



**From:** [Gail Weidman](#)  
**To:** [DH, LTCRegs](#)  
**Cc:** [Zach Shamberg](#)  
**Subject:** [External] Comment Letter Re: Proposed rulemaking 10-223 (Long-Term Care Nursing Facility Proposed Rulemaking 3)  
**Date:** Thursday, April 14, 2022 4:58:57 PM  
**Attachments:** [image001.png](#)  
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Good Afternoon,

Please accept the attached comment letter regarding the DOH proposed rulemaking 10-223, being submitted on behalf of PHCA and the long term care facilities we represent.

Thank you for the opportunity to provide comment.

Sincerely,  
Gail

Gail Weidman  
*Director of Policy & Regulatory Affairs*  
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April 14, 2022

Lori Gutierrez  
Deputy Director, Office of Policy  
Department of Health  
625 Forster Street, Room 814  
Harrisburg, PA 17120

Re: Proposed Rulemaking No. 10-223 (Long-Term Care Facilities, 28 Pa Code §§ 201.12-201.17, 201.22, 209.1, 209.7, 209.8 and 211.1; Chapter 201)

Dear Deputy Director Gutierrez,

We are writing today regarding the Department of Health, Long-Term Care Facilities, Proposed Rulemaking 10-223, published in the *Pennsylvania Bulletin* on March 19, 2022.

Please accept these comments on behalf of the Pennsylvania Health Care Association (PHCA), and the more than four-hundred long-term care facilities we represent throughout the commonwealth, including nursing homes, personal care homes and assisted living communities.

As you are aware, this proposed rulemaking is the third of a series of four separate rulemakings that the Department of Health intends to release.

In the preamble, the Department acknowledges the concerns raised by stakeholders regarding the opportunity to comment holistically on the rulemakings. In response to the stakeholder concerns, the Department has decided to reduce the number of proposed packages from five to four.

The Department goes on to state that, given the volume of the regulations and only slight overlap between packages, issuing the proposed amendments in separate packages allows the public greater opportunity to thoroughly examine the proposed amendments and provide detailed comments to the proposed changes.

To be clear: this does not address our concerns. This fragmented process is and will continue to create confusion and undermine the public and regulated community as we seek to understand how each separate package fits together.

Additionally, we disagree that there is only slight overlap between packages, as each nursing facility must adhere to all provisions in the state licensure regulations in their totality and should be given the opportunity to review the amendments in one comprehensive package.

For example, in this proposed rulemaking, there are provisions regarding the conducting of a facility assessment. The facility assessment is designed as a tool to be used by facilities to determine the resources, staffing levels and staff competencies needed to properly care for the residents residing in their facility. This provision overlaps with the staffing hours proposed in rulemaking package 1, as well as the provisions that the Department intends to address in rulemaking package 4 (related to staffing ratios and staff development). To review these provisions in different rulemaking packages does not accomplish what is intended. Although it may be easier for the Department to manage, it makes it more difficult for stakeholders, particularly nursing facilities, who will be subject to the rulemaking.

Moreover, other state agencies have issued rulemakings of this volume in one comprehensive package successfully. For example, in 2008, the Department of Human Services published a proposed rulemaking to develop the licensing requirements for Assisted Living Residences. Additionally, in 1995, DHS published a proposed rulemaking to develop a new nursing facility reimbursement system. Both were entire regulatory chapters.

Under the regulatory review process, state agencies have the option to extend the 30-day public comment period if they deem it necessary. The Regulatory Review Act specifically states, “The agency shall hold a public comment period which shall commence with the publication of the notice of proposed rulemaking and shall continue for not less than 30 days unless section 203(1) or (2) of the Commonwealth Documents Law applies.” The Department has the option of extending the public comment period to address the concern that the public can thoroughly examine the amendments being proposed.

We understand that the Department plan is to submit all four final-form regulatory packages to the Committees and the Independent Regulatory Review Commission (IRRC) together on the same day. Although this does provide the opportunity to review all four separate packages at the same time, at this point in the Regulatory Review Process, the only recourse is to offer written comments to the IRRC and/or offer comments during a public hearing. The comments offered are not required to be addressed by the Department in any meaningful way and will have no reflection in the final regulation unless the IRRC disapproves the package(s).

For these reasons, PHCA, once again, requests that a comprehensive package be published, as proposed, with a new 30-day public comment period. Publishing all four rulemakings as proposed in one comprehensive package offers a true opportunity to understand the full impact of the proposed provisions and submit comments that are required to be addressed and considered in the development of a final rulemaking package.

Additionally, in the preamble, the Department commits to holding meetings with stakeholders after each public comment period has ended. The Department further states that the first of these meetings to discuss proposed rulemaking packages 1 and 2 was held on December 15, 2021.

While PHCA appreciates the opportunity to participate in these meetings, the meetings would be more meaningful and beneficial to stakeholders if the Department would share the changes being considered to the proposed rulemakings as a result of comments received during the public comment period. Even more meaningful would be the opportunity to discuss the provisions of greatest concern and potential amendments to those provisions. Otherwise, stakeholders will have no knowledge of the changes that will be incorporated into the final rulemakings until it is provided to commentors as part of the regulatory review process.

In addition to the issues related to the process itself, PHCA is providing comments and seeking clarification on several proposed provisions related to regulatory package 3 as outlined below:

We do recognize the need for a more robust application and review process for new facilities and change of ownerships (CHOWs) of existing licensed facilities. And we are generally supportive of the proposed amendments around these processes.

While we support the need to vet CHOWs more diligently, we recommend that the Department also focus on steps that can be taken to limit the number of CHOWs that take place, including establishing reasonable and attainable regulatory requirements and addressing the chronic underfunding of nursing facilities that are providing care and services to residents that rely on Medicaid reimbursement.

In other words: let's work together to address the root cause of changes of ownership first.

*§201.12 Application for license of a new facility or change in ownership.*

Paragraph (b)(4) states "Proposed standard admissions and discharge agreements." PHCA is seeking clarification regarding the reference to "discharge agreements". Is this provision referencing the required transfer agreements with hospitals or some other agreement?

Paragraph (b)(5) states ""The names, addresses, .... of any person that have or will have a direct or indirect interest in management of the facility or the provision of services at the facility." PHCA is seeking clarification as to the intent of "provision of services at the facility" and what specifically is being requested from the entities involved.

Paragraph (b) (6) states "The person's corporate history". PHCA is seeking clarification to better understand what this provision entails.

Paragraph (b) (7) states "A list of every licensed facility in any state...." PHCA is seeking clarification on the definition of "facility" in this provision. Does this mean any health care facility or any nursing facility? In addition, PHCA recommends that, for consistency purposes, the language in this subparagraph include 5 percentage of interest language similar to the language proposed by the Department in subparagraph (b)(1)(i).

Paragraph (b)(8) states “The person’s licensing and regulatory history in all jurisdictions where the person has or has had a direct or indirect ownership interest in a facility.” PHCA recommends, for consistency purposes, this provision include 5 percentage of interest language similar to the language proposed by the Department in subparagraph (b)(1)(i).

Paragraph (b)(9) states “A detailed summary of current or settled civil actions or criminal actions filed against the person.” This provision is unclear and PHCA recommends that a time frame be identified for this provision.

Paragraph (b)(10) states “Any financial failures involving any persons identified in the application that resulted in bankruptcy, receivership, assignment, debt consolidation or restructuring...” PHCA is seeking clarification on the term “financial failures”. And here’s why: these actions may be taken by entities to remain viable and to continue to provide quality care. Consideration must be given to the circumstances that necessitated the action and the way the entity emerged from the action.

Paragraph (b)(11) states “Any additional information the Department may require.” PHCA is concerned that this provision is too vague, and has the potential to delay the approval of the CHOW. It is recommended that the Department provide, at minimum, examples of what additional information may be requested, so the entities involved are prepared to respond to the request timely. This information will help to streamline the process and avoid unnecessary delays that could negatively impact the CHOW and lead to closure.

PHCA also recommends that a new paragraph be added to this section that outlines the appeal rights if a CHOW or new nursing facility application is denied.

Additionally, given the proprietary information that the Department is requiring as part of the process, it is important that a section be added to address disclosure and confidentiality of information and records. Our recommended language is below:

*Section 201. \_\_\_\_ Application for license subject to disclosure; confidentiality of other confidential and proprietary information and records.*

**(a)** *The application for a health care facility license identified at § 201.12(a.2) (relating to application for license of a new facility or change in ownership), and information requested under § 201.12(b)(1) – (11) shall be subject to disclosure under the Right-to-Know Law (RTKL) (65 P.S. §§ 67.101-67.3104), except to the extent that those submissions include any information that is listed in subsection (b) or that is otherwise exempt from access under the RTKL.*

**(b)** *The following information is considered confidential, is not subject to the Right-to-Know Law and will not otherwise be released to a person unless pursuant to court order:*

- (1)** *Residential street addresses*
- (2)** *Dates of birth*
- (3)** *Driver’s license information*

**(4)** *Personal identification numbers*

**(5)** *Personal telephone numbers*

**(6)** *Personal email addresses*

**(c)** *Except for the completed application for licensure and other information identified in subsection (a) as subject to disclosure in response to a RTKL request, the Department shall maintain as confidential and will not disclose all other documents and information required to be submitted in support of an application for licensure under § 201.12, including but not limited to the information required to be submitted under § 201.12(b)\_\_\_\_, and all information and documents required to be submitted under § 201.12(c) which the Department acknowledges as proprietary.*

*§201.12a Evaluation of application for license of a new nursing facility or change of ownership.*

PHCA requests that the process the Department intends to use to review the CHOW and new nursing facility applications be made publicly available to providers. It will be important for the Department to take a consistent approach in reviewing all information, as one component should not be the deciding factor in the determination.

In addition, it is our recommendation that the final determination on all applications for a new nursing facility or a CHOW be completed within 30 days from the date of the application submission.

In the preamble, the Department shares their intent to develop a new unit to review and process applications, including review of the new information required by the proposed changes contained in § 201.12 (relating to application for license of a new facility or change of ownership). It will be imperative that this unit is fully staffed, the staff are trained, and the processes for the unit are in place prior to the effective date of the provisions to ensure timely reviews of new facility and CHOW applications and not force a nursing facility undergoing a CHOW to closure due to a delay in sale.

In the RAF, in response to question number 12, the Department is proposing to include a public notice and comment requirement. PHCA has two comments related to this proposal.

First, it will be important for the inclusion of this requirement to not further delay the review process. Second, it is recommended that comments received by the Department through the public notice process be made available to entities of the pending application, so they have an opportunity to dispute and address any negative comment on their behalf.

*§201.13 Issuance of License for a new facility or change in ownership.*

Subsection (b) provides that the Department will issue a license to operate when it has been determined that the necessary requirements for licensure have been met. PHCA is seeking confirmation that the license issued will be a regular license without conditions.

*§ 201.14 Responsibility of licensee.*

Subsection (h) was amended to require facilities to report “any other” information that the Department may request. PHCA is concerned that this provision is very vague and open ended. It is recommended that, at a minimum, language be added to ensure that facilities are provided advance notice of any additional reporting requirements prior to implementation of that requirement.

Subsection (j) states “The facility shall conduct a facility-wide assessment that meets the requirements of 42 CFR §483.70(e) (relating to administration), as necessary, but at least quarterly.”

PHCA feels this requirement is excessive. In the preamble for the *Medicare and Medicaid Programs; Reform of Requirements for Long Term Care Facilities* regulations published in the Federal Register on October 4, 2016, CMS acknowledged that the care needs of a facility’s resident population do not change frequently. CMS goes on to note that if a facility does begin admitting residents that require substantially different care, under the federal rule, the facility is required to conduct a new facility-wide assessment.

In the preamble, the Department states that it determined that quarterly assessments would provide a more accurate mechanism through which a facility can determine the resources, particularly staffing levels, needed to properly care for residents. PHCA would like to better understand how that determination was made and the benefits residents will realize as a result of this provision.

Moreover, PHCA finds this requirement to be counterintuitive to the rationale provided by the Department contained in rulemaking package 1 to support the increase of the minimum hours of direct care per resident day from 2.7 to 4.1. If a facility conducts a quarterly facility assessment in which the facility is required to consider the resident population, the care required of the residents, the types of diseases, conditions, both physical and cognitive disabilities, overall acuity, staff competencies, physical environment, equipment, and services provided, and based on that assessment determines a staffing level need below 4.1, the facility will still be required to staff at a level to meet the 4.1 requirement.

Given that workforce challenges will likely continue throughout the next decade, establishing a minimum staffing level of 4.1 will be unattainable. Specifically in response to question number 10 of the RAF, the Department states “It has been estimated that by 2030, there will be 38 older Pennsylvanians (aged 65 or older) for every 100-working age Pennsylvanians (15-64 years of age).” How does a facility staff at 4.1 when population projections further demonstrate the workforce challenges experienced by the industry will worsen over the next 8 years?

A more responsible approach to addressing the staffing levels needed for a facility to provide quality care to their residents would be for the Department to develop a more reasonable and attainable staffing hour minimum based on the workforce crisis and rely on the facility assessment to determine the staffing level needed, above that minimum, to meet the care needs of its resident population.

*§201.15 Restrictions on license.*

Subsection (b) paragraph (1) states “A license becomes automatically void without notice if any of the following conditions exist: (1) The license term expires.”

PHCA recommends adding the following language: “unless the term expires due to a departmental delay, a national or state emergency or natural or human-caused disaster.”

We are hopeful that the Department will seriously consider our comments and recommendations to this rulemaking, as well as the two prior proposed rulemaking packages. We would welcome the opportunity to work with the Department to implement a final rule that ensures the health and safety of the residents served in nursing facilities.

PHCA and our members are dedicated to protecting our most vulnerable citizens, and we implore the Department of Health to help – not hinder – this mission. Together, we can make a difference and improve the lives of our residents.

Thank you for the opportunity to share these concerns, and we look forward to working with the Department of Health to address this proposed regulation.

If you have any questions, please reach out to me at 717-221-7925 or [zshamberg@phca.org](mailto:zshamberg@phca.org).

Sincerely,



Zach Shamberg  
President & CEO