

May 30, 2018

The Honorable Alex M. Azar II, Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

The Honorable Seema Verma, Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: Regulation of Skilled Nursing Facilities

Dear Secretary Azar and Administrator Verma:

As State Attorneys General, we take seriously our responsibilities to eradicate fraud, abuse, and neglect in the provision of health care and to safeguard the health of the people of our states. Our State Medicaid Fraud Control Units (MFCUs) recover taxpayer money and protect the integrity of the health care system by investigating and prosecuting those responsible for fraud and substandard care, which harm both individual patients and the larger health care system.

We write this letter to express our concern and to alert the Centers for Medicare & Medicaid Services (CMS) about the substantial and foreseeable detriment of CMS' actions to delay enforcement of protections for Medicare and Medicaid beneficiaries who receive care in skilled nursing facilities (SNFs). The recent CMS guidance significantly decreases the protections in SNFs by rolling back reforms to improve the safety and wellbeing of nursing home residents. If allowed to proceed, recent regulatory changes will not only threaten the mental and physical security of some of the most vulnerable residents of our states, but also potentially create additional challenges for MFCU investigation and prosecution of grievances, violations, and crimes occurring in SNFs. We therefore urge you **not** to lower the level of regulatory oversight.

The proposed regulatory roll-back comes at a time when the U.S. population is aging and in need of quality care in safe facilities. The number of people dependent on SNFs for healthcare is growing: the population aged 65 and older is expected to double by 2060, and one in three people turning 65 will require nursing home care during their lives.¹ In 2015, 1.4 million people were in nursing homes, and over 60 percent of them had a cognitive impairment.² Ensuring that this expanding vulnerable population receives quality care will require significant resources, including those for reporting abuse and for enforcement activity against bad actors.

¹ "Medicaid's Role in Nursing Home Care," Kaiser Family Foundation, June 20, 2017, available at <https://www.kff.org/infographic/medicaids-role-in-nursing-home-care/>.

² *Ibid.*

On May 4, 2017, as part of a proposed rule published in the Federal Register, CMS requested feedback on “Possible Burden Reduction in the Long-Term Care Requirements.”³ Since then, despite the fact that no formal rulemaking has taken place, CMS has issued memoranda to decrease the amounts of Civil Money Penalties levied against non-compliant SNFs and to delay the enforcement of the 2016 long-term care regulatory reform.⁴ These actions weaken existing protections for SNF residents and roll back critical reforms.

We as State Attorneys General recognize that Civil Money Penalties are an essential tool for regulators to ensure SNF compliance and guarantee better performance in the future. Consequently, weakening or delaying their application hampers our ability to both punish bad actors and ensure improvement, thereby putting beneficiaries’ lives at risk. For instance, the July 7, 2017 guidance instructs CMS Regional Offices to impose lower per-instance penalties rather than per-day penalties for past violations. These changes decrease the dollar amount and frequency of penalties that—though rare and low in amount—nonetheless did help safeguard Medicare and Medicaid beneficiaries. The threat of penalties is a deterrent to SNFs engaging in abusive behavior. Eroding even these penalties enables unscrupulous SNFs to provide substandard care and receive minimal penalties, if these lapses are even brought to light.

The 2016 long-term care regulatory reform included provisions to increase infection control; improve training for SNF staff; and provide protections against abuse, neglect, and exploitation of Medicare and Medicaid beneficiaries.⁵ The components of these regulations were scheduled to take effect in three phases, the second of which was due to take effect on November 28, 2017, before CMS acted to delay implementation of certain penalties by 18 months. Enforcement of these reforms keeps SNF residents safe and healthy. They should not be put off or discarded.

Even at present, the quality of care a beneficiary receives can be shockingly low. In 2016, for example, 34.3 percent of SNFs had a violation for quality of care, and 20.1 percent for actual harm or jeopardy to a resident.⁶ Only 6.5 percent of facilities nationwide had no deficiencies in 2016.⁷ In just the first four months of 2018, California regulators issued 170 citations to SNFs

³ 82 FR 21088-21089, available at <https://www.gpo.gov/fdsys/pkg/FR-2017-05-04/pdf/2017-08521.pdf>.

⁴ “Revision of Civil Money Penalty (CMP) Policies and CMP Analytic Tool,” S&C: 17-37-NH, July 7, 2017, available at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-37.pdf>; “Revised Policies regarding the Immediate Imposition of Federal Remedies- FOR ACTION,” S&C 18-01-NH, October 27, 2017, available at <https://www.cms.gov/medicare/provider-enrollment-and-certification/surveycertificationgeninfo/downloads/survey-and-cert-letter-18-01.pdf>; and “Temporary Enforcement Delays for Certain Phase 2 F-Tags and Changes to *Nursing Home Compare*,” S&C 18-04-NH, November 24, 2017, available at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-18-04.pdf>.

⁵ “Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities,” October 4, 2016, 81 FR 68688, available at <https://www.gpo.gov/fdsys/pkg/FR-2016-10-04/pdf/2016-23503.pdf>.

⁶ “Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2009 Through 2016,” Kaiser Family Foundation, April 3, 2018, available at <https://www.kff.org/medicaid/report/nursing-facilities-staffing-residents-and-facility-deficiencies-2009-through-2016/>.

⁷ *Ibid.*

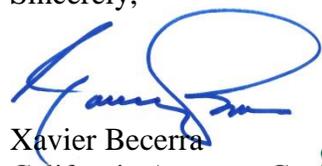
for violations, including for patient abuse.⁸ An August 24, 2017 report by the Office of the Inspector General (OIG) found that CMS has inadequate procedures to ensure proper identification and reporting of incidents of abuse or neglect at SNFs.⁹ The OIG report detailed that an estimated 22 percent of Medicare beneficiaries experienced adverse events—including infections, pressure ulcers, and medication-induced bleeding—during their SNF stays. Nearly 70 percent of these adverse events could have been avoided if the SNF had provided better care, and over half of residents who were harmed required hospital care.¹⁰ The number of violations at SNFs demonstrates that beneficiaries are in need of more protection, not less.

To remove important protections for SNF patients amounts to a devaluation of human wellbeing. Further, these actions to arbitrarily delay or capriciously remove protections are an abuse of federal law. Rolling back regulatory reform and decreasing penalties for non-compliance will result in less governmental oversight of behavior in the long-term care industry, potentially diminishing the government’s ability to ascribe criminal intent to specific actions in appropriate cases.

Investigations by State MFCUs will be further hampered by these regulatory changes, because MFCUs rely on CMS to provide beneficiary protections through a strong regulatory structure. The absence of a reliable regulatory backstop could pose challenges to prosecutions of a variety of infractions, including wrongful evictions; inadequate staff training; and the absence of protections against abuse, neglect, and exploitation. And with fewer safeguards to protect them, nursing home patients will be subject to diminished standards of care and will be more vulnerable to abuse, neglect, and exploitation.

We urge you to reconsider this ongoing regulatory rollback. Protecting the health and security of some of our most defenseless people is a special charge we as States, together with CMS, must uphold.

Sincerely,



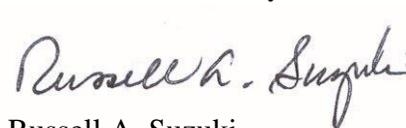
Xavier Becerra
California Attorney General



Karl A. Racine
District of Columbia Attorney General



George Jepsen
Connecticut Attorney General



Russell A. Suzuki
Hawaii Attorney General

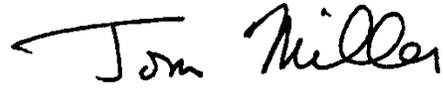
⁸ California Department of Public Health, Health Facilities Consumer Information System, available at <http://hfcis.cdph.ca.gov/EnforcementPenalty/EnforcementPenalty.aspx>.

⁹ Available at <https://oig.hhs.gov/oas/reports/region1/11700504.pdf>.

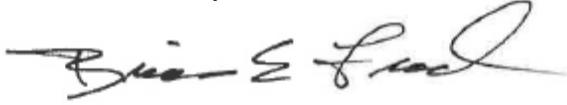
¹⁰ *Ibid.*



Lisa Madigan
Illinois Attorney General



Tom Miller
Iowa Attorney General



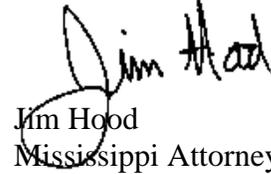
Brian Frosh
Maryland Attorney General



Maura Healey
Massachusetts Attorney General



Lori Swanson
Minnesota Attorney General



Jim Hood
Mississippi Attorney General



Barbara D. Underwood
New York Attorney General



Ellen F. Rosenblum
Oregon Attorney General



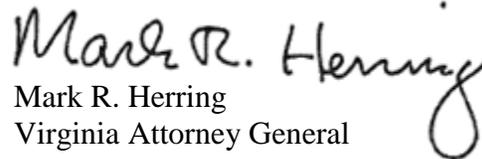
Josh Shapiro
Pennsylvania Attorney General



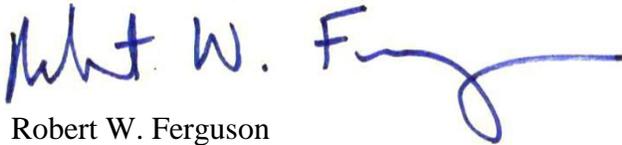
Peter F. Kilmartin
Rhode Island Attorney General



T.J. Donovan
Vermont Attorney General



Mark R. Herring
Virginia Attorney General



Robert W. Ferguson
Washington Attorney General