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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)

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

April 14, 2022

Dear Ms. Gutierrez:

LeadingAge PA, an association representing more than 370 mission-driven providers of senior services, appreciates the opportunity to offer comments on proposed Rulemaking 10-223 (Long-Term Care Facilities, Proposed Rulemaking 3) as published in the March 19, 2022, [Pennsylvania Bulletin](#).

**Additional required documentation submission must be coupled with timely review by DOH.** We understand and support the desire of the Department of Health (DOH) to require additional documentation in hopes of creating more transparency around the change of ownership (CHOW) process but suggest that timelines and protections be included to assure both selling and purchasing facilities of prompt attention to their submissions. The hope that this will limit acquisitions by poorly performing future operators is laudable. With this additional collection of documentation, we hope DOH will feel they are adequately equipped to limit sales of facilities to providers with poor records of care. LeadingAge PA shares in the hope that the documentation submission requirements could serve as deterrence enough to future bad actors, but recognizes that DOH action in denying acquisitions by providers with poor track records will also be needed. Further, LeadingAge PA suggests that applications for CHOW be published in the Pennsylvania Bulletin with a brief comment period similar to the DOH regulatory exception process. Finally, LeadingAge PA would request that DOH's acquisition of documentation for a CHOW not be unlimited, and therefore requests that section 201.12(11) be changed from "Any additional information the Department may require" to reflect that the information be reasonably related to the review of the applicant's history related to the finance and operation of facilities or other human service endeavors.

DOH has stated their intent to maintain resident safety as the reason for pursuit of additional documentation review in advance of a change of ownership. It is imperative that this process of document aggregation on the part of the submitting facility and related review by DOH be completed in a timely manner. Facilities serving Medical Assistance residents continue to be underfunded by the state's program and are in financial peril. The decision to seek new ownership for a facility is rarely taken lightly. Therefore, it is incumbent upon DOH to impose timelines and timeliness standards for document request, review, and decision. Facilities in financial crisis can pose risks to residents so it would be recommended that preliminary financial analysis be

completed on selling facilities to ensure the proposed timeline for ownership transition does not encounter delays and risk resident wellbeing.

We understand that additional required touchpoints and communication by DOH increases the workload and timeframes for DOH approval or denial. With this in mind, the potential for possible delays in review by DOH is very high, as the volume of CHOWs continue to increase, and corporate ownership structures become increasingly complex. Because of these risks, the regulated community needs an understanding of timeliness and timelines for response from the department. We propose that DOH complete an initial review of the selling facility for stability and resident wellbeing within five days of receipt of application for CHOW. A temporary determination should be rendered to the selling facility within ten business days of a CHOW application submission. Full document submission by the purchasing facility must be completed within 10 days of the CHOW application and DOH must request any additional documentation within fifteen business days of submission. A final determination should be offered to both the selling and purchasing facility by DOH within 30 days of the application submission.

The regulated community sees significant increased burdens in this section relating to document submission. The process for review and approval or denial remains obscured. While we appreciate some flexibility on the DOH side for making determinations, we fear these additional requirements may not result in meaningful CHOW denials, where warranted. It is our hope that the required documentation submissions will deter some poor actors from pursuit of nursing home purchases in our commonwealth, but we also urge DOH to establish and communicate the parameters for which denials of CHOWs may occur. In addition, to improve clarity, LeadingAge PA would request that DOH discuss what happens when a CHOW is in process on the effective date of the regulation.

**Completion of facility assessments on a quarterly basis will not contribute to increased care quality but will burden staff and facilities with additional documentation and review.** DOH's proposal to require facilities to complete three additional facility assessments each year is an undue burden on an industry already desperate to hire additional staff. Using DOH's own words to describe the process, "...as it generally just involves compiling information..." it is very difficult to comprehend how these additional assessments will contribute to quality and improve care of nursing home residents if they are not actually used for anything. LeadingAge PA respectfully requests that DOH offer an honest assessment of the time, energy and commitment required to complete and utilize a facility assessment. Further, it is not clear what benefit is derived from conducting the assessment on a quarterly basis while the Centers for Medicare and Medicaid Services (CMS), recognizing the administrative burden of the assessment, requires that it be conducted annually unless significant changes are made.

All industries across the nation are facing staffing challenges as the demographic and societal shifts leading to smaller families with less children are leading to a numerically smaller workforce. Advances in modern medicine have allowed our parents and grandparents to live longer, with more healthcare needs, causing necessity for more healthcare workers. This perfect storm, layered with a global pandemic that burned out thousands of our staff and led to early retirements and untimely departures from healthcare, has exacerbated the staffing crisis. Our facilities cannot be required to, "just compile information" as a requirement for regulatory compliance.

LeadingAge PA requests deletion of this requirement from the regulatory package. If DOH has empirical evidence indicating that more frequent completion of facility assessments results in improved quality outcomes, these requirements should be implemented as best practices, not regulations. Further,

LeadingAge PA urges eliminating the nurse staffing minimum proposed in the first DOH nursing home regulatory package (10-221). Staffing should be based, as it is in the federal regulations, on resident care plans and a facility assessment that matches the needs of the residents to the capabilities of the staff, as well as characteristics of the building that may impact staffing needs.

**DOH's review of the fiscal impact on facilities lacks effort and meaningful analysis of costs on the regulated community and ignores the potential impacts on small businesses and on the elderly.** Additional documentation submission for acquiring facilities coupled with increased staffing burdens for completion of quarterly facility assessments will have associated costs for facilities. The department's analysis of ten additional hours of staff time per month to compile requisite information seems to indicate DOH's lack of investment in the proposal. Simply bringing required information together does not include a comprehensive review of documents to assure proper care, services, and policies are in place to assure resident and staff safety. Additionally, this requirement comes at a time when all or nearly all nursing facilities in our membership are limiting admissions because of an inability to find, recruit, hire, and retain adequate staff.

The Regulatory Review Act requires a statement of the paperwork/forms required. Just because DOH is not requiring a specific form for the facility assessment or the CHOWs does not mean that it is not additional reporting, recordkeeping, or other paperwork that will be required for implementation of the regulation. Additionally, the DOH did not explain any measures which have been taken to minimize these requirements.

In the Regulatory Analysis Form, item 23 lists costs to the regulated community and the agency. While DOH provided estimated costs for itself to review the CHOWs, it does not appear to recognize there will be added costs to the regulated community. While there is a recurring reference to the cost per facility estimate based on nominal review of information provided by the Department of Military and Veterans' Affairs, the analysis is incomplete. Even using the singular and inadequate estimate of nearly \$6,000 per annum per facility, this impact is estimated to cost the regulated community more than \$27 million dollars over the first five years alone. This does not account for increases caused by increasing wages and salary compression, health and retirement benefits, and the likelihood that some facilities may need to hire additional staff to complete paperwork – not care for residents. It also fails to mention systemic and long-standing underfunding by our commonwealth's Medicaid reimbursements for nursing facility services. Underfunding and failure to invest in Medicaid-funded nursing homes threatens facility financial viability. All additional burdens on nursing facilities pose threats to very fragile financing already on the verge of collapse- further accelerating requests for CHOWs and potentially burdening DOH with substantial document review.

In addition, since these proposed regulations will likely have an adverse impact on small businesses - and this is true of each of the regulatory packages DOH intends to submit to change the nursing facility regulations - the DOH should have but did not provide an identification and estimate of the number of the small businesses subject to the proposed regulation. A cursory review by LeadingAge PA indicates that many nursing facilities would be considered small businesses, according to the Regulatory Review Act's definition, which references federal Small Business Administration's definitions of nursing facilities with annual revenue of less than \$30 million. DOH has not even attempted to estimate the regulatory burden on any of the regulated community, much less attempt to discern its impact on the many nursing homes that are considered small businesses. Further, since the license-only homes are likely to be considered small businesses, failing to consider the significant impact on these homes seems to be an omission. DOH's statement that its "responsibility to the quality of care to residents in long-term care nursing facilities applies

to all of those residents and is not altered by the fact that a long-term care nursing facility may be considered a small business” does not sufficiently address the adverse impact of their proposal.

Further, the Regulatory Review Act requires DOH to provide a description of any special provisions which have been developed to meet the particular needs of affected groups and persons, including minorities, the elderly, small businesses, and farmers. The DOH has not addressed the potential access issues the proposal may have on elderly persons who need nursing facility care. The administration’s refusal to increase the Medical Assistance rates in conjunction with this proposal to increase documentation and its earlier proposal to increase staffing requirements (Regulation 10-221) will compound existing business challenges. Workforce, inflation, and wage compression are already hobbling efforts to rebuild census and support full nursing home capacity.

**Release of regulatory package in sections lacks reasonableness, transparency, and clarity.** The proposed rules are noted to be the third in a series of now four related rulemaking packages that DOH expects will eventually update the entirety of the current nursing facility regulations. Without view of the comprehensive package, neither the regulated community nor the public can assess the full scope of changes that may be promulgated as final. This could happen for any number of reasons; none more important than each package likely requiring individual approval by the Independent Regulatory Review Commission 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.

LeadingAge PA would respectfully request that DOH combine the regulatory packages into one coherent whole before publishing as proposed. Further, it is of utmost importance that DOH provide opportunity for public comment on proposed regulations as a whole prior to publishing as final. The regulated community and the public cannot anticipate how the changes to definitions, for example, will impact regulations that have not yet been revealed, nor can they understand how various portions of the regulations will interact with one another. It is reasonable and in the public interest that the nursing facility regulations receive public comment and enactment in a single regulatory package so that stakeholders have clarity on how the proposed regulations interact with one another and can be viewed as a whole.

The Nursing Home Taskforce previously met on a number of occasions and worked extensively with DOH and the administration towards common ground and viable regulatory changes, however the proposed regulations have been issued without further consultation of the Taskforce despite repeated requests by many of the participants. We respectfully recommend that DOH reconvene the Nursing Home Task Force to discuss the proposed regulatory packages once complete as well as how public/private partnerships could help to elevate long term care in the future.

Finally, the proposal anticipates implementation upon publication in the *Pennsylvania Bulletin*, which is not reasonable. Compliance with new regulations takes time to become aware of the required changes and will require planning to initiate the staffing and budget changes to achieve compliance. It is particularly unreasonable to assume that the license-only nursing facilities will be able to immediately implement federal regulations with which they need not currently comply.

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 and CEO  
LeadingAge PA