



November 7, 2016

Patrice Drew
Office of Inspector General
Department of Health and Human Services
Attention: OIG-406-P, Cohen Building
330 Independence Avenue S.W.
Room 5269
Washington, DC 20201

Re: Proposed Rule 42 CFR Part 1007. Medicaid; Revisions to State Medicaid Fraud Control Units

Dear Ms. Drew:

The American Seniors Housing Association (ASHA) and Argentum submit the following comments to the proposed revisions to the State Medicaid Fraud Control Unit (MFCU) rules announced in 81 Federal Register at pp. 64,383 et seq.

ASHA is a national organization of over 445 senior living providers, profit and non-profit, involved in the operation, development, investment and financing of the entire spectrum of seniors housing – independent living, assisted living, memory care and Continuing Care Retirement Communities (CCRCs). Our members' communities serve a wide range of seniors and their families for their housing and supportive service needs, based on a philosophy that supports "aging in place."

Argentum is the leading national trade association serving companies that own, operate, and support professionally managed senior living communities including assisted living, independent living, memory care, and CCRCs. Argentum is expanding senior living through its comprehensive national and state advocacy program; workforce development, training, and certification tools; and industry-leading publications, events, education, and research. Since 1990, Argentum has advocated for choice, accessibility, independence, dignity, and quality of life for all older adults

ASHA and Argentum have grave concerns regarding the proposed regulation's extension of the MFCUs new authority to investigate non-Medicaid funded residential care communities. MFCUs are designed to investigate fraud and abuse among participants in the Medicaid program. We acknowledge that assisted

living communities which choose to participate in the Medicaid waiver program would be subject to the investigative authority of the MFCUs. However, it is unprecedented and inappropriate for CMS to regulate assisted living providers that are not receiving funds from the Medicare or Medicaid programs. It is also misguided to shift scarce Medicaid resources intended to root out fraud and abuse in government programs serving low-income seniors to investigative activities in the private market.

Federal Inspection of Privately Funded Residential Care Properties is Inappropriate

Historically, Congress and the federal government agencies have left the regulation and supervision of privately funded residential care and assisted living to the states. All 50 states regulate assisted living and other providers of residential care to the elderly through their licensing laws. These laws have evolved in recent years to meet changing needs and preferences of residents in areas such as consumer disclosure, quality assurance, staffing and training requirements. Properties are inspected for compliance with licensing requirements and all states have laws to address allegations of elder abuse and neglect and provide for investigations, remedies and penalties for such conduct. Additionally, the Long-Term Care Ombudsman Program investigates elder abuse complaints in long-term care and in residential care facilities including assisted living.

The proposed rule offers the MFCU the option to review complaints relative to non-Medicaid facilities. Further, it provides the MFCU the opportunity to refer significant complaints to appropriate criminal investigative or prosecutorial authorities. It also allows the MFCU to refer lesser complaints to local, state or federal agencies for further investigation. This language indicates a recognition that oversight is in place for private pay assisted living and matters of fraud and abuse should be referred as appropriate.

The MFCU Annual Report highlights that the highest number of fraud and abuse convictions in 2015 involved in-home personal care attendants or other health care aides in private homes. Given that in-home private caregivers tend not to be regulated by state licensing agencies, as are assisted living residences, it would be more appropriate for the MFCUs to devote their limited resources to investigation of these most egregious offenders in the Medicaid program, and allow fraud and abuse complaints against private pay communities to be handled by the appropriate state regulatory oversight agency.

Legislative History to Support Extension of MFCU Authority to the Private Market is Questionable

The mission of the Medicaid Fraud Control Units (MFCUs) is to investigate and prosecute Medicaid provider fraud and patient abuse or neglect under state law. The proposed regulation seeks, for the first time in 17 years, to implement Section 407 of the Ticket to Work and Work Incentives Improvement Act of 1999 (TWWIIA) (Pub.L.106-170), which expanded the reach of the MFCUs' investigative authority to non-Medicaid properties. However, the legislative history suggests there was minimal consideration given to this provision before passage in Congress. In fact, when the provision was introduced, the cosponsor of the Senate version of the TWWIIA (Mr. Allard) complained that Section 407 was introduced "at a date too late to make further changes" and "never debated in the Senate." He was concerned that it might allow "the federal government unprecedented control over the quality of care in private institutions" and represent "yet another example of government authority exceeding its boundaries." (Congressional Record, Vol. 145, November 19, 1999: Senate agrees to the Conference Report)

State Regulation and Enforcement of Private Pay Assisted Living is Effective and Appropriate

States effectively and successfully regulate assisted living, and respond to instances of fraud or elder abuse or neglect, without the intervention of MFCUs. Moreover, the unlimited extension of MFCU investigative jurisdiction to all private-pay assisted living communities could defeat the purpose of MFCUs and overwhelm the resources allocated to them. At present, only a small fraction of assisted living providers in the United States participate in any federal reimbursement program ("Medicaid waiver" programs). If MFCUs were to begin investigating private pay assisted living and board and care facilities, their workload would increase beyond their capacity to respond, and defeat their primary purpose, which is to monitor the integrity of providers participating in the Medicaid program. The resources available to MFCUs to do their job of monitoring Medicaid-participating providers would dissipate and be wasted on tasks that Congress never contemplated. Section 407 should not be interpreted to permit the investigation of an assisted living provider or other residential care settings that have never enrolled in the Medicaid program and is funded solely by private funds.

To reconcile the proposed regulations with the congressional intent behind the MFCU program, ASHA and Argentum ask that any extension of MFCU investigatory powers over private pay assisted living providers be limited to those providers enrolled in Medicaid. We thank you for your consideration.

Sincerely,

A handwritten signature in black ink, reading "David S. Schless". The signature is fluid and cursive, with the first name "David" being more prominent.

David S. Schless
President
ASHA

A handwritten signature in black ink, reading "James R. Balda". The signature is fluid and cursive, with the first name "James" being more prominent.

James R. Balda
President & CEO
Argentum