § 147.701*

###### *1. Introduction*

In 2000, the Commission for the first time in 30 years established a season for hunting or trapping bobcats. A limited number of permits have been available in the past, and a larger number of permits will be offered for the 2002 season. To assist a permittee hunting bobcats, the Commission at its June 12, 2001, meeting proposed, and at its October 2, 2001, meeting finally adopted, the addition of paragraph (10) establishing a permit to allow persons to act as guides in the hunting of bobcats. Section 2901(b) of the code (relating to authority to issue permits) authorizes the Commission, as deemed necessary to properly manage the game or wildlife resources, to promulgate regulations for the issuance of any permit and to control the activities which may be performed under authority of any permit issued.

###### *2. Purpose and Authority*

As is indicated in the Introduction, the addition of a bobcat guide permit would assist persons holding bobcat hunting permits by allowing them to secure the services of a permitted guide. Section 2901(b) of the code authorizes the Commission to promulgate regulations for the issuance of any permit and provides the authority for the adopted change.

###### *3. Regulatory Requirements*

The adopted change would establish a permit and fee requirement. The fee shall be \$10 for residents and \$25 for nonresidents.

###### *4. Persons Affected*

Persons wishing to guide or assist another permitted person to hunt or take bobcats will be affected by the adopted change.

5. *Comment and Response Summary*

No official comments were received regarding this adopted change.

6. *Cost and Paperwork Requirements*

The adopted change would result in a permit application and fee submission of \$10 for residents and \$25 for nonresidents.

*Addition of Change 147, Subchapter T*

1. *Introduction*

Section 2904(17) of the code (relating to permit fees) authorizes a fee for a commercial wildlife pest control permit. While section 2904(17) of the code has authorized a permit, no regulations have been promulgated governing wildlife pest control permit issuance. To rectify this, and deal with an increasing nuisance wildlife problem, the Commission proposed at its June 12, 2001, meeting and adopted at its October 2, 2001, meeting, adding a Subchapter T. Section 2901(b) of the code authorizes regulations for permits as deemed necessary to properly manage the game or wildlife resources and to control the activities which may be performed under authority of any permit issued.

2. *Purpose and Authority*

As is indicated in the Introduction, the adopted regulations would set out conditions under which a person may obtain a commercial wildlife pest control permit, along with specific regulatory requirements that shall be followed by each permit holder. Section 2901(b) of the code provides the authority for the adopted regulations.

3. *Regulatory Requirements*

Those wishing to be issued a permit will have to file an application and pay a fee. Conviction of a code violation within 5 years of the date of the application may preclude the issuance of a permit. New agents shall successfully complete a supervised written examination. Additionally, records shall be kept and available for inspection, along with a report sent to the district wildlife conservation officer each month. The adopted regulations also outline the method and manner of humane dispatch of nuisance wildlife along with approved methods, devices and disposal. Finally, the adopted regulations specify unlawful acts relating to the wildlife pest control permit.

4. *Persons Affected*

Persons holding, or wishing to obtain a commercial wildlife pest control permit may be affected.

5. *Comment and Response Summary*

No official comments were received regarding these adopted regulations.

6. *Cost and Paperwork Requirements*

The adopted regulations require completion and submission of a permit application and payment of a \$25 application fee. An additional fee of \$50 will be required if the applicant passes the examination. There are also recordkeeping and reporting requirements.

*Effective Date*

The adopted regulations will be effective on final publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

*Contact Person*

For further information regarding these regulations, contact David E. Overcash, Director, Bureau of Law Enforcement, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

*Findings*

The Commission finds that:

(1) Public notice of intention to adopt the administrative amendments adopted by this order has been given under sections 201 and 202 of the July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The adoption of the amendments of the Commission in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statute.

*Order*

The Commission, acting under authorizing statute, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapter 147, are amended by amending § 147.701 and adding §§ 147.721 and 147.723—147.725 to read as set forth at 31 Pa.B. 5365 (September 22, 2001); and by adding §§ 147.722 and 147.726—147.728 to read as set forth in Annex A.

(b) The Executive Director of the Commission shall submit this order, 31 Pa.B. 5365 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(c) This order shall take effect upon final publication in the *Pennsylvania Bulletin*.

VERNON R. ROSS,  
*Executive Director*

**Fiscal Note:** Fiscal Note 48-135 remains valid for the final adoption of the subject regulations.

**Annex A**

**TITLE 58. RECREATION**

**PART III. GAME COMMISSION**

**CHAPTER 147. SPECIAL PERMITS**

**Subchapter T. COMMERCIAL WILDLIFE PEST CONTROL**

**§ 147.722. Definitions.**

In addition to the definitions contained in the act and § 131.2 (relating to definitions), the following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

*Agent*—A holder of a valid Commercial Wildlife Pest Control Permit or a legitimate employee.

*Humane manner*—When dispatching an animal, death shall be induced as quickly and painlessly as possible by any of the methods in § 147.727 (relating to humane methods).

*Legitimate employee*—An employee of record, one for which the employer deducts or pays taxes or other fees required by any local, state or the Federal government and is listed on the permit.

**§ 147.726. Operation.**

(a) Approved methods and devices are as follows:

(1) Foot hold traps, body gripping traps, box traps, cage traps, nets and snares.

(2) Agents who are certified pesticide applicators may take vertebrate species with pesticides in accordance with the regulations of the Department of Agriculture. See 7 Pa. Code Chapter 128 (relating to pesticides).

(3) Shooting with a firearm that will induce death as quickly and painlessly as possible.

(b) The agent shall have the approval of the property owner or lessee and confine all activities to that property.

(c) The permit shall be carried at all times and presented upon the request of any officer whose duty it is to enforce this part.

(d) Except as otherwise provided, it is unlawful to sell, trade, barter or transfer to another person any live or dead animal or parts taken under authority of this permit. Furbearer pelts are excluded from this provision provided the particular species is taken during the hunting or trapping season by the holder of a valid hunting or furtaking license as required.

(e) Devices shall be tagged or labeled with the permit number, or trapper I.D. number.

(f) Devices shall be checked by the agent or property owner at least once each calendar day, but only the agent may remove an animal from a trap.

(g) Nuisance wildlife captured alive shall within 24 hours be dispatched in a humane manner or released in an area open to hunting or trapping. Nontarget animals may be released at the site of capture.

(h) Carcasses shall be disposed of by incineration or in an approved landfill in a manner consistent with the solid waste laws of the Commonwealth.

#### § 147.727. Humane methods.

Animals shall be dispatched using the following methods:

(1) Birds shall be dispatched through the use of: inhalant anesthetics, carbon monoxide, carbon dioxide, barbiturates, gunshot, cervical dislocation, decapitation.

(2) Furbearers, small game and other small mammals shall be dispatched through the use of: inhalant anesthetics, carbon monoxide, carbon dioxide, barbiturates, gunshot or penetrating captive bolt.

(3) Big game shall be dispatched through the use of: barbiturates, gunshot, penetrating captive bolt or chloral hydrate.

#### § 147.728. Unlawful acts.

It is unlawful to:

(1) Control any white-tailed deer, black bear, elk, wild turkey, beaver, fisher, otter or bobcat without prior approval of the District Wildlife Conservation Officer.

(2) Control any migratory birds unless the agent has the appropriate valid United States Fish and Wildlife Service depredation permit.

(3) Control any threatened or endangered species without proper permits and approval of the Commission.

(4) Fail to list or delete an employee from the permit.

(5) Dispatch any animal in any manner not defined as a humane manner in § 147.722 (relating to definitions).

(6) Violate any other provisions of this subchapter.

[Pa.B. Doc. No. 01-1962. Filed for public inspection November 2, 2001, 9:00 a.m.]