November 16, 2018

Administrator Seema Verma
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-3346-P
P.O. Box 8010
Baltimore, MD 21244-1810

**Re: CMS-3346-P; Federal Register, Vol. 83, No. 183 (September 20, 2018).**

**Submitted electronically:** www.regulations.gov.

Dear Administrator Verma,

The Long Term Care Community Coalition (LTCCC) is a non-profit organization dedicated to improving care, quality of life, and dignity for residents in nursing homes and other long-term residential care settings. For over 25 years, we have conducted policy studies and analyses of nursing home laws, standards and their implementation. In addition to our work on systemic long term care issues, we work closely with residents, families, and advocates to improve care.

The Center for Medicare Advocacy (Center) is a national, private, non-profit law organization, founded in 1986, that provides education, analysis, advocacy, and legal assistance to people nationwide, primarily the elderly and people with disabilities, to obtain necessary health care, therapy, and Medicare. The Center focuses on the needs of Medicare beneficiaries, people with chronic conditions, and those in need of long-term care and provides training regarding Medicare and health care rights throughout the country. It advocates on behalf of beneficiaries in administrative and legislative forums, and serves as legal counsel in litigation of importance to Medicare beneficiaries and others seeking health coverage.

**Overview of Comments**

The Centers for Medicare & Medicaid Services (CMS) issued a notice of proposed rulemaking (NPRM) to allow nursing homes to review their emergency preparedness programs and train staff to carry out those plans every two years rather than annually.[1] LTCCC and the Center strongly believe nursing home residents will be at a greater risk of harm and even death if the emergency preparedness requirements were to be rolled back. Therefore, we respectfully urge CMS not to finalize the proposed rule.

[1] Medicare and Medicaid Programs; Regulatory Provisions To Promote Program Efficiency, Transparency, and Burden Reduction, 83 Fed. Reg. 47,686, 47,725-47,727 (Sept. 20, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-09-20/pdf/2018-19599.pdf.

## Background

On December 27, 2013, CMS proposed emergency preparedness rules to address health care providers' and suppliers' lack of adequate preparedness for natural and human-made disasters.[2] The proposed rules discussed multiple recent emergencies, including the following disasters:

> [T]he 2009 H1N1 influenza pandemic, the 2001 anthrax attacks, the tornados in 2011 and 2012, and Hurricane Sandy in 2012. In 2014, the United States faced a number of new and emerging diseases, such as MERSCoV and Ebola, and a nationwide outbreak of Enterovirus D68, which was confirmed in 938 people in 46 states between mid-August and October 21, 2014 . . . ."[3]

Nearly 400 members of the public submitted comments. CMS finalized the rule on September 16, 2016, identifying four key components of disaster preparedness: (1) risk assessment and emergency planning, (2) policies and procedures, (3) communication plan, and (4) training and testing. [4]

Since the Final Rule was published two years ago, and implemented just one year ago, natural and human-made disasters have continued: 12 residents at a Florida nursing home died in 2017 when their facility lost its air-conditioning, 10 children at a New Jersey pediatric nursing home died of Adenovirus in 2018, and wildfires have raged in California.

Despite these disasters, CMS issued a NPRM on September 20, 2018, to once again revise the emergency preparedness program requirements.[5] Most notably, the proposed rule would allow nursing homes to review their emergency preparedness programs and to train staff to carry out those plans just once every two years instead of annually.[6]

## Comments

**CMS's proposed rule is a rollback of vital nursing home resident protections.** The objective of this rollback is to reduce the so-called "burden" on nursing homes; the NPRM even notes that the proposed changes would save "burden hours."[7] Ensuring that nursing home residents are protected during increasing cases of natural and human-made disasters must not be viewed as a burden. Nursing homes that voluntarily participate in the Medicare and Medicaid programs in order to receive public money, must adhere to the minimum standards of care established by law

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[2] Medicare and Medicaid Programs; Emergency Preparedness Requirements for Medicare and Medicaid Participating Providers and Suppliers, 78 Fed. Reg. 79,082, 79,084 (Dec. 27, 2013), https://www.gpo.gov/fdsys/pkg/FR-2013-12-27/pdf/2013-30724.pdf.
[3] Medicare and Medicaid Programs; Emergency Preparedness Requirements for Medicare and Medicaid Participating Providers and Suppliers, 81 Fed. Reg. 63,860, 63,862 (Sept. 16, 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-09-16/pdf/2016-21404.pdf.
[4] *Id.*
[5] Medicare and Medicaid Programs; Regulatory Provisions To Promote Program Efficiency, Transparency, and Burden Reduction, 83 Fed. Reg. 47,725-47,727.
[6] *Id.*
[7] Medicare and Medicaid Programs; Regulatory Provisions To Promote Program Efficiency, Transparency, and Burden Reduction, 83 Fed. Reg. at 47,725.

and regulation to provide quality care to residents and safeguard their quality of life. Time spent protecting residents is not a burden and should not be quantified as such.

Nursing home residents, some of the most vulnerable individuals in our country, are placed at a substantially higher risk of harm and death during emergencies. For instance, 12 residents at a Florida nursing home died last year when Hurricane Irma cut power to the facility's air conditioning system.[8] The nursing home's deficient response to the disaster resulted in the county medical examiner ruling the deaths a homicide.[9] In Texas, during Hurricane Harvey, several nursing homes and assisted living facilities flooded.[10] Photos from one Texas nursing home showed 15 residents sheltering-in-place in waist-deep water.[11] Cases of deficient emergency preparedness, amounting to resident abuse and neglect, have become increasingly common.

**In order to protect residents, nursing homes need to review emergency preparedness programs and train staff annually.** According to a post-Hurricane Katrina report by the HHS Office of the Inspector General (OIG) in 2006, nursing home residents were placed in harm's way during a series of hurricanes around the Gulf Coast.[12] The OIG reported that administrators and staff from sample nursing homes did not always follow emergency plans or had to go beyond the details of those plans "either because the plans were not updated or plans did not include instructions for particular circumstances."[13]

In a follow-up 2012 report, the OIG found ongoing problems with emergency planning. Sample nursing homes reported challenges in responding to emergencies, including difficulty following emergency plans as written and logistical problems.[14] Some administrators acknowledged that "their emergency plans did not contain accurate or detailed information on how to execute their plans and respond to disasters."[15]

Natural and human-made disasters are not likely to follow any singular form or pattern. These emergencies vary from year-to-year, depending on factors outside the control of nursing home operators and staff. The OIG's reports indicate that poorly developed or outdated emergency programs may result in staff trying to fill in gaps during emergencies in real-time. Nursing home staff need to be knowledgeable about their facility's emergency preparedness plans at all times. Staff should not have to recall lessons from two years ago or rely on the knowledge of newer, inexperienced staff during emergencies.

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[8] *Sheltering in Danger: How Poor Emergency Planning and Response Put Nursing Home Residents at Risk During Hurricanes Harvey and Irma*, U.S. Senate Committee on Finance, Minority Staff (Nov. 2018), https://www.finance.senate.gov/imo/media/doc/Sheltering%20in%20Danger%20Report%20(2%20Nov%202018).pdf.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] Daniel R. Levinson, *Nursing Home Emergency Preparedness and Response During Recent Hurricanes*, HHS OIG (Aug. 2006), https://oig.hhs.gov/oei/reports/oei-06-06-00020.pdf.
[13] *Id*.
[14] Daniel R. Levinson, *Gaps Continue to Exist in Nursing Home Emergency Preparedness and Response During Disasters: 2007-2010*, HHS OIG (Apr. 2012), https://oig.hhs.gov/oei/reports/oei-06-09-00270.pdf.
[15] *Id*.

**It is inappropriate to claim that the emergency preparedness requirements are burdensome after less than a year of implementation.** The emergency preparedness requirements were recently revised in a 2016 Final Rule and the regulations only started being implemented in November of 2017.[16] The new requirements were still not being implemented when residents at the Florida nursing home died in September of 2017 and when the Texas nursing home flooded in August of that same year.[17] Even after the regulations were implemented, Republican members of the House Energy and Commerce Committee still wanted to know what CMS was doing or could be doing to protect nursing home residents. According to the Committee members, "reports raise serious questions about the degree to which the Centers for Medicare and Medicaid Services (CMS) is fulfilling its responsibility to ensure federal quality of care standards are being met, as well as its duty to protect vulnerable seniors from elder abuse and harm in facilities participating in the Medicare and Medicaid programs."[18] Rolling back resident protections runs counter to the underlying efforts of recent Congressional oversight.

**Claims that the emergency preparedness requirements are burdensome contradict CMS's own justification for implementing the 2016 Final Rule.** When the requirements were finalized in 2016, CMS stated that it disagreed with those who "stated that the emergency preparedness regulations are inappropriate or unnecessary."[19] In fact, CMS acknowledged that "without proper training, healthcare workers may find it difficult to implement emergency preparedness plans during an emergency or disaster."[20] CMS now proposes to rollback protections it deemed necessary two years ago, and which were only implemented one year ago, in an inappropriate effort to fulfill President Trump's "Reducing Regulation and Controlling Regulatory Costs" Executive Order.[21] CMS's obligation to adhere to the President's order should not be at the expense of vital resident protections, without clear evidence indicating that rolling back those protections would actually improve resident health, safety, and well-being.

## Conclusion

Nursing home residents must not have their rights and protections rolled back in order to reduce so-called "burdens" on nursing homes. The deaths of 12 nursing home residents in Florida after Hurricane Irma and the flooding of a Texas nursing home after Hurricane Harvey are only recent examples of why emergency preparedness requirements are necessary for ensuring resident care and quality of life. As the HHS Office of the Inspector General indicated in multiple reports over many years, nursing homes are not able to protect residents during natural or human-made disasters without adequate planning and training. Allowing nursing homes to review their

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[16] Medicare and Medicaid Programs; Emergency Preparedness Requirements for Medicare and Medicaid Participating Providers and Suppliers, 81 Fed. Reg. 63,869.

[17] *Sheltering in Danger: How Poor Emergency Planning and Response Put Nursing Home Residents at Risk During Hurricanes Harvey and Irma*, U.S. Senate Committee on Finance, Minority Staff.

[18] Letter from the House of Representatives, Committee on Energy and Commerce, to CMS Administrator Seema Verma (Apr. 2, 2018), https://energycommerce.house.gov/wp-content/uploads/2018/04/20180402CMS.pdf.

[19] Medicare and Medicaid Programs; Emergency Preparedness Requirements for Medicare and Medicaid Participating Providers and Suppliers, 81 Fed. Reg. at 63,863.

[20] *Id.*

[21] Medicare and Medicaid Programs; Regulatory Provisions To Promote Program Efficiency, Transparency, and Burden Reduction, 83 Fed. Reg. at 47687.

emergency preparedness programs and train staff every two years instead of every year will place residents at an even greater risk of harm and even death.

Sincerely,

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