September 13, 2019

Administrator Seema Verma
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-3347-P
P.O. Box 8010
Baltimore, MD 21244-1850

Re: Medicare and Medicaid Programs; Requirements for Long-Term Care Facilities:
Regulatory Provisions to Promote Efficiency, and Transparency; CMS-3347

Dear Administrator Verma:

AARP appreciates the opportunity to comment on this proposed rule that seeks to revise certain requirements for long-term care (LTC) facilities (also referred to as nursing facilities) to eliminate unnecessary, obsolete, or burdensome requirements. Overall, AARP supports efforts to make nursing facility requirements more meaningful, but urges that current regulations not be modified in ways that could have adverse or potentially harmful impacts on nursing home residents. Strong standards are vital to the residents of LTC facilities and their families. They are particularly important as these facilities serve a population with increasingly complex care needs, including the nearly half of nursing home residents who have Alzheimer's or another dementia.¹

AARP believes strong enforcement of regulations that impact residents' health, safety, and well-being is essential and should be continued. As such, we urge CMS to reconsider a number of its proposals, as described in more detail below. We further encourage CMS to work closely with advocates for nursing home residents and their families as you consider final rulemaking and subsequent guidance.

Grievances (§483.10(j))

Below are specific comments on several provisions regarding grievances. AARP notes that some of the proposed changes would reduce transparency or availability of information, which appear contrary to agency efforts to increase transparency.

Distinguishing between feedback and grievances. Under the proposed rule, the existing requirements for handling grievances would not apply to concerns raised by residents or their representatives that the facility determines to be “general feedback.” AARP does not support this change as proposed because a clear distinction between general feedback and grievances is not offered. Without a clear distinction, we fear that nursing facilities could avoid providing recourse and serious treatment of residents’ and family members’ concerns. If a resident or family member seeks out the identified grievance official to report an issue, it is most likely to be one that has not been quickly resolved by staff and is more serious than general feedback. In addition, we are concerned that the facility would make the determination whether something is a grievance or general feedback and not the resident or their representative. A strong and reliable process for handling grievances must be part of a facility’s approach for delivering quality care and creating a culture of continuous improvement.

Grievance Official. Another proposed change would remove the specific duties set forth for the individual responsible for overseeing the grievance process and would strike the reference to a “Grievance Official.” CMS intends to allow nursing facilities flexibility in delegating the responsibilities of the grievance official without impeding a resident’s right to voice a grievance.

While AARP does not oppose a change from the requirement to have a “Grievance Official”, we urge CMS to recognize and ensure that whatever these individuals are called, they conduct the important duties and responsibilities of the Grievance Official, including: being responsible for receiving and tracking grievances, seeing any necessary investigations through to completion, communicating grievance decisions, and taking actions to prevent violations of residents’ rights raised through the grievance process. Further, it is essential that each resident and their family members be given the name and contact information for the individual responsible for overseeing the grievance process. Thus, AARP urges the retention of the provisions in §483.10(j)(4)(i) and (ii) regarding resident notification of the contact information for the person handling grievances and the specific duties for such individual, respectively.

Eliminating Pertinent Information from Grievance Decisions. CMS proposes to modify the information required to be included in written grievance decisions. The facility would no longer be required to identify the dates when the grievance was received and when the decision was issued; the investigative steps taken; and whether or not the grievance was confirmed. Instead, the facility would only be required to provide “any pertinent information including but not limited to” a summary of findings and corrective actions.
AARP is opposed to eliminating the specific requirements for the information included in the written response to a grievance. While CMS expects that such information would be included without the requirement, this may not always be the case, and continuing the requirement would not be a burden on nursing facilities. Identifying information such as the dates that the grievance was received and the decision was issued, investigative steps taken, and whether the grievance was confirmed or not confirmed is essential for determining whether regulatory timelines are being met as well as establishing a baseline for future activities including analyzing the effectiveness of the grievance process, and establishing essential facts should the information be needed for future legal proceedings.

**Shorten Time Period for Maintaining Records.** Consistent with our position on CMS’ proposal to no longer require certain types of pertinent information on written decisions, we also oppose CMS’ proposal to reduce the timeframe for retaining evidence regarding grievances from three years to 18 months from the issuance of the decision.

In this information age, maintaining records should not be a significant burden to nursing facilities. Shortening the timeframe for facilities to retain those records to 18 months is insufficient to ensure that appropriate records of residents’ and family members’ complaints are available for any future legal matters. Further, it would eliminate a paper-trail that could be necessary to analyze the impact, effectiveness and quality of a facility’s responses to grievances.

**Share Grievances with Residents’ Council.** AARP recommends that, rather than weakening the rights of residents, CMS strengthen nursing facilities’ requirements in response to grievances by requiring a facility to forward grievances -- with personal information redacted -- to any resident and family council in place at the facility so that they are kept apprised of concerns raised and how they are resolved.

**Admission, Transfer, and Discharge Rights (§483.15)**

CMS proposes to modify the requirement that before a facility transfers or discharges a resident, it must send a copy of the notice to a representative of the Office of the State LTC Ombudsman. The change would apply the requirement only to involuntary transfers or discharges that are initiated by the facility. If finalized, this notification would not occur in the case of emergency transfers to an acute care facility when the resident is expected to return to the LTC facility or to resident-requested transfers. CMS further describes that a facility-initiated involuntary transfer or discharge is (1) one to which the resident objects, (2) did not originate through a verbal or written request by the resident, or (3) is not in alignment with the resident’s stated goals and preferences for care.

While we understand the desire to reduce administrative burden, AARP encourages CMS to retain the current regulatory language. We are concerned the proposed change would not protect against all involuntary transfers. For example, the proposed change could result in a situation in which a facility sends a resident to the hospital and expects the resident to come back, but then decides not to let the resident return. It appears that a representative of the Office of the State LTC Ombudsman would not be notified in this case under the
proposed change, even though it is an involuntary transfer or discharge. Provision of notices – to the resident, resident’s representative(s), and ombudsman – whenever there is a transfer or discharge enables ombudsmen to investigate whether they are truly voluntary in nature.

**Nursing Services (§483.35)**

AARP appreciates that CMS makes the important distinction between the requirements for LTC facilities to maintain the posted daily nurse staffing data and the requirements for payroll-based journal reporting. As CMS rightly notes, payroll-based journal reporting of staffing data provides retrospective information for consumers and their families on typical staffing at a facility on an average day, while the posting requirement provides real time information for residents and families about the amount of staff and which staff are working in the facility for a specific shift. However, we urge CMS to retain the current requirement for LTC facilities to maintain the posted daily nurse staffing data from the greater of 18 months or as required by state law. We do not see a compelling reason to change the requirement to the greater of 15 months or the state law requirement.

**Behavioral Health (§483.40)**

AARP strongly supports CMS’ decision not to propose elimination of the requirements of §483.40 on behavioral health services as suggested by some industry stakeholders. This standard requires facilities to have sufficient staff with competencies and skill sets for caring for residents with mental and psychosocial disorders and in implementing non-pharmacological interventions. Appropriate mental health care is an integral part of providing quality care for nursing facility residents. Having a separate standard properly signals to facilities this is an important area for resident care that needs to be prioritized.

**Pharmacy Services (§483.45)**

Changes are proposed to the regulations regarding *pro re nata* (PRN) or “as-needed” orders for psychotropic drugs and anti-psychotic drugs specifically.

The exception to the 14-day limit for PRN orders would be expanded to include all psychotropic drugs, including anti-psychotic drugs. As a result, PRN orders for anti-psychotic drugs could be extended beyond the 14-day limit in accordance with facility policies if the attending physician or prescriber believes that the extension is appropriate, and they document the rationale in the resident’s medical record along with the duration for the PRN order.

AARP opposes this change and urges CMS to not finalize this policy and to reject any extension of the 14-day limit for PRN orders for anti-psychotic drugs. We understand that the proposal reflects comments to CMS that the 14-day limit results in prescribers avoiding use of PRN orders and instead writing routine orders that result in residents receiving the drug more often than if it were given only as needed. We share the concern about over-prescribing of anti-psychotics but do not believe this is the solution. We believe that
providing this additional discretion to nursing facilities would result in more overprescribing of antipsychotic medications and allow their inappropriate use as a chemical restraint to control residents who become agitated or present behavioral symptoms of dementia. Although progress has been made to reduce the inappropriate use of antipsychotics, data from across the country show that this is still a problem.² Concerns remain that facilities continue to overuse antipsychotics to sedate difficult residents or to treat patients with dementia even though the use of antipsychotics is not supported for dementia. Further, antipsychotics come with their own risks -- of impaired memory and cognition, increased falls, and increased risk of death.³ Importantly, physicians should also document that they have had an informed consent conversation with the resident or the resident’s representative, as appropriate, before administering anti-psychotic drugs.

CMS should increase its oversight of antipsychotic use – not make them easier to prescribe. Currently, there is insufficient evaluation of the condition of residents who are prescribed anti-psychotics. We believe that CMS’ efforts should focus on ensuring the proper evaluation of residents who are prescribed antipsychotics to prevent their misuse, including retaining – not removing, as proposed – the current requirement that PRN orders for anti-psychotic drugs cannot be renewed unless the attending physician or prescriber evaluates the resident for the appropriateness of the medication. A resident prescribed with these medications can deteriorate very quickly. Frequency of evaluations should be tied to any change in status or change in prescriptions.

**Food and Nutrition Services (§483.60)**

AARP does not support the proposed change to reduce the credentialing standards for food and nutrition service directors. The existing standards ensure that qualified people in those roles can demonstrate a minimum level of competencies. We believe that the need for food and nutrition services directors to have a minimum level of knowledge and experience is only increasing as nursing home residents are becoming sicker and have more complex conditions. Oftentimes these conditions carry with them more varying and potentially unique dietary and hydration needs. Indeed, overall, there are increasing numbers of individuals in need of special diets, ongoing concerns about eruptions of food-borne illnesses, and a growing number of people identified with food-related allergies and sensitivities. Older individuals have a higher risk of complications from food-related

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illnesses and allergies because their immune systems are often weaker or compromised, making them especially sensitive.\textsuperscript{4} Given the growing importance of food and nutrition issues for nursing home residents, we urge CMS to maintain current credentialing standards.

**Administration (§483.70)**

Current regulations require LTC facilities to conduct and document a facility-wide assessment to determine what resources are necessary to care for its residents competently during both day-to-day operations and emergencies. CMS proposes that the frequency of assessment review and updating would change from annual to biennial. In a year, let alone two years, a facility can experience significant changes that can affect resources necessary for resident care including changes in staffing, leadership, resident population, finances, ownership, and other factors. Requiring this assessment annually can help facilities make more informed and timely decisions about resources needed for competent resident care and implement any needed adjustments promptly. AARP urges CMS to retain the current annual frequency for assessment review and updating.

**Compliance and Ethics Program (§483.85)**

AARP requests additional explanation of a number of proposed changes to compliance and ethics requirements in §483.85:

*Required Components of Compliance and Ethics Programs for All Facilities.* Incorporated in the proposed regulatory text is a change that is not addressed in the preamble. Existing rules require that a LTC facility have a compliance and ethics program contact to which an individual can report suspected violations as well as an alternate method of reporting suspected violations anonymously without fear of retribution. CMS would eliminate “without fear of retribution” from the requirement to provide for an alternate method of anonymous reporting (§483.85(c)(9)). AARP believes that a key element of enforcing requirements for nursing facilities is that individuals can report suspected violations without fear of retribution.

*Additional Required Components: Training Program.* AARP requests clarification on CMS’ proposed change to the additional requirements for operating organizations with 5 or more facilities to enable stakeholders to better understand the need for the change. Under the proposed rule, the existing requirement that those organizations have a mandatory annual training program on compliance and ethics would be replaced with a requirement that those facilities have “a more formal program” that includes written policies defining the standards and procedures for employees to follow.

The term “a more formal” training program is not defined or described. We request additional information on how a more formal training program is intended to differ from the existing requirement for an annual training program. In addition, we are concerned

\textsuperscript{4} Centers for Disease Control Food Safety, [https://www.cdc.gov/foodsafety/people-at-risk-food-poisoning.html](https://www.cdc.gov/foodsafety/people-at-risk-food-poisoning.html).
that CMS is proposing no specific frequency requirements for compliance and ethics training.

Program Review. The requirement at §483.85(e) that the operating organization for each facility review its compliance and ethics program annually is proposed to be changed to require a periodic review. The Executive Summary of the proposed rule and the regulatory impact analysis both, however, state that the proposed change would require a biennial review. We request that CMS clarify whether it is proposing a change from an annual program review to a periodic or a biennial review.

Physical Environment (§483.90)

Resident Rooms and Bathrooms. AARP recommends that CMS not finalize its proposals to reverse standards for resident rooms and bathrooms for certain nursing facilities. Under existing rules, resident rooms in LTC facilities must accommodate no more than four residents, except for facilities that received state and local approval of construction or reconstruction plans or were newly certified after November 28, 2010, in which case those bedrooms must accommodate no more than two residents. With respect to bathrooms, for facilities that received state and local approval of construction or were newly certified after that date, each resident room is required to have its own bathroom including at least a commode and sink.

Under the proposed rules, the 2-resident per room and individual bathroom requirements would only apply to nursing facilities that are newly constructed and newly certified facilities that have never previously been a LTC facility; permitting 4-person rooms and shared bathrooms to continue, even when facilities are undergoing major renovations.

These proposals would reverse incentives for nursing facilities to improve the living conditions for residents. Rooms with four residents create an environment that could impede residents’ quality of life. Instead of loosening physical environment improvement standards, CMS should instead encourage and facilitate nursing facilities not currently required to meet the updated standards for a maximum of two residents per room and individual bathroom to do so.

Implementation Delay of Certain Phase 3 LTC Facility Participation Requirements (§§483.75 and 483.85)

AARP does not support CMS’ proposal to delay the implementation of a number of Phase 3 requirements until one year after the finalization of the rule. Under the proposal, CMS would delay the implementation of all but one of the Phase 3 Quality Assurance and Performance Improvement (QAPI) provisions as well as all of the Compliance and Ethics Program provisions. These provisions are important to the transition to high quality long-term care. They help to improve the effectiveness of a facility’s quality programs, identify quality problems, and prevent their occurrences, leading to better care and higher quality of life for residents.
We urge CMS to not delay the implementation of these provisions which we believe will improve facility compliance and assist in federal and state oversight of nursing facilities. Achieving facility compliance outweighs any potential burden on facilities.

AARP appreciates the opportunity to provide comments on this important proposed rule impacting LTC facility residents and their families. If you have questions, please feel free to contact me or Rhonda Richards (rrichards@aarp.org) on our Government Affairs staff at 202-434-3770.

Sincerely,

David Certner
Legislative Counsel & Legislative Policy Director
Government Affairs