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Nursing Facility Transparency And Congress

Law360, New York (November 14, 2008) -- For years, the long-term care community has supported the development of a nursing facility oversight system that is more objective, provides incentives for improvement, and better measures quality outcomes and processes. Congress has introduced two such bills this year.

Earlier this year, Sens. Charles Grassley (R-Iowa) and Herb Kohl (D-Wisc.) authored the Nursing Home Transparency and Improvement Act of 2008 (S.B. 2641), legislation that would bring more "transparency" to consumers regarding nursing facility quality, improve enforcement, and strengthen nursing facility staff training requirements. S.B. 2641 requires that "special focus facility" designations be placed on the Centers for Medicare & Medicaid Services (CMS) Nursing Home Compare Web site.

The legislation also would require CMS to develop a standardized complaint form and require more uniform reporting of nurse staffing levels so that comparisons can be made across nursing facilities. S.B. 2641 also would strengthen available penalties.

For instance, the Secretary of Health and Human Services would be able to impose civil monetary penalties of up to \$100,000 for a deficiency resulting in death, \$3,000 to \$25,000 for deficiencies at the level of actual harm or immediate jeopardy, and not more than \$3,000 for other deficiencies.

Lastly, S.B. 2641 would attempt to improve staff training by including dementia management and abuse prevention training as part of pre-employment training.

Recently, U.S. Reps. Pete Stark (D-Calif.) and Jan Schakowsky (D-Ill.) have introduced another nursing facility bill called the Nursing Home Transparency and Quality of Care Improvement Act of 2008, or H.R. 7128.

The intent of this proposed legislation is to amend the Medicare and Medicaid provisions of the Social Security Act "...to improve the transparency of information on skilled nursing facilities and nursing facilities and to clarify and improve the targeting of the enforcement of requirements with respect to such facilities."

Upon release of the bill, Rep. Stark stated, "As the government pays for 60 percent of spending on nursing facilities annually, with 80 percent of residents supported by public funds at any time, we have the responsibility to hold these facilities accountable for the quality of care they provide ... Our bill will increase transparency of nursing facility ownership and operations, which will help us make the right decisions about which facilities provide quality care for our loved ones and who will be held accountable if anything goes wrong."

H.R. 7128 expands on many of the provisions found in S.B. 2641. A major driving force in H.R. 7128's more exacting proposed disclosure and compliance requirements is the rising concern regarding nursing facilities owned by large private equity firms and the potentially complicated corporate structures used to shield themselves from liability. H.R. 7128 requires nursing facilities to identify not just the corporate groups that have ownership shares, but the members of the groups that own them.

Facilities would be required to provide to the government an outline of the organizational structures of all entities affiliated with the facility and would be required to provide advance notice to the government regarding closure of the facility. Additionally, facilities will be required to provide detailed information on their staffing levels.

Moreover, H.R. 7128 contains provisions to put in place processes to conduct independent monitoring of large intrastate and interstate nursing facility chains. The proposed legislation states that the goal in such monitoring is to address issues of chronic poor performance based upon quality deficiencies, high staff turnover rates, or poor performance on other identified factors contributing to quality of care evaluation.

Currently, the CMS Nursing Home Compare Web site makes available performance statistics and the results of inspections for all nursing facilities that participate in the federal health insurance programs. H.R. 7128 would significantly expand the data reported by nursing facilities to CMS and subsequently expand the amount of information available on the Nursing Home Compare Web site to include facility ownership information and staffing data.

The CMS Nursing Home Compare Web site also would provide a standardized form for reporting complaints about nursing facility care and links to facilities' inspection reports.

The new complaint form would be part of a larger initiative to standardize the complaint process. H.R. 7128 also would establish a uniform complaint resolution process that would include notification requirements and response deadlines.

H.R. 7128 includes requirements that skilled nursing facilities create and implement compliance and ethics programs. The proposed bill states that facilities must, within 36 months of enactment of the proposed statute, implement a compliance and ethics program that meets certain criteria.

Specifically, the program must:

Be reasonably designed and implemented

Appoint individuals at high levels of the organization to oversee the program

Not delegate responsibility to individuals who may have committed fraud and abuse

Communicate the standards to employees effectively

Take reasonable steps to ensure compliance

Contain standards that are reasonably and consistently enforceable

Include steps to follow should a violation be detected

Conduct periodic self-revaluations to ensure adequate updates.

Further, to encourage greater accountability, H.R. 7128 would enact whistle-blower protections to prevent retaliation by facilities against employees who file complaints with CMS.

H.R. 7128 also seeks to bolster enforcement actions taken against nursing facilities by the United States Department of Health and Human Services (HHS). These measures would:

Increase the maximum penalty the agency can impose for violations that result in death from \$10,000 to \$100,000

Impose penalties of between \$3,000 and \$25,000 for deficiencies that result in actual harm or immediate jeopardy to residents

Impose a maximum fine of \$3,000 for lesser offenses

Require HHS to evaluate the potential benefit and feasibility of establishing a national monitoring program to oversee financially troubled nursing facility chains

Require HHS to compile a manual of best practices for quality assurance in nursing facilities.

To further the goal of quality assurance, and in a significant deviation from S.B. 2641, H.R. 7128 would propose a quality-assurance and improvement demonstration program. The three-year program would provide funding for quality control and performance improvements for between 15 and 30 facilities.

HHS then would evaluate whether the improvements led to reductions in deficiency citations and increases in other measures of quality of care. HHS would report to Congress on any statutory changes needed to improve the quality of care at the nation's nursing facilities.

Nursing facility advocacy groups such as the American Health Care Association (AHCA) have voiced their disapproval for both pieces of legislation. Advocacy groups have a history of pressing for fair and appropriate oversight of nursing facilities.

However, it has been argued that both of the proposed pieces of legislation create a system that is too subjective to be fair to nursing facilities and utilizes information that has no guarantee of being up-to-date, which could lead to inaccurate conclusions about evaluated facilities. The goal of a fair oversight system, according to AHCA), is to be "up-to-date, accurate, and easy-to-understand for it to be both meaningful for consumers and fair to care providers"

(www.ahcancal.org/News/news_releases/Pages/nr29Sep2008.aspx).

Currently, Congress is in recess, and likely will not take up debate on either of these bills before the end of the 2008 legislative session. However, given the activity in both the House and Senate, we fully expect further action to arise in the 111th Congress next year.

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