

United States Senate Committee on Finance

“Not Forgotten: Protecting Americans From Abuse and Neglect in Nursing Homes”

March 6, 2019

Statement submitted by:

Long Term Care Community Coalition, Center for Medicare Advocacy,
National Consumer Voice for Quality Long-Term Care, Justice in Aging,
California Advocates for Nursing Home Reform, and National Academy of Elder Law Attorneys

The Long Term Care Community Coalition, Center for Medicare Advocacy, National Consumer Voice for Quality Long-Term Care, Justice in Aging, California Advocates for Nursing Home Reform, and National Academy of Elder Law Attorneys thank the Senate Finance Committee for holding the March 6, 2019, hearing “Not Forgotten: Protecting Americans From Abuse and Neglect in Nursing Homes.” Our organizations are dedicated to improving the lives of long-term care residents across the country and are writing this Committee to highlight both recent and ongoing concerns that place nursing home residents at risk of experiencing abuse, neglect, and other forms of harm.

As this Committee knows, the Nursing Home Reform Law requires every nursing home to provide residents with the services they need to attain and maintain their “highest practicable physical, mental, and psychosocial well-being.”¹ To ensure that residents receive the care that they need and deserve, the law and its implementing regulations detail specific resident rights and protections that all nursing homes must adhere to when they voluntarily participate in Medicare, Medicaid, or both. Unfortunately, the Centers for Medicare & Medicaid Services (CMS) has been rolling back these resident rights and protections, often at the request of the nursing home industry, for the purpose of reducing so-called provider “burdens.”²

The following actions represent only a few of CMS’s deregulatory efforts over the past two years:

1. CMS placed an 18-month moratorium on the full enforcement of eight standards of care.³ These standards relate to important resident protections, such as baseline care planning, staff competency, antibiotic stewardship, and psychotropic medications. The moratorium means that nursing homes will not be financially penalized when these safeguards are violated.
2. CMS shifted the default civil money penalty (CMP) from per day (for the duration of a violation) to per instance.⁴ *The New York Times* reported that “the change means that some nursing homes could be sheltered from fines above the maximum per-instance fine of \$20,965 even for egregious mistakes.”⁵

¹ 42 U.S.C § 1395i–3(b)(2).

² See, e.g., *Don’t Abandon Nursing Residents*, CANHR et al., available at <https://nursinghome411.org/dont-abandon-nursing-home-residents-series/>.

³ *Temporary Enforcement Delays for Certain Phase 2 F-Tags and Changes to Nursing Home Compare*, Ref: S&C 18-04-NH, CMS, Nov. 24, 2017, available at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-18-04.pdf>.

⁴ *Enforcement Weakens as Civil Money Penalties Shift from per Day to Per Instance*, Center & LTCCC, available at <https://www.medicareadvocacy.org/enforcement-weakens-as-civil-money-penalties-shift-from-per-day-to-per-instance/>.

⁵ Jordan Rau, *Trump Administration Eases Nursing Home Fines in Victory for Industry*, N.Y. Times (Dec. 24, 2017), available at <https://www.nytimes.com/2017/12/24/business/trump-administration-nursing-home-penalties.html>.

3. CMS issued a notice of proposed rulemaking (NPRM) to roll back emergency preparedness requirements. Most notably, the proposed rule would allow nursing homes to review their programs and train staff every two years instead of annually.⁶
4. In response to industry lobbying, CMS is carrying out plans to revise the federal nursing home Requirements of Participation to “reform” standards that have been identified as “excessively burdensome” for the nursing home industry.⁷ The Requirements were recently revised in October 2016 (for the first time in 25 years) to better address longstanding problems, including persistent abuse and neglect.⁸ These standards need to be implemented, not watered down.

Nursing home residents are some of the most vulnerable individuals in the nation. CMS’s deregulatory agenda puts residents in danger of experiencing harm or being placed in immediate jeopardy of health, safety, or well-being. This potential for resident harm is in direct opposition to the HHS Secretary’s duty under the law. The law makes clear that the Secretary is responsible for assuring the “requirements which govern the provision of care in skilled nursing facilities..., and the enforcement of such requirements, are adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys.”⁹ CMS’s deregulatory actions indicate that the Secretary is ignoring this long-standing mandate.

CMS’s efforts are even more dangerous because they exacerbate existing problems in nursing homes. Multiple reports from the HHS Office of the Inspector General (OIG) and the Government Accountability Office (GAO) document persistent and widespread problems facing nursing home residents. For instance, a 2014 OIG report found that one-third of Medicare beneficiaries experienced harm within, on average, 15.5 days of entering a nursing home; the OIG stated that 59 percent of these events were preventable.¹⁰ Similarly, a 2008 GAO report highlighted that studies since 1998 indicate state surveyors “sometimes understate the extent of serious care problems in homes because they miss deficiencies”¹¹ Such persistent problems over the years have created greater insecurity for residents, requiring additional legislation and regulations, not less.

⁶ Medicare and Medicaid Programs; Regulatory Provisions To Promote Program Efficiency, Transparency, and Burden Reduction, 83 Fed. Reg. 47686 (Sept. 20, 2018), available at <https://www.govinfo.gov/content/pkg/FR-2018-09-20/pdf/2018-19599.pdf>.

⁷ *Requirements for Long-Term Care Facilities: Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction (CMS-3347-P)(Section 610 Review)*, Office of Information and Regulatory Affairs (Fall 2018), available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=0938-AT36>.

⁸ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68688 (Oct. 4, 2016), available at <https://www.govinfo.gov/content/pkg/FR-2016-10-04/pdf/2016-23503.pdf>.

⁹ 42 U.S.C. § 1395i-3(f)(1)

¹⁰ Daniel R. Levinson, *Adverse Events in Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries*, HHS OIG (Feb. 2014), available at <https://oig.hhs.gov/oei/reports/oei-06-11-00370.pdf>.

¹¹ *Federal Monitoring Surveys Demonstrate Continued Understatement of Serious Care Problems and CMS Oversight Weakness*, GAO (May 2008), available at <https://www.gao.gov/assets/280/275154.pdf>.

The following problems indicate only some of the ongoing concerns:

- 1. Citations.** More than 95 percent of all citations for violations of the federal minimum standards of care result in findings of no resident harm.¹² A “no harm” citation does not mean that the resident did not, in fact, experience pain, suffering, or humiliation. However, a finding of “no harm” all too often **does** mean that the nursing home is **not** penalized for poor care.¹³
- 2. Staffing.** Staffing is essential to resident care and quality of life. Too often, insufficient staffing is the underlying cause of other health violations.¹⁴ By law, nursing homes must have a registered nurse on duty for eight consecutive hours and 24-hour licensed nurse services every single day.¹⁵ These two requirements are recognized as the minimum necessary to ensure that residents receive the “skilled nursing” care and monitoring that they need and which facilities are paid to provide. However, CMS noted in a 2017 memorandum that about six percent of nursing homes that submitted nurse staffing data for the third quarter of 2017 had seven or more days with no reported RN hours and that 80 percent of these days were on weekends.¹⁶ *The New York Times* further described the federal data as documenting that, for at least one day in the last quarter of 2017, 25 percent of nursing homes reported no registered nurses at work.¹⁷
- 3. Antipsychotic Drugs.** About 20 percent of nursing home residents are administered antipsychotic drugs every day.¹⁸ However, less than two percent of the population will ever have a diagnosis for a clinical condition (e.g., Schizophrenia) identified by CMS when it risk-adjusts for potentially appropriate uses of these drugs. In a 2011 statement addressing widespread and inappropriate use of antipsychotic drugs in nursing homes, the HHS Inspector General stated that “[g]overnment, taxpayers, nursing home residents, as well as their families and caregivers should be outraged - and seek solutions.”¹⁹ Nevertheless, seven years later, in the absence of meaningful enforcement, the problem of overuse and misuse of antipsychotic drugs is still widespread.

¹² *Nursing Home Data Compendium 2015 Edition*, CMS, available at https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/nursinghomedatacompendium_508-2015.pdf.

¹³ See generally, *Elder Justice: What No Harm” Really Means for Residents*, LTCCC & Center, available at <https://nursinghome411.org/news-reports/elder-justice/>.

¹⁴ *The New York Times Shows Nursing Homes Are Not Meeting Staffing Requirements*, LTCCC & Center, available at <https://nursinghome411.org/the-new-york-times-shows-nursing-homes-are-not-meeting-staffing-requirements/>.

¹⁵ 42 U.S.C. § 1395i-3(b)(4)(C).

¹⁶ *Transition to Payroll-Based Journal (PBJ) Staffing Measures on the Nursing Home Compare tool on Medicare.gov and the Five Star Quality Rating System*, Ref: QSO-18-17-NH, CMS (Apr. 6, 2018), available at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/QSO18-17-NH.pdf>.

¹⁷ Jordan Rau, *It’s Almost Like a Ghost Town. Most Nursing Homes Overstate Staffing for Years*, N.Y. Times (Jul. 7, 2018), available at <https://www.nytimes.com/2018/07/07/health/nursing-homes-staffing-medicare.html>.

¹⁸ *Despite Promised Crackdown, Citations for Inappropriate Drugging Remain Rare*, LTCCC (Nov. 8, 2018), available at <https://nursinghome411.org/ltccc-news-alert-despite-promised-crackdown-citations-for-inappropriate-drugging-remain-rare/>.

¹⁹ Daniel R. Levinson, *Overmedication of Nursing Home Patients Troubling*, HHS OIG (May 9, 2011), available at https://oig.hhs.gov/newsroom/testimony-and-speeches/levinson_051011.asp.

- 4. Transfer and Discharge.** CMS has stated that “facility-initiated discharges continue to be one of the most frequent complaints made to State Long Term Care Ombudsman Programs.”²⁰ Although the Nursing Home Reform Law places specific restrictions on when and how a resident can be transferred or discharged, many residents fall victim to inappropriate and unsafe discharges. Residents have been discharged to unsafe and inappropriate settings, such as homeless shelters, storage units, and motels.
- 5. Ownership.** The buying and selling of nursing homes and the transfer of licenses to new managers raise questions about who these operators are and whether there are sufficient state and federal law, regulations, and practices in place, and meaningfully enforced, to protect residents.²¹ For instance, Skyline Healthcare took over 100 nursing homes across the country starting in 2015 before ultimately collapsing in 2018.²² Officials from various states indicated that Skyline facilities were at imminent risk of running out of necessary food and medication, and were unable to meet payroll. Many of Skyline’s nursing homes were acquired from Golden Living, another chain that was sued by the Pennsylvania Attorney General in 2015 for providing poor care to residents.²³

Nursing home residents are in need of urgent action to protect their quality of care and quality of life. Given the ongoing problems that already exist in nursing homes, CMS’s deregulation places residents at an even greater risk of experiencing harm. We applaud the Senate Finance Committee’s decision to hold a hearing on nursing home resident abuse and neglect, and hope that this Committee will continue to shine a spotlight on these issues until real change occurs and is sustained. Our organizations would like the opportunity to work with this Committee on future hearings and legislation to find solutions to these problems.

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²⁰ *An Initiative to Address Facility Initiated Discharges that Violate Federal Regulations*, Ref: S&C 18-08-NH, CMS (Dec. 22, 2017), available at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-18-08.pdf>.

²¹ *Joint Statement on Turmoil in the Nursing Home Industry*, LTCCC & Center, available at <https://nursinghome411.org/wp-content/uploads/2019/01/LTCCC-CMA-Joint-Statement-on-Turmoil-in-the-Nursing-Home-Industry.pdf>.

²² Kimberly Marselas, *Skyline’s implosion continues with Pennsylvania takeover*, McKnight’s Long-Term Care News (May 3, 2018), available at <https://www.mcknights.com/news/skylines-implosion-continues-with-pennsylvania-takeover/>.

²³ Wesley Robinson, *Harrisburg, Camp Hill nursing homes among 14 sued by state*, Penn Live (Jul. 1, 2015), available at https://www.pennlive.com/midstate/index.ssf/2015/07/14_nursing_homes_of_chain_name.html.

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