DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

FINAL

DSSM: 15120.2 Financial Eligibility and 16230.1.2 Self-Employment Income

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance initiated proceedings to amend several sections in the Division of Social Services Manual (DSSM) regarding the self-employment standard deduction to determine eligibility. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the February 2009 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by March 4, 2009 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

The proposed changes described below amends policies in the Division of Social Services Manual (DSSM) to comply with the CMS-approved Medicaid state plan amendment regarding the use of a self-employment standard deduction to determine eligibility.

Statutory Authority

Section 1902(r)(2) of the Social Security Act, *More Liberal Methods of Treating Income*

Summary of Proposal

Title XIX Medicaid State Plan, SPA #411, regarding self-employment income, was approved on March 9, 2006 and effective October 1, 2005. Policy addressing actual self-employment expenses was inadvertently omitted in the final regulation as published in the Delaware Register at 9 DE Reg. 567 (October 1, 2005 issue). The Centers for Medicare & Medicaid Services (CMS) approved SPA #411 provided agency policy indicates that actual expenses are used if the application of the standard deduction results in a finding of ineligibility.

DSSM 15120.2, *Financial Eligibility;* DSSM 16230.1.2, *Self-Employment Income*: The proposed rule will amend existing rules to reflect the policy of the state plan to allow actual self-employment expenses to be used when the application of the self-employment standard deduction results in a finding of ineligibility.

There will be no change in practice or procedure as staff has been applying this policy about actual self-employment expenses.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE

The Governor's Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. DMMA has considered each comment and responds as follows:

Unfortunately, the rationale for the regulation and the actual regulatory text do not match. The GACEC and SCPD would like to share our observations.

The Summary of Proposal section (at p. 1044) recites that DMMA inadvertently omitted a CMS-approved provision in the regulation adopted on October, 2005. CMS had approved an exception to the general flat rate approach to self-employment expenses. Specifically, “actual expenses are used if application of the standard deduction results in a finding of ineligibility.” At 1044.

Consistent with the “Summary of Comments Received with Agency Response” from the October, 2005 regulation, the State Council for Persons with Disabilities (SCPD) had unsuccessfully objected to a no-exceptions approach to the standard, percentage-based deduction. However, consistent with the DMMA regulation adopted in July, 2006, DMMA reconsidered and added an exception to allow actual expenses. Therefore, there is no need to correct the October, 2005 omission since it was fixed in July, 2006.

However, the text of the current proposed regulation defines what qualifies as “actual self-employment expenses”. The regulation contains a list of disallowed expenses which are generally allowed by the IRS, including: 1) purchase of capital equipment; 2) payments on the principal of loans for capital assets or durable goods; and 3) depreciation. Unless precluded by CMS regulation or policy, the Council recommends that IRS deductions be allowed. If DMMA is dis-inclined to allow all IRS deductions, Council recommends that the three expenses listed above not be excluded. They are seemingly common, legitimate expenses of a business and would include purchases of computers, printers, and other common necessities of a business.

To the extent the underlined text in the Register accurately reflects the proposed revision, the Council recommends adoption of a less restrictive approach to self-employment deductions.

Agency Response: DMMA acknowledges that the July, 2006 final regulation included the CMS approved State Plan Amendment adding the exception to allow the application of actual self-employment expenses. The February, 2009 proposed regulation defines allowable actual self-employment expenses. DMMA must apply the financial methodologies of the cash assistance program that is most closely related to the individual's status. The list of disallowed self-employment expenses is prescribed at 45 CFR 233.20(a)(6)(v)(B). No change will be made to the regulation as a result of this comment.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the February 2009 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Division of Social Services Manual (DSSM) regarding actual self-employment expenses to be used when the application of the self-employment standard deduction results in a finding of ineligibility is adopted and shall be final effective April 10, 2009.

Rita M. Landgraf, Secretary, DHSS

DMMA FINAL ORDER REGULATION #09-15
REVISIONS:

15120.2 Financial Eligibility

TANF rules on income standards and methodologies (disregards, exclusions, allocations) apply to Section 1931 Medicaid except as provided in this section.

For Section 1931 Medicaid, there are two income tests to determine financial eligibility. The first test is a gross income test and the second is a net income test. For the gross income test, compare the family's gross income to 185% of the applicable standard of need. For the net income test, compare the family's net income to the applicable standard of need.

Financial eligibility for both applicant and recipient families will be calculated using the 30 and 1/3 disregard if applicable. This disregard allows the deduction of $30 plus 1/3 of the remaining earned income after the standard allowance for work connected expenses is subtracted.

The $30 plus 1/3 disregard is applied to earned income for four (4) consecutive months. If Medicaid under Section 1931 or employment ends before the fourth month, the earner is eligible for the disregard for four (4) additional months upon reapplication or re-employment.

When an earner's wages are so low ($90 or less in the month) that the income is zero before any part of the $30 plus 1/3 disregard can be applied, that month does not count as one of the four (4) consecutive months and the earner is eligible for the disregard for four (4) additional months.

After the $30 plus 1/3 disregard has been applied for four (4) consecutive months, the 1/3 disregard is removed from the budget. The $30 disregard continues to be deducted from earned income for eight (8) consecutive months. The $30 disregard is not repeated if an individual stops working or 1931 Medicaid ends before the completion of the eight (8) consecutive months. If 1931 Medicaid ends and the family reapplies, the $30 disregard from earned income is continued until the end of the original eight (8) consecutive months.

Unlike the $30 plus 1/3 disregard which is dependent upon the family having sufficient earned income and being 1931 Medicaid recipients, the $30 disregard is for a specific time period. This time period begins when the $30 plus 1/3 disregard ends and is not dependent upon the family having earned income or 1931 Medicaid.

When an earner has received the $30 and 1/3 disregard in four (4) consecutive months and the $30 deduction has been available for eight (8) consecutive additional months, neither disregard can be applied to earned income until the individual has not received Medicaid under Section 1931 for twelve (12) consecutive months.

All earned income is disregarded for the second and third months of eligibility.

All earned income is disregarded for 12 months after employment causes ineligibility.

A self-employment standard deduction is used to calculate self-employment income. The self-employment standard deduction is considered the cost to produce income. The self-employment standard deduction is a percentage that is determined annually and announced in the Cost-of-Living Adjustment (COLA) Administrative Notice each October.

To calculate self-employment income, use the gross proceeds and subtract the self- employment standard deduction. The result is the amount included in the gross income test (185% of the applicable standard of need). Standard earned income deductions are then applied to the self-employment income for the net income test (the applicable standard of need).

To receive the self-employment standard deduction, the individual must provide verification that costs are incurred to produce the self-employment income. Verification can include, but is not limited to, tax records, ledgers, business records, receipts, check receipts, and business statements. The individual does not have to verify all business costs to receive the standard deduction.

If the individual does not claim or verify any costs to produce the self-employment income, the self-employment standard deduction will not be applied.

When the application of the standard deduction results in a finding of ineligibility, the applicant or recipient will be given an opportunity to show that actual self-employment expenses exceed the standard deduction. If the actual expenses exceed the standard deduction, they will be used to determine net income from self-employment.

Actual self-employment expenses must be directly related to producing the goods or services. Actual self-employment expenses for the eligibility determination do not include all expenses that are allowed by the Internal Revenue Service. Actual self-employment expenses that are not allowed for the eligibility determination include depreciation, personal and entertainment expenses, personal transportation, purchase of capital equipment, payments on the principal of loans for capital assets or durable goods, and rent or mortgage payments when the business is in the home.

Any diversion assistance provided does not count as income.

Resources are not counted for Medicaid under Section 1931.

9 DE Reg. 564 (10/01/05)

10 DE Reg. 143 (07/01/06)

(Break in Continuity of Sections)

16230.1.2 Self-Employment Income

A self-employment standard deduction is used to calculate self-employment income. The self-employment standard deduction is considered the cost to produce income. The self-employment standard deduction is a percentage that is determined annually and announced in the Cost-of-Living Adjustment (COLA) Administrative Notice each October.

To calculate self-employment income, use the gross proceeds and subtract the self- employment standard deduction. The result is the amount included in the individual's gross income. Standard earned income deductions are then applied to the individual's gross income.

To receive the self-employment standard deduction, the individual must provide verification that costs are incurred to produce the self-employment income. Verification can include, but is not limited to, tax records, ledgers, business records, receipts, check receipts, and business statements. The individual does not have to verify all business costs to receive the standard deduction.

If the individual does not claim or verify any costs to produce the self-employment income, the self-employment standard deduction will not be applied.

When the application of the standard deduction results in a finding of ineligibility, the applicant or recipient will be given an opportunity to show that actual self-employment expenses exceed the standard deduction. If the actual expenses exceed the standard deduction, they will be used to determine net income from self-employment.

Actual self-employment expenses must be directly related to producing the goods or services. Actual self-employment expenses for the eligibility determination do not include all expenses that are allowed by the Internal Revenue Service. Actual self-employment expenses that are not allowed for the eligibility determination include depreciation, personal and entertainment expenses, personal transportation, purchase of capital equipment, payments on the principal of loans for capital assets or durable goods, and rent or mortgage payments when the business is in the home.

9 DE Reg. 564 (10/01/05)

10 DE Reg. 143 (07/01/06)
12 DE Reg. 1320 (04/01/09) (Final)