

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 483, 488, 489, and 498

[CMS-3230-F]

RIN 0938-AQ09

**Medicare and Medicaid Programs; Requirements for Long-Term Care (LTC) Facilities;
Notice of Facility Closure**

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This rule adopts, with technical changes, the interim rule that published February 18, 2011. That interim rule revised the requirements that a long-term care (LTC) facility must meet in order to qualify to participate as a skilled nursing facility (SNF) in the Medicare program, or a nursing facility (NF) in the Medicaid program. The requirements implemented section 6113 of the Patient Protection and Affordable Care Act to ensure that, among other things, in the case of an LTC facility closure, individuals serving as administrators of a SNF or NF provide written notification of the impending closure and a plan for the relocation of residents at least 60 days prior to the impending closure or, if the Secretary terminates the facility's participation in Medicare or Medicaid, not later than the date the Secretary determines appropriate.

DATES: Effective on **[OFR insert 30 days after the date of publication in the Federal Register]**.

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SUPPLEMENTARY INFORMATION:

I. Background

A. Overview

According to the Centers for Medicare & Medicaid Services (CMS) data, as of October 2011, there were 15,720 long-term care (LTC) facilities (commonly referred to as nursing homes) in the United States. These facilities are generally referred to as skilled nursing facilities (SNFs) in the Medicare program and as nursing facilities (NFs) in the Medicaid program. For the past decade, CMS Survey and Certification Tabulation of Certification and Survey Provider Enhanced Reporting (CASPER) data have shown a decline in the number of nursing homes, from 17,508 in 1999 to 15,720 in 2011. In 2010, there were 141 nursing home closures. In 2011, there were 90 closures.

LTC facility closures have implications related to access to care, the quality of care, availability of services, and the overall health of residents. Therefore, having an organized process that facilities must follow in the event of a nursing home closure will protect residents' health and safety, and make the transition as smooth as possible for residents, as well as family members and facility staff.

On February 18, 2011, we published in the **Federal Register** an interim final rule with comment period, entitled "Requirements for Long-Term Care (LTC) Facilities; Notice of Facility Closure" (76 FR 9503). In that rule, we revised the current requirements for LTC facilities under the provisions of section 1128I(h) of the Social Security Act (the Act), as added by section 6113(a) of the Patient Protection and Affordable Care Act (P.L. 111-148, March 23,

2010)(Affordable Care Act). The new statutory provision requires us, among other things, to impose sanctions on the administrator of an LTC facility for failure to provide proper notice to specified parties, including CMS, that the facility is about to close.

B. Legislative History and Statutory Background

Sections 1819(b)(1)(A) of the Act for SNFs and 1919(b)(1)(A) of the Act for NFs both state that a SNF/NF must care for its residents in a manner and in an environment that will promote maintenance or enhancement of the quality of life of each resident.

Sections 1819(c)(2)(A)(vi) and 1919(c)(2)(A)(vi) of the Act state that in general, with certain specified exceptions, a SNF/NF must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility, except under specified circumstances, including, at clause (vi), when the facility ceases to operate.

As described in detail in the preamble of the February 18, 2011 interim final rule, section 6113 of the Affordable Care Act added subsection 1128I(h) to the Act, setting forth certain requirements for LTC facility closures, effective March 23, 2011. We issued this rule in the form of an interim final rule because we believed delaying implementation would continue to cause unjustified harm to LTC facility residents, families and visitors, and to meet the March 23, 2011 statutory deadline for implementation (76 FR 9508).

II. Health Disparities

In the February 18, 2011 interim final rule, we discussed our goal of addressing health care disparities (76 FR 9505). We noted that research has extensively documented the pervasiveness of vulnerable populations which can be defined by race/ethnicity, socioeconomic status, geography, gender, age, disability status, sexual orientation, and other factors. Although there has been much attention at the national level to ideas for

reducing health disparities in vulnerable populations, we remain vigilant in our efforts to improve health care quality for all persons by improving health care access and by eliminating real and perceived barriers to care that may contribute to less than optimal health outcomes for vulnerable populations.

We specifically requested comments in regard to how our revised LTC facility closure requirements could be used to address disparities among facility residents.

The comments we received on this provision and our responses are set forth below.

Comment: Several commenters encouraged CMS to review a number of policies and make changes that would have a positive impact on health disparities. One commenter encouraged CMS to review disparate treatment of all the populations that were identified in the preamble of the regulation and provide the appropriate information and support that would improve access to culturally competent care, language access, legal and counseling services. The commenter suggested that CMS also work with the patient advocacy community.

Another commenter suggested that CMS examine all of the facilities owned by the provider to determine whether there are differences in the quality of care provided, including significant differences between predominantly Caucasian and predominantly minority facilities.

Other commenters suggested that CMS should require more monitoring of facility finances, following up on all indicators of financial problems through special surveys of compliance and financial audits. It was also suggested that the concentration of Medicaid beneficiaries in a small number of facilities would be reduced if CMS clarified that financial screening is illegal under existing law. Another commenter recommended CMS issue new guidance to State Survey Agencies of existing conditions of participation that prohibit discriminatory admissions practices and provide training for State Survey Agencies on how to

identify discriminatory practices by facilities.

Response: We appreciate the comments received on this very important issue. CMS is committed to addressing health care inequalities for racial and ethnic minorities that rely on Medicare and Medicaid for quality health care. We will consider these comments in the development of future regulations.

III. Provisions of the Proposed Regulations and Analysis of and Responses to Public Comments

In response to the February 18, 2011 interim final rule, we received 15 public comments. Interested parties that submitted comments included individuals, advocacy organizations, and industry associations. In this final rule, we provide a summary of each provision, a summary of the public comments received and our responses, and any changes to the interim final rule we are implementing as a result of comments received.

A. Transfer and discharge (§483.12(a))

Timing of Notice

We revised §483.12(a)(5)(i), Timing of the Notice, to accommodate the closure notice provisions of §483.12(a)(8) and §483.75(r)(1)(i). The February 18, 2011 interim final rule requires the administrator of a facility to provide written notification of a facility's closure to specified individuals, including facility residents, at least 60 days prior to the date of a voluntary closure. This 60-day notice requirement is an exception to the general 30-day advance notice requirement governing transfer and discharge of individual patients from an LTC facility. The comments we received on this provision and our responses are set forth below.

Comment: One commenter requested clarification regarding the interaction between existing State policies (where applicable) and Federal regulations when the State requires no less

than 60 days notice. The commenter stated that many States already have notification of closure requirements in place, and expressed concern that in those States, a nursing facility administrator will be required to complete two notifications: one consistent with State law and regulations and one consistent with Federal law and regulations.

Response: Only one notification would be required by this regulation, either 60 days prior to closure for voluntary closures or as the Secretary determines appropriate for involuntary closures. CMS does not have authority over State licensure, health, reporting, or facility requirements. However, according to §488.3(b)(3), any time a State law applicable to providers or suppliers of Medicaid services in that State is more stringent than the Federal requirements, as is hypothesized here, CMS must enforce the more stringent State requirement as a condition of Medicare payment. For example, if the State law requires the administrator of a NF participating in its State Medicaid program to provide a 90-day notice of closure, the administrator would provide 90 days notice, since it is more stringent for compliance with Federal law. Failure to do so would put both its Medicaid and Medicare payments at risk. We also note that regardless of whether State or Federal regulations provide for a longer notification period, no-preemption issue arises because a facility complies with both laws by complying with the longer notification period.

Notice of Closure

We added a new §483.12(a)(8) to require that, in the case of a facility closure, any individual who is the administrator of the facility must provide written notification prior to the impending closure to the Secretary, the State LTC ombudsman, the residents of the facility, and the legal representatives of the resident or other responsible parties, as well as provide a plan for the transfer and adequate relocation of the residents, in accordance with the new section

§483.75(r). As discussed in detail below, in section III. B of this preamble, we have revised §483.12(a)(8) to conform with changes to §483.75(r). The comments we received on this provision and our responses are set forth below.

Comment: One commenter suggested that in the final rule, the LTC facility be required to notify the medical director, attending physicians and other clinicians who regularly provide healthcare services within the LTC facility of that facility's closure.

Response: We appreciate the commenter's suggestion; however, we do not consider it necessary to provide additional language in the final rule regarding notices to physicians and/or other clinicians providing services to the resident. We believe this issue is sufficiently addressed in §483.12(a)(3)(i), "Documentation," which requires that when a facility transfers or discharges a resident, the resident's clinical records must be documented and the documentation must be made by the resident's physician. Therefore, a resident's physician and/or other practitioners would have received notice of the impending closure because they are required to be involved in the discharge plan for the resident. We will incorporate language into the State Operations Manual (SOM) to specify that a resident's practitioner(s) must be involved as soon as the notice of closure has been sent to the residents to assure, as stated in §483.75(r)(3), that the residents would be transferred to the most appropriate facility or other setting in terms of quality, services and location, taking into consideration the needs, choice, and best interests of each resident.

B. Facility Closure-Administrator (§483.75(r))

We added a new paragraph (r) to §483.75, which requires any individual who is the administrator of the facility to submit to the Secretary, the State LTC ombudsman, residents of the facility, and the legal representative of such residents (or other responsible parties) written notification of an impending closure at least 60 days prior to the date of closure; or, in the case of

a facility where the Secretary terminates the facility's participation in the Medicare and/or Medicaid programs, no later than the date that the Secretary determines appropriate for such notification. The language of this paragraph parallels that of section 1128I(h) of the Act, as added by section 6113(a) of the Affordable Care Act. The comments we received on this provision and our responses are set forth below.

Comment: The majority of commenters supported the February 18, 2011 interim final rule, stating that they believe the rule would improve resident notification and facility planning, and would ensure a smooth relocation of LTC facility residents in the event of a facility closure or relocation.

Response: We appreciate the support from the commenters on this rule. We believe that having a requirement that establishes an organized process that facilities must follow in the event of an LTC facility closure protects residents' health and safety, and makes the transition as smooth as possible for residents, family members and facility staff.

Comment: A few commenters recommended that the final rule define the term "closure." Another commenter suggested specific changes to the language in §483.75(r)(1). The commenter suggested that we revise the regulation to require that the administrator submit, "written notification of an impending closure whenever 10 or more residents are likely to be transferred due to any voluntary or involuntary change in the status of the license or operation of a facility, including but not limited to, a facility closure or voluntary or involuntary termination of a facility's Medicaid or Medicare certification." One commenter recommended that an exception be made to the requirement of written notification for unplanned events, such as a fire, major storms, or flooding.

Response: For the purpose of this regulation, "closure" means an LTC facility that

ceases to operate under §483.12(a)(2)(vi), and therefore, is no longer providing care and services to residents. We believe that the notification requirements should be met regardless of the number of residents likely to be transferred. We do not believe that establishing criteria for a minimum number of residents that must be affected before the notice requirements apply promotes the highest quality of care during what can be a difficult situation. We believe that all residents should be made aware of a facility closure in a reasonable amount of time, regardless of the size of the facility, as this regulation currently requires.

Regarding unplanned events, current regulations at §488.426(a), “Transfer of residents,” or closure of the facility and transfer of residents, gives a State the authority to transfer Medicare and Medicaid patients out of a facility (temporarily or permanently) in emergency situations. If the State orders the temporary relocation of residents during an emergency, with the expectation that the residents will return to the facility, this would not be regarded as a facility closure under this requirement and the notification requirements under §483.75(r) would not be applicable. For example, if a facility’s air conditioning failed during a heat wave, the State could order the facility to relocate all of its residents while the problem was being investigated, without closing the facility.

Comment: One commenter suggested that the final rule allow for a longer notification period for residents and their families, as well as others, in the case of an involuntary closure. A longer notice period would give family members time to consider whether a home and community-based setting would better meet the LTC facility resident’s needs than placement in another LTC facility. The commenter further recommended that, to the extent possible, the closure notification requirement for involuntary terminations should be at least 60 days in advance of closure, consistent with the rule for voluntary closures, or at a minimum, 30 days,

consistent with the transfer/discharge provisions at §483.12(a)(5)(i), unless there is an immediate threat to the health and safety of residents that necessitates a shorter notification timeframe.

Response: This regulation does not preclude a facility from providing a longer notification period if it chooses. Only the State has the authority to close a facility. CMS has authority to terminate provider agreements and thereby Medicare payments, as well as the Federal Medicaid matching payment to the State. In this case, the notification requirements are determined by the Secretary in collaboration with the State. In the preamble of the February 18, 2011 interim final rule, we provided background information regarding how the Secretary may determine a date for notification (76 FR 9506).

Additionally, §483.75(r)(3) requires that the administrator include in the written notification of closure assurances that the residents would be transferred to the most appropriate facility or other setting in terms of quality, services, and location, taking into consideration the needs, choice, and best interests of each resident. We believe that this requirement sufficiently addresses the commenter's concern about ensuring that the resident's needs are successfully met upon relocation to another facility or location.

Comment: One commenter suggested that in addition to State's approving the closure plan prior to notification and overseeing closures, LTC facility administrators should also be required to send the notice directly to the State Survey Agencies.

Response: We agree with the commenter that the written notification should also be given to the State Survey Agency. The State Survey Agency acts on the behalf of the Secretary and the intent of the February 18, 2011 interim final rule was to ensure that the notification went to the State Survey Agency. Therefore, we are revising the regulation at §483.75(r)(1) to clarify that any individual who is the administrator of the facility must submit to the State Survey

Agency, the State LTC ombudsman, residents of the facility, and the legal representatives of such residents or other responsible parties, written notification of an impending closure. As noted above, we have also revised §483.12(a)(8) to clarify that the written closure notification must be submitted to the State Survey Agency.

C. New Admissions after Closure Notice (§483.75(r)(2))

At §483.75(r)(2), we require any individual who is the administrator of the LTC facility to ensure that the facility does not admit any new residents on or after the date, which such written notification of facility closure is submitted to the Secretary, the State LTC ombudsman, and the residents, and/or their representatives or other responsible parties.

We did not receive any public comments regarding this requirement; therefore, we are finalizing §483.75(r)(2) as published in the interim final rule.

D. Closure Notice (§483.75(r)(3))

At §483.75(r)(3), we require that any individual who is the administrator of an LTC facility include in the written notice of closure, a plan that has been approved by the State for the transfer and adequate relocation of the residents by a date that must be specified by the State prior to closure. The plan must include assurances that the residents will be transferred to the most appropriate facility or other setting in terms of quality, services, and location, taking into consideration the needs, choice, and best interests of each resident.

In the preamble of the February 18, 2011 interim final rule, we expressed our expectation that the closure plan would include sufficient detail to identify clearly the steps the facility would take, and would specify the individual responsible for ensuring the steps were successfully carried out (76 FR 9507). We note that we inadvertently omitted language regarding the statutory requirement at section 1128I(h)(1)(C) of the Act for State approval of the plan. We are

correcting the language accordingly in section §483.75(r)(3) of the regulations text in this final rule. The comments we received on this provision and our responses are set forth below.

Comment: Several commenters suggested that the final rule include regulations text specifying the minimum requirements for the facility closure plan, including information on transfer and discharge rights.

Response: We appreciate the commenter's suggestion; however, we do not believe it is necessary to include specific requirements for the plan in the regulation text. We want to allow each LTC facility the flexibility to develop a plan that would most effectively protect the residents' health, safety, and well-being. We note that we included detailed examples of elements of a closure plan in the preamble of the February 18, 2011 interim final rule (76 FR 9507). In addition, we intend to issue further guidance regarding the elements of a closure plan subsequent to the publication of this final rule.

Comment: One commenter recommended that CMS require the facility administrator to share the required relocation plan with residents and family members, as well as making it available upon request and/or publish the plan on State government nursing home information websites.

Response: We appreciate the commenter's suggestion. However, we do not believe that sharing the facility's relocation plan with residents would be appropriate, since the plan includes information that does not directly pertain to the health, safety, and well-being of the residents (for example, continuation of appropriate staffing levels and paychecks at the facility; method for communicating with staff and/or unions; and ongoing provision of necessary supplies, for example, food, linens, and utilities). The facility must meet its obligation set out at existing §483.12(a)(4), "Notice before transfer," to provide notice to the resident before the transfer or

discharge of the resident. Our requirements at existing §483.12(a)(6), “Contents of the notice,” specifically set out what must be included in the notice of transfer given to residents and, if known, a family member or legal representative. Since the transfer and discharge requirements are tailored specifically to each resident’s unique needs, we believe that the required information will sufficiently address the commenter’s concerns.

Additionally, the Nursing Home Compare website is a tool available to individuals looking for updated comparative information regarding functioning LTC facilities; this information can be utilized during the relocation process, and is available online at: <http://www.medicare.gov/nhcompare/include/datasection/questions/proximitysearch.asp?bhcp=1>

Comment: Some commenters expressed concern that CMS was requiring the facility closure plan to include a commitment to retain and pay employees at the facility until it was closed (76 FR 9507). In particular, the commenters were concerned that the administrator might be held accountable for civil monetary penalties for any failure to adequately staff and pay employees. The commenters observed that unless the facility administrator was also the owner, the administrator generally would not have authority over, or access to, the funds that would be used to pay staff.

Response: While we expect the LTC facility administrator will be able to identify the necessary steps for a successful transfer of the residents, we note that the contents of the closure plan described in the preamble of the February 18, 2011 interim final rule were examples, not requirements (as incorrectly characterized by the commenter). Additionally, as mentioned in the preamble of the February 18, 2011 interim final rule, we expect that the closure plan include sufficient detail to clearly identify the steps the facility would take, and the individual responsible for ensuring the steps are successfully carried out, such as continuation of

appropriate staffing levels, and paychecks at the facility. We intend to provide more detail on the contents of the closure plan in the interpretive guidance.

Comment: Several commenters requested clarification as to how a resident would be assessed for transfer to either an LTC facility or other community and home-based settings. Additionally, one commenter requested clarification regarding what would happen if admission to any of the settings deemed most appropriate for the resident were denied.

Response: We believe existing requirements at §483.20(l), “Discharge summary,” should sufficiently address the commenter’s concerns regarding how a resident would be assessed for transfer. According to those requirements, when the facility anticipates discharge, a resident must have a discharge summary that includes a final summary of the resident’s status to include the elements in the comprehensive assessment of a resident’s needs located in §483.20(b). Section 483.20(l) also requires a post-discharge plan of care to be developed with the participation of the resident and his or her family. The plan of care will assist the resident with adjusting to his or her new living environment.

Additionally, §483.75(r)(3) requires the LTC facility to include in the notice, the plan for the transfer and adequate relocation of the residents of the facility by a date that would be specified by the State prior to closure, that has been approved by the State, including assurances that the residents would be transferred to the most appropriate facility or other setting in terms of quality, services, and location, taking into consideration the needs, choice, and best interests of each resident. If admission to any of the settings deemed most appropriate for the resident were denied, the facility would still be responsible for locating another setting comparable in terms of quality, services, and location, taking into consideration the needs, choice, and best interests of the resident, in order to comply with the requirements of this regulation.

Comment: One commenter recommended that CMS require that SNFs and NFs give residents, to the extent possible, an opportunity to visit facilities in advance so that they can choose the facility they would like to move.

Response: This regulation does not prohibit residents of a SNF or NF from visiting other facilities in advance. Additionally, existing regulations at §483.12(a)(7), state that a facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. The facility should actively involve, to the extent possible, the resident and the resident's family in selecting the new residence. Some examples of orientation may include trial visits, if possible, by the resident to a new location; orienting staff in the receiving facility to the resident's daily patterns; and reviewing with staff routines for handling transfer and discharges in a manner that minimizes unnecessary and avoidable anxiety or depression for the resident.

Comment: One commenter suggested that the facility's closure plan include a requirement to ensure that other nursing homes, including those owned by the same company as the facility that is closing, do not have access to a resident's record in order to "cherry pick" private pay residents or those with lighter care needs. Additionally, one commenter suggested that the facility's closure plan include information on how residents may contact the State's long-term care ombudsman and access CMS's Nursing Home Compare website since the updated data planned for the site will increase its value as a tool for residents to select an alternate nursing home in the event of a facility closure.

Response: The selection of an alternate facility is a decision collectively made by the resident (or their responsible party) and the care planning team. We believe that the provision at §483.75(r)(3), which requires the written notice to assure residents that they will be transferred to

the most appropriate facility or other setting in terms of quality, services, and location, taking into consideration the needs, choice, and best interests of each resident, adequately addresses the commenter's concerns. In addition, to ensure that the residents' rights are protected, §483.75(r)(1) requires the ombudsman to be contacted as part of the closure notice. Under the Federal Older Americans Act, every State is required to have an Ombudsman Program that addresses complaints and advocates for improvements in the LTC system (<http://www.ltcombudsman.org/>).

Comment: Several commenters offered suggestions to CMS on what should be included in the SOM regarding the implementation guidelines for this regulation. One commenter suggested that CMS include in the SOM that nursing home residents displaced due to a facility closure be provided with information about and access to home and community-based setting options as appropriate.

Another commenter suggested that CMS provide additional guidance to State Survey Agencies regarding how to use monitors and temporary managers more effectively in facility closure situations. Additionally, one commenter recommended that the SOM should include guidance related to timeframes for completion of all paperwork assuring successful resident relocation. Another commenter recommended that CMS include guidance regarding post-transfer assessments of the residents' emotional health. The commenter stated that an assessment would ensure that evaluating the success of the residents relocation would not be limited to the mere physical move itself, but would also consider the residents' psychosocial adjustment.

Response: We appreciate the commenters' suggestions regarding guidance for surveyors. We will consider these comments when making changes to the interpretive guidance.

E. Facility Closure (§483.75(s))

At §483.75(s), we require that the facility have in place policies and procedures that will ensure the administrator's duties and responsibilities involve providing the appropriate notices in the event of a facility closure. In the preamble to the February 18, 2011 interim final rule, we noted that the facility will not be sanctioned for noncompliance with this rule; however, it may be cited for a deficiency during the survey process (76 FR 9507). We are finalizing these provisions as set forth in the interim final rule.

The comments we received on this provision and our responses are set forth below.

Comment: One commenter suggested that CMS withdraw §483.75(s) from the final rule due to its inconsistency with the Congressional intent, which is to hold the administrator, not the facility, accountable for failure to provide proper notification in advance of a facility closure. Alternatively, a few commenters suggested that the final rule should establish a process for sanctioning facility owners in addition to administrators who do not comply with the closure provisions. Some commenters suggested that the provision was unnecessary because when a facility decides to close, the rule requires the administrator to prepare the closure plan and seek appropriate approvals, regardless of whether the facility has policies and procedures.

Response: As we stated in the preamble of the February 18, 2011 interim final rule, while this provision is not explicitly required by section 1128I(h) of the Act, we believe that it is implicitly authorized by this section of the Act, which set forth requirements for LTC facility closures. Moreover, issuance of this regulatory provision is permitted by the general rulemaking authority of sections 1819(d)(4)(B) and 1919(d)(4)(B) of the Act, which explicitly permits the Secretary to issue rules relating to the health, safety, and well-being of residents, as well as rules concerning physical facilities. Additionally, §483.75(d), Governing body, requires the facility to

have a governing body, or designated persons functioning as a governing body, that is legally responsible for establishing and implementing policies regarding the management and operation of the facility. Therefore, the facility is responsible for the overall functioning of the LTC facility, though it will not be sanctioned for noncompliance with this rule, a facility that does not meet the requirements at §483.75(s) could be cited for a deficiency during the survey process. We continue to believe this level of added protection will ensure that the intent of the Congress is implemented and that residents receive adequate notice before a facility closure.

F. Transfer of residents, or closure of the facility and transfer of residents (§488.426)

We revised §488.426, Transfer of residents, or closure of the facility and transfer of residents, at §488.426(b) to include a cross-reference to the new requirements at §483.75(r). We also added a new requirement at §488.426(c) to address the required notifications when a facility closes. We are finalizing these provisions set forth in the interim final rule.

The comments we received on this provision and our responses are set forth below.

Comment: A few commenters mentioned that the Affordable Care Act requires the notices issued by administrators to include a closure plan that has been approved by the State; however, the regulation does not establish any process for State review and action on facility closure plans. It was suggested that the final rule establish these procedures under which States would review and act on proposed closure plans. The commenter suggested that CMS prescribe in regulations (rather than through sub-regulatory guidance in the SOM) that States will be required to ensure safe relocation of residents following their facility's closure and that CMS has authority to enforce the requirements directly.

Response: Section 1128(h)(1)(C) of the Act states any individual who is the administrator of a facility must include in the notice a plan for the transfer and adequate

relocation of the residents of the facility by a specified date prior to closure that has been approved by the State, including assurances that the residents will be transferred to the most appropriate facility or other setting in terms of quality, services, and location, taking into consideration the needs, choice, and best interests of each resident. In accordance with the statute, States are required to approve the plan. We expect the State Survey Agency to manage the approval process. Thus, we do not believe it is necessary to add these requirements to the regulation, but will address it in the SOM. In this final rule, we have revised the language at §483.75(r)(3) of the regulations text to incorporate the explicit requirement. The regulation text will now read, “Include in the notice the plan, *that has been approved by the State*, for the transfer and adequate relocation of the residents of the facility by a date that would be specified by the State prior to closure, including assurances that the resident would be transferred to the most appropriate facility or other setting in terms of quality, services, and location, taking into consideration the needs, choice, and best interests of each resident.”

G. Administrator sanctions: long-term care facility closures (§488.446)

As required by section 6113 of the Affordable Care Act, we added a new §488.446, which will potentially subject to sanctions any administrator of a facility that fails to comply with the requirements at §483.75(r). We are finalizing these provisions as set forth in the interim final rule. The comments we received on this provision and our responses are set forth below.

Comment: Several commenters had concerns that an owner of a nursing facility could arrange for the closure of the facility after the prescribed timeframe for notification, without knowledge or involvement of the administrator, thus exposing the facility administrator to the sanction when they were not aware of the owner’s plans to close the facility. Additionally, commenters requested that CMS consider waiving sanctions for administrators that are hired

after the decision is made to close a facility.

Response: We agree with the commenters that the administrator may encounter a situation where adequate time to submit a notification of closure to the specified entities, as required by §483.75(r)(1), was not given. In some cases, an administrator may not have had control over implementing the notice procedures. For example, an administrator may have been hired to oversee the facility's impending closure, although he or she was not present when the decision was made to close the facility. The administrator may have been employed less than 60 days prior to closure. Another possibility is that the facility owner may not have even informed the new administrator of plans to close the facility. However, the lack of previous involvement does not relieve the administrator (at the time of closing) of the responsibility for implementing the plan and the procedures as required to the extent possible. In these instances, the administrator would be expected to provide the closure notice as soon as possible and begin implementing the plan for closure, working with the State Survey Agency for transferring the residents. The administrator hired to assist with closure would be expected to implement the closure plan and work closely with the State and CMS to assure that appropriate procedures were implemented. From the time that the administrator was made aware of the closure, he or she would be responsible for compliance with this regulation.

Additionally, while it was not mandated by the Affordable Care Act, we have added §498.5(m), which allows for appeal rights of an individual who is the administrator of a SNF or NF. Therefore, if an individual who is the administrator of a SNF or NF is dissatisfied with the decision of CMS to impose sanctions, he or she would be entitled to a hearing before an Administrative Law Judge (ALJ), to request the Departmental Appeals Board review of the hearing decision, and to seek judicial review of the Board's decision.

Comment: A few commenters expressed concerns about the Civil Monetary Penalty (CMP) levels being too low, considering that section 6113 of the Affordable Care Act permits fines of up to \$100,000 and subsequent exclusion from participating in any Federal healthcare programs and suggested increasing the minimum penalty. Another commenter recommended enforcing CMPs from \$100.00 up to \$1,000.00, multiplying the amount of the CMP by the number of residents who were admitted after written notice of closure was provided to the State. Another commenter suggested that those facilities that committed multiple offenses should incur all penalties to the fullest extent possible, while another commenter requested clarification and/or criteria for what would constitute multiple offenses that would result in increased amounts of CMPs.

Response: We believe that the Congress intended for CMS to use sanctions as a method to ensure that the statutory requirements are enforced. The statutory language that was enacted stated “up to \$100,000.” This language established a maximum limit, but afforded CMS the discretion to determine the actual amount of the sanctions. Due to the many possible combinations of violations that could be cited, the amount of the penalty will be determined based on the survey findings. For example, if it is determined that an administrator of record completely fails to take the necessary and timely actions to adhere to the closure requirements, thus potentially causing harm to residents, then the administrator could be subject to additional CMPs. Any sanctions that have been levied against an administrator could also be reviewed by the State’s licensing agency for possible disciplinary action, including suspension or termination of the administrator’s license, in those States that provide for the licensing of LTC facility administrators. Interpretive guidelines are being developed that will establish criteria for determination of its CMP amounts.

Comment: One commenter suggested that CMS and State licensing agencies consider sharing a percentage of any resultant CMP proceeds with any parties that may have directly been injured because of failures to notify and/or plan for relocation,

Response: Existing requirements at §488.433, “Civil money penalties: Uses and approval of civil money penalties imposed by CMS,” state that 10 percent of the collected CMP funds that are required to be held in escrow and that remain after a final administrative decision will be deposited with the Department of Treasury. The remaining 90 percent of the collected CMP funds that are required to be held in escrow and that remain after a final administrative decision may not be used for survey and certification operations, but must be used entirely for activities that protect or improve the quality of care for residents. These activities must be approved by CMS and may include, but are not limited to: support and protection of residents of a facility that closes, time-limited expenses incurred in the process of relocating residents to home and community-based settings or another facility when a facility is closed or downsized pursuant to an agreement with a State Medicaid agency, facility improvement initiatives approved by CMS, such as, joint training or facility staff and surveyors or technical assistance for facility implementing quality assurance and performance improvement program, when facilities have been cited by CMS for deficiencies in the applicable requirements. While the collected CMPs are not dispersed to the affected parties directly, the money will be used to protect and improve the quality of care for residents. Therefore, we believe they ultimately will derive benefits from the collected CMP funds.

Comment: A few commenters requested clarification regarding what would constitute “unjustified harm” to the resident, family, and visitors, as mentioned in the preamble to the February 18, 2011 interim final rule with comment period cited as a justification for harsher

administrator sanctions (75 FR 9507). One commenter stated that it was not clear how or why the administrator would have any legal obligation to third parties such as family members or visitors. A commenter suggested that we remove the language in the preamble suggesting that the administrator could be subject to additional CMPs if it was determined that family members and visitors of the resident experienced “unjustified harm” (75 FR 9507).

Response: We are clarifying that it was not our intention to make an LTC facility administrator personally liable to family members and visitors for harm resulting from a failure to notify. We used a technical term to describe deficiencies; however, this terminology does not create either a Federal or State standard of care. We do not believe that any level of harm, whether based on intent or negligence, is acceptable.

H. Period of continued payments (§488.450(c))

We revised §488.450 by adding a new requirement to provide that, in the case of a facility closure, the Secretary may, as appropriate, continue to make payments under this title with respect to residents of an LTC facility that has submitted a notification of closure, during the period beginning on the date such notification is submitted and ending on the date, which the resident is successfully relocated. We note that in this final rule, we are correcting a typographical error in the regulations text. The provision in section §488.450(c)(2) will now read, “...ending on the date on which the residents are successfully relocated.”

The comments we received on this provision and our responses are set forth below.

Comment: One commenter suggested that CMS provide a procedure for residents, their representatives, citizen advocacy groups, and the State LTC ombudsman to comment on when payments can be terminated.

Response: We appreciate the commenter’s concern regarding termination of payment in

the event of a facility closure. However, we do not believe that any changes in this aspect of the rule are needed because the statute and our regulatory requirements address the concerns of the commenter. Section 1128I(h)(3) of the Act and requirements at §488.450(c), authorize the Secretary to continue to make payments with respect to residents of an LTC facility that has submitted a notification of closure during the period beginning on the date such notification is submitted to CMS and ending on the date on which all residents are successfully relocated. Therefore, CMS will determine, as appropriate, whether to continue to make payments with respect to residents of an LTC facility that has submitted a notification of closure as required at §483.75(r). We believe this matter is purely operational and not amenable to the discretion implied by an opportunity for public comment. If residents have concerns regarding a facility closure and relocation process, we would encourage them to make their concerns known to the State LTC Ombudsman.

I. Notice to CMS (§489.52(a))

We revised §489.52(a)(1) to provide an exception for SNFs, and by adding a new requirement specific to SNF notifications to CMS. Specifically, at §489.52(a)(2), we specify that a SNF provider that wishes to terminate its agreement must send CMS written notice of its intent at least 60 days prior to the date of closure, in accordance with §483.75(r)(1)(i).

We did not receive any public comments regarding this provision. Therefore, we are finalizing the revisions of §489.52(a)(2) as set forth in the interim final rule.

J. Skilled nursing facility closure (§489.53(d)(3))

We added a new requirement at §489.53(d)(3), to state that when CMS terminates a facility's participation under Medicare or Medicaid, CMS will determine the date of the required notifications. We also revised §489.53(d)(1) to reflect this change.

We did not receive any public comments regarding this provision. Therefore, we are finalizing §489.53(d)(1) and (d)(3) as set forth in the interim final rule.

K. Exceptions to effective date of termination (§489.55)

We added a new requirement at §489.55 that authorizes the Secretary to continue to make payments to the SNF or, for a NF, to the State, as the Secretary considers appropriate, during the period beginning at the time the notification is submitted and until the resident is successfully relocated. In this final rule, we are correcting a typographical error in the regulations text at §489.55(a)(1). The provision will now read, “Inpatient hospital services (including inpatient psychiatric hospital services) and post hospital extended care services...”

The comments we received on this provision and our responses are set forth below.

Comment: A few commenters recommended CMS consider the role economic factors play in a decision to close, the potential impact of discontinued funding to resident care and services during the closure process, and to support ongoing policy for continued payment through the 60-day notice period or until the last resident is successfully relocated, whichever is earlier.

Response: We agree with the need to provide continued funding until all of the residents are successfully relocated. As stated in a previous response, section 1128I (h)(3) of the Act authorizes the Secretary to continue to make payments with respect to residents of an LTC facility that has submitted the required notification of closure to CMS.

L. Scope and Applicability (§498.3)

We added a new requirement at §498.3(a)(2)(iv) to clarify that CMS may also impose sanctions on NF administrators for noncompliance with §483.75(r). We also added a new requirement at §498.3(a)(3)(ii) to indicate that the appeals process applies to NFs as well as

SNFs. In addition, a new requirement was added at §498.3(b)(18) to indicate that a sanction imposed on a SNF or NF administrator for noncompliance with the requirements set out at §483.75(r) constitutes an initial determination of the agency.

We did not receive any public comments regarding this provision. Therefore, we are finalizing the revisions at §498.3(a)(2)(iv) as set forth in the interim final rule. However, we are correcting a typographical error at §498.3(a)(3), to include, “(iii)” when referring to Part 488, subpart E (§488.330(e)) and subpart F (§488.446)—for SNFs and NFs and their administrators.

M. Appeal Rights (§498.5)

We added a new requirement at §498.5(m), to establish appeal rights for administrator sanctions for noncompliance with the requirements set out at §483.75(r).

We did not receive any public comments regarding this provision. However, we are making a technical correction at §498.5(m) to include, “or NF” when referring to the appeal rights of an individual who is the administrator. We had included the term “NF” in the February 18, 2011 interim final rule’s preamble language on this provision, but inadvertently omitted it from the corresponding regulations text.

IV. Provisions of the Final Regulations

We are adopting as final the requirements set forth in the interim final rule published in the **Federal Register** on February 18, 2011 (76 FR 9503), with the following changes:

- We are revising §483.12(a)(8) and §483.75(r)(1) to clarify that the facility must submit written notification of an impending closure to “the State Survey Agency” instead of “the Secretary”.
- We note that we inadvertently omitted language regarding the statutory requirement at 1128I(h)(1)(C) for State approval of the plan. We are correcting the language

accordingly in section §483.75(r)(3) of the regulations text in this final rule.

- We are correcting a typographical error in the provision regarding the period of continued payments at §488.450(c)(2), which will now read, “...ending on the date on which the residents are successfully relocated.”
- We are correcting a typographical error in the provisions regarding Exceptions to the effective date of termination at §489.55(a)(1), which will now read, “Inpatient hospital services (including inpatient psychiatric hospital services) and post hospital extended care services...”
- We are correcting a typographical error at §498.3(a)(3), to include, “(iii)” when referring to Part 488, subpart E (§488.330(e)) and subpart F (§488.446)—for SNFs and NFs and their administrators.
- We are making a technical correction at §498.5(m) to include, “or NF” when referring to the appeal rights of an individual who is the administrator. We included NFs in the preamble language and inadvertently omitted it from the regulation text.
- We inadvertently omitted a citation from all authority citations in the regulation text. We are correcting that error by adding “1320a-7j” to all authority citations.

V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We requested public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs):

The revisions at §483.12(a)(8) require any individual who is the administrator of the facility to submit to the Secretary, the State LTC ombudsman, residents and their legal representatives, or other responsible parties, written notification of an impending closure at least 60 days prior to such closure; or not later than the date that the Secretary deems appropriate in the case of a facility where the Secretary terminates the facility's participation under this title.

Current regulations at §483.12(a)(5) require notification of transfer or discharge to a resident and, if known, a family member or legal representative, in writing. Except in certain specified circumstances, notification must be made at least 30 days prior to transfer or discharge. Facility closure is not a circumstance that permits a facility to make notification in fewer than 30 days. Although the requirement extends the time period for notification from 30 days to 60 days (or a date determined by the Secretary in case of CMS termination of the facility), we do not believe the change in the time period for reporting imposes any additional burden. In addition, notification of transfer or discharge to residents and their representatives is already a usual and customary business practice. Therefore, in accordance with 5 CFR 1320.3(b)(2), we will not include this activity in the ICR burden analysis.

Although there are no existing Federal regulatory requirements for LTC facilities to notify other individuals or entities of an impending closure, according to feedback to CMS from State surveyors for LTC facilities, nearly all States already require LTC facilities to notify the State within 30 to 90 days. Because we have found that notifications of impending closure are a standard business practice for most LTC facilities, we believe that this requirement would impose burden on only a small number of facilities.

Each facility that does not already notify the State and the State LTC ombudsman must develop a process for notifying these entities. We estimate that the burden associated with complying with this requirement would be due to the resources required to develop a process for notifying the State and the State LTC ombudsman and the time it takes to notify those entities. We expect that the notification process would involve the administrator of the facility and administrative support person and an attorney to review the plan.

The revisions at §483.75(r)(2) require that the administrator of the facility ensure that the facility does not admit any new residents on or after the date written notification is submitted. We do not anticipate any ICR burden associated with this requirement.

Section 483.75(r)(3) requires the administrator of the facility to include in the notice the plan for the transfer and adequate relocation of the residents of the facility by a date that is specified by the State prior to closure, that has been approved by the State, including assurances that the residents would be transferred to the most appropriate facility or other setting in terms of quality, services, and location, taking into consideration the needs, choice, and best interests of each resident.

Section 483.75(s) requires the facility to have in place policies and procedures to ensure that the administrator's duties and responsibilities include the provision of the appropriate notices in the event of a facility closure.

In our experience, based on feedback to CMS from State surveyors of LTC facilities, most facilities already have plans for transfer of residents, regardless of whether closure of the facility is expected. For example, most facilities have plans for transfer of residents to another facility in the event of an emergency. Also, based on our experience, nearly all facilities anticipating closure develop plans for the relocation of residents and other closure-related activities. Many States require these plans. For example, Vermont requires that the State licensing agency and the LTC ombudsman be notified by the administrator of the facility 90 days prior to the proposed date of closure. Additionally, the facility administrator is required to provide to the State licensing agency and LTC ombudsman a written transfer plan 60 days prior to closure. See

http://www.sph.umn.edu/hpm/nhregsplus/NH%20Regs%20by%20Topic/NH%20Regs%20Topic%20Pdfs/Admission/admission_transfer_and_discharge_rights_ALL_STATES.pdf.

Because we have found that transfer plans are a standard business practice for most LTC facilities, we believe that this requirement would impose burden on only a small number of facilities.

Each facility that does not already have a plan in place must develop a plan for the transfer and adequate relocation of residents of the facility. We estimate that the burden associated with complying with this requirement would be due to the resources required to develop and review a new plan or, if necessary, modify an existing plan for the transfer of residents in the event of facility closure. We expect that development of a plan would involve

the administrator of the facility, an administrative support person, and an attorney to review the plan.

LTC facilities are currently required to have a plan under §483.12 for discharge and transfer of residents. A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. Therefore, we anticipate that, on average, it will take 3 hours to develop the plan, 1 hour to ensure that the administrator's duties include policies and procedures relating to facility closures, 2 hours for an administrative support person to prepare the document(s), and 1 hour for an attorney to review the document(s), for a total estimated burden of 7 hours per facility. We also believe that the burden would remain approximately the same for the first year and beyond.

Currently, there are 15,720 LTC facilities in the U.S. Based on an hourly rate of \$58.17 for a nursing home administrator, we estimate that development of the plan and incorporating facility closure policies and procedures into the administrator's duties would cost \$3,657,729.60 (15,720 facilities x 4 hours per facility) x \$58.17 per hour). Based on an hourly rate of \$20.11 for an administrative assistant, we estimate that preparing the plan documents would cost \$632,258.40 ((15,720 facilities x 2 hours per facility) x \$20.11 per hour). Finally, based on an hourly rate of \$82.50 for an attorney, we estimate that reviewing the plan document would cost \$1,296,900.00 ((15,720 facilities x 1 hour per facility) x \$82.50 per hour). The salary estimates include 33 percent of the mean hourly rate for overhead and fringe benefits (Source: BLS.gov). Therefore, we anticipate that the total burden associated with this provision is \$5,586,888.00 (15,720 facilities x 7 hours per facility at \$355.40).

If you comment on these information collection and recordkeeping requirements, please submit your comments to the Office of Information and Regulatory Affairs, Office of

Management and Budget,

Attention: CMS Desk Officer, CMS-3230-F

Fax: (202) 395-6974; or

Email: OIRA_submission@omb.eop.gov

VI. Regulatory Impact Analysis

A. Statement of Need

Executive Order 13563 directs agencies to consider and discuss qualitatively values that are difficult to quantify, including equity, human dignity, fairness and distributive impacts. This final rule will implement section 1128I(h) of the Act (as amended by section 6113 of the Affordable Care Act), which mandates specific procedures in the event of a closure of a nursing home. LTC facility closure procedures have implications related to access to care, the quality of care, and the overall health of residents. These procedures help protect the resident, the resident's family, and visitors because they require the facility to provide an organized plan that allows the resident, family, and visitors to make the necessary adjustments within a reasonable time frame.

B. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104-4), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of

available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (\$100 million or more in any 1 year). This rule does not qualify as a major rule as the estimated economic impact. We estimate that these requirements will cost \$355.40 (5,586,888.00/15,720) per facility the first year and each year thereafter. Due to the increase in the number of long-term care facilities, we recalculated the economic impact of the February 18, 2011 IFC and have determined that it has slightly increased by \$2,488 in total. (The number of long-term care facilities has increased slightly since publication of the interim final rule.) As a result, the economic impact for the February 18, 2011 IFC is \$5,586,888.

The RFA requires agencies to analyze options for regulatory relief of small businesses, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small government jurisdictions. The great majority of hospitals and most other health care providers and suppliers are small entities, either by being nonprofit organizations or by meeting the SBA definition of a small business (having revenues of less than \$7.0 million to \$34.5 million in any 1 year). For purposes of the RFA, most physician practices, hospitals, and other providers are small entities, either by nonprofit status or by qualifying as small businesses under the Small Business Administration's size standards (revenues of less than \$7.0 to \$34.5 million in any 1 year). States and individuals are not included in the definition of a small entity. For details, see the Small Business Administration's Web site at <http://www.sba.gov/about-sba-services/7591>. A rule has a significant economic impact on the small entities it affects, if it significantly affects

their total costs or revenues. Under statute, we are required to assess the compliance burden the regulation will impose on small entities. Generally, we analyze the burden in terms of the impact it will have on entities' costs if these are identifiable or revenues. As a matter of sound analytic methodology, to the extent that data are available, we attempt to stratify entities by major operating characteristics such as, size and geographic location. If the average annual impact on small entities is 3 to 5 percent or more, it is to be considered significant.

We estimate that these requirements will cost \$355.40 (\$5,586,888.00/15,720 facilities) per facility initially and \$355.40 (\$5,586,888.00/15,720 facilities) thereafter. This clearly is far below 1 percent of total facility costs or revenues; therefore, we do not anticipate it to have a significant impact. We do not have any data related to the number of LTC facilities that have facility closure plans in place; however, we are aware through our experience with LTC facilities and the survey process that most facilities have a plan for closure either because they are required to have a plan in place at the State level or because of their understanding that this is a standard business practice.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For the purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. This rule would only affect those institutions that meet the definition of a "facility" in section 1128I(a) of the Act; that is, SNFs and NFs. Therefore, the Secretary has determined that this final rule would not have any impact on the operations of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that

agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2012, that threshold is approximately \$139 million. This rule would not have a significant impact on the governments mentioned or on private sector costs. The estimated economic effect of this rule is \$5,586,888.00 the first year and \$5,586,888.00, thereafter. These estimates are derived from our analysis of burden associated with these requirements in section IV, “Collection of Information Requirements.”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This rule will not have any effect on State or local governments.

C. Anticipated Effects

1. Effects on LTC facilities

The purpose of this final rule is to ensure that, among other things, in the case of a facility closure, any individual who is the administrator of the facility will provide written notification of the closure and the plan for the relocation of residents at least 60 days prior to the impending closure or, if the Secretary terminates the facility’s participation in Medicare or Medicaid, not later than the date the Secretary determines appropriate. This rule will protect residents’ health and safety and make the transition to closure as smooth as possible for residents, as well as family members and facility staff.

2. Effects on Other Providers

This rule is expected to allow for a smoother transition when a facility closes. It requires facilities and facility administrators to prepare in advance for closure so that, in the event of a

closure, the facility is equipped to protect resident rights and continue to provide quality care to residents who must be relocated. This final rule will also improve coordination of care between the transferring LTC facility and the chosen destination setting. For example, if a resident is transferred from an LTC facility to a non-LTC facility such as an assisted living facility, we do not believe that non-LTC facilities would experience any increase in administrative burden as a result of these provisions. In fact, we anticipate that the receiving facility would benefit from increased coordination with the transferring LTC facility.

3. Effects on the Medicare and Medicaid Programs

This rule will require that the State and CMS be notified in the case of a facility closure and provides them with the ability to make determinations regarding the timing of termination of provider agreements and continuation of payments to LTC facilities. This rule will also support efforts directed toward broad-based improvements in the quality of health care furnished by Medicare and Medicaid providers.

D. Alternatives Considered

We considered the effects of not addressing specific requirements for the notification of facility closures in LTC facilities, although these requirements are statutory and only allow limited discretion on the part of the Secretary. However, we strongly believe that to improve quality and ensure consistency in the provision of care in LTC facilities, it is important to ensure that residents rights are protected in LTC facilities and that they are relocated appropriately, taking into consideration the needs, choice, and best interest of each resident should a facility closure take place. We expect that these requirements will result in improvement in the quality of services provided to LTC residents when they need to be involuntarily relocated as a result of the closures.

E. Conclusion

This final rule ensures that, among other things, in the case of a facility closure, any individual who is the administrator of the facility provide written notification of the closure and the plan for the relocation of residents at least 60 days prior to the impending closure or, if the Secretary terminates the facility's participation in Medicare or Medicaid, not later than the date the Secretary determines appropriate.

It is consistent with the requirements set forth in section 6113 of the Affordable Care Act and the Administration's efforts toward broad-based improvements in the quality of health care furnished by Medicare and Medicaid providers.

This final rule clarifies the responsibility of the administrator of a facility (which is to ensure that the designated parties are notified of an impending closure within a specified timeframe), and identifies penalties for non-compliance. It also clarifies the responsibility of the administrator of the facility to ensure that no new residents are admitted after written notice is submitted and that the notice of closure must include a plan for transfer and adequate relocation to another facility. These facilities must take into consideration the needs, choice, and best interests of each resident.

In accordance with the provisions of Executive Order 12866, this regulation was not reviewed by the Office of Management and Budget.

List of Subjects42 CFR Part 483

Grant programs-health, Health facilities, Health professions, Health records, Medicaid, Medicare, Nursing homes, Nutrition, Reporting and recordkeeping requirements, Safety.

42 CFR Part 488

Administrative practice and procedure, Health facilities, Medicare, Reporting and recordkeeping requirements

42 CFR Part 489

Health facilities, Medicare, Reporting and recordkeeping requirements

42 CFR Part 498

Administrative practice and procedure, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements

Accordingly, the interim rule amending 42 CFR Parts 483, 488, 489, and 498, which was published at 76 FR 9503 on February 18, 2011, is adopted as final with the following changes:

PART 483--REQUIREMENTS FOR STATES AND LONG TERM CARE FACILITIES

1. The authority citation for part 483 is revised to read as follows:

Authority: Secs. 1102, 1128I and 1871 of the Social Security Act (42 U.S.C. 1302, 1320a-7j, and 1395hh).

Subpart B--Requirements for Long Term Care Facilities

2. Section 483.12 is amended by revising paragraph (a)(8) to read as follows:

§483.12 Admission, transfer and discharge rights.

(a) * * *

(8) Notice in advance of facility closure. In the case of facility closure, the individual who is the administrator of the facility must provide written notification prior to the impending closure to the State Survey Agency, the State LTC ombudsman, residents of the facility, and the legal representatives of the residents or other responsible parties, as well as the plan for the transfer and adequate relocation of the residents, as required at §483.75(r).

* * * * *

3. Section 483.75 is amended by revising paragraphs (r)(1) introductory text and (r)(3) to read as follows:

§483.75 Administration.

* * * * *

(r) * * *

(1) Submit to the State Survey Agency, the State LTC ombudsman, residents of the facility, and the legal representatives of such residents or other responsible parties, written

notification of an impending closure:

* * * * *

(3) Include in the notice the plan, that has been approved by the State, for the transfer and adequate relocation of the residents of the facility by a date that would be specified by the State prior to closure, including assurances that the residents would be transferred to the most appropriate facility or other setting in terms of quality, services, and location, taking into consideration the needs, choice, and best interests of each resident.

* * * * *

PART 488—SURVEY, CERTIFICATION, AND ENFORCEMENT PROCEDURES

4. The authority citation for part 488 is revised to read as follows:

Authority: Secs. 1102, 1128I and 1871 of the Social Security Act, unless otherwise noted (42 U.S.C. 1302, 1320a-7j, and 1395hh); Pub.L.110-149, 121 Stat. 1819.

Subpart F-- Enforcement of Compliance for Long-Term Care Facilities with Deficiencies

5. Section 488.450 is amended by revising paragraph (c)(2) to read as follows:

§488.450 Continuation of payments to a facility with deficiencies.

* * * * *

(c) * * *

(2) Facility closure. In the case of a facility closure, the Secretary may, as the Secretary determines appropriate, continue to make payments with respect to residents of a long-term care facility that has submitted a notification of closure during the period beginning on the date such notification is submitted to CMS and ending on the date on which the residents are successfully relocated.

* * * * *

PART 489—PROVIDER AGREEMENTS AND SUPPLIER APPROVAL

6. The authority citation for part 489 is revised to read as follows:

Authority: Secs. 1102, 1128I and 1819, 1820(e), 1861, 1864(m), 1866, 1869, and 1871 of the Social Security Act (42 U.S.C. 1302, 1320a-7j, 1351i-3, 1395x, 1395aa(m), 1395cc, 1395ff, and 1395hh).

Subpart E—Termination of Agreement and Reinstatement After Termination

7. Section §489.55 is amended by revising paragraph (a)(1) to read as follows:

§489.55 Exceptions to effective date of termination.

(a) * * *

(1) Inpatient hospital services (including inpatient psychiatric hospital services) and post hospital extended care services (except as specified in paragraph (b) of this section with respect to LTC facilities) furnished to a beneficiary who was admitted before the effective date of termination; and

* * * * *

PART 498—APPEAL PROCEDURES FOR DETERMINATIONS THAT AFFECT PARTICIPATION IN THE MEDICARE PROGRAM AND FOR DETERMINATIONS THAT AFFECT THE PARTICIPATION OF ICFs/MR AND CERTAIN NFs IN THE MEDICAID PROGRAM.

8. The authority citation for part 498 is revised to read as follows:

Authority: Secs. 1102, 1128I and 1871 of the Social Security Act (42 U.S.C. 1302, 1320a-7j, and 1395hh).

Subpart A—General Provisions

9. Section 498.3 is amended by revising paragraph (a)(3) to read as follows:

§498.3 Scope and applicability.

(a) * * *

(3) The following parts of this chapter specify the applicability of the provisions of this part 498 to sanctions or remedies imposed on the indicated entities or individuals:

(i) Part 431, subpart D—for nursing facilities (NFs).

(ii) Part 488, subpart E (§488.330(e))—for SNFs and NFs.

(iii) Part 488, subpart E (§488.330(e)) and subpart F (§488.446)—for SNFs and NFs and their administrators.

* * * * *

10. Section 498.5 is amended by revising paragraph (m) to read as follows:

§498.5 Appeal rights.

* * * * *

(m) Appeal rights of an individual who is the administrator of a SNF or NF. An individual who is the administrator of a SNF or NF who is dissatisfied with the decision of CMS to impose sanctions authorized under §488.446 of this chapter is entitled to a hearing before an ALJ, to request Board review of the hearing decision, and to seek judicial review of the Board's decision.

CMS-3230-F

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare--Hospital Insurance;
and Program No. 93.774, Medicare--Supplementary Medical Insurance Program)

Dated: May 23, 2012

Marilyn Tavenner,

Acting Administrator,

Centers for Medicare & Medicaid Services.

Approved: July 20, 2012

Kathleen Sebelius,

Secretary,

Department of Health and Human Services.

Editorial Note: This document was received at the Office of the Federal Register on March 14,
2013.

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