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Mike Nardone, Director
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Centers for Medicare & Medicaid Services
Department of Health and Human Services
7500 Security Blvd
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October 11, 2016

RE: Final Rule on Home and Community-based Setting Requirements

Dear Mr. Nardone:

Medicaid waivers covering home and community-based services (HCBS) are a critical avenue for many seniors and those living with disabilities to gain increased independence and access to care in assisted living (AL) communities, thereby avoiding institutionalization. The National Center for Assisted Living (NCAL) appreciates the efforts of the Centers for Medicare and Medicaid Services (CMS) to promote person-centered care (PCC) for those receiving such Medicaid services, and CMS' dialogue with the Center for Excellence in Assisted Living (CEAL) to develop guidance that reflects best practices for assisted living residents.

However, we are very concerned that the final rule on home and community-based setting requirements for waivers ("the Rule") could ultimately exclude many AL communities from the Medicaid program. These exclusions would reduce access to this type of home and community-based setting and therefore significantly increase Medicaid expenditures because AL residents would be left with no options other than costlier intuitional settings. This result would be counterproductive to the original intention of the Rule and of HCBS waivers.

Specifically, in this situation CMS' application of the *Olmstead* decision and integration principles fails to distinguish between the needs and preferences of people with disabilities and of seniors. AL communities have always been designed to provide a home-like alternative to nursing homes. There is significant alarm that AL communities may not overcome a heightened scrutiny review because of certain characteristics that concern CMS; yet these communities were intentionally designed to respond to demand from seniors for these very same characteristics of AL to reduce isolation and provide an appropriate home-like environment. For example, many residents and their loved ones find proximity to a nursing center or a hospital to be convenient rather than isolating. Additionally, given that 40% of AL residents are living with dementia, many intentionally select AL because of its specially tailored services and safety features.[1] The Rule emphasizes the importance of patient choice and engagement, yet the current trajectory for implementation could result in many seniors' losing access to an AL community that has been their long-time chosen home.

On this implementation trajectory, many residents will not be able to find another suitable home and community-based setting and will thus be forced into a higher cost, more restrictive institutional setting. AL communities may be excluded from the Medicaid waiver program or have no choice but to voluntarily cease to participate as a Medicaid provider because the remediation costs are prohibitive

and Medicaid reimbursement is already often insufficient to cover the cost of care. For most seniors in AL, returning to an independent living environment is unrealistic because of the complexity of their medical and personal care needs. A nursing home would be their only option if there are no Medicaid AL communities available to them, which is likely because many states limit the number of AL beds or AL communities limit the number of Medicaid beneficiaries that they accept.

Creating further potential challenges, states for which the majority of long term care is provided through HCBS have an insufficient supply of nursing home beds to accept resident transfers from assisted living communities that are no longer Medicaid HCBS providers. It is unclear where these AL residents would be discharged to, especially in rural areas of the country where there are already limited provider options.

In addition, implementation of the Rule has been impeded by the absence of sufficient, timely guidance that reflect the preferences of seniors and the nature of AL communities in response to those preferences. We request further guidance to support the efficient and effective implementation of the Rule.

Specifically, we request a timeline describing the key pieces of planned sub-regulatory guidance that will be released, as was published for the Medicaid managed care rule earlier this year. Stakeholders would benefit from CMS guidance on: (1) operationalizing PCC for people with dementia; (2) criteria for AL communities to overcome a heightened scrutiny review for home and community-based settings that are co-located with or adjacent to an institutional setting; (3) CMS' process for heightened scrutiny review, including CMS' timeline for response to settings submitted for review, opportunities for the state or settings to amend files during review, and appeal rights; and (4) response to confusion about how to operationalize CMS' guidance on new construction (published in April 2016). Additionally, as noted in communications from other stakeholders to CMS, we strongly urge CMS officials visit assisted living communities to ensure that forthcoming guidance reflects the current preferences of AL residents and the true nature of AL communities. Such visits should include communities offering memory care, co-located with a nursing center, and located in a rural area. CEAL or NCAL would be happy to coordinate a site visit.

We agree about the importance of ensuring that home and community-based settings offer resident-centered services that are integrated into the community; it is also critical to ensure that the settings analysis takes into account what community integration means for seniors. We request a meeting with you and your colleagues to further discuss the issues raised herein.

Sincerely,

Scott Tittle
NCAL Executive Director

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