

STATEMENTS OF POLICY

Title 55—PUBLIC WELFARE

DEPARTMENT OF PUBLIC WELFARE

[55 PA. CODE CH. 1187]

Nursing Facility Services

Statutory Authority

The Department of Public Welfare (Department), under the authority of section 443.1(8) of the Public Welfare Code (code) (62 P. S. § 443.1(8)) amends the Statement of Policy published in 55 Pa. Code § 1187.21a (relating to nursing facility exception requests—statement of policy). The Department published proposed amendments to the Statement of Policy at 38 Pa.B. 5974 (November 1, 2008). The final amended Statement of Policy is set forth in Annex A.

Scope

This final amended Statement of Policy applies to county and nonpublic nursing facilities that are enrolled, or applying for enrollment in the Medical Assistance (MA) Program, including general, hospital based, and special rehabilitation nursing facilities, and to persons who wish to enroll in the MA Program as new providers of nursing facility services.

Purpose

The purpose of this final amended Statement of Policy is to provide nursing facilities and other interested persons with the guidelines that the Department will use in exercising its existing statutory and regulatory discretion to manage the enrollment and participation of nursing facilities as providers in the MA program.

Background

In response to the Commonwealth Court's decision in *Eastwood Nursing & Rehabilitation Center v. Department of Public Welfare*, 910 A.2d 134 (2006), the General Assembly amended the code in 2007 to require, as a condition of participation, that county and nonpublic nursing facilities seek and obtain advance written approval from the Department to enroll in the MA Program or, if already enrolled in the MA Program, to seek and obtain this advance written approval before increasing their existing certified bed complements. See the act of June 30, 2007 (P. L. 33, No. 16) (Act 16), Section 1; (62 P. S. § 443.1(8)). Pending the issuance of regulations or until September 30, 2011, (whichever comes first), the General Assembly directed the Department to review pending and future requests for enrollment or expansion in accordance with the process and guidelines contained in the original Statement of Policy published at 28 Pa.B. 138 (January 10, 1998). It also authorized the Department to amend the Statement of Policy, after soliciting public comments, if the Department determined such changes to the Statement of Policy would "facilitate access to medically necessary nursing facility services or . . . assure that long-term living care and services under the MA program will be provided in a manner consistent with applicable Federal and State law, including Title XIX of the Social Security Act." 62 P. S. § 443.1(8).

On November 1, 2008, the Department published a notice in the *Pennsylvania Bulletin* proposing to amend the Statement of Policy to:

1. Identify the types of information, including information that the Department maintains or obtains from others, which the Department considers to be relevant in reviewing bed requests under the Statement of Policy.

2. Eliminate obsolete provisions in the Statement of Policy pertaining to bed requests that had been approved under the prior Certificate of Need (CON) Program, and outdated bed need projections that were originally developed under the CON Program.

3. Include new provisions in the Statement of Policy containing separate guidelines to allow expedited reviews of bed transfer requests involving nursing facilities owned or controlled by the same legal entity and located in the same county.

The Department also proposed to make other changes to the Statement of Policy to reflect the language of section 443.1(8) of the code and to streamline the guidelines and process for reviewing bed requests.

In proposing these changes, the Department stated that its paramount consideration in reviewing nursing facility enrollment and expansion requests ever since the Statement of Policy was first issued in 1998 has been the best interests of MA recipients. The Department also noted that it had issued the Statement of Policy to promote the growth in Home and Community-Based (HCB) services, which consumers prefer, while ensuring that MA recipients have adequate access to medically necessary nursing facility services.

The Department invited interested persons to submit written comments on these proposed changes within 30 days. Written comments were received from four commentators. A summary of those comments and the Department's responses to them follows.

Public Comments

§ 1187.21a—Generally.

Comment

This final amended Statement of Policy sets forth a process by which additional nursing facility beds can be added to the overall bed complement of the MA Program. One commentator, a trade association representing nearly 300 long-term care and senior services providers that provide care for more than 60,000 elderly and disabled individuals across this Commonwealth, stated that it is "adamantly opposed to the addition of any new MA beds in the commonwealth whether temporary or permanent."

Response

In general, the Department agrees with the commentator that the current complement of nursing facility beds enrolled in the MA Program is more than sufficient to assure that MA recipients have access to medically necessary nursing facility services, both currently and in the foreseeable future. Nonetheless, because there may be instances in which the enrollment of a new MA nursing facility provider or an increase in the bed capacity of an existing MA nursing facility provider may be in the best interests of MA recipients who reside in a particular locale or who have specialized medical needs that are not being met by the current MA nursing facility provider complement, the Department does not support a blanket prohibition on any further increase of new MA beds at this time. Further, the Department interprets Act 16 to be a legislative endorsement of the need for a participation

review process that promotes a better balanced MA service system. By enabling the Department to manage and target increases in MA beds where they are required to assure appropriate access to care, the Statement of Policy has permitted and will continue to allow for expansion of other service options for consumers.

§ 1187.21a(e)—*Contents of bed requests.*

Comment

One commentator noted that the Department currently permits an applicant to submit the independent audited financial statement of a parent corporation if a financial statement is not available for the individual nursing facility, which is the subject of the bed request. The commentator read the Department's proposed amendments to § 1187.21a(e)(3)(v) to foreclose this practice and asked the Department to clarify this provision to maintain the status quo.

Response

The Statement of Policy does not require that the applicant submit any particular financial record with a bed request. Rather the Statement of Policy identifies what the Department considers to be the best and most reliable financial information in evaluating the financial viability of a proposed project, that is, the audited or reviewed financial statements for the subject facility. As the commentator note, however, when the financial statements are not available, an applicant may provide the financial statements of the parent corporation or other financial records to demonstrate a proposed project's financial viability. As specified in the Statement of Policy, the Department will consider whatever information an applicant submits in support of its bed request. While we did not intend to change our current practices regarding the submission and consideration of financial statements, we have clarified the provision in response to the comment to better reflect this position.

§ 1187.21a(f)—*Consideration of bed requests.*

Comment

One commentator recommended that the Department eliminate § 1187.21a(f)(7)(iv), which specifies that the Department may consider data relating to the availability of HCB services in reviewing an applicant's or provider's bed request. The commentator questioned whether the availability of HCB services is relevant in determining if a facility should be permitted to increase its MA-certified beds. The commentator also suggested that the Commonwealth should expand both the availability of HCB services and nursing facility beds.

Response

The Department disagrees with the commentator's recommendation to eliminate this provision. When the Statement of Policy was issued in 1998, it specified that the Department would consider the availability of HCB services in assessing whether a need exists for additional MA-certified beds in a particular area. The Department explained that:

In considering its MA Program needs, the Department will also examine whether those needs can be appropriately met through the provision of home and community-based services rather than additional nursing facility beds. The Department views home and community-based services to have several important benefits. Among other things, many older residents of this Commonwealth and residents with disabilities prefer home and community based ser-

vices over institutional services. Given a choice, the Department believes that many people would choose to remain in their own homes and communities rather than reside in a nursing facility. Moreover, in many, if not most, instances, the Department has found that HCB services are less expensive than institutional services.

28 Pa.B. 141 (January 10, 1998). The Department also noted that an underlying objective of the Statement of Policy was to promote the Department's ongoing efforts to develop a fuller array of service and support options for consumers. *Id.*, at 139. The Department's experience during the past 10 years has only reinforced these views and its commitment to rebalance the long-term living (LTL) service system to provide consumers with more service choices to meet their needs.

For many consumers, HCB services continue to be a more preferable and less costly option than institutional care. By enabling consumers to receive necessary care and services in their own homes, HCB services can delay or prevent institutionalization of individuals who would otherwise require care in nursing facilities. As a result, as the Department has worked to steadily increase the supply of HCB services throughout this Commonwealth, we have begun to see a decline in the use of nursing facility services. The Department expects this trend to continue as HCB service and support options for consumers are further expanded.

Rebalancing the LTL service system does not mean that the Department will never approve increases in MA nursing facility beds. It does mean, however, that the Department intends to evaluate requests for the increases in the context of creating a balanced continuum of publicly-funded care. By directing the Department to continue to use the Statement of Policy in reviewing and responding to bed requests, the General Assembly endorsed this approach. Consequently, as has been done ever since the Statement of Policy was issued in 1998, the Department will consider the availability of HCB services as a relevant factor in assessing the need for additional institutional capacity in the MA Program.

Comment

The Department received comments from one commentator expressing concerns about the proposed amendment to § 1187.21a(f)(7) which specified that the Department "will consider" the information submitted by the applicant, but may consider other information contained in its own books and records or from persons other than the applicant in evaluating a bed request. The commentator contended that the Department should not "reach beyond the extensive information that must be submitted to the Department as part of the review process." The commentator also suggested that "[t]he notion that each request may be subject to review based on unspecified information from unidentified sources is fundamentally inconsistent with basic principles of due process." Asserting that the Statement of Policy should "provide certainty to applicants regarding the review process," the commentator recommended that the Department revise the Statement of Policy by replacing the phrase, "may consider" with "will consider," and that the Department provide a comprehensive list of the data which the Department will consider for each guideline.

Response

The Department does not agree that any due process concerns are implicated by the final amended Statement of Policy or the Department's evaluation of, or response to

bed requests thereunder. Nursing facilities do not have an absolute right to enroll or to continued participation as providers in the MA Program. Even if they had some protected property interest, however, the Department provides all the process that is due, including affording an applicant who is dissatisfied with the Department's response to its bed request the opportunity to appeal and have an administrative hearing before the Bureau of Hearings and Appeals.

In addition, the Department finds that it is neither necessary nor prudent for the Department to set forth an all-inclusive list of data and information in the Statement of Policy. For one thing, the Statement of Policy already identifies the data and information which is generally considered by the Department in evaluating a bed request. See § 1187.21a(e)(3) and (4), which lists the information which the Department recommends and that applicants generally do include in their bed requests, and § 1187.21a(f)(7), which identifies that the demographic and other service data and information that the Department typically considers in evaluated bed requests.

In addition, despite the commentator's suggestion to the contrary, the Statement of Policy does not limit what an applicant may include in a bed request. It merely lists the kind of information and data that the Department would like applicants to provide. The final amended Statement of Policy is unequivocal, however, that an applicant's failure to include the recommended information will not result in the automatic denial of the applicant's bed request. Significantly, the final amended Statement of Policy also expressly permits an applicant to submit any information that the applicant deems relevant.

Because the final amended Statement of Policy allows applicants to submit whatever information they choose in support of the bed requests, the Department cannot anticipate all of the data and information that may be available and necessary to make an informed decision on each and every bed request, and, therefore, is unable to set forth an inclusive list of information in the Statement of Policy, as suggested by the commentator. Further, it would be imprudent, and contrary to the best interest of MA recipients and the MA Program, for the Department to adopt a policy that limits its ability to test the information and analyses submitted in connection with a bed request, particularly where it has, or could obtain, other information relevant or even contrary to that which an applicant chooses to provide. Rather, the Department must retain the ability to consider all relevant data and information, including that contained in its own books and records or obtained from sources other than applicants who have an obvious self-interest in getting their own proposed projects approved. For these reasons, the Department has made the decision to retain the language as proposed.

Comment

One commentator requested that, before rendering a decision on a bed request, the Department should disclose to the applicant all of the information that the Department will be relying upon, in making that decision.

Response

The Department agrees with the commentator that the Statement of Policy process should be transparent. Indeed, for each review period, it has been the Department's practice to assemble a "data book" containing demographic and other data regarding the availability and cost of nursing facility and home and community-

based services. The Department uses the data book for a review period when evaluating bed requests for that period, and has made these data books available to applicants and other interested persons on request. In addition to creation of the data books, it has also been the Department's practice to create a file for each bed request. That file contains copies of the request; information received by the Department in connection with the request, including any public comments; and the Department's written response to the request. Like the data books, the Department has made these files available during regular business hours to applicants and other interested parties upon request. In response to the commentator's comments, the Department is incorporating provisions in the final amended Statement of Policy to make these practices a formal part of the review process. To the extent the commentator is suggesting that an applicant has any greater right of access to this information or a right to some type of predecisional hearing, the Department disagrees. As noted previously, however, an applicant that is dissatisfied with the Department's decision on its bed request may appeal that decision and have a *de novo* hearing before the Department's Bureau of Hearings and Appeals.

§ 1187.21a(g)—Guidelines for evaluation of bed transfer requests.

Comment

One commentator recommended that as part of the bed transfer request guidelines the Department require that a nursing facility that is proposing a bed increase as part of a bed transfer request be required to provide HCB services or at a minimum provide home health or home care services.

Response

In accepting the nursing facility industry's recommendation that the Department include provisions in the final amended Statement of Policy to allow for expedited review of bed transfer requests, the Department agreed with the industry that there may be circumstances when allowing owners to adjust MA-certified beds at their nursing facilities may facilitate access to medically necessary nursing facility services for MA recipients but not impede the Department's ability to administer long-term living care and services under the MA program in an efficient and economic manner that is consistent with applicable Federal and State law. In creating these separate guidelines and expedited review process, however, the Department did not intend to signal that our review of bed transfers request would occur in a vacuum. Consequently, in response to this comment, the Department revised the guidelines to specify that, in evaluating a bed transfer request, the Department will consider how a proposed project affects the Department's ongoing efforts to create a better balanced continuum of LTL services with more service options for consumers. In this context, the Department welcomes, but will not require, bed transfer requests that include an HCB service component.

Comment

One commentator recommended that, as part of the bed transfer request guidelines, the Department establish a rule that, "in order to not increase the cost of the case mix reimbursement system, a receiving facility's peer group will not change if [its] increase in bed complement would otherwise warrant a change."

Response

In reviewing bed transfer requests, the Department will consider whether the transfer will result in a change in Peer Group of either facility involved in the transaction, and, if so, the implications for the MA Program, including how changes in the Peer Group composition might affect MA recipients' access to nursing facility services and the payments the MA Program makes for those services. The change which the commentator suggests, however, would require an amendment to the Department's case-mix regulations, which the Department cannot effectuate through this Statement of Policy. The Department will give consideration to adopting such a rule in the context of the rulemaking process.

Comment

One commentator recommended that, as part of the bed transfer request guidelines, the Department should provide for "virtually automatic approval" of transactions that involve 15% of the nursing facility's bed complement, or 15 beds, whichever is greater.

Response

If nursing facilities could transfer MA beds with limited or no review, MA beds might be shifted from areas where they are needed and occupied by MA residents to areas where they are not needed, or to facilities with low MA occupancy rates. Rather than assuring MA recipients' continued access to necessary nursing facility services, access could end up reduced. This outcome is neither desired nor acceptable to the Department. As previously discussed, the final amended Statement of Policy enables the Department to manage and target increases in MA beds where they are required to assure MA recipients have appropriate access to care. Careful stewardship of our institutional resources has also permitted the expansion of other service options for consumers. Allowing automatic approvals of bed transfer requests would undermine the fundamental purposes of the Statement of Policy.

§ 1187.21a(g)(7) and (h)(2)—*Record of licensure and Medicaid and Medicare Program participation.*

Comment

One commentator requested that the language related to the review of the licensure or participation sanctions or remedies of the nursing facility's owner be confined to this Commonwealth's nursing facilities only. The commentator questioned why the Department would hold this Commonwealth's nursing facilities accountable for the performance of facilities in other states, when, according to the commentator, the survey system is inconsistently administered across the Nation. The commentator suggested that this criterion will not otherwise serve to assure greater quality of care to or access by MA residents in this Commonwealth.

Response

The Department has determined that it is relevant to the review process to consider the history of an owner's Medicare and Medicaid compliance. Further, we note that applicants are not being asked to disclose every citation of regulatory noncompliance. Rather, the Department is only asking an applicant to disclose whether the legal entity or owner of the subject facility or a related party involved in the proposed project owned a nursing home that was designated a "poor performing facility" or had such serious deficiencies that it was precluded from participating in the Medicare and Medicaid programs, had its license to operate revoked or suspended, was subject to sanctions or

remedies because it violated the rights of its residents or had deficiencies that immediately jeopardized their health and safety. An owner's experience in other states becomes particularly relevant in instances where the owner may not be currently operating a nursing facility in this Commonwealth but is, or has operated, a nursing facility in another state that has been sanctioned or closed due to noncompliance issues. Limiting consideration of compliance history to this Commonwealth's nursing facilities will not afford the Department the capability to consider this critical information.

§ 118721a(k)—*Definitions*

Comment

One commentator raised concern that the proposed definition of "applicant" would enable anyone to submit a bed request, regardless of whether the person had any connection to the nursing facility that was the subject of the request. The commentator stated that only a provider should be granted the authority to expand its complement of MA beds and recommended that the Department reinstate the language of the existing Statement of Policy published at 28 Pa.B. 138.

Response

In defining an applicant as a person who submits a bed request, the Department did not intend to permit individuals having no authority to act on behalf of a nursing facility to submit a request to enroll that facility as a new MA provider or to expand the MA certified bed complement at an existing MA nursing facility provider. Section 443.1(8) of the code, specifies that "before any county or nonpublic nursing facility increases the number of medical assistance certified beds in its facility or in the medical assistance program, whether as a result of an increase in beds in an existing facility or the enrollment of a new provider, the facility must seek and obtain advance written approval of the increase in certified beds from the department." The Department interprets this provision as requiring bed requests to be filed by the legal entity of an existing facility, a developer proposing to construct a new county or nonpublic nursing facility, or other person, such as an attorney, who has been authorized by and is acting on behalf of the legal entity or developer. Consistent with this interpretation and to avoid any confusion as to who may file a bed request, we revised the definition of "applicant," added a new definition of "legal entity," and included provisions to ensure that applicants filing bed requests have the requisite authority.

Comment

The proposed definition of "bed transfer request" required that the same person own both the surrendering facility and the receiving facility for a request to be considered a bed transfer request. Several commentators recommended that the requirement of common ownership be deleted. One commentator raised concern that the ownership requirements for bed transfer requests favors for-profit entities and requested that the Department amend the language to read "the same organization is the operator of the nursing facility."

Response

In response to the comments, the Department has revised the definition of "bed transfer request" to eliminate the common ownership criteria. Under the revised definition, transactions involving nursing facilities that are not under common ownership could be considered bed transfers.

Comment

In the proposed Statement of Policy, the definition of “bed transfer request” required that the surrendering facility and the receiving facility be located in the same county. Several commentators requested that the Department consider expanding the geographical limitation. One commentator recommended that the Department consider using the Department of Health districts as market or service areas for purposes of reviewing bed transfer requests.

Response

Upon consideration of the comments, the Department has revised the definition of a “bed transfer request” to cover transactions involving MA nursing facilities that are located in the same county or no more than 25 miles apart if both nursing facilities are located in Metropolitan Statistical Area (MSA) Level A or 50 miles apart if one, or both, nursing facilities are located in a MSA other than MSA Level A, as specified by the Federal Office of Management and Budget in the OMB Bulletin No. 99-04. Requests that do not involve facilities falling within these geographic limitations, will not be automatically denied, but, rather, will be evaluated under the guidelines in § 1187.21a(h).

*Separate Guidelines for Continuing Care Retirement Communities (CCRC)**Comment*

Several commentators raised concern that the proposed Statement of Policy does not include provisions specifically addressing proposed projects involving CCRCs. The commentators noted that when the internal demand exceeds the internal supply of nursing facility beds on a CCRC campus, the CCRC must refer its consumers to other providers and facilities. The commentators recommended that the Department develop a separate methodology to review requests for a measured expansion of MA nursing facility beds that are part of a CCRC campus where such an outsourcing situation is well-substantiated. The commentators suggested this would support the continuity of care, and avoid the hardships associated with splitting up family units and relocation. One commentator recommended that the Department provide for emergency certification of MA beds sufficient to accommodate the CCRC’s demonstrated need.

Response

In the proposed amendments published in November 2008, the Department did not include separate provisions relating to CCRCs. After careful consideration of the commentators’ recommendations, the Department has decided not to include those provisions in these final amendments. Given the level of complexity involved in developing separate CCRC guidelines and the different and sometimes opposing views on what the provisions should permit, the Department has determined that the issue should and could be more fully vetted in the context of the full rulemaking process. In the interim, CCRCs that operate nursing facilities, or that seek to open nursing facilities, continue to have the opportunity to submit bed requests to the Department, including bed transfer requests which, as discussed previously, no longer require common ownership.

Other Revisions to the Statement of Policy

In addition the revisions discussed previously in the Public Comment section, the Department made other technical amendments to the Statement of Policy to reflect the language of section 443.1(8) of the code or to

clarify or streamline the guidelines and process for reviewing bed requests. The Department received no comments objecting to its proposal to delete obsolete provisions pertaining to CON holders from the Statement of Policy or to its proposal to eliminate Appendix C, which contained out-dated bed need projections. The Department has adopted those changes in the final amended Statement of Policy.

Statement of Policy

The final amended Statement of Policy is contained in Annex A.

Effective Date

The Statement of Policy will be effective upon publication in the *Pennsylvania Bulletin*.

Contact Person

Comments and questions regarding this Statement of Policy should be directed to the Commonwealth of Pennsylvania, Department of Public Welfare/Department of Aging, Office of Long-Term Living, 555 Walnut Street, Forum Place, 5th Floor, Harrisburg, PA 17101-1919, ATTN: Bureau of Policy Strategic Planning, (717) 705-3705.

HARRIET DICHTER,
Acting Secretary

(Editor’s Note: The regulations of the Department, 55 Pa. Code Chapter 1187, are amended by amending § 1187.21a to read as set forth in Annex A.)

Fiscal Note: 14-BUL-89. No fiscal impact; (8) recommends adoption.

Annex A**TITLE 55. PUBLIC WELFARE****PART III. MEDICAL ASSISTANCE MANUAL****CHAPTER 1187. NURSING FACILITY SERVICES****Subchapter C. NURSING FACILITY PARTICIPATION****§ 1187.21a. Nursing facility participation review process and guidelines—statement of policy.**

(a) *Scope.* This section applies to applicants, as defined in subsection (j).

(b) *Purpose.* The purpose of this section is to describe the process and the guidelines that the Department will use to review and respond to bed requests under section 443.1(8) of the Public Welfare Code (62 P. S. § 443.1(8)).

(c) *Policy regarding enrollment and expansion.*

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

(2) The Department will review bed requests on a case-by-case basis in accordance with the guidelines in subsection (g) or (h).

(d) *Submission of bed requests.*

(1) An applicant shall submit an original and two copies of its bed request to the Department at the following address:

Commonwealth of Pennsylvania
 Department of Public Welfare/Department of Aging
 Office of Long-Term Living
 555 Walnut Street
 Forum Place, 5th Floor
 Harrisburg, PA 17101-1919
 ATTN: Participation Review

(2) An applicant shall submit its bed request to the Department prior to commencing construction of a proposed project that involves expansion of an existing nursing facility or building a new nursing facility.

(e) *Contents of bed requests.*

(1) When an applicant submits a bed request, the Department has no obligation to independently seek out any information on the question of whether the applicant's bed request should be approved. To the contrary, the applicant should submit to the Department whatever information that the applicant believes is relevant to or supports its bed request.

(2) An applicant's bed request must be signed and include the following information:

(i) A statement that the representations made and the information provided in the bed request are true and correct to the best of the applicant's knowledge, information and belief.

(ii) A statement that the applicant is authorized to submit the bed request on behalf of the legal entity and that the legal entity has reviewed and approved the contents of this bed request, if the applicant is a person other than the legal entity of the subject facility.

(iii) A list containing the name and address of the following:

(A) Each person who is the legal entity of the subject facility.

(B) Each owner of the subject facility.

(C) A related party involved in the proposed project. For each person identified, the applicant shall specify whether the person is currently precluded from participating in the Medicare Program or any State Medicaid Program.

(3) An applicant's bed request should include the following information:

(i) An overview of the applicant's proposed project which includes a description of the population and primary service area of the subject facility.

(ii) A narrative and supporting documentation, if any, addressing each guideline in subsection (g) or (h) indexed to identify which guideline is being addressed.

(iii) Copies of any feasibility or market studies and financial projections prepared for the proposed project, including any studies or projections identifying project costs, sources of project funds, projected revenue sources by payer type, including assumptions used and expected occupancy rates by payer type.

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

(v) Other information that the applicant believes to be relevant.

(4) An applicant should specify whether or not any of the following applies, and if so, the applicant should attach copies of all documents relating to the applicable action, including notices, orders, or sanction letters, received from the Federal Centers for Medicare and Medicaid Services or any State Medicaid, survey or licensing agency:

(i) Whether the subject facility, the legal entity or any owner of the subject facility, or a related party involved in the proposed project is currently operating, or, at any time during the 3-year period preceding the date of the bed request, operated under a Corporate Integrity Agreement with the Department or the Federal government.

(ii) Whether the legal entity or any owner of the subject facility, or a related party involved in the proposed project owned, operated or managed a nursing facility at any time during the 3-year period preceding the date of the bed request and one of the following applies:

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

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

(C) The facility was subject to the imposition of sanctions or remedies for resident's rights violations.

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

(5) If a bed request does not include the information recommended in paragraph (3) or (4), the Department will not automatically deny the bed request, but the Department may independently seek and consider the information in determining how to respond to the bed request.

(f) *Consideration of bed requests.*

(1) Subject to paragraph (6), the Department will consider bed requests, other than bed transfer requests, submitted on or after January 1, 2010, biannually in two groups as follows:

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

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

(2) The Department will use its best efforts to issue decisions on any bed requests, other than bed transfer requests, that were submitted prior to and pending with the Department on December 31, 2009, by September 30, 2010.

(3) The Department will use its best efforts to issue decisions on any bed transfer requests that were submitted prior to April 3, 2010, by June 2, 2010.

(4) The Department will consider bed transfer requests submitted on or after April 3, 2010, in the order in which they are received. Subject to paragraph (6), the Department will issue decisions on the requests on an ongoing

basis following the expiration of the public comment period in paragraph (5)(iii).

(5) The public process is as follows:

(i) *Data book.* The Department will compile and make available on the Office of Long-Term Living (OLTL) web site a workbook for each review period containing the following:

(A) Data relating to the availability and cost of MA nursing facility services in this Commonwealth and by county.

(B) Data relating to the availability and cost of home and community-based services in this Commonwealth and by county.

(C) Commonwealth and county demographic data.

(ii) *Bed requests, other than bed transfer requests.* Following the close of each 6-month request period, the Department will make available on the OLTL web site a listing of the bed requests, other than bed transfer requests, included in the group under consideration. The Department will make copies of the requests in that group available for review by the public during regular business hours, and will accept written comments related to the requests in the group for a 30-day period following the date that the notice is posted on the web site.

(A) The Group One listing will be made available on the OLTL web site on or before July 31.

(B) The Group Two listing will be made available on the OLTL web site on or before January 31.

(iii) *Bed transfer requests.* No later than 15 calendar days following the last day of each calendar month, the Department will make available on the OLTL web site a listing of the bed transfer requests received by the Department during that calendar month. For a 15-day period following the date that the notice is posted on the web site, the Department will make copies of the bed transfer requests that are listed in the notice for that calendar month available for review by the public during regular business hours, and will accept written comments related to the bed transfer requests.

(6) If an applicant demonstrates good cause, the Department may expedite its review and respond to a bed request before the target date; provided that the Department will not respond prior to the close of the applicable public comment period specified in paragraph (5)(ii) and (iii).

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

(i) The information specified in subsections (e)(3) and (4).

(ii) Data relating to the overall occupancy rates of MA nursing facilities in the subject facility's primary service area and the county in which the subject facility is or will be located.

(iii) Data relating to the admission rates for day-one MA eligible persons and the MA occupancy rates of MA nursing facilities in the subject facility's primary service area and the county in which the subject facility is or will be located.

(iv) Data relating to the availability of home and community-based services in the subject facility's primary service area and the county in which the subject facility is or will be located.

(v) Data relating to the demographics of the subject facility's primary service area and the county in which the subject facility is or will be located.

(vi) Data relating to the admission and discharge practices of the subject facility and of MA nursing facilities in the subject facility's primary service area and the county in which the subject facility is or will be located.

(vii) Data relating to the subject facility's suitability as a provider of nursing facility services.

(viii) If the applicant is proposing to provide specialized medical services, data relating to the availability of the services in the subject facility's primary service area and the county in which the subject facility is or will be located.

(8) The Department will maintain a public file for each bed request that will be available for review by the public during regular business hours that contains the following:

(i) The bed request.

(ii) Public comments relating to the bed request.

(iii) Requests for additional information relating to the bed request made by the Department and any response to those requests.

(iv) Data or information relied upon by the Department in deciding to approve or disapprove a bed request.

(v) The Department's written response to the bed request.

(g) *Guidelines for evaluation of bed transfer requests.* The Department will use the following guidelines to evaluate bed transfer requests:

(1) Whether the receiving facility and the surrendering facility admit MA day-one recipients.

(2) Whether the decrease in beds at the surrendering facility will result in access barriers to nursing facility services for MA recipients. For purposes of this determination, the Department will examine, among other things, the MA occupancy rates both at the surrendering facility and at the receiving facility.

(3) Whether the increase in beds at the receiving facility will improve access to nursing facility services for MA recipients. For purposes of this determination, the Department will examine, among other things, the MA occupancy rates both at the surrendering facility and at the receiving facility.

(4) Whether the proposed bed transfer will result in a change in peer group under this chapter for the surrendering or receiving facility and, if so, whether the change will have a negative or positive effect on the MA Program or on MA recipients.

(5) Whether the surrendering facility is receiving capital component payments for the MA-certified nursing facility beds it is proposing to close as part of the bed transfer request.

(6) Whether any of the circumstances in subsection (e)(4) apply to the receiving facility or the legal entity or an owner of the receiving facility.

(7) Whether, and how, the applicant's proposed project would affect the Department's goal to rebalance the

Commonwealth's publicly-funded long-term living system to create a fuller array of service options for MA recipients.

(h) *Guidelines for evaluation of bed requests other than bed transfer requests.* The Department will use the following guidelines in evaluating a bed request that is not a bed transfer request:

(1) *MA Program's need for additional nursing facility beds.* The Department will determine whether additional MA-certified nursing facility beds are needed in the subject facility's primary service area and the county in which the subject facility is or will be located and, if so, whether the applicant or provider has demonstrated to the Department's satisfaction that it will meet that need. In making these determinations, the Department will review and consider the following:

(i) The existing size and utilization of the MA-certified bed capacity in the subject facility's primary service area and the county in which the subject facility is or will be located.

(ii) The extent to which MA recipients, including day-one MA recipients have access to the existing MA-certified bed capacity in the subject facility's primary service area and the county in which the subject facility is or will be located, and whether there are systemic barriers that prevent MA recipients from accessing that bed capacity.

(iii) If the applicant is proposing to provide specialized medical services in the subject facility, whether the applicant will admit and serve MA recipients who need such services; the extent to which the services are available in the existing MA-certified bed capacity in the subject facility's primary service area and the county in which the subject facility is or will be located, and whether there are systemic barriers that prevent MA recipients who need the services from accessing that bed capacity.

(iv) Whether, and to what extent (expressed as a percentage of MA occupancy), the applicant is willing and able to admit and serve day-one eligible MA recipients.

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

(vi) Whether, and how, the applicant's proposed project would affect the Department's goal to rebalance the Commonwealth's publicly-funded long-term living system to create a fuller array of service options for MA recipients.

(2) *Suitability.* The Department will determine whether the licensure and Medicaid and Medicare Program participation record of the subject facility and the legal entity and owners of the subject facility during the 3-year period preceding the date of the bed request demonstrates the subject facility's suitability to increase the number of MA-certified nursing facility beds in the MA Program.

(3) *Economic and financial feasibility without MA capital component payments.* The Department will consider whether the applicant has made, or will provide the legal entity's written assurances to the Department that the construction and operation of new or additional beds will be economically and financially feasible without the receipt of MA capital component payments and that the

legal entity is not entitled to MA capital component payments related to the new or additional beds.

(4) *Employment of welfare and Medical Assistance recipients.* The Department will consider whether an applicant has provided or will provide the legal entity's commitment to employ Public Assistance or MA recipients in the subject facility.

(i) *Time lines for completion of approved projects.* An applicant whose bed request is approved shall provide the legal entity's written assurances to the Department that the applicant's project will be completed in sufficient time so that the beds may be licensed, certified and available for occupancy within 3 years from the date the Department approves the applicant's bed request, or by such other date as may be specified by the applicant and agreed to by the Department.

(j) *Definitions.* For purposes of this section, the following words and terms, have the following meanings, unless the context clearly indicates otherwise:

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

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

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

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

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

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

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

Legal entity—A person who is one of the following:

(i) Authorized by the Department of Health as the licensee of a licensed nursing facility.

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

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

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

Primary service area—The county in which a subject facility is or will be physically located. If the applicant can demonstrate to the Department's satisfaction that at least 75% of the subject facility's residents will originate from another geographic area, the Department will consider that geographic area to be the subject facility's primary service area.

Proposed project—Any one of the following:

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

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

Receiving facility—A provider that is a subject facility of a bed transfer request which will increase the number of its MA-certified beds if a bed transfer request is approved.

Related party—A person who is or would be identified on Schedule J of a subject facility's MA cost report is a related party if the person were to provide goods, services or property to the subject facility.

Specialized medical services—Services not routinely provided in a nursing facility, including services needed by an individual who requires a respirator for survival, or services needed by an individual who has severe dementia, traumatic brain injury or bed side hemodialysis.

Subject facility—An existing or proposed county or nonpublic nursing facility that is the subject of a bed request.

Surrendering facility—A provider that is a subject facility of a bed transfer request which will decertify and permanently close at least the same number of MA-certified beds as the receiving facility identified in the same bed transfer request, if the request is approved.

Appendix C (Reserved.)

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