STATE OF MICHIGAN
RICK SNYDER
GOVERNOR

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

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MEMORANDUM

TO: **Nat Forstner, Chief of Staff, Lt. Governor Calley**

CC: **Brian Calley, Lt. Governor**

Dennis Muchmore, Chief of Staff, Governor Snyder

Stephen Hilfinger, Director, LARA

FROM: **Shelly Edgerton, Deputy Director**

DATE: **September 11, 2012**

RE: **Follow-up Comments on SB 884**

In follow-up to my summary of our meeting from last Tuesday, September 4, below are our responses to your questions. I've also noted a few other items for your reference.

1. **CMP Funds:** Can Civil Monetary Penalties funds (CMP) be used to provide monetary grants?

   CMS Response: This provision defines a "high performing" nursing home and states such a nursing home will receive money from the CMP fund. On the surface, this appears to conflict with the Social Security Act, which specifies that CMP funds must be used for the protection/benefit of nursing home residents. In addition, please be reminded that States must follow the request/approval process for CMP use as detailed in S&C 11-42-NH.

   The CMS memorandum identified above also appears to preclude providing monetary grants from the civil monetary penalty fund to nursing homes for this purpose. Based on the CMS response and the CMP memo issued by CMS, we believe it is unlikely that financing this proposal through the CMP fund would be approved.

   Solution: We recommend having the department continue working with the industry through the current Stakeholder Workgroup that has been established to create a quality incentive program not based on monetary reward, but based on the following ideas:

   a. Award certificates for reaching certain levels of improvement (similar to MIOSHA incentive program).
   b. Create Alliances and Partnerships (like MIOSHA).

c. Look at establishing a graduated "experiential" fee system for licensing like UIA, where the high quality facilities pay less into the system and those who are "bad actors" pay more.

Through the Stakeholder workgroup, we are creating an Incentive and Quality Subcommittee to come up with ideas and recommendations for consideration.

2. **Consecutive Days:** Are there real world examples of where "consecutive days" could result in unintended consequences that might result if this requirement stays?

For clarification, LARA supports the following language found in Section (A), page 19, lines 19 to 21: "Consecutive days" means calendar days, but does not include Saturday, Sunday, or State or Federally-Recognized Holidays.

However, where this definition causes concern is (1) under Section (4) page 21 that requires all abbreviated complaint surveys to be conducted on ***consecutive days*** until complete and (2) under Section (5), page 21, lines 10 to 13: Departmental notifications of acceptance or rejection of a nursing home's plan of correction shall be reviewed and released to the nursing home within 10 ***consecutive days*** of receipt of that plan of correction.

CMS Response: While we agree, in concept, that complaint surveys should be conducted on consecutive days, we understand this provision if applied in every case could present significant challenges to the State Survey agency in scheduling other surveys, including timely investigation of self-reported incidents and complaints in which immediate jeopardy may be present. Therefore, CMS does not support this provision. There is no Federal requirement stipulating that complaint surveys must be conducted on consecutive days.

With respect to employment concerns with "consecutive days" below are examples:

a. Employees working on flex-time, where he/she is working 10 hours a day for four days a week instead of the typical 8 hour days for five days a week.
b. Annual or sick leave requested.
c. Lack of staff resources due to the department having to respond to higher level investigations or an emergency occurring at a facility or multiple facilities.

The language of this section also limits the ability for the bureau to work with the facilities in creating a good POC that can be accepted versus rejected. It removes flexibility for the bureau to distribute staff resources and time according to need and priority. Finally, it does not take into consideration employee contracts, employee emergencies, sick and leave time. The goal of the bureau and the department is to provide consistency in surveyors so that nursing homes do not end up with different surveyors for every matter or situation.

Solution: LARA recommends the inclusion of "**as administratively feasible**" in both sections so that it requires the department to do its best to meet the "consecutive days" requirement so long as it does not conflict with Departmental priorities or efforts to promote employee engagement or employee contracts, sick leave, flex time, etc.

LARA also wishes to point out that BHS has received a special technology grant from CMS to automate the Plan of Correction process for nursing homes. This project is underway and will fully automate a very manual and labor intensive process to the mutual benefit of the providers and department. Once implemented, facilities will no longer have to submit POCs via fax or U.S. mail for review. They will be able to submit them electronically. BHS will also be able to approve POCs electronically and advise the providers of the POCs status.

3. **40/20 Day Timeline:** The proposed language requires nursing homes to implement a POC within 40 days and then require the department to schedule a revisit within 20 days. This statute removes all discretion from the State Agency and in many circumstances will actually harm the nursing home rather than help them.

   Background: When an incident occurs or a facility has open citations that need to be resolved, this leads to the facility having to provide a POC to the bureau for approval or rejection. Once this POC is approved then the facility must adhere to the dates it has selected by which time all citations have been corrected. In addition, the nursing home has to show that it can maintain compliance so that when the bureau returns for its unannounced revisit the surveyor can determine the facility is back in substantial compliance.

   CMS Response: We find that the State Survey Agency should be afforded flexibility in conducting its survey workload, including recertification, complaint, and revisit surveys.

   Please note that per SOM 7317.1 (Verifying Facility Compliance), "revisits may be conducted anytime for any level of noncompliance." In addition, per SOM 7317.2, #2, there is no guarantee of a revisit. Quoting from that section, "revisits are performed…at the discretion of CMS or the State. When conducted, however, one revisit will normally be conducted after a survey which found noncompliance and another before the expiration of the 6-month period by which a facility must be in substantial compliance." Thus, CMS puts no parameters on the timing of revisits beyond what is established in the SOM.

   CMS does not allow a desk review for a 3rd or 4th revisit. In addition, there is potential conflict with Bill 884 and CMS policy. Please review 7317.2, #1, Mandatory Onsite Revisits, which states that when a beginning survey [emphasis added] finds deficiencies that constitute SQC, harm, or IJ, "onsite revisits must continue for these deficiencies even if they lessen to lower levels of noncompliance."

   Situational example: If a POC has the last date of implementation of correcting its citations on the 40th day and during this time frame the nursing home receives an additional citation(s) due to a consumer complaint or a facility reported incident (FRI),

then the additional citation gets added to the list of items that the nursing home has to correct.

In order to correct these new items, the nursing home may not be ready for the revisit to occur until after the 40th day, perhaps the 50th or 60th day. As a result, the bureau would more wisely choose to conduct its unannounced revisit after these new items have also been fully corrected. The intent of waiting for all of these to be resolved prior to the revisit allows BHS to be more efficient and judicious with its first revisit to the facility. It is inefficient to travel to the facility prior to the correction date of all citations, knowing it is necessary to then have to return again for the facility's second revisit a few weeks later. For those facilities with multiple complaints/incidents coming in during the enforcement cycle, multiple revisits can be detrimental. The State Agency is permitted to authorize only two revisits during any one survey cycle. If a third or fourth revisit is necessary to determine substantial compliance, CMS must authorize it.

Under the proposed language of SB 884, the bureau would have to go back within 20 days after the 40th day that the nursing home has implemented its POC. This could lead to the following:

- Nursing homes have a better idea of predicting when the bureau will be back for the revisit that could allow for the nursing home to have a better idea of when it should look its best instead of always looking its best.
- The industry knows that it has to show it can remain in compliance after being cited, so as a result the bureau is most likely going to wait to do its revisit until several days after the 40th day, but also not wait until the 20th day if the bureau wants to maintain good customer service. Either way it will make it easier for the industry to determine when the revisits will likely occur, therefore the federal requirement to have the revisits unannounced and staggered will be diminished.

Solution: LARA recognizes the intent of the timelines set forth in SB 884, but we believe this language creates unintended consequences for the industry. Additionally, it will result in less flexibility for the department to work with the nursing homes to be in compliance, close out cycles, and utilize Bureau resources efficiently.

LARA proposes modifying the language that would include:

a. The 1st revisit shall be within 20 days so long as the nursing home does not have additional survey events resulting in citations that have not yet been corrected.

4. **<u>Additional Recommendations:</u>**

Stakeholder Input: Again, as we shared during our meeting we also recommend changing the language on the Stakeholder Workgroup(s) and sub-Workgroup topic areas and suggest the following:

a. Set-up a Stakeholder Workgroup that the department (LARA) creates, similar to what we already have or formalize the group by including in SB 884:

- The department shall establish a Stakeholder Committee to be made up of at least 7 members to include 3 nursing home providers, 1 consumer, Long Term Care Ombudsman, 2 representing the department (LARA).
- The purpose of the Stakeholder Committee is to discuss and make recommendations to the department on areas such as but not limited to policy, quality standards, guidelines, survey protocols, and technology. The Stakeholder Committee may establish separate workgroups or subcommittees to make recommendations on how to address specific issues or concerns to the whole Stakeholder Committee.

By making the language more broad it will give the Stakeholder group an opportunity to look at current issues and concerns occurring between the industry and the department without being required to focus on certain items that may no longer be a problem. With our current Stakeholder Workgroup, we are establishing four Subcommittees to address topics such as:

- Consistency as it relates to surveyors, application of regulations, communications
- IT/Electronic Records – Already met and are setting a rigid timeline to address issues and concerns both immediate and long-term.
- Incentives & Quality
- Customer Service/Communications

IT/Technology: CMS has approved our proposal for $3.5 million to allow Michigan to create a new web-based case management system for incident reporting. We ask that consideration be given to modify the language of requiring the department to submit an appropriations proposal for IT/electronic records system, since we are trying to work through this issue as well we will be focused on working through our proposal that has been approved.

5. **Summary:**

Some of these are being defined more clearly but LARA is currently reviewing ideas that have already been discussed and will create a timeline for when these Subcommittees need to meet and offer recommendations. These are being aligned with additional projects that are ongoing in terms of the BHS internal review and IT projects with DTMB.

We are taking an aggressive approach and our hope is to have our initial Stakeholder Workgroup recommendations and implementation of some of the ideas established within a 3, 6, 9 and 12 month period depending on the idea and level of work that needs to be done to meet each of these timelines. We will share all of this information with you and Senator Hansen and are willing to make modifications on timelines as necessary.

Again, we are happy to provide additional information and/or language recommendations for SB 884. Ultimately, my team and I are ready and will do everything possible to meet the requirements of SB 884 as currently proposed in (H-3). Our hope, however, is that we can make a few changes given the current considerations of the progress we have made to involve the industry and start building a positive relationship for improved customer service.

As always, thank you for your time and consideration.