PHCA
PENNSYLVANIA HEALTH CARE ASSOCIATION

October 25, 2022

The Honorable George D. Bedwick
Chairman
Independent Regulatory Review Commission
333 Market St.
14th Floor
Harrisburg, PA 17101

cc: The Pennsylvania Department of Health

RE: Final Rulemakings: 10-221, 10-222, 10-223, 10-224 (Long-Term Care Nursing Facilities)

Chairman Bedwick,

On behalf of the Pennsylvania Health Care Association (PHCA), we want to thank you and the commission for your time and consideration throughout this regulatory process.

Today, we write to offer our comments in response to the final versions of the Department of Health's proposed revisions to the Long-Term Care Facilities regulations, including 10-221 (relating to General Applicability and Definitions), 10-222 (relating to General Operations and Physical Requirements), 10-223 (relating to Applications for Ownership, Management and Changes of Ownership; Health and Safety), and 10-224 (relating to Qualifications, Training, Job Duties, Recordkeeping, Program Standards, and Resident Rights and Service).

Please accept these comments on behalf of PHCA and the more than 450 long-term care facilities we represent throughout the commonwealth, including nursing homes, personal care homes and assisted living communities.

Throughout this regulatory review process, we have appreciated the willingness of leaders from the Department of Health to amend their initial proposals because of the comments submitted by stakeholders, including PHCA and our members. A number of our questions and concerns have been addressed, either through amendments or explanations in a regulatory preamble.

We also commend the Department on its decision to remove all incorporated references of the State Operations Manual, Chapter 7 and Appendix PP — Guidance to Surveyors for Long-Term Care, and for delineating in each of the four final rulemakings the provisions that nursing facilities will be required to follow if the regulations are adopted. These amendments will help to ease the burden on the regulated industry in their review and understanding of both state and federal requirements.

We do, however, have outstanding questions and concerns, and those are listed below. For ease of review, we have separated each by the regulation in which they appear.

Rulemaking 10-221 – General Applicability and Definitions
PHCA appreciates the Department's decision to strike from this rulemaking the amendments to §211.12(i) (relating to nursing services) and include them in Rulemaking No. 4 – 10-224 for ease of readability and clarity.

Rulemaking 10-222 – General Operation and Physical Requirements
Once again, we recognize and appreciate the amendments made in this rulemaking and the Department's efforts to balance the competing interests of various stakeholders.

PHCA does have one concern related to the provisions contained in §201.23 (related to the closure of a facility).

Subsection (c.2) requires a nursing facility to provide notice of closure and the closure plan to the Department for approval at least 75 days prior to the proposed date of closure. Subsection (c.3) further requires a nursing facility to notify certain entities, such as the resident, resident representative, and facility employees, of the proposed closure at least 60 days before the proposed date of closure. While we don't object to these requirements, our concern is regarding the timing of the Department's approval of the closure plan and the written notice to the residents, resident representatives, facility employees etc., required in Subsection (c.3).

To ensure that any change to the closure plan resulting from the Department's review for approval has been addressed prior to the distribution of the written notice required in subsection (c.3) it will be important for the Department to commit to a timely review and approval process. PHCA recommends that all closure plan reviews are completed within 10 days of receipt of submission. This will allow a nursing facility time to make any necessary adjustments to the closure plan and determine if the closure date continues to be viable, or if adjustments need to be made, prior to notification to the residents, resident representatives, facility employees, and long-term care ombudsman. The reason for this recommendation is to alleviate potential confusion around the date of closure and to ensure that the residents, resident representatives, and the facility employees have a clear understanding of the process and timeframe as the closure moves forward.

This recommendation does not require an amendment to the rulemaking and can be achieved through the development of the processes and procedures that are implemented by the Department related to the review and approval of closure plans.

PHCA is requesting a commitment from the Department to provide an opportunity to review and comment on any processes and procedures established around this provision prior to its implementation.

Rulemaking 10-223- Applications for Ownership, Management and Changes of Ownership; Health and Safety
This rulemaking is of greatest concern to PHCA and our members, and we cannot support its adoption at this time.

As noted in our prior comments to the proposed 10-223, PHCA recognizes the need for a more robust application and review process for new facilities and change of ownership (CHOW) of existing facilities; however, the scope and magnitude of the amendments contained in this final rulemaking have generated new and grave points of concern.

After consulting with legal counsel, we believe that 10-223 now contains language that exceeds the scope of the proposed rulemaking, and, under the Commonwealth Documents Law, the rulemaking should be republished to afford the regulated community and other stakeholders a meaningful

opportunity to comment. See Section 201 of the Commonwealth Documents Law (Act of July 31, 1968, P.L. 769, No. 240), 45 P.S. § 1201.[1]

In this final rulemaking, the Department made significant additions to some sections, as well as adding new sections with new requirements — positioning the rulemaking out of scope — some of which are listed below:

- Significant additions were made to § 201.12 (relating to application for license of a new facility or change in ownership);
- An entirely new section was added, § 201.12a (relating to notice and opportunity for comment);
- A new requirement was added to § 201.12b (relating to evaluation of an application for license of a new facility or change in ownership) for consideration of public comments submitted as part of the CHOW review process;
- New sections 201.13a and 201.13b were added, declaring that the Department will issue a regular license when the facility is in substantial compliance with licensure requirements;
- and a new section 201.13c (relating to license renewal) was added which includes, among other items, a requirement for submission of an updated annual financial report with the annual application for license renewal.

We will address each of the new requirements and issues we have identified in connection with those requirements in the paragraphs that follow.

In § 201.12 (relating to application for license of a new facility or change of ownership), the Department has made the following changes since the first regulation was proposed:

- Added to the requirement that a prospective licensee provide names, addresses, email addresses and phone numbers of persons with a 5% or greater ownership interest in the facility operations or the land on which the facility is located, to now require persons who own or will own "a whole or part interest in any mortgage, deed, trust, note or other long-term liability secured in whole or in part by the equipment used in the facility, the land on which the facility is located or the building in which the facility is located" (referred to subsequently in this memorandum as "financing");
- Added language to require names, addresses, email addresses and phone numbers of (1) "a parent company", (2) "a shareholder" and (3) a "related party" – defined as a "person that provides a service, facility or supply to a long-term care nursing facility or that is under common ownership or control, as defined in 42 CFR 413.17(b)" to include the eight examples listed in the revised regulation including "an owner of real estate" and "a banking or financial entity.";

[1] Section 202. Adoption of Regulations. – Before taking action upon any administrative regulation or change therein the agency shall review and consider any written comments submitted pursuant to section 201 and may hold such public hearings as seem appropriate. If the act of Assembly or other authority under which a regulation is proposed to be promulgated, amended or repealed requires the holding of public hearings or establishes other procedures in addition to those prescribed by this Article II, the agency shall hold public hearings or comply with such other procedures as are not inconsistent with the provisions of this act. **The agency text of any administrative regulation or change therein as finally adopted may contain such modifications to the proposed text as published pursuant to section 201 as do not enlarge its original purpose, but modifications which enlarge the original purpose of a proposal as published under section 201 shall be republished thereunder prior to final adoption by the agency**.

- Added language requiring a prospective licensee to provide an annual financial report to include (1) audited financial statements, (2) a visual representation of the current ownership structure to include parent companies, "shareholders" and any "related parties", and (3) a supplemental schedule of annual gross revenues;
- Added language requiring the prospective licensee to identify whether an "immediate family member" relationship exists between the prospective licensee and (1) persons with an ownership interest in the entity that owns operations or the property, or an interest in the financing, and (2) "a parent company," a "shareholder," and a "related party";
- and added language stating that a prospective licensee will be permitted one opportunity to "cure an application."

From proposed to final, § 201.12 has become extremely long and confusing, with ambiguous terms and repetitive requirements, potentially producing information with negligible usefulness. Furthermore, we feel these requests fail to produce the information that it seems the Department anticipates receiving or that would, in fact, assist the Department in determining whether the prospective licensee has the organizational capacity and capability to successfully operate a facility.

The consistent use of terminology requiring the prospective licensee to supply names, addresses, email addresses, and phone numbers of various "persons" suggests the Department anticipates being supplied with names of individuals, when it may be that the "person" who fits the description (e.g., owner of facility operations, or of the property on which the facility is located) is a newly formed corporation with no compliance or prior history to report. There is no explicit recognition that the prospective licensee could be an entity rather than an individual, and no requirement for production of formation documents or documents outlining how the entity will operate and company or corporate positions or actual individuals will be responsible for management.

It's important to note that, in the event a prospective licensee is a corporation, the corporation's bylaws will contain helpful information regarding responsibility for management of the facility. And a limited liability company's operating agreement will do the same. The operating agreement also will identify who owns the company, whether that is another limited liability company or individual members who are identified in the document. The document could also identify individuals who are named as manager. There may also already be a management agreement in place that will identify the persons – potentially both individuals and entities – that have responsibility for management of the facility.

Requiring names, addresses, email addresses, and phone numbers of "a parent company" or "a shareholder" without an explanation is confusing. After a comment period and discussion, and depending upon the Department's explanation of its ultimate goal, the regulation could be revised to require an explanation of the type of ownership and a description of the ownership structure that includes a visual representation and identification of any parent companies or companies that have ownership interest in both facility operations and the property on which the facility is located.

Changes of ownership can include complicated transfers, and requiring a visual representation of the proposed ownership structure can be extremely helpful in understanding both the mechanics of the transfer and all the principals involved in the transfer, including any parent companies. The visual representation may also make clear when operations and property are owned separately by unrelated parties, or by related parties, or when the same entities or individuals share ownership interests in both operations and the property.

Instead of asking for information regarding "a shareholder" without more specificity, the Department could ask for information regarding shareholders with a significant ownership interest, such that they are able to influence corporate decisions and use of corporate resources. Asking for immediate family member relationships between the prospective licensee and "a shareholder" or a "related party" who, given the definition, is most likely an entity and not an individual is confusing and challenging to comprehend.

The proposed regulation is lengthy, but it does not address the situation described in 28 Pa. Code § 51.4 when there is not necessarily a complete change in ownership with all new parties responsible for operations, but a transfer involving the introduction of new parties and a possible departure of others.

An example would be if one of the two original members of a limited liability company has sold his or her interest in the company to another person who replaces the original member. To address this possibility, the Department should outline a process whereby the anticipated transfer is described in a written communication that includes a visual representation of the ownership structure and individuals involved prior to and after the shift in ownership occurs — so the Department can determine if the changes being contemplated do or do not trigger the extensive requirements at § 201.12. The Department should also outline an abbreviated process requiring less information and documentation when there is a shift in controlling interest but not a complete change of ownership.

Section 201.12 now states that a prospective licensee will have only one opportunity to "cure" an application. This places the expectation for a complete application solely on the prospective licensee when, in fact, in complicated transactions with numerous parties involved, there is often, by necessity, a flow of information back and forth between the Department and the prospective licensee. It may well be the Department that determines at some point in the process that more information or documentation is needed to properly evaluate the application for a license. Placing this limit on the prospective licensee and on the process seems to be shortsighted and impracticable. PHCA suggests that the Department reconsider its position on this point.

Additionally, this provision asks for information ordinarily considered confidential. In the preamble for the rulemaking — in response to comments that the Department addresses the issue of confidentiality and access to financial information required to be supplied — the Department declined to do so, saying it would address any need for redactions or confidentiality concerns through "programmatic guidance."

PHCA requests that the Department reconsider its response to this specific provision because it is in violation of Right to Know Law standards. The Right to Know Law specifically exempts home addresses, personal email addresses and personal phone numbers from access (65 P.S. § 67.708(b)(6)). The Right to Know Law also exempts from access "financial information" (as contrasted with "financial records" of an agency demonstrating the agency's use of public funds) required of an entity bidding on a contract to establish the bidder's economic capability. 65 P.S. § 67.708(b)(26). While the Right to Know Law does not specifically address financial information supplied by an applicant for license, conceptually the issue is the same and prospective licensees are entitled to the same considerations as bidders. PHCA is willing to assist the Department in revising the CHOW requirements to assure the Department receives information that will be helpful in evaluating and making informed decisions on applications for licensure, however we cannot support the release of information to the public that is protected under the Right to Know Law.

The Department also added a new § 201.13c (relating to license renewal) requiring, among other things, submission of an updated annual financial report with the annual application for license renewal. Thus, the Department intends to make the requirement for submission of financial information an annual requirement. PHCA has concerns for providers that these new requests could generate additional costs — both timely and monetary — by creating specific audited financials. Moreover, an annual financial report might not coincide with the license renewal. Most significantly, the information contained in an annual financial report is neither meaningful nor useful information for determining whether a facility is experiencing or is likely to experience financial distress.

Moreover, existing Department regulation that has been carried over to the new licensure requirements requires that "a facility owner shall pay in a timely manner bills incurred in the operation of a facility that are not in dispute and that are for services without which the residents' health and safety are jeopardized." Additionally, Federal interpretation of the prohibition against resident abuse and neglect in the requirements for participation (State Operations Manual at F600) lists failure to pay bills as an example of potential resident neglect. Thus, both the state licensure and Federal regulations give the Department, as state licensing agency and state survey agency for CMS, the authority to investigate and review financial documents. This includes accounts payable to obtain real time information regarding whether it is necessary to use its enforcement authority to take action to protect the health and safety of residents. The Department has all the tools at its disposal to determine financial distress and to protect residents; requiring an annual financial report does neither and seems to be an overreach on the part of the Department.

The Department notes in the preamble that adding this submission requirement at the same time as the license renewal process will make it easier and more efficient for the regulated community to know when to submit this information. What the Department fails to do is to explain the purpose of the requirement and how it will impact the status of a nursing facility's license. There is no clarity as to who will review the report, the qualifications of the reviewers, the criteria that will be used to review the report, the timing of the review and how the financial review will be used in the determination of a license renewal. The absence of this information makes it impossible for the regulated community to fully understand the intent of this provision.

The Department also added a new provision at § 201.12a (relating to notice and opportunity for comment) and a new provision at § 201.12b (relating to evaluation of an application for license of a new facility or change in ownership), allowing for consideration of public comments submitted under § 201.12a(d). This is an extremely significant change from proposed to final and introduces an entirely new element to the licensure and CHOW process, not unlike the certificate of need process that originally was part of the Health Care Facilities Act (which ultimately came to an end). The certificate of need process permitted competitors to challenge an application for Departmental approval for the development, construction, renovation or expansion of a clinically related health service or health care facility. It is a very significant change in the licensure process and deserving of a public comment period, allowing facilities and stakeholders the opportunity to debate the pros and cons of making licensure an adversarial process.

Similarly, it is crucial that the Department provide for true public debate on the merits of a provision that will allow the issuance of a provisional license in situations when there is less than substantial compliance (i.e. minor deficiencies, per the definition at § 201.3) as opposed to when there are numerous deficiencies or a single serious deficiency as permitted in current statute. The issuing of a provisional license has ramifications that can be detrimental to a nursing facility and their ability to continue to operate. It can lead to termination of participation by a managed care organization, loss of

liability coverage and other financially significant consequences for the current owner. It can also negatively impact the ability of a buyer of a troubled facility with admirable intention of turning around the facility from accomplishing this goal. Not providing for public debate on this provision can be viewed as an infringement to the guaranteed right of the affected entities and individuals to be notified and have an opportunity to comment. If only on this basis alone, Rulemaking 10-223 cannot be approved as final.

We must express our disappointment that the Department made the decision to maintain the proposed provision contained in §201.14(j) (relating to responsibility of licensee) that will require nursing facilities to conduct a facility-wide assessment that meets the requirements of 42 CFR §483.70(e) (relating to administration) as necessary, but at least quarterly. We feel the requirement of a quarterly facility-wide assessment is excessive, with little to no commensurate benefit to the residents or the facility.

For these reasons, we cannot support the promulgation of this rulemaking, and we ask that you oppose its adoption. These drastic changes deserve a public comment period and review, and a 'no' vote will provide an opportunity for the Department and stakeholders to collaborate and establish provisions that will meet the goals of this rulemaking, as well as provide clarity for providers without unnecessary burdens and challenges.

Additionally, this time will help to ensure the processes are fully developed and qualified staff are hired, trained, and in place to conduct the review of CHOWs prior to implementation.

In the interim, the Department has the authority under the Health Care Facilities Act to request the information necessary to conduct a thorough review of CHOW applications that are submitted for approval. The Department can use the current guidance and review process while we work together to develop a process that accomplishes the intent of this rulemaking.

Rulemaking 10-224 - Qualifications, Training, Job Duties, Recordkeeping, Program Standards, and Resident Rights and Service

PHCA greatly appreciates the amendments the Department made to this rulemaking, particularly the requirements regarding staffing ratios and minimum hours of direct care for each resident; we do, however, have remaining concerns surrounding how compliance of these provisions will be measured at survey.

As noted in our comments to the proposed rulemaking, nursing facilities must be able to structure staffing shifts based on their operations and the needs of the residents they serve. A nursing facility that demonstrates a good faith effort to comply with the requirements and that residents received the care and services outlined in their care plan should not be cited and/or punished in a punitive manner.

PHCA requests the opportunity to work collaboratively with the Department as it develops interpretive guidelines to be used at survey, the processes and procedures that will be followed to implement new and updated provisions, and the development/scheduling of educational opportunities on the regulatory requirements for both surveyors and nursing facility providers.

Additionally, while we are very grateful for the funding that the Wolf Administration and General Assembly agreed to and allocated to long-term care in the FY 2022-23 state budget, it will be imperative that this investment continues beyond this fiscal year. Future and ongoing investments in our industry will be necessary to ensure nursing facilities have the resources to provide access to quality care to

those in need of services, to hire and retain qualified staff, and to maintain compliance with both federal and new state requirements.

Once again, we thank you for the opportunity to provide comments on the four final rulemakings. We look forward to working with the Department of Health to address these outstanding questions and concerns.

Please let us know if you have any questions.

We look forward to testifying on Friday, October 28th.

Sincerely,

Zach Shamberg
President and CEO