October 14, 2015

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS–3260–P
P.O. Box 8010
Baltimore, MD 21244

Via: http://www.regulations.gov

Re: CMS-2015-0083-0001

Comments to the Proposed Rule for Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities

We, the undersigned organizations and Fair Arbitration Now,[1] a network of more than 70 consumer, labor, legal and community organizations, respectfully submit these comments on the proposed rule, issued by the Centers for Medicare & Medicaid Services (CMS), which adds and revises requirements for long-term care facilities, including "skilled nursing facilities," or nursing homes, that participate in Medicare and Medicaid programs. These comments respond to the proposed requirements and discussion on the use of pre-dispute binding mandatory (or forced) arbitration clauses in nursing home contracts. Our organizations call on CMS to issue a final rule that will meaningfully restore critical legal protections for the over one million nursing home residents and their families. That is, CMS must prohibit the use of arbitration agreements entered into before a dispute arises, and render all such terms in nursing home contracts unenforceable for facilities that participate in CMS programs.

CMS rightly recognizes serious problems with forced arbitration in the nursing home sector.

Residents of nursing homes are typically vulnerable and elderly people. They enter into these facilities to obtain assistance with their daily living when they cannot take care of themselves. They become completely dependent on nursing home operators to maintain their well-being.

During an admission process into a nursing home, which often takes place under stressful conditions including following a recent hospital stay or a medical emergency, residents and their family members are presented with nonnegotiable admission documents to complete

[1] Fair Arbitration Now, http://www.fairarbitrationnow.org/coalition/.

and sign. Many facilities' admission contracts, which can be as long as 70 pages,[2] contain forced arbitration clauses that require residents to surrender their right to bring legal claims against the facilities in court. Instead, these terms require residents to resolve disputes with the nursing homes in private arbitration proceedings.

In forced arbitration, the nursing home corporation determines the rules for the arbitration, including choosing the arbitration firm that will conduct the proceeding and choosing the venue. Arbitrators do not have to follow the law, and their decisions are rarely appealable. The arbitration process would occur out of the public eye. Further, the arbitration process for nursing home disputes has been historically cost-prohibitive for many residents.

In its proposed rule, CMS acknowledged numerous disadvantages of forced arbitration for nursing home residents. It noted facilities' superior bargaining power in drafting and presenting, to residents and their families, nonnegotiable admission documents with forced arbitration clauses, which residents would feel pressure to sign. It mentioned the significance of the legal rights that residents must surrender in one-sided contracts as well as residents' lack of awareness and understanding of the consequences of arbitration clauses. It also noted the secretive nature of forced arbitration (including confidentiality clauses in nursing home contracts or that result from settlements) that can keep serious health and safety issues at nursing homes undisclosed from CMS and the public for an unreasonable period of time, facilitating continued misconduct.

Residents and their families must be able to seek remedies for serious injuries and harm caused by nursing home negligence, neglect and abuse, such as bedsores and infection, pressure ulcers, dehydration and malnutrition, unnecessary restraints, and even physical and sexual abuse. When forced arbitration clauses are present, residents lack meaningful ability to hold the nursing home accountable for these and other law-breaking conduct.

Further, operators have less incentive to maintain safe facilities when the likelihood for being held liable for injuries they cause is low, undermining the priority that should be placed on patient and resident care. Recent evidence from over the past decade shows that patient and resident safety standards at nursing home facilities have dropped precipitously.[3] Medicare's Office of Inspector General (OIG) reported that expenditures for skilled nursing facility (SNF) care more than doubled over the course of a decade, from $12 billion in 2000 to $26 billion in 2010. Some of the costs were due to preventable harm to residents. The OIG report determined that more than half of "adverse events," or harm resulting from medical care at facilities, was preventable.[4] The report attributed much of the harm to substandard treatment, inadequate resident monitoring, and failure or delay of necessary care, which cost

[2] Benjamin Pomerance, *Arbitration over Accountability? The State of Mandatory Arbitration Clauses in Nursing Home Admission Contracts*, 16 FLA. COASTAL L. REV. 153 (2015).

[3] Department of Health and Human Services, Office of Inspector General, *Adverse Events In Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries*, Feb. 2014, http://1.usa.gov/MITafe.

[4] Id.

the federal government billions.[5] The elimination of forced arbitration clauses can help to restore operators' financial incentive to provide better service and care to their residents.

CMS' proposed requirements on forced arbitration won't alleviate nursing home abuses.

CMS' proposed requirements to revise forced arbitration clauses in nursing home admission contracts and to require specific communications about arbitration between the facility and residents at the time of admission will not meaningfully change the nature or impact of the terms for nursing home residents or for nursing home corporations.

CMS proposes to require that the facility explain the arbitration clause to the resident in a manner that he or she understands and the resident must acknowledge their understanding. As a Congressional report observed, "family members admitting a loved one are focused solely on finding the best possible care, and not on the legal technicalities of arbitration."[6] Even if arbitration clauses are required to be explained to them as CMS proposes, residents and their loved ones will have little use for, or understanding of, these particular legal terms at that critical, emotional time of admission.

CMS proposes that arbitration agreements "must be entered into by the resident voluntarily" and must not be made a condition of "admission, readmission or continuation of residence" at the facility. We agree that arbitration should be voluntary. However arbitration clauses are not truly voluntary unless both parties agree to arbitrate *after* a dispute arises. That is, after a dispute has arisen, residents should be able to choose the forum, whether the court system, arbitration or other dispute resolution process, in which to resolve a controversy with a nursing home operator. We do not object to arbitration agreements entered into knowingly and voluntarily, post-dispute.

CMS proposes to require that nursing homes cannot make forced arbitration a condition of admission. However, the meaning behind this requirement is unclear. It is uncertain whether nursing homes would be required to tell residents that they are not compelled to sign an arbitration clause. Merely prohibiting nursing home operators from formally making admission conditional on agreement to arbitrate is likely meaningless.

Some nursing home contracts already contain terms claiming that the arbitration clause in the contract is not a condition of admission.[7] But they likely have had little effect on restoring residents' access to their legal rights when they need them the most. Residents who will become entirely dependent on nursing homes, and who may even understand the forced arbitration terms, could fear the consequences of rejecting an arbitration clause during the

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[5] Id., at 2.
[6] Fairness in Nursing Home Arbitration Act, Sen. Rep. No. 110-518 (2008).
[7] Lisa Tripp, *Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of AT&T Mobility v. Concepcion,* 35 AM. J. TRIAL ADVOC. 87, *99* (2012).

admissions process, including potential harsh treatment in the home. Residents may not want to provoke a facility that they or their loved one will be dependent on.[8]

The proposed rule also requires a neutral arbitrator and convenient venue for the arbitration proceeding. On its face, this is a reasonable requirement, but practically, whether neutrality can be achieved in a private arbitration proceeding, undisclosed to the public, is unlikely. Nursing homes would benefit from a "repeat player bias," as a corporate interest that provides repeated business to an arbitration provider that then has the financial incentive to rule in favor of the facility to acquire further business.

We agree that residents and their loved ones must feel free to communicate with federal, state and local officials about their nursing home care. However, this proposed requirement does not, and cannot be intended to address, the ability of residents to seek remedies for harm they suffered due to nursing home misconduct. Private and public enforcement of consumer protection laws are both important and at times may even complement the other, but they also serve different purposes. Private litigation helps private parties to obtain compensation for injuries caused by violations of laws, and may also help to deter law-breaking conduct.

The federal government has protected certain consumer sectors from forced arbitration.

The federal government has restored the rights of consumers in various sectors by eliminating forced arbitration in cases where the more powerful party had superior power and control over dispute resolution and used it to evade accountability. Similarly, CMS must use its authority to protect the rights of nursing home residents.

In 2002, Congress passed a law shielding motor vehicle dealers from forced arbitration in their transactions with the more powerful automobile manufacturers. Under the statute, the parties (dealers and manufacturers) can agree to participate in arbitration only when "after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy."[9]

In 2010, after the evidence of toxic residential subprime mortgages and the related financial industry abuses that crippled the U.S. economy came to light, Congress passed a comprehensive financial reform law that eliminated the use of forced arbitration in certain areas of the financial sector, and specifically granted federal agencies the authority to limit or prohibit forced arbitration in other areas.[10] Under the Dodd-Frank Act, the Consumer Financial Protection Bureau and the Securities and Exchange Commission may limit or restrict the use of forced arbitration, as used against consumers of financial services and customers of broker-dealers and financial advisers.[11]

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[8] Lisa Tripp, *A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts*, 31 CAMPBELL L. REV. 157, 164 (2009).
[9] *21st Century Department of Justice Appropriations Authorization Act,* Sec. 11028. Motor vehicle franchise contract dispute resolution process. (2002), Pub. L. 107-273, 15 U.S.C. § 1226.
[10] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111 – 203 (2010).
[11] Pub. L. 111 – 203, §§ 921 and 1028.

The Dodd-Frank Act also prohibited the use of forced arbitration clauses in residential mortgages and lines of credit to ensure that homeowners would have the right to choose – after the dispute arises – how to resolve disputes with lenders and servicers.[12] A few years before, the government-sponsored financial entities Fannie Mae and Freddie Mac stopped investing in mortgages that contained arbitration clauses.[13] Freddie Mac currently lists the ban on forced arbitration as an "anti-predatory lending requirement," that sellers and servicers must confirm when selling their mortgages.[14]

Under its rulemaking authority for the Magnuson-Moss Warranty Act (MMWA), the Federal Trade Commission (FTC) interpreted the MMWA as barring forced arbitration provisions covering written warranty contracts for consumers and issued a rule prohibiting enforcement of arbitration provisions for consumer claims brought under the law.[15] In 1999 and again in 2015, the FTC re-confirmed its interpretation of the statute.[16] "[T]he FTC's rules permit "post-dispute" binding arbitration, where the parties agree—after a warranty dispute has arisen—to resolve their disagreement through arbitration."[17]

Ideally, forced arbitration clauses should be barred from all consumer and non-bargaining employment contracts.[18] In the meantime, like the federal entities above, CMS has the opportunity to curb the harmful practice in the sector under its respective jurisdiction. Elderly residents of long-term care facilities are in a particularly vulnerable position. This constituency should be immediately protected against forced arbitration clauses.

CMS is the right agency to restore legal protections for nursing home residents.

The Secretary of the Department of Health and Human Services (of which CMS is a sub-agency) has extremely broad statutory authority to prescribe standards for Medicare and Medicaid programs.[19] In addition, Congress granted CMS specific rulemaking authority with respect to nursing homes under the Nursing Home Quality Reform Act, which requires

[12] 15 U.S.C. § 1639c.
[13] See, Kenneth R. Harney, *Fannie gives swift kick to mandatory arbitration*, CHICAGO TRIBUNE, Oct. 10, 2004, http://trib.in/1OfxfHb; *Freddie Mac Promotes Consumer Choice With New Subprime Mortgage Arbitration Policy*, 2004, http://prn.to/1zeQbw9.
[14] Freddie Mac, *Anti-Predatory Lending Requirements*, May 2015, http://bit.ly/1fYyHBO.
[15] See 16 C.F.R. § 703.5; 40 Fed.Reg. 60167, 60210 (Dec. 31, 1975) and *see*, 64 Fed. Reg. 19700, 19708 (Apr. 22, 1999)("Rule 703 will continue to prohibit warrantors from including binding arbitration clauses in their contracts with consumers that would require consumers to submit warranty disputes to binding arbitration.").
[16] Federal Trade Commission, *Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act; Rule Governing Disclosure of Written Consumer Product Warranty Terms and Conditions; Rule Governing Pre-Sale Availability of Written Warranty Terms; Rule Governing Informal Dispute Settlement Procedures; and Guides for the Advertising of Warranties and Guarantees*, 80 Fed. Reg. 42710, (July 20, 2015).
[17] FTC, 80 Fed. Reg. 42710, at 42719.
[18] Arbitration Fairness Act of 2015, S. 1133, H.R. 2087, 114th Cong. (2015).
[19] See, e.g., *Wisconsin Dept. of Soc. Servs. v. Blumer*, 534 U.S. 473, 496 (2002) and *Sebelius v. Auburn Reg'l Med. Ctr.,* 133 S.Ct. 817, 826 (2013).

nursing homes to meet federal standards in areas of "quality of care" and "residents' rights."[20] Forced arbitration clauses that eliminate their right to sue when harmed by nursing homes represent a clear interference of residents' legal rights. CMS can issue, and has issued, regulations that impose restrictions on the admissions policies of long-term care facilities as a requirement for receiving Medicare and Medicaid funds.[21] CMS can do the same for nursing home residents, by requiring the elimination of forced arbitration in facilities' contracts in order to receive federal funds.

CMS has numerous compelling reasons to act on behalf of the public interest and render arbitration clauses in nursing home contracts unenforceable. Beyond the interests in protecting nursing home residents and in better ensuring nursing home accountability, cost implications also exist for the Medicare and Medicaid programs. The agencies are entitled to reimbursement in nursing home negligence and abuse cases where residents are injured due to negligence or abuse and Medicare and/or Medicaid paid any medical expenses on behalf of the resident. Without liability, medical care necessitated by unnecessary injuries and abuses are paid by Medicare and Medicaid, and the agencies may not be reimbursed for injuries caused by third parties.

As noted earlier, "repeat player bias" discourages arbitrators from assessing damages awards against nursing home operators. Thus, when residents are required to participate in private forced arbitration to resolve disputes, CMS would receive little or no reimbursements for medical expenses it paid related to those injuries, because operators in many cases would have avoided liability. Eliminating forced arbitration in nursing home contracts therefore can enhance cost savings for the Medicare and Medicaid programs, as well as improve resident care, because the programs will be entitled to reimbursements from damages awards that resulted from litigation.

Conclusion

The U.S. Census Bureau estimates that by 2030, one in every five U.S. residents will be 65 years or older. "By 2050, the population of Americans 65 years or older would nearly double from their population in 2010."[22] The services provided by long-term care facilities will be more critical than ever, as they tend to a growing segment of the population. The incentives of nursing home operators and their corporate owners must be aligned with their capability and willingness to provide each resident with adequate care. The elimination of pre-dispute arbitration clauses in contracts between facilities and their residents will further the purposes of the Medicare and Medicaid programs by improving accountability, which would in turn better serve a growing population and improve the health and safety of older Americans.

[20] 42 U.S.C. §§ 1395i-3(c) (Medicare) and 1396r(c) (Medicaid).
[21] 42 CFR § 483.12(d)(2).
[22] Robert Weech-Maldonado et al. Nursing home financial performance: The role of ownership and chain affiliation, http://bit.ly/1PNUKrk.

Respectfully submitted,

Alliance for Justice

American Association for Justice

Caring Across Generations

Center for Effective Government

Center for Justice and Democracy

Consumer Action

Consumers for Auto Reliability and Safety

Economic Policy Institute

Empire State Consumer Project

Georgia Watch

Homeowners Against Deficient Dwellings

Home Owners for Better Building

National Association of Consumer Advocates

National Consumer Law Center (on behalf of its low-income clients)

National Consumers League

Protect All Children's Environment

Public Citizen

Take Back Your Rights PAC

U.S. PIRG