DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health Care Finance (DHCF or the Department), pursuant to the authority set forth in An Act to enable the District of Columbia (District) to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes approved December 27, 1967 (81 Stat.774; D.C. Official Code § 1-307.02 (2014 Repl.)) and Section 6(6) of the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2012 Repl.), hereby gives notice of the adoption, on an emergency basis, of a new Chapter 98, entitled "Financial Eligibility for Long Term Care Services and Supports" of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR).

Long term care services and supports are available for individuals with long-term medical needs who also meet specific financial eligibility (income and resources) requirements. In accordance with 42 U.S.C. §§ 1396a and 1396r-5; 42 C.F.R. §§ 435.631, 435.726, 435.821, and 435.832, these emergency and proposed rules provide a comprehensive regulatory framework for: (1) the determination of financial eligibility for long term care services and supports; and (2) the amount a beneficiary shall contribute to the cost of care for long term care services and supports following a determination of financial eligibility. This framework will ensure that accurate determinations of financial eligibility and contributions to cost of care are made, enabling eligible individuals to access these crucial services provided under the Medicaid program.

Emergency action is necessary for the immediate preservation of the health, safety, and welfare of District residents by maintaining Medicaid program integrity and preserving access to vitally important long term care services and supports. Long term care services and supports provide beneficiaries with crucial services including assistance with basic tasks of everyday life. Medicaid beneficiaries may receive these services in institutional/facility based settings, in the community, and in their homes. Accordingly, these services and supports are provided to some of the District's most vulnerable residents. As the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) has promulgated new Medicaid financial eligibility rules, the District must adopt new methodologies for determining and renewing eligibility for long term care services and supports without delay to continue to provide these much-needed services and supports to vulnerable residents.

The emergency rulemaking shall be adopted on May 13, 2015 and became effective on that date. The emergency rules shall remain in effect for one hundred and twenty (120) days until September 10, 2015 unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*.

The Director of DHCF also gives notice of the intent to take final rulemaking action to adopt these rules not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

A new Chapter 98, FINANCIAL ELIGIBILITY FOR LONG TERM CARE SERVICES AND SUPPORTS, is added to Title 29 DCMR, PUBLIC WELFARE, to read as follows:

9800 GENERAL PROVISIONS

9800.1 This chapter establishes standards governing financial eligibility determinations and post-eligibility treatment of income for long term care services and supports (LTCSS), which include health-related care and services provided in a nursing facility or Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID), or in a home or community setting through a Home and Community-Based Services Waiver (HCBS Waiver) program.

9800.2 Applicants and beneficiaries shall consist of the following three (3) eligibility groups:

(a) Individuals who have been determined eligible for Social Security Income (SSI) by the U.S. Social Security Administration (SSA);

(b) Individuals who meet the income and resource requirements under the Special Income Standard (SIS), which is equal to three hundred percent (300%) of the SSI federal benefit rate (FBR); and

(c) Individuals whose gross countable income exceeds the SIS and who elect to spend their excess income down to the Medically Needy Income Level (MNIL) to become financially eligible for LTCSS.

9800.3 The Department of Health Care Finance (the Department) shall establish an applicant or beneficiary's financial eligibility for LTCSS after evaluating the applicant's or beneficiary's non-financial eligibility for LTCSS.

9800.4 A determination of non-financial eligibility for LTCSS shall include consideration of the following five (5) components:

(a) District of Columbia residency, determined in accordance with Section 9502 of Title 29 DCMR;

(b) U.S. citizenship or satisfactory immigration status, determined in accordance with Section 9503 of Title 29 DCMR;

(c) Social Security number, determined in accordance with Section 9504 of Title 29 DCMR;

(d) Age (eighteen (18) years or older for all LTCSS applicants and beneficiaries, and sixty five (65) years or older for applicants and beneficiaries seeking LTCSS under the Elderly and Persons with Physical Disabilities (EPD) waiver program on the basis of advanced age); and

(e) Clinical determination that the applicant or beneficiary requires an institutional level of care.

9800.5 Determinations of financial eligibility for LTCSS shall include those determinations made at the initial application, annual renewals, and periodic redeterminations.

9800.6 A determination of financial eligibility for LTCSS shall include the following:

(a) An income test, as described at Subsection 9801.1; and

(b) A resource test, as described at Subsection 9802.1.

9800.7 In calculating gross countable income and gross countable resources, the Department shall only count the income and resources available to the applicant or the applicant's spouse at the time of the initial eligibility determination.

9800.8 The Department shall redetermine financial eligibility for LTCSS every twelve (12) months, except for individuals referenced in Subsection 9800.2(c). Financial eligibility for these individuals shall be redetermined every six (6) months.

9800.9 A beneficiary shall immediately notify the Department of any change in circumstances that directly affects financial eligibility for LTCSS.

9800.10 The Department shall redetermine eligibility for beneficiaries identified at Subsection 9800.9 at the time the change is reported.

9800.11 After an applicant or beneficiary is determined financially eligible for LTCSS, the Department shall determine how much that individual shall contribute to the cost of care.

9801 INCOME TEST

9801.1 In order to be eligible for LTCSS, an applicant or beneficiary shall have gross countable income at or below the Special Income Standard (SIS), which is equal to three hundred percent (300%) of the SSI federal benefit rate (FBR), except as identified at Subsection 9801.6.

9801.2 Individuals identified at Subsection 9800.2(a) shall be exempt from the income test in Subsection 9801.1.

9801.3 If an applicant or beneficiary has a community spouse, gross countable income shall be determined after spousal impoverishment protections for income have been applied.

9801.4 Gross countable income shall include the following:

(a) Taxable income received from employment;

(b) Income received from sources other than employment; and

(c) Income from self-employment.

9801.5 Gross countable income shall exclude the following:

(a) Earnings from an unmarried minor child who is living with an individual who provides care or supervision;

(b) Adoption subsidies;

(c) AmeriCorps/VISTA Income received under the National and Community Service Trust Act of 1993, effective September 21, 1993 (Pub.L. No. 103-82, 107 Stat. 787), as amended by the Serve America Act, effective April 21, 2009 (Pub.L. No. 111-13, 123 Stat. 1463; codified at 42 U.S.C. §§ 12501 *et seq.*);

(d) Child Nutrition Payments;

(e) Payments received under the Domestic Volunteer Service Act of 1973, effective October 1, 1973 (Pub.L. No. 93-113, 87 Stat. 396), as amended by the Domestic Volunteer Service Act Amendments of 1984, effective May 21, 1984 (Pub.L. No. 98-288, 98 Stat. 189), as amended by the National and Community Service Trust Act of 1993, effective September 21, 1993 (Pub.L. No. 103-82, 107 Stat. 899), as amended by the Serve America Act of 2009, effective April 21, 2009 (Pub.L. No. 111-13, 123 Stat. 1581; codified at 42 U.S.C. §§ 12501 *et seq.*);

(f) Earned Income Tax Credits;

(g) Educational benefits;

(h) Energy assistance;

(i) Foster care payments;

(j) Housing assistance provided by the federal or District of Columbia government or non-profit organizations;

(k) Incentive payments for Prenatal & Well-Baby Care and from the Work Incentive programs for current or former recipients of Temporary Aid to Needy Families (TANF) under the Personal Responsibility and Work

Opportunity Reconciliation Act of 1996, effective August 22, 1996 (Pub. L. 104-193, 110 Stat. 2105; as codified as 42 U.S.C. §§ 1305 *et seq.*)

(l) Non-cash benefits in the form of voucher, commodity or service;

(m) Jury duty payments;

(n) Money received by a third party for an applicant, beneficiary, or community spouse, unless an applicant, beneficiary, or community spouse has or will have access to the funds;

(o) Money received by an applicant, beneficiary, or community spouse, on behalf of any third party;

(p) Nutrition payments;

(q) Rehabilitation Services Administration (RSA) Payments received under the Rehabilitation Act of 1973, effective September 26, 1973 (Pub.L. No. 93-112, 87 Stat. 355);

(r) Reimbursements received from an individual or organization to cover past, current, or future expenses, if all the following conditions are met:

(1) The reimbursement is for actual expenses;

(2) The reimbursement is earmarked to cover those expenses; and

(3) The reimbursement is paid or documented separately from any other payment such as wages;

(s) Payments received from roommates to cover their share of household expenses such as rent and utilities and which are paid by the applicant or beneficiary to the landlord or utility company;

(t) Senior Community Service Employment Program (SCSEP) Income received under the Older Americans Act of 1965, approved July 14, 1965 (Pub.L. No. 89-73, 79 Stat. 218), as amended by the Older Americans Act Amendments of 2000, approved November 13, 2000 (Pub.L. No. 106-501, 114 Stat. 2226), as amended by the Older Americans Act Amendments of 2006, approved October 17, 2006 (Pub.L. No. 109-365, 120 Stat. 2522);

(u) TANF underpayments;

(v) Training income, such as Training Expense Allowances/Stipends; and

(w) Utility allowances received through a federal or District government housing assistance program.

9801.6 An applicant or beneficiary who has gross countable income exceeding the SIS shall be permitted to spend down the excess income to the MNIL, in accordance with 42 C.F.R. § 435.831, to become financially eligible for LTCSS.

9801.7 The following standards shall apply in determining the income allocated to an applicant or beneficiary with a spouse:

(a) If there is no trust or other legally enforceable document establishing ownership of the income, one half (1/2) of the income shall be considered available to each spouse;

(b) If payment of income is provided for in a trust or other legally enforceable document, the income shall be considered available to each spouse in accordance with the allocation made in the document;

(c) If there is no trust or other legally enforceable document establishing ownership of the income and payment of income is made in the names of both spouses, one half (1/2) of the income shall be considered available to each spouse;

(d) If there is no trust or other legally enforceable document establishing ownership of the income and payment of income is made solely in the name of one spouse, the income shall be considered available only to that spouse; and

(e) If there is no trust or other legally enforceable document establishing ownership of the income and payment of income is made in the names of either spouse, or both, and to another individual or individuals, the income shall be considered available to each spouse in the proportion to the spouse's interest. If payment is made to both spouses and no other interest is specified, one half (1/2) of the joint interest shall be considered available to each spouse.

9801.8 Following an initial eligibility determination, no income of a community spouse shall be considered available to a beneficiary during any month in which the beneficiary receives LTCSS.

9801.9 A community spouse shall be entitled to retain a Community Spouse Allowance.

9801.10 A Community Spouse Allowance shall equal the minimum monthly maintenance needs allowance (MMMNA) plus any excess shelter allowance.

9801.11 A community spouse may retain an amount higher than the Community Spouse Allowance if either spouse demonstrates at a fair hearing that a higher amount is necessary due to exceptional circumstances resulting in severe financial duress. Exceptional circumstances may include but are not limited to:

(a) Recurring or extraordinary non-covered medical expenses;

(b) Amounts to preserve, maintain, or make major repairs to a home;

(c) Transportation costs; and

(d) Amounts necessary to preserve an income-producing resource.

9801.12 In accordance with 1 DCMR § 2970 and 42 C.F.R. § 431.200, an applicant, beneficiary, or community spouse may request a fair hearing to address the following matters:

(a) The amount of the Community Spouse Allowance; or

(b) The amount of income determined available to the community spouse.

9801.13 At the first annual renewal following the initial eligibility determination, the District shall verify that an institutionalized spouse has made available any amount of income under a Community Spouse Allowance to the community spouse.

9802 RESOURCE TEST

9802.1 In order to be eligible for LTCSS, an applicant or beneficiary shall not have gross countable resources that exceed four thousand dollars ($4,000).

9802.2 Individuals identified at Subsection 9800.2(a) shall be exempt from the resource test in Subsection 9802.1.

9802.3 If an applicant or beneficiary has a community spouse, gross countable resources shall be determined after spousal impoverishment protections for resources have been applied.

9802.4 If an applicant or beneficiary's gross countable resources exceed four thousand dollars ($4,000), the applicant or beneficiary may reallocate excess resources to excludable resource types without affecting eligibility for LTCSS.

9802.5 Gross countable resources shall exclude the following resource types:

(a) The personal home of the applicant or beneficiary, if one (1) of the following conditions is met:

(1) The home equity interest does not exceed the maximum home equity limit set annually by the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) and available at: http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Spousal-Impoverishment-Page.html (last visited March 25, 2015);

(2) The community spouse of the applicant or beneficiary resides in the home; or

(3) A child of the applicant or beneficiary who is under age twenty-one (21) or has a disability resides in the home;

(b) Accounts receivable;

(c) Burial funds that are in a separate, designated account;

(d) Promissory notes, if the notes are not related to transfers of resources within the past sixty (60) months;

(e) Earned income tax credits;

(f) Energy assistance payments;

(g) Proceeds from a home sale, if the applicant or beneficiary purchases or intends to purchase a new home within the next twelve (12) months;

(h) Household and personal goods;

(i) Inaccessible resources, which the applicant or beneficiary can neither use for ongoing support nor sell;

(j) Indian lands;

(k) Jointly owned resources, if the owner is legally unable to liquidate the resources;

(l) Land contracts;

(m) Life insurance funded funerals;

(n) Resources used to secure a loan for business purposes;

(o) Resources not fit to sell or not capable of being sold;

(p) Property pending sale;

(q) U.S. Department of Housing and Urban Development (HUD) reimbursements;

(r) One (1) vehicle per household (if there are multiple vehicles in the household, the vehicle with the highest value shall be excluded);

(s) Higher education savings plans;

(t) U.S. savings bonds, if penalties apply to early withdrawals or liquidations and they have not been renewed or reinvested during any immediately preceding period of Medicaid eligibility;

(u) Individual Retirement Accounts;

(v) Keogh accounts;

(w) Other retirement accounts including, but not limited to, 401(k), 403(b), and 457 accounts; and

(x) Funds or deposits with a Continuing Care Retirement Community (CCRC), unless all of the following conditions are met:

(1) The funds can be used to pay for care under the terms of the contract should other resources of the individual be insufficient;

(2) The entrance fee, or remaining portion, is refundable when the individual dies or leaves the community; and

(3) The fee confers no ownership interest in the community.

9802.6 When the personal home is excluded from gross countable resources in accordance with Subsection 9802.5(a), the Department may place a lien, in accordance with federal requirements, on the personal home of a beneficiary if:

(a) The beneficiary has been institutionalized in a nursing facility or Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID) for longer than six (6) months; and

(b) The Department has determined, based on a physician's statement, that the beneficiary cannot reasonably be expected to be discharged from the institution and to return home, and has notified the beneficiary of this determination.

9802.7 In accordance with 1 DCMR § 2970 and 42 U.S.C. § 1396p(a)(1)(B)(ii), a beneficiary may request a fair hearing regarding the Department's determination that the beneficiary cannot reasonably be expected to be discharged from the institution and to return home.

9802.8 A lien shall not be imposed under Subsection 9802.6 if any of the following individuals are lawfully residing in the beneficiary's personal home:

(a) The community spouse of the beneficiary;

(b) A child of the beneficiary who is under age twenty-one (21) or is permanently and totally disabled; or

(c) A sibling of the beneficiary who has an equity interest in the home and who had been residing in the home for at least one (1) year immediately before the date the beneficiary became institutionalized.

9802.9 Any lien imposed under Subsection 9802.6 shall be dissolved upon the beneficiary's discharge from the institution and return home.

9802.10 The Department shall apply methods used by the Social Security Administration (SSA), detailed at: https://secure.ssa.gov/apps10/poms.nsf/lnx/0501130700 (last visited March 25, 2015), for counting resources in which countable and excluded resource types are comingled.

9802.11 The Department shall determine the total gross countable resources available to an institutionalized spouse and community spouse at the:

(a) Time of the initial eligibility determination; or

(b) Request of either spouse during the institutionalized spouse's first period of institutionalization lasting thirty (30) or more consecutive days.

9802.12 Any countable resources held by the institutionalized spouse, the community spouse, or both spouses shall be considered available to the institutionalized spouse at the time of the initial eligibility determination, unless:

(a) The institutionalized spouse has assigned to the District any rights to support from the community spouse;

(b) The institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment, but the District has the right to bring a support proceeding against the community spouse without such assignment; or

(c) The District determines that the denial of eligibility would work an undue hardship.

9802.13 The Department shall determine the spousal share of resources allocated to each spouse either:

(a) At the time of the initial eligibility determination; or

(b) At the request of either spouse during the institutionalized spouse's first period of institutionalization lasting thirty (30) or more consecutive days.

9802.14 A community spouse shall be entitled to retain a Community Spouse Resource Allowance equal to the spousal share, unless the spousal share is less than the minimum amount or greater than the maximum amount established annually by CMS and available at: http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Spousal-Impoverishment-Page.html (last visited March 25, 2015).

9802.15 If the spousal share is less than the minimum amount, the institutionalized spouse may transfer excess countable resources to the community spouse to raise the Community Spouse Resource Allowance to the minimum amount.

9802.16 If the spousal share is greater than the maximum amount, the community spouse may only retain the maximum amount.

9802.17 Where an institutionalized spouse is allowed to transfer excess countable resources following the initial eligibility determination to a community spouse, the institutionalized spouse shall reallocate excess countable resources before the first annual renewal.

9802.18 In accordance with 1 DCMR § 2970 and 42 C.F.R. § 431.200, an applicant, beneficiary, or community spouse may request a fair hearing to address the following matters:

(a) The spousal share of resources;

(b) The amount of the Community Spouse Resource Allowance; or

(c) The amount of resources attributed to each spouse.

9802.19 At the first annual renewal following the initial eligibility determination, the District shall verify that a beneficiary has transferred excess countable resources to the community spouse

9803 IMPROPER RESOURCE TRANSFERS AND PENALTY PERIOD

9803.1 At the time of the initial eligibility determination, the Department shall conduct a review to determine whether the applicant, the applicant's spouse, or an individual authorized to act for the applicant by a power of attorney executed in accordance with D.C. Official Code § 21-2101 or § 21-2102 has improperly transferred resources for less than fair market value within sixty (60) months prior to the date of an application for LTCSS.

9803.2 The Department shall impose a penalty period if the applicant, the applicant's spouse, or an individual authorized to act for the applicant by a power of attorney has transferred resources for less than fair market value within sixty (60) months prior to the date of an application for LTCSS.

9803.3 The penalty period shall be the length of time during which an individual is ineligible for Medicaid coverage of LTCSS due to improper resource transfers made within sixty (60) months prior to the date of an application for LTCSS.

9803.4 The length of the penalty period shall be based on the following formula:

Total Uncompensated Value of All Transferred Resources

÷

Average Monthly Cost of a Private Nursing Facility Patient in the Community

=

Number of Months of Penalty Period.

9803.5 The Department shall determine the total uncompensated value of all transferred resources by subtracting the amount received by the individual for the improperly transferred resources from the fair market value of those resources.

9803.6 The Department shall determine the average monthly cost of a private nursing facility patient in the community on an annual basis, using a single standard figure for all LTCSS applicants.

9803.7 Where a partial month period exists at the end of the penalty period, the applicant is only eligible for LTCSS for the portion of the month after the penalty period ends.

9803.8 The Department may waive the penalty period if it could create an undue hardship. Undue hardship may exist:

(a) For applicants in an institutional setting, if the individual has been threatened with eviction from a long-term care facility or medical institution and has exhausted all legal methods to prevent the eviction; or

(b) For applicants eligible for Home and Community-Based Services (HCBS) Waiver, if the individual's service provider has threatened to terminate services; and

(1) The individual to whom the resource was transferred is no longer in possession of the transferred resource and has no other resources of comparable value with which to pay the cost of care; and

(2) There is no family member or other individual or organization able and willing to provide care to the individual; or

(c) For all LTCSS applicants, if the applicant would be deprived of medical care that would endanger his or her life or health; or food, clothing, shelter, or other necessities of life; or

(d) For all LTCSS applicants, if any other undue hardship or good cause exemption exists, as may be defined by the Secretary for the U.S. Department of Health and Human Services or the Secretary for the U.S. Department of Agriculture.

9803.9 Transfers of resources under the following circumstances shall not be subject to the penalty period described in Subsection 9803.3:

(a) The resource that was transferred was the applicant's personal home, and title to the home was transferred to:

(1) The spouse of the applicant;

(2) A child of the applicant who:

(i) Was under the age of twenty-one (21);

(ii) Was blind or permanently and totally disabled; or

(iii) Had been residing in the home for at least two (2) years immediately before the date the applicant became institutionalized and who provided care to the applicant which permitted the applicant to reside at home, rather than in an institution; or

(3) A sibling of the applicant who had an equity interest in the home and who had been residing in the home for at least one (1) year immediately before the date the applicant became institutionalized.

(b) Any type of resource that was transferred:

(1) To the applicant's spouse or to another for the sole benefit of the spouse;

(2) From the applicant's spouse to another for the sole benefit of the spouse;

(3) To the applicant's child who is blind or permanently and totally disabled, or to a trust established for the sole benefit of such child; or

(4) To a trust established for the sole benefit of an individual under the age of sixty-five (65) who is disabled as defined by SSI.

(c) Any type of resource that was transferred, and for which a satisfactory showing is made to the District that:

(1) The applicant intended to dispose of the resources at fair market value;

(2) The resources were transferred exclusively for a purpose other than to qualify for medical assistance; or

(3) All resources transferred for less than fair market value have been returned to the applicant, or the fair market equivalent has been returned.

9803.10 Establishment of the following types of trusts s shall not be subject to the penalty period described in Subsection 9803.3:

(a) A "special needs" trust containing the resources of an individual under the age of sixty-five (65) with a disability, which may also contain the resources of other individuals and which meets the following conditions:

(1) The trust is established for the sole benefit of the individual by a parent, grandparent, legal guardian, or court; and

(2) The trust contains a provision stating that, upon the death of the individual, the District receives all amounts remaining in the trust, up to the total amount of medical assistance paid on behalf of the individual.

(b) A "pooled" trust containing the resources of an individual with a disability which meets the following conditions:

(1) The trust is established for the sole benefit of the individual by a parent, grandparent, legal guardian, or court;

(2) The trust is established and managed by a non-profit association;

(3) A separate account is maintained for each beneficiary, but funds are pooled for investment and management purposes; and

(4) The trust contains a provision stating that, to the extent that any amounts remaining in the individual's account upon his or her death are not retained by the trust, the trust pays to the District the amount remaining in the account up to the total amount of medical assistance paid on behalf of the individual.

9803.11 The purchase of an annuity shall not be subject to the penalty period described in Subsection 9803.3 under the following conditions:

(a) Annuities purchased on or after February 8, 2006 name the District as the primary remainder beneficiary, or secondary remainder beneficiary after a community spouse or minor child or child with a disability, for an amount equal to the total amount of medical assistance paid on the behalf of the applicant; and

(b) Annuities purchased on or after February 8, 2006, are irrevocable, non-assignable, actuarially sound, and provide for payments in equal amounts during the annuity term, with no deferral or balloon payments; or meet the requirements pertaining to retirement plans in 42 U.S.C. § 1396p(c)(1)(G)(i).

9803.12 For annuities purchased prior to February 8, 2006, actions taken by the individual that change the course of payments to be made by the annuity or treatment of the income or principal of the annuity subject the annuity to the requirements for those purchased on or after February 8, 2006.

9803.13 Routine changes and automatic events that do not require action by the individual do not subject an annuity purchased prior to February 8, 2006, to the requirements for those purchased on or after February 8, 2006.

9803.14 The purchase of a life estate interest in another individual's home shall not be subject to the penalty period described in Subsection 9803.3 when the purchaser lives in the home for at least one (1) year after the date of purchase.

9803.15 The full purchase price of the life estate interest shall be deemed a transfer of resources for less than fair market value if the purchaser has not lived in the home for at least one (1) year.

9803.16 Notwithstanding the length of time the purchaser lives in the home, if the purchase amount of the life estate interest is greater than the computed value of the interest, the difference is considered a transfer of resources for less than fair market value.

9803.17 The purchase of a promissory note or loan shall not be subject to the penalty period described in Subsection 9803.3 under the following conditions:

(a) The repayment terms are actuarially sound;

(b) Payments are made in equal amounts with no balloon payments; and

(c) The note, loan or mortgage prohibits cancellation of the debt upon the death of the lender.

9804 POST-ELIGIBILITY TREATMENT OF INCOME

9804.1 The Department shall determine how much monthly income a beneficiary must contribute toward the cost of LTCSS after an initial eligibility determination.

9804.2 The Department shall project the beneficiary's gross countable monthly income for a six (6) month prospective period to determine a beneficiary's contribution to the cost of care.

9804.3 Gross countable monthly income shall be calculated as follows:

(a) Income received on a yearly basis or less often than monthly shall be converted to a monthly amount or prorated;

(b) If the amount or frequency of regularly received income is known, the Department shall average the income over the period between payments; or

(c) If neither the amount nor the frequency of income is predictable, the Department shall not average the income but count income only for the month in which it is received.

9804.4 The Department shall subtract the following types of deductions from the beneficiary's gross countable monthly income:

(a) A Personal Needs Allowance equal to:

(1) Seventy dollars ($70) for a beneficiary in a nursing facility who does not receive a pension from the Department of Veterans Affairs;

(2) Ninety dollars ($90) for a beneficiary in a nursing facility who receives a pension from the Department of Veterans Affairs;

(3) One hundred and forty dollars ($140) for a couple if both spouses are institutionalized in a nursing facility;

(4) One hundred dollars ($100) for a beneficiary who receives residential supports through the District Department on Disability Services (DDS);

(5) Seventy dollars ($70) for a beneficiary in an Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID) who receives Supplemental Security Income (SSI); and,

(6) One hundred dollars ($100) for a beneficiary in an ICF/IID who receives Social Security Disability Income (SSDI).

(b) A Community Maintenance Needs Allowance, for a beneficiary enrolled in an HCBS Waiver program only, equal to the Special Income Standard (SIS);

(c) A Community Spouse Allowance, for a beneficiary who has a community spouse only;

(d) A Dependent Family Allowance, equal to the annual MNIL, for a beneficiary who has:

(1) Minor or dependent children, including disabled adult children of the beneficiary or community spouse, who reside in the personal home with the community spouse;

(2) Dependent parents of the beneficiary or community spouse who reside in the personal home with the community spouse; or

(3) Dependent siblings of the beneficiary or community spouse who reside in the personal home with the community spouse;

(e) Incurred Medical Expenses, if the expenses are not subject to payment by a third party, including incurred medical expenses used to meet a spend down obligation;

(f) Remedial Care Expenses, equal to the amount of fees paid to a guardian, conservator, or representative payee;

(g) A Home Maintenance Deduction equal to the MNIL for a beneficiary residing in an institutional facility. A home maintenance deduction may be deducted only:

(1) For up to six (6) months;

(2) When a community spouse does not reside in the home; and

(3) If a physician certifies that the beneficiary is likely to return to the home within six (6) months; and

(h) The full amount of SSI or State Supplementary Payment Benefits for a beneficiary who resides in a long term care facility.

9804.5 The amount of the beneficiary's gross countable income that remains after allowable deductions and spousal impoverishment protections for income and resources (if applicable) have been applied is the amount of the beneficiary's contribution to the cost of care.

9804.6 The Department shall reduce its payment for LTCSS by the amount of the beneficiary's contribution to the cost of care.

9804.7 The Department shall reconcile the beneficiary's projected income with the beneficiary's actual income at the end of every six (6) month period in which a beneficiary receives Medicaid coverage of LTCSS, or whenever any significant change in the beneficiary's income or circumstances occurs.

9804.8 The reconciliation may include a period of up to six (6) months prior to the month in which the reconciliation is done.

9804.9 The Department may redetermine the beneficiary's contribution to the cost of care:

(a) After the reconciliation process;

(b) At annual renewals; and

(c) When a beneficiary reports a significant change of income or other circumstances.

9804.10 Any redetermination of or adjustment to the beneficiary's contribution to the cost of care resulting from the reconciliation shall not be applied until timely and adequate notice of the redetermination or adjustment is provided to the beneficiary.

9804.11 The Department shall adjust the beneficiary's contribution to the cost of care prospectively when the income actually received by the beneficiary during the six (6) month reconciliation period differs from the beneficiary's projected income for that period.

9804.12 If the income actually received by the beneficiary during the six (6) month period exceeds the beneficiary's projected income for that period, an adjustment shall be added to the beneficiary's contribution to the cost of care in a future month or

months to reflect the amount that should have been contributed during the six (6) month period.

9804.13 If an income change or change in circumstances renders a beneficiary ineligible for Medicaid coverage of LTCSS, a prospective adjustment cannot be added to the former beneficiary's contribution to the cost of care. Under these circumstances, the Department may seek to recover the full amount of the adjustment by requesting voluntary repayment from the former beneficiary.

9804.14 The Department may pursue recovery by appropriate action, pursuant to District law, against the income or resources of the former beneficiary if the Department is unable to recover the full amount of the adjustment through voluntary repayment from the former beneficiary.

9804.15 If the income actually received by the beneficiary during the six (6) month period is less than the beneficiary's projected income for that period, the beneficiary's contribution to the cost of care shall be reduced in a future month or months to reflect the amount that should not have been contributed during the six (6) month period.

9899 DEFINITIONS

For the purposes of this chapter, the following terms shall have the meanings ascribed:

Community Maintenance Needs Allowance (CMNA): A standard income amount that an HCBS Waiver participant living at home may retain to afford the costs associated with living in the community, such as expenses related to mortgage, rent, food, utilities, taxes, and home repairs.

Community Spouse: A spouse of an institutionalized individual who is not institutionalized or enrolled in a Waiver program.

Community Spouse Allowance (CSA): The amount of the institutionalized spouse's income that can be maintained by or transferred to the community spouse. The CSA is the amount needed to maintain or raise the community spouse's income to the Minimum Monthly Maintenance Needs Allowance (MMMNA).

Community Spouse Resource Allowance (CSRA): An allowance of resources that can be maintained by or transferred to the community spouse without incurring penalties.

Cost of Care: The amount of money charged by a long term care facility or HCBS Waiver service provider for LTCSS.

Dependent: A dependent family member may include a parent, minor child, dependent child, or dependent sibling, including half and step siblings, of either member of a couple who resides with the community spouse and who may be claimed as a dependent by either member of the couple for tax purposes pursuant to 26 U.S.C. § 152.

Dependent Family Allowance: An allowance of income for each dependent family member residing with the community spouse.

Exceptional Circumstances: Circumstances that threaten the community spouse's ability to remain in the community due to severe financial duress.

Excess Shelter Allowance: An allowance of the community spouse's income for shelter including rent or mortgage payment, taxes, utilities, and insurance.

Fair Market Value: In accordance with 26 C.F.R. § 20.2031-1(b), the fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.

Federal Benefit Rate: The share of the Supplemental Security Income (SSI) grant paid by the federal government, which does not include any applicable State supplement.

Gross Countable Income: Includes an individual's total gross earned and unearned income, excluding income from non-countable sources.

Gross Countable Resources: Includes all resources available to the individual, excluding exempt categories of resources.

Home and Community-Based Services Waiver (HCBS Waiver) Programs: HCBS Waiver programs, the Home and Community-Based Services Waiver for Persons who are Elderly and Individuals with Physical Disabilities (EPD), and the Home and Community-Based Services Waiver for Persons with Intellectual and/or Developmental Disabilities (IDD), that provide home and community-based services that assist Medicaid-eligible individuals to live in the community and avoid institutionalization.

Home Maintenance Deduction: A standard income amount that an individual residing in an institutional setting may retain to pay for the maintenance of the home.

Incurred Medical Expenses: Medically necessary medical expenses incurred by an individual, family member, or financially responsible relative that are not subject to payment by a third party.

Institutional Level of Care: The level of care furnished to individuals residing in a nursing facility or Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID).

Institutionalized Individual: An individual receiving an institutional level of care in an institutional setting (*i.e.*, nursing facility or Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID)). An individual in an acute care facility is considered institutionalized if the individual receives, or is likely to receive, an institutional level of care for more than thirty (30) days.

Institutionalized Spouse: An individual who is residing in an institutional setting and who is married to a person who is not in a medical institution or nursing facility.

Land Contract: A contract between a seller and buyer of real property in which the seller provides financing to the buyer to purchase the property for an agreed-upon purchase price and the buyer repays the loan in installments.

Long term care services and supports (LTCSS): Health-related care and services, above the level of room and board, that are needed regularly due to a mental or physical condition, provided in a nursing facility or Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID), or in a home or community setting through a Home and Community-Based Services Waiver (HCBS Waiver) program.

Maximum Home Equity Limit: The amount established annually by CMS which limits the home equity interest an individual may have in his or her personal home, and still be eligible for LTCSS.

Medically Needy Income Level (MNIL): Fifty percent (50%) of the Federal Poverty Level (FPL) for a household of two or larger; the MNIL for a household of one is ninety-five percent (95%) of that for a household of two.

Minimum Monthly Maintenance Needs Allowance (MMMNA): The minimum amount of monthly income that the community spouse is entitled to possess. This may consist solely of the community spouse's income or the sum total of the community spouse's income plus the Community Spouse Allowance.

Personal Home: An individual's primary residence.

Personal Needs Allowance (PNA): A standard income amount that an individual residing in an institution or receiving residential supports through the

Department on Disability Services (DDS) may retain to pay for personal needs not provided by the institution.

Pooled Trust: A trust which contains the resources of an individual with a disability, is established for the sole benefit of the individual by a parent, grandparent, legal guardian, or court, and meets the requirements of 42 U.S.C. § 1396p(6)(4)(C).

Remedial Care Expenses: Amounts for fees paid to a guardian, conservator, or representative payee.

Sibling: One (1) of two (2) or more children related by blood or adoption through a common legal parent or through the marriage of the children's legal or biological parents.

Special Income Standard (SIS): Three hundred percent (300%) of the SSI federal benefit rate (FBR) defined by the Social Security Administration (SSA).

Special Needs Trust: A trust which contains the resources of an individual under the age of sixty-five (65) with a disability, is established for the sole benefit of the individual by a parent, grandparent, legal guardian, or court, and meets the requirements of 42 U.S.C § 1396p(d)(4)(a).

Spend Down: Spend down is the process by which an individual may use medical expenses to reduce countable income to the Medicaid income limit to meet financial eligibility requirements for Medicaid coverage.

Spousal Impoverishment Protections: Allowances and deductions to a couple's income and resources, defined in Section 1924 of the Social Security Act, that are designed to protect the income and resources of the community spouse. Spousal impoverishment protections apply to HCBS Waiver individuals and institutionalized individuals who were institutionalized in a long-term care facility on or after October 1, 1989.

Spousal Share: Half (1/2) of the total countable resources available to either the institutionalized or community spouse.

Spouse: A person married under District law, including members of common-law and same-sex couples whose marriages or civil unions are recognized under the Religious Freedom and Civil Marriage Equality Act of 2009 (D.C. Official Code § 46-401). The term does not include registered domestic partners.

State Supplementary Payment: Payments made to individuals residing in a Certified Residential Facility (CRF) or Adult Living Facility (ALF).

Comments on the proposed rule shall be submitted, in writing, to Claudia Schlosberg, Senior Deputy Director/State Medicaid Director, Department of Health Care Finance, 441 4th Street, NW, Suite 900S, Washington, D.C. 20001, via telephone on (202) 442-8742, via email at DHCFPubliccomments@dc.gov, or online at www.dcregs.dc.gov, within thirty (30) days after the date of publication of this notice in the *D.C. Register*. Copies of the proposed rule may be obtained from the above address.