

Congress of the United States
Washington, DC 20510

March 5, 2020

The Honorable Seema Verma
Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
7500 Security Boulevard
Baltimore, MD 21244

Dear Administrator Verma,

We write to express our growing concern about the threat that Coronavirus Disease 2019 (COVID-19) poses to senior citizens and people with underlying health conditions, particularly those living in group care settings, such as nursing homes. The Trump Administration's continued weakening of nursing home safety standards, including the rollback of infectious disease control and emergency preparedness regulations, is especially troubling given that seniors who contract COVID-19 are experiencing the highest rates of serious illness and death. Therefore, we write to highlight our concerns and questions in light of the Centers for Medicare & Medicaid Services' (CMS) announcement of survey actions related to COVID-19 on March 4th, 2020.

The World Health Organization recently reported that people over the age of 60 and those with underlying medical conditions are at the highest risk for severe disease and death due to COVID-19. Recent data from the Republic of Korea also show higher mortality rates among senior citizens diagnosed with the disease.¹ Furthermore, the unfolding crisis at the Life Care Center in Washington underscores that the rapid spread of COVID-19 in nursing homes can have ripple effects beyond residents—spreading the disease to health care workers, first responders, and visitors, which puts additional strain on health care systems.

The Trump Administration has repeatedly weakened nursing home safety standards that put residents at greater risk to infectious disease outbreaks. In 2016, the Obama Administration updated and enhanced Federal health and safety standards in nursing homes.² In a July 2019 rule, the Trump Administration proposed removing the requirement implemented in 2016 that infection preventionists work at nursing facilities at least part-time or have frequent contact with the infection prevention and control program staff at the facility.³ Even in typical times, nursing

¹ <https://www.who.int/docs/default-source/COVID-19e/who-china-joint-mission-on-covid-19-final-report.pdf>;
<https://www.cdc.go.kr/board/board.es?mid=a30402000000&bid=0030> (Update 171, March 4, 2020)

² <https://www.govinfo.gov/content/pkg/FR-2016-10-04/pdf/2016-23503.pdf>

³ <https://www.govinfo.gov/content/pkg/FR-2019-07-18/pdf/2019-14946.pdf#page=1>

homes are hotspots for infection and disease. In the United States, one to three million serious infections occur in nursing homes each year,⁴ and more than 60 percent of facilities have been cited for deficiencies relating to infection control since the beginning of 2017.⁵

The proposed rollback of infectious disease controls followed a final rule issued by the Trump Administration in September 2019 that removed the requirement that nursing homes coordinate with local, tribal, regional, state, and federal emergency preparedness officials or participate in collaborative and cooperative planning in the community.⁶ *Sheltering in Danger*, a Senate Finance Committee Minority Staff report examining the impact of Hurricanes Irma and Harvey on nursing homes, found that CMS's emergency preparedness regulations, as promulgated in 2016, were already inadequate to address resident needs during an emergency.⁷ For example, a Florida nursing home where more than a dozen residents died following Hurricane Irma was not required to establish, and did not establish, any coordinated health care arrangements with the regional hospital across the street from the home.⁸

The Administration has also made changes to the imposition of enforcement remedies associated with Federal nursing home requirements. In guidance released in July of 2017, CMS instructed surveyors to rely increasingly on civil money penalties on a per-instance basis rather than on a per-day basis.⁹ In a "Patients over Paperwork" newsletter, CMS explicitly indicated that it had "reduced the penalty amounts for non-compliance with Requirements of Participation," and, according to Kaiser Health News, aggregate fines on nursing homes fell from \$41,260 in 2016 to \$28,405 in 2017.^{10 11} These penalty reductions exacerbate the already almost-nonexistent enforcement for deficiencies relating to crucial health requirements like infection control. In 2017, less than one percent of infection control deficiencies resulted in a high-level citation that could be associated with a financial penalty.¹²

The Administration's efforts to weaken nursing home oversight leaves seniors more likely to be in the care of facilities that are unprepared for an emerging infectious disease, such as COVID-19. The outbreak of COVID-19 at the Life Care Center of Kirkland demonstrates the tragic consequences of emerging infectious diseases for nursing home residents and underscores the need for robust emergency preparedness and infection control requirements and response.

On March 4th, CMS announced that State Survey Agencies and Accrediting Organizations would be directed to prioritize inspections on infection control, along with noncompliance associated

⁴ <https://www.cdc.gov/longtermcare/index.html>

⁵ <https://khn.org/news/COVID-19-preparedness-infection-control-lapses-at-top-rated-nursing-homes/>

⁶ <https://www.govinfo.gov/content/pkg/FR-2019-09-30/pdf/2019-20736.pdf>

⁷ [https://www.finance.senate.gov/imo/media/doc/Sheltering%20in%20Danger%20Report%20\(2%20Nov%202018\).pdf](https://www.finance.senate.gov/imo/media/doc/Sheltering%20in%20Danger%20Report%20(2%20Nov%202018).pdf)

⁸ [https://www.finance.senate.gov/imo/media/doc/Sheltering%20in%20Danger%20Report%20\(2%20Nov%202018\).pdf](https://www.finance.senate.gov/imo/media/doc/Sheltering%20in%20Danger%20Report%20(2%20Nov%202018).pdf)

⁹ <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-37.pdf>

¹⁰ <https://www.cms.gov/Outreach-and-Education/Outreach/Partnerships/Downloads/JanuaryPoPNewsletter011818.pdf>

¹¹ <https://khn.org/news/nursing-home-fines-drop-as-trump-administration-heeds-industry-complaints/>

¹² <https://khn.org/news/COVID-19-preparedness-infection-control-lapses-at-top-rated-nursing-homes/>

with serious health and safety risks. We share the agency's concern about the spread of COVID-19. To that end, we request responses to the following questions as soon as possible.

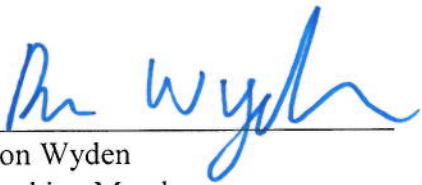
1. Has CMS identified such a survey suspension in previous emergency planning, or was the policy developed specifically in reaction to the current COVID-19 outbreak? Has a similar suspension happened in response to any previous emergencies? What statutory basis did CMS identify to carry out the survey suspension? How long does CMS expect the survey suspension to be in place, and will the duration be associated with the length of the current or future public health emergency declarations?
2. Which facilities does CMS anticipate will be surveyed under the following priority categories provided in the March 4th memorandum regarding the suspension of survey activities?¹³
 - a. Facilities with complaints alleging infection control concerns and facilities with potential COVID-19 or other respiratory illnesses;
 - b. Facilities that have a history of infection control deficiencies at the immediate jeopardy level in the last three years; and
 - c. Facilities that have a history of infection control deficiencies at lower levels than immediate jeopardy.
3. Will the names of the facilities in these and all other priority categories be released publicly in real time? If so, by what communication channels?
4. What will be the process to prioritize facilities for inspection between CMS and the State Survey Agencies?
5. Will surveyors be assessing facilities based on compliance with the standard infection control requirements under Medicare Conditions of Participation, including as required by the Code of Federal Regulations (CFR) §483.80?
6. Will surveyors be assessing facilities based on adherence to infection control guidelines specific to coronavirus? If so, please provide the standards against which facilities will be assessed.
7. What, if any, infection control training will surveyors be required to undertake before entering facilities with potential cases of COVID-19 to ensure they are not at risk of contracting the virus and that they do not inadvertently spread the disease into the community or to other facilities?
8. What steps is CMS taking to ensure nursing homes are effectively coordinating with relevant local, tribal, regional, state, and federal emergency preparedness and response officials? Will surveyors be assessing facilities' coordination with these groups as part of the targeted infection control surveys?
9. The CMS announcement of survey guidance does not include a mention of additional funds for focused surveys relating to infection control. How is CMS planning to allocate resources, including surveyor time, across the priority areas defined in the memorandum?

¹³ <https://www.cms.gov/files/document/qso-20-12-allpdf.pdf-1>

10. Will the surveys performed under the survey suspension guidance, including those specific to infection control, be included in the Five-Star Ratings System methodology and displayed on the Nursing Home Compare website?
11. Does CMS have a plan in place to triage survey resources if additional cases or outbreaks of COVID-19 are identified in additional nursing facilities?
12. How will CMS ensure that facilities facing a shortage of personal protective equipment (PPE) or other essential infection control supplies are connected with appropriate resources? Will inspections under the March 4th guidance include an assessment of the adequacy of PPE supplies?
13. How is CMS ensuring that facilities have the necessary capabilities, resources, and guidance to test residents for the COVID-19 appropriately and effectively? Will inspections under the March 4th guidance include information regarding testing protocols and access to tests?
14. How will CMS ensure that vulnerable nursing home patients continue to receive necessary care during an outbreak if staff become ill with COVID-19 and can no longer provide direct patient care?
15. The Department of Health and Human Services Deputy Secretary Eric Hargan announced on March 4th that there will be a CMS liaison to the Centers for Disease Control and Prevention (CDC). Who will fill this role and what will their specific responsibilities be? Will they be empowered to make decisions regarding the response to coronavirus in nursing homes? How will they communicate their activities and related updates on CMS and CDC actions and guidance to stakeholders and Congress?

Thank you for your prompt attention to this matter. If you have any questions, please contact Kristen Lunde with the Senate Committee on Finance at 202-224-4515 or Rachel Dolin with the House Committee on Ways and Means at 202-225-3625.

Sincerely,



Ron Wyden
Ranking Member
Committee on Finance, U.S. Senate



Richard E. Neal
Chairman
Committee on Ways and
Means, U.S. House of
Representatives