

## MEMORANDUM

TO: Rules Reform Task Force

FROM: Patti Cullen, Vice President, Care Providers of Minnesota

RE: Comments on rules review process

DATE: November 28, 2000

Care Providers of Minnesota is a trade association representing for-profit and not for profit long term care facilities and services in Minnesota, with significant experience dealing with agency rules. It has frequently been noted that a portion of our membership, nursing homes, is the second most regulated “industry” in the state, second only to the regulation of nuclear waste. With that in mind, we would like to identify some issues that have not been addressed to date by the task force, and provide some recommendations on changes to our current system.

1. **ADDRESSING CURRENT REGULATIONS** (Vs forthcoming regulations) Many of the current paperwork compliance issues for nursing homes are based on state regulations that have been in place for years. We welcome the development of a new process for regulatory oversight looking both at existing regulations and proposed rules and/or interpretations. Recommendations from this task force should include a review of current rules and interpretation of these rules, as well as a process for looking at the impact of the enforcement of those rules.

For proposed regulations, quicker implementation of rule changes is necessary because the current timeframes are too lengthy, resulting in many state agencies bypassing the administrative process entirely and going to interpretive bulletins or statutory changes. The challenge is to balance a shortened regulatory timeframe with the need for interested stakeholders to participate in the development of final regulations.

Current regulations need to be reviewed on a consistent timeframe to ascertain whether the regulations are current, duplicative, and necessary. One approach is to place automatic sunsets into the rulemaking process so rules would expire unless specifically reviewed and renewed. In the long term care “world” we have a multitude of state-based regulations that are also federal requirements. Past attempts to simply adopt the federal regulations were met with much opposition from the state agency, and consumer representatives, since there was a belief that additional state-specific regulations somehow “ensures” protection for the frail elderly.

Another approach may be to have another state agency or entity, apart from the agency responsible for writing the regulations recommend which current regulations

could be repealed. The theory behind this proposal is that a separate entity is a bit more removed from the regulations, and has less vested interest in the regulations.

2. **STATUTES Vs REGULATION** Due to the length of time and administrative expense it takes to promulgate a rule, there are many regulatory changes that have been placed in statute. Even the expedited procedure in place today is often too lengthy for some of our issues. Further, the legislative process has been more “open” historically to accepting non-agency points of view. For example, each state agency has their particular “charge” or public policy goals that may not be well balanced with issues such as workforce shortage, financial implications on consumers, or interaction with other state agency regulations. The legislative process has been more conducive to at least introducing these balancing issues. The question is whether this practice is “appropriate” in terms of legislative time and energy.
3. **STATE Vs FEDERAL** While it is true that state agencies have limited ability to direct federal regulations, state agencies do have the ability to introduce state standards stricter than the federal standards; and do have some degree of latitude in interpretation and enforcement. We have experienced both of these practices with the nursing home regulations. There are state-specific nursing home regulations, adopted in 1996 which add additional state-specific regulations to the existing federal standards. In addition, our state-specific payment system has added additional layers of documentation over the years that further exacerbate the paperwork blizzard impacting nursing home nurses. Finally, in our area, often when state regulatory agencies are given the latitude for interpretation of federal rules, and for enforcement actions against non-complying entities, the more stringent actions are taken. This was the situation with the side-rail issue, which this task force has noted on a few occasions. In that instance, Minnesota’s interpretation of federal law was a strict reading, not necessarily followed by other states in the same region.

Where there are federal regulations with state-specific interpretations, the state must be a bit more cautious in exercising its “free will” if the state interpretation is more lax than what the federal government has intended. Again, using the side-rail issue as an example, Minnesota’s response was to pass legislation that could have been construed as less stringent than federal law, placing nursing homes in jeopardy of losing federal financial participation. In the end, the federal guidance was revised on restraint usage to match Minnesota’s law, however, this is an extremely rare occurrence.

4. **PIECEMEAL APPROACH Vs BIG PICTURE** One suggestion from the task force was to have each committee identify one area of regulation to address each session. While that is a good approach to make sure something **does** get accomplished, it doesn’t address the fact that many businesses/stakeholders are subject to a multitude of regulatory requirements from almost every state agency. That interaction between agency rulemaking efforts could get lost with the suggested

approach. For example, an area as “simple” as the Clean Indoor Air Act statute and regulations are difficult for nursing facilities to comply with because another state agency has interpreted federal regulations as guaranteeing residents certain rights, including the right to smoke. Also, we continually have struggled with agency jurisdictional issues, and this approach may likely exacerbate that struggle. For example, the nursing home alternative payment system, governed by the department of human services, includes expectations in facility contracts for quality improvement, which is often duplicative of quality expectations built into the regulations the department of health is responsible for enforcing.

5. **DEFINITIONS OF RULES/REGULATIONS** Many of our members are governed not only by statutes and rules, but also by bulletin, policy memorandum, contract and the health care programs provider manual. Prior to the absolution of the Legislative Commission to Review Administrative Rules, if a manual or bulletin was released by a state agency that set new public policy, we went to LCRAR questioning the unpromulgated rule. We no longer have that ability short of spending funds to file lawsuits. It would be helpful to establish a venue for questioning the authority and/or boundaries of state agency policy without requiring individual businesses to expend funds on attorneys. In addition, taking the legal route to stop implementation of a policy that is essentially an unpromulgated rule is very time consuming, and in most instances, our members and their customers do not have this amount of time.

For example, when there were new clauses added to the contract most nursing facilities have with the state, there was very little that could be done to question the appropriateness of the new clauses, yet, the implications of not signing the contract were huge. There was also a situation where a state agency changes its interpretation about payment responsibility for electric wheelchairs that was new policy with great impact on a small group of individuals dependent on state paid services. Generally what happens when these situation surface is the agency commissioner or management team is contacted in hopes they would intercede and “stop” the new policy. On occasion we have had to contact legislators to have them question the agency staff about their actions. Some times these efforts work; sometimes new policy is implemented without any discussion.