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March 25, 2011

Donald M. Berwick, M.D.  
Administrator  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Hubert H. Humphrey Building, Room 445-G  
200 Independence Avenue, SW  
Washington, DC 21244-1850

**Re: CMS -3230-IFC: Medicare and Medicaid Programs; Requirements for Long-Term Care (LTC) Facilities; Notice of Facility Closure**

Dear Dr. Berwick:

National Patient Advocate Foundation (NPAF) would like to thank you for the opportunity to comment on the Interim Final Rule entitled "Requirements for Long Term Care (LTC) Facilities; Notice of Facility Closure," published in the *Federal Register* on February 18, 2011.<sup>1</sup> NPAF is a non-profit organization dedicated to improving access to healthcare services through both federal and state policy reform. Its mission is to be the voice for patients who have sought care after a diagnosis of a chronic, debilitating or life-threatening illness. The advocacy activities of NPAF are informed and influenced by the experience of patients who receive direct, sustained case management services from our companion organization, Patient Advocate Foundation (PAF). In fiscal year 2010 (July 1, 2010 – June 30, 2011), PAF resolved 82,963 cases nationally and provided information to almost 4 million online contacts.

The Interim Final Rule ensures that in the case of a LTC facility closure, Skilled Nursing Facility (SNF) or Nursing Facility (NF) administrators provide written notification of the impending closure and a plan for the relocation of residents at least 60 days prior to the impending closure. If the Secretary of Health and Human Services terminates the facility's participation in Medicare or Medicaid, notification is to be provided not later than the date the Secretary determines appropriate.

Section 6102 of the Affordable Care Act of 2010<sup>2</sup> requires states to ensure that all LTC facility residents have been successfully relocated to another facility or an alternative home and community-based setting before the facility closure date. The State Operations Manual (SOM) guidance should identify 30 days before the impending closure date as the date by which all paperwork assuring successful resident relocation must be completed. Additionally, to assure the definition of successful relocation is not limited to the mere physical relocation of the resident, NPAF suggests the SOM also include a duty by state surveyors to conduct 30 and 90 day patient emotional health assessments to assure true relocation success. The results of those assessments should be shared with the facility so that it can amend its policies to adequately accommodate the transferred resident's needs.

NPAF notes that this regulation imposes civil monetary penalties on administrators for failure to provide notice according to the new provisions and as such, it is the first to impose civil monetary penalties on

<sup>1</sup> 76 Fed. Reg. 9503 (Feb. 18, 2011).

<sup>2</sup> Pub.L. 111-148, (March 23, 2010)

an individual. CMS interprets the Congressional intent of the language implementing this penalty as an assurance that the statute's facility closure notification requirement is implemented. NPAF concurs with this interpretation and offers an expansion of it. NPAF notes that the imposition of CMPs serves as both a deterrent to unwanted behavior as well as a remedy to the party that took on an extra burden as a result of the inaction. Clearly CMS and the state licensing agencies have taken on the burden of appropriately notifying residents of the impending closure in an untimely manner. However, both entities should recognize they are not the only entities that have been burdened. NPAF encourages CMS and state licensing agencies to consider sharing a percentage of any resultant civil monetary penalties with the party that has directly suffered - the relocated resident who was not given adequate notice.

While the rule contemplates the timing of notice to residents of impending LTC closure, it states little regarding the content of any written notice. Consumers benefit from informational brochures and communication items that are generally prepared and written in a standardized format. While this may not markedly enhance the readability of the content, it at least organizes the information in a consistent manner for consumers. According to research from the U.S. Department of Education, only 12 percent of English-speaking adults in the United States have proficient health literacy skills.<sup>3</sup>

NPAF is pleased to note the inclusion of a section requesting comments on how the regulations could be used to address health disparities. A 2008 article in the journal *Health Affairs* found supportive social environments encourage higher levels of patient activation. Activation was defined as having the capability and willingness to assume personal health care management. These higher levels of activation by patients increase their likelihood of engaging in positive health behavior.<sup>4</sup> An important first step in promoting an individual's capability and willingness to assume health responsibility is to empower him or her. As noted in the recently-released Institute of Medicine document on health literacy<sup>5</sup>, patient empowerment cannot happen unless patients have options presented to them in a manner they can understand so that they can make informed decisions. Because patient advocates are trained to empower patients, NPAF encourages CMS to partner with the patient advocacy community to reduce health disparities. LTC facility closure requirements should ensure a patient advocate is assigned to affected residents to prevent health disparities.

Thank you again for the opportunity to comment on this rule. Proper Medicare and Medicaid beneficiary notification of an impending LTC facility closure is necessary to assure optimal health outcomes for this population.

Sincerely,



Nancy Davenport-Ennis  
CEO and President  
National Patient Advocate Foundation

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<sup>3</sup> Kutner, M., Greenberg, E., Jin, Y., & Paulsen, C. (2006). *The health literacy of America's adults: Results from the 2003 National Assessment of Adult Literacy* (NCES 2006-483). Washington, DC: U.S. Department of Education, National Center for Education Statistics.

<sup>4</sup> Hibbard J. et. al., Racial/Ethnic Disparities and Consumer Activism in Health. *Health Aff*(Millwood) 2008

<sup>5</sup> Institute of Medicine: Medicare's Quality Improvement Organization Program. Washington (DC) National Academies Press. 2006