NOTICES

DEPARTMENT OF PUBLIC WELFARE

Nursing Facility Assessment Program

The act of September 30, 2003 (P. L. 169, No. 25) (Act 25),[1] known as the Nursing Facility Assessment Law, directs the Department of Public Welfare (Department) to "implement a monetary assessment" on nonpublic licensed nursing facilities beginning July 1, 2003, and ending June 30, 2007. See sections 802-A and 815-A of Act 25 (62 P. S. §§ 802-A and 815-A).

Act 25 was enacted to enable the Department to continue to assure the availability of long-term care facility services to indigent persons under the Medical Assistance (MA) Program. Since 2001, the number of individuals eligible for MA services in this Commonwealth has grown dramatically. The Department projects that 1.8 million persons will be enrolled in the MA Program in the next fiscal year compared to 1.4 million in Fiscal Year (FY) 2001-2002, an increase of 29%. The average cost of MA benefits has also climbed at an alarming rate. In the past 3 years, costs have risen by approximately $500 million per year, due principally to the cost of medical services rendered to the elderly and disabled populations. Although the elderly and disabled represent only 1/3 of the MA population, the MA long-term care services provided to these individuals now consume more than 70% of the $15 billion MA Program budget. The Department expects that long-term care costs will continue to rise in future years.

The increase in the cost of publicly funded healthcare has outpaced the growth in State revenue. To compensate for the lack of general fund revenue, the Commonwealth has aggressively pursued alternative sources of funding for the MA Program. One source to which the Department has traditionally turned to supplement general revenue funds has declined and will soon be depleted. Since 1991, the Department has used Intergovernmental Transfer (IGT) funds to claim approximately $6.778 billion in additional Federal matching grants to support the MA Program. The Commonwealth's ability to use the IGT mechanism to offset MA Program spending requirements was curtailed in 2000 when Congress amended Federal law to require states to phase out their IGT Programs. As a direct result of these amendments, the Commonwealth's IGT revenues have been reduced by more than 50%, from $820 million in FY 2001-2002 to $405 million in FY 2005-2006. By FY 2008-2009, the Commonwealth's existing IGT Program will be phased out entirely and this revenue source will be exhausted.

Given the significant increases in eligible recipients and service costs coupled with the sharp declines in traditional funding sources, the Department estimated a shortfall of available funding for MA nursing facility services of $320.407 million in FY 2003-2004 and $315.208 million in FY 2004-2005. The Department also projected continuing shortfalls in future fiscal years. Therefore, absent a new source of revenue to address the significant ongoing funding crisis, the Department determined that it would be necessary to restrict eligibility for long-term care services, decrease benefit levels or reduce nursing facility and other provider payment rates. In June 2003, the Department announced its intent to reduce nursing facility payment rates by approximately 12% effective July 1, 2003. To forestall rate reductions and to avoid significant changes in eligibility or covered services, or both, the General Assembly passed Act 25 to enable the Commonwealth to qualify for a new source of increased Federal funds.

The express purpose of Act 25 is to ensure that MA recipients "have access to medically necessary nursing facility services" by generating additional State and Federal matching funds. See section 802-A of Act 25. To achieve this purpose, Act 25 requires that all State and Federal revenues collected under the Assessment Program be deposited into a restricted account and used exclusively to maintain and increase MA payments to MA nursing facility providers. See sections 806-A and 813-A of Act 25 (62 P. S. §§ 806-A and 813-A).

Act 25 specifies that the Department implement an Assessment Program "only to the extent that the revenues generated therefrom will qualify as the State share of [MA] program expenditures eligible for Federal financial participation." See section 803-A of Act 25 (62 P. S. § 803-A). To guarantee that the assessment amounts qualify for matching Federal funds, Act 25 directs the Department to seek waivers from the Federal Centers for Medicare and Medicaid Services (CMS) as may be necessary to implement the Assessment Program in conformity with Federal law. See section 812-A of Act 25 (62 P. S. § 812-A).

Generally, under Federal law, for the state revenue collected under an assessment program to qualify for Federal matching funds, a state must implement its program on both a uniform and a broad-based basis, that is, all nonpublic entities must be assessed in the same amount or at the same rate. See 42 CFR 433.68 (relating to permissible health care-related taxes after the transition period). Federal law permits the CMS to waive the uniform and broad-based requirements so long as a state demonstrates that its assessment program meets certain mathematical formulas specified in Federal regulations and that the program does not hold assessed entities indirectly or directly harmless. See 42 CFR 433.72 (relating to waiver provisions applicable to health care-related taxes).

As authorized by Act 25, the Department submitted a request to the CMS on September 30, 2003, seeking a waiver of both the uniform and broad-based requirements. In this initial submission, the Department requested approval to implement an Assessment Program that would have: (i) exempted all nursing facilities that are not MA nursing facility providers and all public nursing facilities from payment of the assessment; and (ii) assessed all other nursing facilities at varying rates depending upon their MA occupancy.

The CMS advised the Department that it would not approve the Department's proposed Assessment Program or any other proposal that would completely exempt non-MA facilities or private-pay days or private-pay revenues from the assessment. Thereafter, the Department engaged in extended discussions with the CMS over 15 months, during which time the Department developed and evaluated multiple alternative assessment models. Throughout this process, the Department's goal was to design an Assessment Program that would comply with applicable State and Federal law within two basic parameters: First, the Assessment Program must result in additional State and Federal funding essential to ensure that MA recipients continue to have access to medically necessary nursing facility services as required by law. Second, the Assessment Program should minimize the number of nursing facilities adversely impacted by the assessment and the extent of the impact.

In developing the various alternative models, the Department reviewed and considered the methodologies and exemptions included in other state provider tax or assessment programs the CMS had already approved. The Department also compared the projected assessment costs that would be imposed under each model with the estimated additional payments that would be made from the assessment revenues collected on both an individual nursing facility and aggregate basis. Among the various alternative models, the Department evaluated the consequences of assessing nursing facilities on a broad-based and uniform basis. The Department determined that a broad-based and uniform program would result in a greater negative financial impact to the nursing facility industry overall and would adversely affect more facilities on an individual facility basis than a model that accounted for different classes of nursing facilities.

Ultimately, the Department developed an Assessment Program that addressed all of the concerns raised by the CMS and that also met the Department's basic design parameters. First, under the Assessment Program, the Department will raise sufficient revenue to maintain MA case-mix payment rates and to provide additional payment increases to MA nursing facility providers in the form of supplemental payments. While not every licensed nursing facility participates in the MA Program, MA nursing facility providers account for 94% of all licensed nursing facility beds operating and provide 96% of the days of care delivered to nursing facility residents in this Commonwealth. The Department determined that, by maintaining and increasing MA payment rates to facilities that provide the vast majority of nursing facility services to Commonwealth residents, the Assessment Program, as designed, will not only assure that MA recipients will continue to have access to medically necessary nursing facility services but will also benefit the consumers, the nursing facility industry and this Commonwealth as a whole.

Second, under the Assessment Program, the Department will recognize distinctions among nursing facilities by including provisions similar to those included in other approved state programs. These provisions allow for varying assessment rates depending on the size of the nursing facility or whether it is part of a licensed continuum of care. The Department determined that by varying the assessment rates to account for these differences, the Assessment Program, as designed, will minimize the overall and individual adverse financial consequences to nursing facilities while still conforming to the Federal requirement that assessed facilities may not be directly or indirectly held harmless from the effects of the Assessment Program.

On January 5, 2005, the CMS approved the Department's assessment proposal, including its request for waiver of the uniformity and broad-based requirements.

After receiving the CMS's approval, the Department published a notice in the *Pennsylvania Bulletin* announcing the details of the Assessment Program that the CMS had approved. See 35 Pa.B. 808 (February 5, 2005). In addition, as required by Act 25, the Department also announced its proposed aggregate assessment amount, methodology and assessment rates for FY 2003-2004 and FY 2004-2005 and invited interested persons to provide comments regarding the proposed Assessment Program. See section 804-A of Act 25 (62 P. S. § 804-A).

Public Comment on the Proposed Assessment Program

Ninety-one commentators submitted comments in response to the Department's notice published at 35 Pa.B. 808. The Department received comments from consumers, family members, representatives of nursing facilities and the four major trade associations that represent nursing facility constituents.

The trade associations were generally supportive in their comments about the Assessment Program. For example, the Pennsylvania Health Care Association, which represents for-profit nursing facilities in this Commonwealth, endorsed the Department's proposed Assessment Program, the assessment methodology, the assessment rates and the amounts as published in the proposed notice. In addition to this general support, however, the Department received comments that opposed the Assessment Program for various reasons or that requested additional clarification or information from the Department. Although the Department has decided, with the approval of the Governor, to implement the Assessment Program as approved by the CMS, the Department considered and took into account all of the public comments it received regarding the Assessment Program. The following is a summary of those comments and the Department's responses.

Comment. Several commentators objected generally to the nursing facility Assessment Program. Chief among those general objections were the assertions that the Assessment Program is unfair to nursing facilities that do not participate in the MA Program and that the Assessment Program is unfair to non-MA eligible individuals residing in nursing facilities.

As to the nonparticipating facilities, the commentators stated that these facilities will not receive any MA payment to offset their assessment costs and cannot enroll in the MA Program to receive any MA payments, due to the Department's current MA enrollment policies, which the commentators characterize as a "moratorium" on nursing facility beds in this Commonwealth. The commentators suggest that the combination of the Assessment Program and the Department's enrollment policies will create a substantial negative financial impact on nonparticipating nursing facilities and will effectively place MA nursing facilities in a better market position. The commentators also suggested that the negative financial impact may bankrupt private nursing facilities or cause them to close operations.

As to the private-pay nursing facility residents, the commentators expressed great concern that nursing facilities will inevitably pass the cost of the assessment to the residents or their families. One commentator noted that the increased resident costs will result in a more rapid depletion of the residents' resources, which, in turn, will result in the residents qualifying earlier for MA. Consequently, according to the commentator, the Department's MA costs will increase as a result of the assessment.

Response. The Department recognizes that a few non-MA nursing facilities and some MA nursing facilities with low MA occupancy rates may have significant assessment liabilities; however, the Department disagrees with the commentators' view that the Assessment Program is unfair.

As previously noted, the Department initially proposed to exempt all non-MA nursing facilities from payment of the assessment. Unfortunately, the CMS viewed this proposal as creating an illegal "hold harmless" provision. Subsequently, the Department developed various models that included assessment levels with different numbers of beds, different assessment amounts and different exemptions. After considering alternative models, the Department chose the model previously described because it results in the best overall outcome for the Commonwealth.

Although the Assessment Program does not exempt the 105 private licensed nursing facilities that do not participate in the MA Program, the Assessment Program, as designed by the Department and approved by the CMS, minimizes the effect on those facilities by placing the majority of nonparticipating facilities into the lower assessment rate level. Under the Assessment Program, the Department will assess 234 nursing facilities at the lower rate level of $1.50 per non-Medicare resident day. Of these 234 nursing facilities, 98 are non-MA nursing facilities. The Department will assess the remaining 474 nonexempt nursing facilities at the higher assessment rate level of $15.91 per non-Medicare resident day. Of these 474 nursing facilities, only 7 are nursing non-MA nursing facilities.

The Department also disagrees with the commentators' suggestions that the Department's enrollment policies do not permit nursing facilities to mitigate the adverse financial effects of the Assessment Program. MA nursing facility providers may increase their MA occupancy levels by admitting more day-one MA eligible recipients. Private nursing facilities that have historically chosen not to provide services to MA recipients may submit an exception request to the Department for approval to enroll in the MA Program, as permitted under 55 Pa. Code § 1187.21a (relating to nursing facility exception requests-statement of policy). Although it is the Department's general policy to limit increases in MA institutional services, the Department enrolls new nursing facility providers whenever the Department determines that there is an MA Program need for additional institutional services.

The Department recognizes that the Assessment Program may ultimately result in some nursing facility residents qualifying for MA nursing facility services earlier if nursing facilities pass along the assessment costs to them through increased private pay rates. The Department does not expect, however, that the increased MA Program costs that may result from the earlier MA conversions will remotely approach the additional revenues and associated benefits to MA recipients that will be achieved through the Assessment Program.

Comment. Several commentators asserted that the assessment structure violates the Uniformity Clause of the Pennsylvania Constitution and is an impermissible retroactive tax.

Response. The plain language and expressed intent of Act 25 make clear that the assessments are not taxes, and therefore, the Assessment Program is not subject to the constitutional uniformity requirements or constitutional restraints on retroactive taxes. The assessment is in the nature of a narrowly structured license fee that ensures that MA recipients have access to medically necessary nursing facility services. The assessment is obtained only from a specific class (nursing facilities), the assessment amounts are placed in a restricted account, and the amounts cannot be used for the general public or to cover the general expenses of the Commonwealth. Once the amounts are collected and the matching Federal financial participation is received, the collected funds will be redistributed to the vast majority of nursing facilities upon which the assessment is imposed, along with additional Federal matching funds.

Comment. One commentator asserted that the assessment structure violates Title XIX of the Social Security Act (Title XIX).

Response. Although the commentator generally claimed that the Assessment Program violates Title XIX, the commentator did not state how or why the Assessment Program conflicts with the Federal law. For this reason, the Department cannot respond specifically to the commentator's concerns. The Department notes, however, that the CMS is the Federal agency that implements and interprets Title XIX. As previously noted, the CMS worked extensively with the Department in developing the Assessment Program and approved the model described in this notice. Having approved the Department's Assessment Program, the CMS necessarily determined that the Assessment Program complies with Title XIX.

Comment. One commentator requested that the Department specifically commit to use the additional Federal funds for supplemental payments to nursing facilities out of concern that the funds may be used for other purposes.

Response. Act 25 specifically provides that the assessments may be imposed only to the extent that they qualify for Federal matching funds and that moneys from the assessment must be placed in a restricted account and used only to maintain and increase payments for nursing facility services provided by MA nursing facility providers. See sections 803-A and 806-A of Act 25.

Comment. One commentator was concerned that independent nursing facilities may attempt to link with Continuing Care Retirement Communities (CCRC) to qualify for the lower rate of assessment.

Response. The Department agrees with the commentator's concern. Therefore, using information obtained from the Insurance Department and the Department of Health, the Department developed a list of nursing facilities that it will classify as CCRCs for the first two assessment periods of FY 2003-2004, and FY 2004-2005. The Department distributed the list to all nursing facilities by letter dated March 9, 2005, and invited nursing facilities to explain to the Department why they should or should not be considered a CCRC facility for purposes of the assessment. A copy of this letter is available on the Department's website at www.dpw.state.pa.us/omap/provinf/ltc/nsgfacass.asp or by contacting the Department at (717) 787-1171.

For FY 2005-2006, the Department will consider a nursing facility to qualify for the CCRC rate if the nursing facility satisfies the following criteria:

1. The nursing facility is owned or controlled by an entity that is certified as a CCRC by the Insurance Department (for purposes of this guideline, "control" means the power to direct or cause to direct the management and policies of the nursing facility, whether through equitable ownership of voting securities or otherwise).

2. In addition to being owned and controlled by the certified CCRC entity, the nursing facility must be: (a) located on the CCRC campus; or (b) identified in the CCRC's Disclosure Statement and Resident Agreement under the Continuing-Care Provider Registration and Disclosure Act (40 P. S. §§ 3201—3225) and located no more than 30 miles from the independent living units of the certified CCRC.

A nonexempt nursing facility that does not satisfy the previous guidelines but believes that it otherwise qualifies for the CCRC rate will also be given the opportunity to submit a written request to the Department that it be assessed at the CCRC rate. The written request should include any supporting documentation demonstrating that the nursing facility participates within a licensed CCRC.

Comment. One commentator raised a concern that the Department would implement the Assessment Program prior to the release of the nursing facility payment rates for FY 2004-2005.

Response. The Department intends to issue proposed FY 2004-2005 nursing facility payment rates on or before the date of implementation of the Assessment Program and make associated payments prior to the due date for the FY 2004-2005 assessment payment due dates.

Comment. Several commentators suggested that the Department permit payment plans that extend beyond the statutory payment date to accommodate a nursing facility's financial ability to pay the assessment.

Response. The Department will consider whether to allow payment plans based on the individual circumstances of the particular facility.

Comment. One commentator requested that the Department provide an educational program on the Assessment Program to nursing facilities for the purpose of ensuring the complete exchange of information between the nursing facilities and the Department.

Response. The Department has provided educational programs regarding the Assessment Program. The nursing facilities were provided written educational materials via a letter dated March 9, 2005, which provided access to a user manual as well as a telephonic help line. The Department will provide further educational resources in the near future.

Assessment Methodology and Rates for FY 2003-2004 and FY 2004-2005

After consideration of the various alternative assessment models and the public comments received concerning the proposed model and assessment rates, and in consultation with the Secretary of the Budget and with the approval of the Governor, the Department announces the final nursing facility assessment methodology and rates for FY 2003-2004 and FY 2004-2005.

Nursing facilities will be exempt from payment of the assessment if they fall into any of the following categories:

1. Government owned and operated nursing facilities.

2. Veterans Administration nursing facilities.

3. Nursing facilities that have not been licensed and operated by the current or previous owner for the full calendar quarter prior to the calendar quarter for which an assessment is collected.

Other licensed nursing facilities will be assessed by the Department every quarter of the fiscal year. The assessment rate for a nonexempt nursing facility for each quarter of the calendar year will be determined as follows:

1. If the nonexempt facility participates within a licensed CCRC or has 50 licensed beds or less, it will be assessed at $1.50 per non-Medicare resident day in the calendar quarter preceding the assessment quarter.

2. All other nonexempt nursing facilities will be assessed at $15.91 per non-Medicare resident day in the calendar quarter preceding the assessment quarter.

Assessment payments are due to the Department on the following dates:

1. FY 2003-2004 assessment payment is due April 29, 2005.

2. Quarters 1 and 2 of FY 2004-2005 are due May 11, 2005.

3. Quarters 3 and 4 of FY 2004-2005 are due May 27, 2005.

These dates, along with supplemental payment dates, are available on the Department's website at www.dpw.state.pa.us/omap/provinf/ltc/nsgfacass.asp. As previously stated, the Department will consider whether to allow payment plans based on the individual circumstances of the particular nursing facility.

Aggregate Assessment Amounts and Fiscal Impact

As a result of the implementation of this Assessment Program, the Department estimates that annual aggregate assessment fees for nonexempt nursing facilities will total $280,064,899 for FY 2003-2004 and $277,755,479 for FY 2004-2005. These assessment fees, when combined with Federal matching funds, will enable the Department to maintain rates under the existing case-mix payment methodology (55 Pa. Code Chapter 1187 (relating to nursing facility services)) in FY 2003-2004 and FY 2004-2005 and provide additional supplemental payments to qualified MA nursing facility providers. Absent the additional assessment revenues for these fiscal periods and the projected assessment revenues for the next 2 fiscal years, the Department will be required to adjust payments rates effective July 1 2005, and take other measures as may be necessary based upon the funds available to support long-term care institutional services.

Public Comment

Interested persons are invited to submit written comments regarding the Assessment Program, methodology and rates to Gail Weidman, Chief, Program Analysis and Review Section, Department of Public Welfare, Division of Long-Term Care Client Services, P. O. Box 2675, Harrisburg, PA 17105. Comments received in response to this notice will be considered in developing the assessment methodology and rates for FY 2005-2006 and FY 2006-2007. See section 805-A of Act 25 (62 P. S. § 805-A).

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

ESTELLE B. RICHMAN,
Secretary

Fiscal Note: 14-NOT-416. No fiscal impact; (8) recommends adoption. This public notice announces the amount and rate of assessment for Fiscal Year 2003-2004 and 2004-2005. Both assessments will occur during Fiscal Year 2004-2005 and are estimated to provide $557,820,000 in total additional revenue to supplement the Medical Assistance—Long-Term Care Appropriation.

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