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March 5, 2019

The Honorable Chuck Grassley  
Chairman  
Committee on Finance  
United States Senate  
219 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Ron Wyden  
Ranking Member  
Committee on Finance  
United States Senate  
219 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Wyden:

AARP appreciates the attention you are giving to the quality of care and quality of life of our country's nursing home residents, the federal standards for nursing homes, and their enforcement. Thank you for holding the March 6, 2019 hearing entitled, "Not Forgotten: Protecting Americans from Abuse and Neglect in Nursing Homes." AARP, with its nearly 38 million members in all 50 States, the District of Columbia, and the U.S. territories, is a nonpartisan, nonprofit, nationwide organization that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse.

AARP has been deeply concerned over recent reports and evidence of dangerous conditions in nursing homes across the country. Ensuring the health, well-being, quality of care and quality of life, and safety of nursing home residents is critically needed. AARP is concerned with regulatory and administrative actions taken by the Centers for Medicare & Medicaid Services (CMS) over the last couple of years, as well as potential future actions under consideration, that could weaken the quality of care and quality of life for our country's approximately 1.3 million nursing home residents.

In 2016, CMS issued a final regulation that provided the first comprehensive review and update for the Medicare and Medicaid conditions of participation for skilled nursing facilities (SNFs) and nursing facilities (NFs) (collectively "nursing homes") since 1991. CMS received thousands of comments, including from AARP. The final rule provides additional emphasis on person-centered care and addressing residents' individual needs and preferences; improved protections against abuse, neglect and exploitation; better planning for resident care; and stronger protections against evictions, among

other benefits. Recognizing the comprehensive nature of the regulatory revisions, CMS provided for implementation of the requirements in three phases over three years.

While many nursing homes provide quality care, media coverage and investigations continue to document the devastating cases of potential abuse, neglect, poor care, and even death that are too common in nursing homes. The Department of Health and Human Services Office of Inspector General (OIG) issued an August 2017 early alert finding that “CMS has inadequate procedures to ensure that incidents of potential abuse or neglect of Medicare beneficiaries residing in SNFs are identified and reported”<sup>1</sup> to law enforcement in accordance with applicable requirements. The OIG also found that CMS was not using available tools to enforce the requirement that skilled nursing facilities report potential abuse to law enforcement. In a September 2017 data brief, the HHS OIG also found that overall, “states received one-third more nursing home complaints in 2015 than in 2011” and that states “prioritized more than half of nursing home complaints into the most serious categories--“immediate jeopardy” and “high priority”.”<sup>2</sup>

Unfortunately, these findings coincide with a disturbing trend of CMS actions to undermine federal oversight and enforcement of nursing home quality standards. In November 2017, CMS established an 18-month moratorium on imposing certain enforcement remedies -- specifically civil money penalties (CMPs), discretionary denials of payment for new admissions, and discretionary termination -- for specific Phase 2 requirements under the nursing home conditions of participation final rule, such as baseline care plans and behavioral health services.<sup>3</sup> CMS would instead focus on provider and nursing home surveyor education during this time. Regulations need effective enforcement in order to be meaningful, and this delay in enforcement amounts to an additional delay in implementation. CMS has also issued guidance that reduces the amount of CMPs, such as by making *per instance* CMPs the default, rather than the higher *per day* CMPs, for noncompliance that existed before a nursing home survey.<sup>4</sup> In the case of making *per instance* CMPs the default for noncompliance before a nursing home survey, AARP notes that such a change conflicts with the enforcement provisions in the Social Security Act that provide for the imposition of CMPs for “each day of noncompliance.” Given this, AARP has asked CMS to withdraw the directive making this change and to notify its Regional Offices as well as State Survey Agency Directors that they again have discretion to impose *per-day* CMPs for past noncompliance as the Nursing Home Reform Act and its implementing regulations provide.<sup>5</sup> Both of these examples weaken federal enforcement of federal nursing home quality standards.

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<sup>1</sup> <https://oig.hhs.gov/oas/reports/region1/11700504.pdf>

<sup>2</sup> <https://oig.hhs.gov/oei/reports/oei-01-16-00330.pdf>

<sup>3</sup> <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-18-04.pdf>

<sup>4</sup> <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-37.pdf>

<sup>5</sup> <https://www.aarp.org/content/dam/aarp/politics/advocacy/2019/01/aarp-letter-to-cms-about-cmp-changes-final-10219.pdf>

Any weakening of the federal nursing home regulations will negatively impact nursing home residents. For example, a state may defer enforcement of nursing home violations to the federal government, whereby the state assesses the greater of the federal or state penalty, but not both. Thus, if a federal penalty is greater and then federal penalties and enforcement are weakened, this lowers the bar, further jeopardizing the health and safety of residents, including in states that may already have more nursing homes providing poor quality care. AARP state offices in a number of states, including Texas, Minnesota, Louisiana, Oklahoma, Arizona, Georgia, Illinois, Kansas, and South Dakota have also taken action to improve the quality, safety, rights, and protections for nursing home residents and their families or improve enforcement of standards for nursing homes.

CMS also issued a proposed rule in 2017 to reverse the existing prohibition on the use of pre-dispute, binding arbitration agreements in nursing home admission contracts. AARP filed comments on this proposed rule and joined other organizations and individuals in opposing this proposed rule. Pre-dispute binding arbitration is not appropriate where abuse and neglect are at issue. As outlined in our comments, we were alarmed that the provisions of the proposed rule would very likely have dangerous and harmful impacts on nursing home residents, as well as their families, and place them at even greater risk than they faced before CMS addressed this issue its 2016 nursing home conditions of participation final rule. AARP has urged CMS to retain the prohibition on pre-dispute arbitration provisions in long-term care facility admission contracts. In the alternative, AARP urged CMS to simply rescind the sections of the final regulation entitled “Reform of Requirements for Long-Term Care Facilities” (81 FR 68688) which addressed arbitration, rather than adopting the proposed rule. If this proposed rule was finalized as proposed, it would remove an enforcement tool that nursing home residents and their families can use to hold nursing homes accountable for providing quality care. The Office of Management and Budget (OMB) is currently reviewing this final rule.

OMB is also currently reviewing a proposed rule that CMS is planning to issue to “reform the requirements that long-term care facilities must meet to participate in the Medicare and Medicaid programs, that CMS has identified as unnecessary, obsolete, or excessively burdensome on facilities.”<sup>6</sup> While the upcoming proposed rule has not yet been released, the description of the proposed rule raises questions and concerns about whether it will reverse or undo important protections and standards for current and future nursing home residents, including those more recently added to the current nursing home conditions of participation. In November 2017, AARP joined other organizations and individuals in strongly opposing current and proposed efforts to revise the nursing home requirements of participation and delay their implementation. We also requested that CMS retain the regulations as issued in October 2016 and implement and enforce these requirements according to the originally outlined schedule. We are pleased that since then you and other leaders of Congressional committees of jurisdiction have raised questions and/or concerns regarding CMS’ oversight and

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<sup>6</sup> <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=0938-AT36>

enforcement of nursing home quality of care standards and protection of nursing home residents.

CMS should maintain strong federal nursing home quality standards, oversight, and enforcement to protect nursing home residents' rights, health, safety, and well-being. We appreciate the Committee's efforts to protect nursing home residents from abuse and neglect, including this hearing and any future investigative or other work. We look forward to working with you and your staff on these critical issues for our nation's nursing home residents and their families. If you have any questions, please feel free to contact me or have your staff contact Rhonda Richards on AARP's Government Affairs staff at [r-richards@aarp.org](mailto:r-richards@aarp.org) or 202-434-3770.

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner", with a long horizontal flourish extending to the right.

David Certner  
Legislative Counsel & Legislative Policy Director  
Government Affairs