August 15, 2024

SENT VIA EMAIL (**mhcc_regs.comment@maryland.gov**)

Mr. Ben Steffen
Executive Director
Maryland Health Care Commission
4160 Patterson Avenue
Baltimore, MD 21215

Re: Comments on Draft Changes to COMAR 10.24.01 and 10.24.20

Dear Ben:

Thank you for all you do. I hope this letter finds you well at work and home. As you know HFAM and our broader team of member leaders, members, and consultants worked long and hard ALONGSIDE you and others for the passage of Senate Bill 1000, Nursing Home Acquisition legislation (Chapter 816) and HB 1122 (Chapter 817). In the coming weeks and months, we look forward to working collaboratively with you and your team at the MHCC and others on reviewing, debating, finalizing, and publishing final rules in time for the January 1, 2025, deadline.

On Tuesday, July 30, 2024, the MHCC distributed proposed draft regulations and updates to the certificate of need regulations at COMAR 10.24.01 and the State Health Plan Chapter on comprehensive care facilities (nursing homes) at COMAR 10.24.20, some of those updates apparently unrelated to SB 1000/HB 1122, with comments due by Monday, August 19, 2024.

Many of the proposed MHCC changes align with the intent of SB 1000/HB 1122, but some appear to exceed the legislation's language and beyond the scope of the MHCC's authority. Others may present operational challenges, while some could benefit from minor adjustments to enhance their practicality. However, many of the proposals are sound. HFAM is submitting these substantively considered comments and constructive feedback by the deadline, remaining committed to collaboration to achieve effective outcomes. We look forward to further discussions on these proposed regulations. The notice from the MHCC advises that the agency is considering hosting a webinar to discuss comments received and entertain questions from stakeholders. We support such an MHCC webinar.

Here are specific comments:

Comments Regarding Proposed Changes to CON Regulations Under COMAR 10.24.01

Section .03A(1)(d): The proposed language is of concern. Certificate of Need documents are often decades old, and copies may be difficult to acquire from the seller, with the only copy available at the MHCC. As MHCC is the official custodian of such documentation, it should serve as the verifying source of any certificate of need with continuing conditions to which an applicant would be required to agree to meet.

Section .03D (2): We seek confirmation that for nursing homes not being acquired with rooms with one or two beds, the existing temporary delicensure rule under .03D(1) remains available and that .03(D)2) applies to acquisitions of nursing homes with rooms with more than 2 beds.

Section .21A (1): [Just relative to Real Property]: The reference to changes of ownership over real property and improvements should be removed. The MHCC has authority over health care facilities and in this context, this refers to the licensed nursing home under Health-General Article, Section 19-1401. This definition is consistent with the Nursing Home Acquisition legislation under SB 1000/HB 1122. A landlord entity does not hold a nursing home license. The landlord may not own the "bed rights." In such circumstances, changes of ownership in that landlord or real property are outside the scope of the MHCC's authority. This comment is consistent with the Chapter's language under COMAR 10.24.20.04C(1)(a) referring to transfers of 5% or more ownership of a facility licensed as a nursing home. Corresponding changes are therefore needed to other draft provisions under COMAR 10.24.20 referring to ownership changes involving real property only.

Like the comment under .21A, here too .21B(1)(b)(i) seeks to require approval of acquisitions of landlord entities that are not a licensed healthcare facility and do not own bed rights. This is beyond the authority of the MHCC. Under the Nursing Home Acquisition legislation, Health-General Article Section 19-114(a)(A-1)(1) a change of ownership involving assets is covered only if it results in a change of the person that controls a health care facility.

NOTE: Where there is a change in the person that owns the "bed rights" but that person does not hold a license and does not operate or control the nursing home, there should be a separate notice process but without treating this as an acquisition of a health care facility. The Nursing Home Acquisition legislation addresses nursing home acquisition by cross-referencing the license definition under Health-General Article Section 19-1401. Landlord entities that own bed rights but do not operate or control the nursing home are beyond its scope.

Draft State Health Plan Comprehensive Care Facility (Nursing Home) Chapter Changes: COMAR 10.24.20

.03C: Policy Statements

HFAM suggests that MHCC explain the practicality and process for adherence to the FGI guidelines and maintain the ability of an applicant to explain why such adherence is impractical.

Regarding the language stating that "the Commission will require that an applicant seeking to establish, renovate, replace or acquire a nursing home serve an equitable proportion of Medicaid Eligible individuals in the jurisdiction or region."

- HFAM notes there is NO shortage of Medicaid beds in Maryland nursing homes for Marylanders in need.
- The Commission does not have authority over nursing home renovations or replacements on the current site with the removal of the capital expenditure threshold. This reference should only refer to projects that otherwise require a CON.
- Expansions using waiver beds are permitted by statute and cannot be conditioned on a Medicaid occupancy requirement.
- Former Policy 2.0 should be carried over, permitting a nursing home with an existing MOU to obtain approval to come under the current formula on request.

We at HFAM and other industry leaders look forward to working with you to capture existing federal and state data for consumer benefit, and especially data that will become available because of this MHCC work. We believe that MHCC, because of its mission is uniquely qualified to serve as the portal for such data.

Regarding the language stating that "Commission to require full ownership disclosure including the legal names of owners, related or affiliated entities, ownership structure, including parent and subsidiary companies and historical ownership information."

Greater clarity is needed regarding who is to provide this information, and for what period. For example, does it go back forever? Just the nursing home? Landlords owning bed rights without any operational license or control over the nursing home? The sector wants to be a good partner in this work; however, this effort could become unwieldy and non-operational very quickly.

.04B: Incremental Addition of Nursing Home Capacity:

Waiver beds should be permitted to be added as part of an addition or replacement facility that would result in the elimination of triple and quad rooms.

04C: Nursing Home Acquisitions and other Transfers of Ownership:

Transfers among existing owners should be exempt, just like acquisitions.

05A: General Standards:

- The standard requiring a certain percentage of Medicaid occupancy should be removed as there is not a Medicaid access issue in Maryland.
- This should not be imposed upon an acquisition as a new condition.
- Where this condition is imposed it should set the percentage as of the application date or other definite date.
- The MOU has a clear process for a corrective action plan when a facility fails to meet its percentage goals. That process should be maintained.
- CCRCs are not required to participate in Medicaid when they use statutorily exempt beds. Acquisition determinations cannot be conditioned on Medicaid participation where there is no CON required.

For projects involving new construction renovation or expansion no more than 2 beds per room are permitted and single rooms are preferred citing to FGI.

Where a facility is being renovated or replaced on-site without additional beds added, the MHCC does not have approval authority.

To demonstrate it will provide high-quality of care, the applicant must report on its overall Five Star rating for all nursing homes owned or operated by the applicant or a related or affiliated entity for three years prior to the letter of intent for a CON or other submission. The three-star requirement is removed as a barrier, but substantial information must be supplied if the disclosed facilities have an average rating below 3 Stars including inspection actions, staffing measure information, and Short- and Long-Term Quality Measure performance.

This could be a MASSIVE submission. A more focused approach to capturing relevant information capable of effective review is warranted.

The effect on filings by landlord entities that own bed rights but do not operate or control nursing homes is substantial and should not be the same as where there is a change in operation or control. Such information is not relevant and should not be required where such an entity did not directly or through an affiliate own or operate the licensed nursing home. Substantial information would need to be gathered and evaluated by the MHCC concerning operational performance over which the landlord entity has no authority or control.

Section .05A(8)(b) is very problematic. It states that if “any” disclosed nursing home has an average star rating below 3 stars substantial information about inspections, staffing and quality measures is to be provided. Since all nursing homes cannot, by definition, be at 3 stars or above and since the disclosure involves what can be large numbers of nursing homes out of state, it is inevitable that there will be a substantial challenge to providing this information. Moreover, the Applicant may, through a related or affiliated entity, own or have owned less than a controlling interest if a disclosed nursing home and so would not be in a position to obtain or cause the actions required to be taken to demonstrate good cause.

Under Section .05A(8)(e) the applicant is to demonstrate appropriate infection prevention and control policies and practices at the nursing home that is the subject of the request, with substantial disclosures of flu and pneumonia vaccinations of staff and residents. The disclosure must include policies, procedures and practices. This provision, as applicable to the applicant, should refer to how the applicant will prospectively approach these areas.

Section .06 Contains the Standards pertaining to the Acquisition of Nursing Homes:

Regarding Section.06A details the Request for Acquisition Approval and the grounds for denial.

As in the same comment above under COMAR 10.24.01, the absence of authority at the MHCC to require approval of a transfer of real estate owned by a landlord who does not own bed rights or own or control the licensed nursing home applies here too. Corresponding changes to the definitions of Acquisition and Transfers under Section .08B(1) and (40) are needed.

As a final comment, we note the provisions governing the elimination or reduction of triple and quad rooms following an acquisition. The provisions governing requests for a waiver or temporary delicensure outline a helpful process that we anticipate will be applied in a thoughtful manner.

Be well,

Joe DeMattos
President and CEO

CC: HFAM Board of Directors
Howard L. Sollins, Esq.