The Honorable Seema Verma
Administrator, Centers for Medicare and Medicaid Services
200 Independence Ave, SW
Washington, DC 20201
RE: CMS-2393-P
Submitted Electronically via www.regulations.gov

Docket #CMS-2019-0169

Dear Ms. Verma:

I am writing on behalf of Argentum, the leading national association exclusively dedicated to supporting companies operating professionally managed, resident-centered senior living communities and the older adults and families they serve. Argentum appreciates the opportunity to provide comments on the proposed rule titled, "Medicaid Fiscal Accountability Regulation" (MFAR), Docket #CMS-2019-0169, published in the *Federal Register* on November 18, 2019.

The members of Argentum operate senior living communities offering assisted living, independent living, continuing care, and memory care services to older adults and their families. Our membership supports choice, independence, dignity, and quality of life for all older adults. As such, we are concerned with several proposed changes that could negatively affect continuing care retirement communities (CCRCs) and their residents. We have focused our comments on the provisions of the rule relating to provider healthcare taxes and their effects on CCRCs.

To develop this comment letter, Argentum asked a representative group of operators of CCRCs to contribute their viewpoints on how the proposal could affect their communities and the residents they serve. Based on their input and recommendations, we request that CMS not move forward with finalizing the rule at this time, and to reconsider the impact of this proposal on providers, including those classified as small entities.

Background on CCRCs

CCRCs offer a continuum of care to more than 700,000 Americans through independent living, assisted living, nursing home, and other types of services for older adults. The nearly 2,000 communities nationally are a critical component of the aging services system, offering a full range of housing, dining, social activity and other services to residents as they age, through skilled nursing care. Almost all CCRC residents are older adults, with the average new resident being about 80 years old, and the vast majority pay for care in CCRCs out-of-pocket, and not through Medicaid funding. The average CCRC serves about 290 people and has an average annual budget of $12.2 million.

Provider Tax Exemptions

States are able to increase their share of Medicaid funds by levying healthcare related taxes, but these must meet federal guidelines to be broad-based and uniformly applied. Currently, 45 states assess some type of nursing-home health-care related taxes to generate revenue for federal Medicaid matching funds. However, 18 states that levy provider taxes offer an exemption to CCRCs, or reduce their tax burden, relative to provider taxes typically charged to nursing homes. These exemptions or discounts must pass either the B1/B2 test for waivers of uniformity, or the P1/P2 test for waivers of the broad-based requirement.

The proposed rule's additional requirements beyond these tests are overly vague and provide too much discretion to CMS. As a result, states that currently offer an exemption or discounted tax rate may not be able to reasonably determine what types of provider taxes would or would not comply with the proposed rule. Further, while most CCRCs do not currently participate in Medicaid or do so on a very limited basis, the proposal to eliminate the tax exemption/discount could result in these communities being required to pay new state taxes to subsidize the Medicaid program.

We are specifically concerned with the following provisions:

- CFR § 433.68 (f)(3)(i): Taxing providers that provide less Medicaid services at lower rates than those that provide relatively more Medicaid services. The proposal does not include any definition or sub-criteria for what would constitute "relatively more" Medicaid services, making it exceedingly difficult for states to comply.
- CFR § 433.68 (f)(3)(iii): Not taxing, or taxing at a lower rate, groups of providers with no Medicaid services compared to other groups (e.g., those that take Medicaid). This proposal could lead to states to impose new taxes, particularly on current non-Medicaid providers.
- CFR § 433.68 (f)(3)(iv): Tax excludes or imposes a lower tax rate on a taxpayer group defined based on any commonality that, considering the totality of the circumstances, CMS reasonably determines to be used as a proxy for the taxpayer group having no Medicaid activity or relatively lower Medicaid activity than any other taxpayer group. These would lead to undefined and excessive discretion for CMS to determine the permissibility of state provider tax structures, which could cause the rule to be inconsistently and/or arbitrarily applied across states.

Analysis by Argentum members indicate that the effects of this policy change could lead to new taxes in the six- or seven- figure range each year. Communities would likely be forced to absorb the costs of the new taxes by increasing costs onto current and future residents through higher entrance fees and/or monthly fees. Some communities may ultimately determine that the costs of the taxes supersede their means and may opt to discontinue nursing home services entirely. This would significantly reduce the availability of nursing home services at a time when demand is increasing exponentially.

CMS should not move forward with the proposed provider tax changes given their impact on CCRC nursing homes. We request that CMS withdraw this section (proposed 42 CFR § 433.68), or at minimum include in final rule language that the regulation does not apply to exemptions or discounts for nursing homes in continuing care retirement communities.

Effects on Small Businesses

The proposed rule includes language under Section V (Regulatory Impact Analysis), Part C (Anticipated Effects), Item 2 (Effects on Small Businesses and Other Providers), which certified that the rule would not have a significant economic impact on a substantial number of small entities. However, according to industry data, the average CCRC has an average annual budget of $12.2 million, well below the small business size standard of $30 million in average annual receipts for CCRCs, as established by the Small Business Administration. As proposed, the rule would result in considerable tax increases for small entities like CCRCs without provider tax exemptions or discount protections. We request that CMS reconsider the impact of this proposal on small entities and make necessary revisions.

Conclusion

Since 1990, Argentum has advocated for choice, independence, dignity, and quality of life for all older adults. We do not believe it is the intention of this rule to increase taxes for CCRCs or the cost of providing care to the residents they serve. However, we are concerned that the MFAR as proposed could lead to considerable unintended consequences for these communities by disallowing long-standing provider tax exemptions and discounts for CCRCs. This would ultimately be detrimental to our member's ability to provide for their residents' quality of life, and overall patient care and quality.

We request that CMS reconsider the provisions of this rule relating to provider taxes and CCRCs and consider making revisions that would reduce or eliminate the impact on these communities and their residents. If CMS moves forward with finalizing the rule, we request that it eliminate the provisions that would alter existing exemptions or discounts for nursing homes for CCRCs. Should CMS finalize the rule with this language, we request that it consider extending the implementation period to provide states and providers sufficient time to evaluate and plan for the transition. We recommend that the implementation date be extended across the rule to five years, or at a minimum, extend the implementation period for provider tax changes to five years.

We sincerely appreciate the opportunity to voice our viewpoint on the proposed rule, as well as your commitment to gathering the views of all stakeholders about these critical topics. If you have any questions about our comments, or if Argentum can be of assistance as you move forward, please do not hesitate to contact me at either (703) 894-1805 or jbalda@argentum.org.

Respectfully Submitted,

James Balda
President & CEO
Argentum