



1100 Bent Creek Boulevard, Mechanicsburg, PA 17055  
O: 717-763-5724 | F: 717-763-1057 | [www.LeadAgePA.org](http://www.LeadAgePA.org)



Submitted by e-mail to: [RA-DHLTCRegs@pa.gov](mailto:RA-DHLTCRegs@pa.gov); [irrc@irrc.state.pa.us](mailto:irrc@irrc.state.pa.us)

Ann Chronister  
Director, Bureau of Long-Term Care Programs  
PA Department of Health  
625 Forster Street, Room 814  
Health and Welfare Building  
Harrisburg, PA 17120

October 24, 2022

Dear Ms. Chronister:

LeadingAge PA, an association representing more than 370 mission-driven providers of senior services, appreciates the opportunity to offer comments on Final Form Rulemaking 10-222 (Long-Term Care Facilities, Rulemaking 2) found on the Independent Regulatory Review Commission (IRRC) [website](#). We begin by thanking the Department of Health (DOH) for responding to our suggestions on several items in this regulatory package, but we must also reiterate several significant concerns with this regulation, namely the closure requirements that are in addition to federal regulations and may impose hardship upon nursing facilities, the residents, and staff who are already under considerable stress over an impending closure.

**New Closure Requirements May Distract from Resident Care and are Based on Guidance.** It is important that the facility's administration be allowed to notify residents and staff in the way they believe is best, once the plan is developed in conjunction with DOH, to offer assurances and information as needed to residents. The decision to close is not taken lightly and the facility will need to manage communications in a way that is responsive to the needs of residents and does not trigger staffing distractions from care. It is appreciated that facilities can notify residents and staff in a timeline that makes sense, if it is at least 60 days prior to the closure, as is required by Federal regulations. Although the requirement to notify DOH at least 75 days prior to closure is earlier than required by Federal regulations, this may be acceptable if the information is kept confidential so that the timing and content of communications with residents are at the discretion of administration to accomplish minimal disruption to operations during the closure. LeadingAge PA recognizes that the federal regulations do not require notification of staff and would respectfully request that this requirement be removed, however, as a practical matter, we recognize that the information will be shared quickly as soon as residents and their representatives are notified. LeadingAge PA has noted that several of the new requirements included in the Final Form regulatory package are discussed in the State Operations Manual (SOM). It is important to note that these are currently *guidance* rather than regulation at the Federal level and to understand that DOH is requesting that this guidance be incorporated as Final Form regulation, without the opportunity for the regulated community to provide input during the proposed stage. If these guidelines are incorporated as final regulations, we would request that DOH commit to discussions with the regulated community as they are implemented to address issues that arise as guidance is implemented and

enforced as regulation, especially because CMS has made it clear that the SOM is intended to be guidance rather than regulation.

In addition, the three private pay facilities would be impacted even if they choose not to close, as they will be required to comply with 42 CFR 483.70(l) and (m), with (m) requiring that each facility have in place policies and procedures to ensure that the administrator's duties and responsibilities involve providing the appropriate notices (newly incorporated into state regulations from the federal regulations and State Operations Manual (SOM) guidance) in the event of a closure. If they close, they will also be subject to the closure notice requirements in 483.70(l). As DOH notes, this will be a new paperwork requirement for these three facilities, two of which are also noted by DOH to be small businesses. We would respectfully request that these three homes be exempt from the new closure requirements contained in the final form regulation and be allowed to continue under the current state regulations governing closure.

**Separating Requirements for New Construction from Current Facilities.** DOH has addressed many concerns about the new physical plant requirements by providing the opportunity for buildings approved prior to July 1, 2023 that are not making any changes or facilities that are only making cosmetic upgrades, *e.g.*, paint, new flooring, or changing light fixtures as noted on page 8 of the Regulatory Analysis Form (RAF), to continue to comply with current requirements (contained in Section 205) rather than imposing the new Section 204 requirements that use the 2018 edition of the Facilities Guidelines Institute (FGI) *Guidelines for Design and Construction of Residential Health, Care, and Support Facilities*. The separation of buildings into those that must comply with Section 204 and those that must comply with Section 205 makes the definition of construction, alteration, or renovation vitally important and LeadingAge PA appreciates that DOH has provided a definition of construction, alteration, or renovation in final form regulation 1.

LeadingAge PA respectfully requests that DOH commit to meeting with LeadingAge PA and other stakeholders to assure that all parties have clarity regarding the definition and what constitutes alteration or renovation. This commitment is critical because the definition was not included in the proposed regulations and indeed is not even included in the 10-222 regulation, but is instead contained in regulatory package 1 but is not explained. LeadingAge PA appreciates that DOH has defined construction, alteration, or renovation, and notes that the terms "construction, alteration, or renovation" are used but not defined in Title 28, Chapter 51, and would request explanation of the definition, which is newly included in regulatory package 1 upon Final Form. The interpretation of the terms: construction, alteration or renovation could limit nursing homes seeking to make small changes to improve their physical environment which could offer significant improvements for residents and staff, though not having financial means to complete full renovations that would comply with chapter 204.

It is likely that, as DOH and providers gain experience in using the definition of construction, renovation, or alteration as well as working with the FGI guidelines, modifications to the regulations and their interpretation may need to be discussed and memorialized in Interpretive Guidelines to the regulations, if not in regulatory changes that may be necessary. We strongly urge that DOH hold discussions with LeadingAge PA and other stakeholders to ensure mutual understanding of the definition of construction, alteration, or renovation as well as the FGI guidelines. It will be important to continue discussions during implementation to promptly address any unintended consequences of these changes. The FGI guidelines are updated frequently and DOH discussions with stakeholders will also be important in determining whether adoption of newer versions of the guidelines will be beneficial in the future.

**Occupying portions of buildings not used for one year or more.** LeadingAge PA appreciates that DOH has modified the requirements for allowing beds licensed but unoccupied for more than a year to be used again. LeadingAge PA was concerned with proposed requirements for unoccupied beds to comply with the newer standards as was proposed in Section 204.2(e) in proposed rulemaking 2. The changes to the provision appear more reasonable, as it may be difficult to address a multitude of new physical plant requirements when the facility is attempting to re-open a wing it may have only closed due to staffing shortages or more recently, COVID-related occupancy issues. We would respectfully request that the language in 204.2(e) be changed. Instead of requiring Departmental approval before using an area of the facility for resident care when that area has not been occupied or used by residents for one year or more, the regulations should state that the facility will provide the Department with notice that the area will reopen. Since it is already difficult to transfer or license new beds, it is important not to increase barriers that impede access to nursing facilities by older adults who need these services. If the Department retains the current language, LeadingAge PA requests that DOH work with LeadingAge PA and other stakeholders to outline the criteria it will use to determine Department approval, so that there is clarity about what is necessary, and it does not unduly limit access to care.

This change is important because many nursing facilities are currently forced to limit admissions as they struggle to recruit, hire, and retain staff sufficient to provide the level of quality care that residents deserve. These limitations on admissions have caused reductions in census below licensed capacity. In many instances facilities are forced to optimize staffing efficiency and are leaving areas and wings vacant. Depending on what is required to gain DOH approval to reopen, this requirement could impose the unintended consequence of causing the facility to permanently delicense those beds, causing a reduction in our commonwealth's capacity to serve our aging population. It may be reasonable to require facilities to undergo a life safety survey of the previously unoccupied areas to ensure the locations are safe and habitable, but it may not be reasonable to comply with the new FGI guidelines in this instance.

**Release of Regulatory Package in Sections Lacks Transparency and Clarity.** LeadingAge PA has noted in our comments on the proposed rules that DOH's process of releasing the regulations in four sets, even if these are submitted to the IRRC on the same day, are problematic for several reasons. Without view of the comprehensive package during the proposed stage, neither the regulated community nor the public could assess the full scope of changes that would be promulgated as final. Further, the final form regulations contain many new definitions and regulatory sections that the regulated community had no opportunity to review or provide input. In regulatory package 2, this would include the closure provisions and the definition of construction, alteration, or renovation, for example. While DOH is to be commended for responding to some of the stakeholder input it received, it would have been in the public interest to have received public comment on the new language prior to final form. We recommended that DOH combine the regulatory packages into one coherent whole before publishing as proposed, which was not done, nor did DOH offer the public opportunity to comment on an Advance Notice of Final Rulemaking. As it stands, each package will require individual approval by the IRRC and oversight committees in the General Assembly. This could result in incongruous enactment and confusion that will not further DOH's stated goals of improving the quality of care. If DOH moves forward with the Final Form regulations, it will be extremely important to plan and implement robust conversations with stakeholders to address unintended consequences that result as well as to offer further clarifications through interpretive guidance.

The members and staff of LeadingAge PA are always ready to assist you with any issues or questions relating to caring for our seniors. We look forward to working with you, so the Commonwealth's seniors have quality long-term care services and supports should they be needed.

Please feel free to contact me if you have any questions regarding these comments or if we can be a resource to the Department.

Sincerely,

A handwritten signature in black ink, appearing to read "Garry Pezzano". The signature is fluid and cursive, with the first name "Garry" written in a larger, more prominent script than the last name "Pezzano".

Garry Pezzano  
President & CEO, LeadingAge PA  
[gpezzano@leadingagepa.org](mailto:gpezzano@leadingagepa.org)