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Independent Regulatory
Review Commission

**P.O. Box 60769
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VIA EMAIL [RA-DHLTCREGS@PA.GOV]

Department of Health
625 Forster Street
Harrisburg, PA 17120

Attn: Lori Gutierrez, Deputy Director, Office of Policy

Re: Rulemaking 10-221 (Long-Term Care Facilities, Proposed Rulemaking 1)

Dear Deputy Director Gutierrez:

I am writing on behalf of PELICAN, RRG, an insurance Risk Retention Group (RRG) based in Vermont and a sponsored program of PACAH (Pennsylvania Coalition of Affiliated Healthcare & Living Communities). PELICAN provides General Liability and Professional Liability insurance coverage and risk management services to many nursing homes in Pennsylvania. We appreciate the opportunity to provide comments about the Department of Health's (the "Department") proposed rulemaking. We have several concerns about Rulemaking 10-221, and we list them below for your consideration.

1. The Department should provide its entire rulemaking in one submission, rather than five. Regulations governing the operation of nursing homes are complex and interrelated, and the Department should be able to promulgate its revised licensure requirements in a comprehensive, unified and transparent process.
2. The Department should be explicit about the language it proposes to rely upon from the Centers for Medicare and Medicaid ("CMS") State Operations Manual ("SOM"). The SOM is a federal guidance document, and as such it has not gone through a regulatory review process at the federal level. If the Department moves forward with its proposal to incorporate the SOM by reference, the SOM text will automatically become state regulations without ever having been subjected to any regulatory review process. In other words, incorporating the SOM by reference will result in the Department's

complete evasion of Pennsylvania's Regulatory Review Act and the Commonwealth Documents Law.

3. The Department should promulgate the definitions it plans to apply to nursing homes, rather than incorporate unidentified regulations by reference. For example, in its Preamble, the Department refers to several definitions that it proposes to eliminate because they are defined in the federal regulations, the SOM, or both. If the Department knows what definitions they are going to apply, it should assure that they are expressed in writing in the regulations so that the public and the regulated community are able to read them and apply them. The Department's attempt to avoid having to be explicit lacks the clarity and transparency that Pennsylvania's laws require.

4. We support the principle that staffing is an integral component of good care, but we are troubled by the Department's failure to consider fully the feasibility of imposing a per shift 4.1 ppd mandate. Many nursing homes are presently struggling with finding enough staff to meet the 2.7 ppd, and it is well-established that the entire country is experiencing a significant work force shortage. The Department has failed to address the issue of where it expects nursing homes to find sufficient staff. Many nursing homes in the Commonwealth have closed beds because they cannot find enough staff. The Department has not addressed the impact its proposal will have on access to care. If the Department believes that nursing homes should be staffed per shift at 4.1 ppd, it should be working with the legislature and sister agencies to ensure that there is a sustainable infrastructure to support such a significant change.

In closing we note that the ambiguities created by the Department's proposed use of incorporation by reference and its unrealistic belief that nursing homes will be able to staff at a per shift 4.1 ppd as soon as the regulations become final (an unattainable requirement), will likely lead to an increase in frivolous litigation.

Thank you.

Sincerely,

Jamie Aurand

Jamie Aurand, President
PELICAN Subscribers Advisory Committee