

October 26, 2017

Eric Hargan
Acting Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W
Washington, D.C. 20201

Seema Verma
Administrator
Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
200 Independence Ave., SW
Washington, D.C. 20201

Dear Acting Secretary Hargan and Administrator Verma:

The National Consumer Voice for Quality Long-Term Care (Consumer Voice) and the undersigned organizations and individuals strongly oppose current and proposed efforts to revise the nursing home requirements of participation and delay their implementation. Such actions threaten the well-being and safety of frail, vulnerable residents of long-term care facilities. We are writing to request that the Centers for Medicare and Medicaid Services (CMS) retain the regulations as issued in October 2016 and implement and enforce these requirements according to the originally mandated schedule.

These recently revised rules have been years in the making. CMS first began consulting with stakeholders in 2012 and provided multiple opportunities - in writing and in person - for groups representing a range of interests to express their perspective and concerns prior to issuing the proposed rule. When released, the proposed regulations received nearly 10,000 comments.¹ CMS carefully reviewed and evaluated each of these comments, and in the publication to the final rule, provided detailed explanations as to why specific comments were accepted and incorporated, or rejected from the final rule.

As a result, there are now stronger regulations that will improve the quality of care, quality of life, and safety of nursing home residents. These include:

¹ <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2016-Press-releases-items/2016-09-28.html>

- Greater focus on person-centered care and addressing a resident’s individual needs and preferences
- Better planning for resident care
- Improved staff training
- Improved protections against abuse, neglect and exploitation
- Stronger protections against evictions
- Required infection prevention
- A facility assessment to determine what resources are needed to care for residents

The regulations also incorporate current standards of practice that promote professional, resident-centered care to achieve better clinical outcomes.

1. Undermining and rolling back of regulations

Despite the improvement in care and safety these requirements will bring, there are ongoing concerted efforts to undo or weaken the regulations and delay their implementation. We have already seen a new proposed rule issued to rescind protections around forced pre-dispute arbitration.² This rule not only permits arbitration agreements in which residents and their families sign away their constitutional right to a trial by jury before any dispute arises, it authorizes such agreements as a condition of admission. As a result, residents victimized by abuse or neglect would likely have no recourse for justice in the court system if they had signed a mandatory pre-dispute arbitration agreement authorized under the CMS proposed rule.

More rollbacks of regulations appear likely. In May 2017 CMS requested stakeholder feedback on the elimination or modification of regulations related to the grievance process, including reporting of suspected abuse and neglect; the Quality Assurance and Performance Improvement (QAPI) process; and discharge notices to long-term care ombudsmen. The agency also opened the door to wide scale removal or alteration of the regulations by asking for comments about changes in any other areas of the requirements of participation that would result in burden reduction and cost savings to long-term care facilities.³

Elimination or modification of many, if not all, of the current regulations is, in fact, what is being sought by the nursing home industry. Between the trade associations representing for-profit and not-for-profit nursing homes, elimination or revision of the following requirements has been requested:^{4 5}

- Facility assessment to determine necessary numbers and type of staff needed to care for residents
- Behavioral health resources to care for the chronically mentally ill

² Federal Register / Vol. 82, No. 109 / Thursday, June 8, 2017 / Proposed Rules

³ Federal Register / Vol. 82, No. 85 / Thursday, May 4, 2017 / Proposed Rules

⁴ Letter to HHS Secretary Thomas E. Price from the American Health Care Association/National Center for Assisted Living. March 9, 2017.

⁵ <http://www.leadingage.org/regulation/leadingage-calls-delay-revision-nursing-home-requirements-participation>

- Documentation by physicians on prescribing decisions
- Release of peer review and root cause analyses to surveyors
- Conversion of room sizes and bathrooms whenever construction/renovations are made
- Infection prevention and control
- Time frame for abuse reporting
- Notices of transfers/discharges to long-term care ombudsmen
- Quality Assurance and Performance Improvement
- Staff training
- Grievance processes

And the push for a drastic revision of the rule is gaining momentum. On October 11, 120 members of the House of Representatives sent a letter to CMS calling for “re-evaluation” of the requirements, citing how burdensome they are to providers. We understand a similar letter to CMS is circulating in the Senate.

Each of these provisions targeted to be re-evaluated or rolled back is important to residents and their families. Binding pre-dispute arbitration is unfair to residents and strips them of their rights; the timeliness of reporting allegations of abuse is critical to preserving evidence and obtaining assistance for the victim; staff are often inadequately trained to manage conditions of mental illness and dementia; grievances are regularly ignored and not acted upon by facility administration; and 1-3 million residents experience serious infections each year and up to 380,000 die.⁶ These are just a few examples of how these regulations will make a difference for residents.

Re-evaluating the regulations could open the door to their reversal and the rollback of other important rules, such as the one requiring nursing homes to report their staffing information using a system based on auditable payroll data. Consumers desperately want to know nursing home staffing levels, yet current information has been shown to be flawed. The payroll data rule means that, for the first time, we will have a much more accurate picture of nursing home staffing.

2. Delaying implementation and enforcement

In response to provider concerns about insufficient time to come into compliance with the revised regulations, CMS decided to phase in the requirements and gave nursing homes up to three years to comply (Phases 1, 2, and 3). Even with this additional time, one nursing home trade association requested a complete suspension of the phase-in enforcement of the requirements of participation until the new rule it is requesting is finalized,⁷ while another called

⁶ <https://www.cdc.gov/longtermcare/index.html>

⁷ AHCA letter, March 2017

for a delay of the effective dates of Phases 2 and 3.⁸ At the same time, a House of Representatives letter sent to CMS in October asks the agency to give providers more time to comply.⁹

Rather than considering what is best for, and the impact on, residents, CMS addressed provider concerns regarding the scope and timing of the revised Medicare and Medicaid requirements by announcing a moratorium on enforcement of certain Phase 2 requirements.¹⁰ Since regulations are meaningless unless they are effectively enforced, this delay in enforcement amounts to an additional delay in implementation.

Residents should not have to wait any longer for these - and other - protections. Stronger regulations and timely implementation are needed now more than ever. The requirements of participation have not been updated since they were first issued in 1991. Since that time, the acuity level of residents has increased dramatically. Residents are more frail and dependent, and the majority have some form of dementia. Increased physical and cognitive impairments make residents more vulnerable to abuse and neglect, as evidenced by a CNN investigative report exposing widespread sexual assault in nursing homes across the country.¹¹

The continued prevalence of poor care nationwide also makes timely implementation of more robust rules imperative. Studies and reports continue to show the harm that nursing home residents experience. The U.S. Department of Health and Human Services Office of Inspector General (OIG) report released in 2014 found that approximately one-third of individuals discharged from a hospital to a skilled nursing facility were harmed, and that 59% of the time that harm was “clearly or likely preventable.”¹² Another study found that in 2015 more than one in five nursing homes had violations that caused harm or immediate jeopardy (defined as causing or likely to cause injury, harm, impairment, or death to a resident).¹³ Now is not the time to lessen the oversight and monitoring of these facilities.

Finally, the natural disasters that hit nursing homes within the past several months provide compelling evidence of the urgent need for these stronger standards and for not postponing their implementation. The importance of rules requiring competent staff, sufficient training, and a well-developed facility assessment that determines what resources are necessary to care for residents during emergencies is underscored by the events stemming from Hurricanes Harvey, Irma and Maria and the tragic deaths in Florida.

⁸ <http://www.leadingage.org/regulation/leadingage-calls-delay-revision-nursing-home-requirements-participation>

⁹ Letter to CMS from 120 Members of the US House of Representatives, October 11, 2017
http://renacci.house.gov/_cache/files/8ad42967-7fd9-4d12-abaa-f65dda6e0426/renacci-rop-final-letter-10.11.17.pdf

¹⁰ CMS Survey and Certification memo: 17-36-NH, June 30, 2017

¹¹ Sick, Raped and Dying in America’s Nursing Homes.
<http://www.cnn.com/interactive/2017/02/health/nursing-home-sex-abuse-investigation/>

¹² *Adverse Events in Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries* (Feb. 2014) OEI-06-11-00370

¹³ *Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 2009-2015*. Prepared by: Charlene Harrington, Ph.D. Helen Carrillo, M.S. University of California San Francisco and Rachel Garfield Kaiser Family Foundation

The updated standards will better protect residents every day and in emergencies. We urge CMS to move forward with implementation of the nursing home rules as promulgated and within the mandated time frames. The revised requirements of participation and the improvements they bring to the safety, health, welfare and rights of residents are needed more than ever before.

Sincerely,

Handwritten signature of Lori Smetanka in cursive script.

Lori Smetanka, J.D.
Executive Director

Handwritten signature of Robyn Grant in cursive script.

Robyn Grant, M.S.W.
Director, Public Policy & Advocacy