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Secretary Alex Azar
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20101

Administrator Seema Verma
Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20101

RE: Executive Order 13924: Regulatory Relief to Jumpstart the Economy and Get Americans Back to Work

Dear Secretary Azar and Administrator Verma:

On behalf of the National Hospice and Palliative Care Organization (NHPCO), I thank you for your continued leadership in keeping Americans safe and supporting our health care providers as we face the coronavirus (COVID-19) pandemic together. NHPCO is the largest membership organization representing the entire spectrum of not for-profit and for-profit hospice and palliative care programs and professionals in the United States. NHPCO is comprised of almost 4,000 hospice locations with more than 60,000 hospice staff and volunteers, as well as 46 state hospice and palliative care organizations. We appreciate your ongoing collaboration with the hospice and palliative care community in responding to the pandemic since our meeting with Vice President Pence and you, Administrator Verma and other members of White House COVID-19 Task Force on March 4, 2020. I appreciated your ear, Secretary Azar on April 30, 2020 when I was invited to represent hospice providers and the patients and families they serve at President Trump's COVID-19 press conference focused on seniors.

NHPCO appreciates the Administration's efforts to reduce red tape and promote pro-growth policies, which support small businesses and entrepreneurs in creating jobs and driving economic growth. Those small businesses include thousands of small hospice and palliative care providers

across the United States. NHPCO appreciates the President's direction to agencies to avoid over-enforcement of regulations for organizations working in good faith to follow HHS and CMS direction during this national emergency. In support of Executive Order 13924 Regulatory Relief to Support the Economic Recovery, NHPCO submits the following regulatory and statutory recommendations that would promote job creation and economic growth.

**Regulatory Flexibilities that Encourage Economic Recovery**

1. **Hospice face-to-face encounters through telehealth to be permanent after the public health emergency**

   Section 3706 of the CARES Act (P.L. 116-136) allows providers to use telehealth to conduct face-to-face encounters prior to recertification of eligibility for hospice care during the public health emergency. Given the growing concerns related to the spread of COVID-19, use of technologies, where possible and appropriate, has helped limit the spread of the virus and addressed growing concerns among seniors around exposure risk that in-home visits may pose to these vulnerable patients and their caregivers. Under existing rules (including recent changes enacted under the CARES Act), the hospice face-to-face encounter may be conducted using telehealth, with both audio and visual capabilities, for the duration of this public health crisis. The additional flexibility to conduct this administrative task by telehealth has already made a direct impact on improving workforce shortage issues by allowing physicians and nurse practitioners to provide needed medical care to patients in addition to the face-to-face requirement.

   The Interim Final Rule with Comment (CMS 1744-IFC) published on May 8, 2020, amended the regulations at § 418.22(a)(4) on an interim basis to allow the use of telecommunications technology by the hospice physician or nurse practitioner (NP) for the face-to-face visit when such visit is solely for the purpose of recertifying a patient for hospice services during the public health emergency for the COVID-19 pandemic.

   **NHPCO Recommendations:** NHPCO recommends that CMS make the hospice face-to-face encounter delivered via telehealth permanent by:

   a. Supporting a provision to make Section 3706 of the CARES Act permanent, which would extend this telehealth flexibility beyond the duration of the public health emergency.
   b. Allowing the use of telehealth for the hospice face-to-face encounter at § 418.22(a)(4) permanently, beyond the public health emergency.

2. **Audio-only Advance Care Planning Services**

   Using its waiver authority, CMS has waived the requirements of section 1834(m)(1) of the Act and 42 C.F,R § 410.78(a)(3) for use of interactive telecommunications systems to

furnish telehealth services and allows the use of audio-only equipment to furnish services for some E/M codes. CMS states that some E/M services where "prolonged, audio-only communication between the practitioner and the patient could be clinically appropriate…," while in many cases the audio-only visits could be followed by a face-to-face visit. NHPCO believes that there are instances where, after the end of the pandemic, audio-only visits should remain an option. The advance care planning codes (99497 and 99498), found in the list of CMS Medicare telehealth codes, are among the codes that are categorized as audio-only for patient education during the pandemic. Discussions about a patient's wishes, goals of care, and advance care planning are being very successfully conducted through audio-only methods, and many providers report that these discussions are rich and often last longer.

**NHPCO Recommendation:** NHPCO recommends making permanent the inclusion of advance care planning codes, CPT 99497 and 99498, as services that can be delivered by audio-only communication between the practitioner and the patient. We are hearing from providers that this method of communication is successful, appropriate and is a way to involve the patient or their representatives in advance care planning discussions. We encourage CMS to make audio-only communication for these codes a permanent alternative, beyond the COVID-19 pandemic.

3. **Telehealth visits on hospice claim form**

NHPCO appreciates the additional clarification regarding hospice claims submission provided by CMS on the CMS Home Health and Hospice stakeholder calls, on which your staff confirmed that even the claim with no visits reported (because they were conducted through telecommunications) will process correctly in the system. We believe CMS should go a step further and maintain metrics on how many visits were conducted through telecommunications and what disciplines provided them, both during and after the public health emergency.

**NHPCO Recommendation:** NHPCO recommends that CMS develop and assign modifiers or specific billing codes for visits conducted through telecommunications so that visits can be recorded on the hospice claim form, both now and beyond the public health emergency.

4. **Telehealth services to be made permanent after the end of the public health emergency to enhance palliative care services**

Providers of palliative care around the country are utilizing telehealth waivers that have been issued via 1135 waiver authority and the CMS-1744-IFC, Medicare and Medicaid Programs; Policy and Regulatory Revisions in Response to the COVID-19 Public Health

Emergency to address workforce shortage issues, protect their workforce and provide consistent care during this public health emergency.

These waiver flexibilities also have benefits that extend beyond the public health emergency. Our members "see remote patient monitoring and telehealth not as a replacement for our in-home visits but as an extension of our services. It allows us to be there when the patient needs us most. Getting ahead of health events through data monitoring and virtual visits gives us the ability to provide better care which we believe will improve the patient experience."

**NHPCO Recommendations:** NHPCO recommends that CMS make the telehealth waiver flexibilities listed below permanent.

1. Waive limitations on the types of health care professionals eligible to offer telehealth services as indicated in the CMS FAQ on Medicare Fee For Service Billing;
2. Allow flexibility for originating sites as indicated in the CMS FAQ on Medicare Fee For Service Billing;
3. Allow new services to be added to the list of Medicare services that may be offered through telehealth as described in the list of CMS Medicare telehealth codes;
4. Allow greater flexibility for providers to furnish services through audio-only communication as allowed through the added CPT codes and described in the CMS FAQ on Medicare Fee For Service Billing; and
5. Allow rural health clinics and federally qualified health centers to serve as distant sites for telehealth per CMS-1744-IFC, Medicare and Medicaid Programs; Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency.

Extending these flexibilities beyond the public health emergency will address workforce shortage issues and provide patients with better care. Our providers have proven during this time that health care and family support services can be successfully delivered via telehealth as an extension to in-person visits.

5. **Hospice aide competency testing – using pseudo patients**

Using its waiver authority, CMS temporarily waived the requirements of 42 C.F.R. § 418.76(c)(1) to allow hospice aide competency testing to be performed using pseudo patients in lieu of the requirement for specific tasks to be evaluated by observing an aide's performance of certain tasks with a patient as indicated in the Hospice: CMS Flexibilities to Fight COVID-19. This modification allows hospices to utilize pseudo

patients such as a person trained to participate in a role-play situation or a computer-based mannequin device, instead of actual patients, in the competency testing of hospice aides for those tasks that must be observed being performed on a patient. The purpose of the waiver is to increase the speed of performing competency testing and allows new aides to begin serving patients more quickly without affecting patient health and safety during the public health emergency (PHE).

This waiver has been extremely beneficial in reducing the burden of scheduling direct patient observation placed on Hospices and the patients and families who would be asked to participate in the competency testing, especially for community-based hospices and has allowed for timely provision of aide services during the PHE.

On February 21, 2020, CMS issued CMS Transmittal R200SOMA, with permanent changes for home health agencies. The State Operations Manual Appendix B §484.80(c) Standard: Competency evaluation has been updated to allow home health agencies to perform initial home health aide competencies using a pseudo patient as stated below: *(b)(3)(i), (iii), (ix), (x), and (xi) of this section must be evaluated by observing an aide's performance of the task with a patient or pseudo-patient. The remaining subject areas may be evaluated through written examination, oral examination, or after observation of a home health aide with a patient, or with a pseudo-patient as part of a simulation.*

**NHPCO Recommendation:** NHPCO recommends making permanent the allowance for hospice aide competency testing at 42 C.F.R. § 418.76(c)(1) and at the State Operations Manual – Appendix M - Hospice, to be performed using pseudo patients. This recommendation is consistent with the regulations in place for Home Health Agencies as of February 21, 2020. This will allow hospice providers the ability to perform competency testing using methods that will facilitate timely service provision for hospice patients while validating competency of the care provided by hospice aides in an efficient and appropriate manner, without undue burden on hospice patients and families, especially for those hospice providing services in community-based settings.

**Innovative Care that Encourages Economic Recovery**

6. **Implement a community-based palliative care model**

The COVID-19 pandemic has had a profound impact on the quality of life and delivery of care for people living with serious illness and their families. Patients living with serious illness are at higher risk for poor outcomes and for complications from COVID-19 infection. For this population effective proactive management of their chronic and serious conditions while limiting exposure to infection is imperative. NHPCO along

with the National Coalition for Hospice and Palliative Care urges CMS to implement a community-based palliative care demonstration under the authority of the CMS Innovation Center (CMMI) to provide essential person-centered interdisciplinary care, in their homes, for people at increased risk for poor outcomes from COVID-19 due to social isolation and other factors.

Because a statutorily defined community-based palliative care benefit does not currently exist, this model would test an innovative reimbursement structure for an interdisciplinary care team to ensure the right care is provided at the right time. The model utilizes a pre-acute strategy, proactively identifying at risk individuals, aimed at improving outcomes and experience of care and reducing unnecessary or unwanted emergency department visits and hospitalizations. Of special significance, this model will address social determinants of health to improve outcomes for those living in under-resourced (i.e., inner city, rural) areas including minority populations who have experienced death and illness from COVID-19 at disproportionately higher rates.

If this model is implemented quickly, it has the potential to improve quality of life and outcomes that matter for our most vulnerable population as we prepare for future waves of COVID-19 cases. This model is explicitly intended to improve the quality of care for at-risk individuals, reduce the occurrence of preventable hospitalizations and ED visits, deploy limited workforce more effectively, enhance the use of telehealth and lower total costs of care. The COVID-19 crisis has driven this type of unprecedented innovation which NHPCO believes is necessary to support the unique needs of the seriously ill as the nation experiences a rapid transformation of our healthcare system.

**NHPCO Recommendation:** The hospice and palliative care community urges CMMI to join us in the fast-track development of a Community-Based Palliative Care (CBPC) Demonstration to provide essential interdisciplinary care, in their homes, for seriously ill individuals at increased risk for poor outcomes from COVID-19 and social isolation.

**Enforcement for Agencies Working in Good Faith to Follow the Law and Regulations**

7. **TPE and Other Audits**

Hospice providers are utilizing all possible resources to care for patients and families during this public health crisis while keeping their staff and patients safe to the extent possible. On any given day before the crisis, our community was facing a range of duplicative requirements, ineffective mandates, and bureaucratic processes that interfered with day to day operations of hospice providers and that had little or nothing to do with patient care through Targeted Probe and Educate (TPE) and other audits.

**NHPCO Recommendation:** As indicated in the Hospice: CMS Flexibilities to Fight COVID-19, NHPCO recommends a continued suspension of Targeted Probe and Educate (TPE) and other audits for at least twelve months after the public health emergency concludes to ensure providers are using 100% of their resources for patient care and not unnecessary administrative tasks.

8. **Hospice in Nursing Homes**

We have heard from hundreds of providers regarding their ongoing challenges with providing care to their patients who reside in nursing homes. NHPCO appreciates the CMS guidance that directs nursing homes to allow hospice workers to see their patients. Hospice providers remain committed to partnering with the nursing homes in their communities, to provide care to patients who are enrolled in hospice and to provide needed support to nursing home staff and other residents. That commitment will continue well beyond the end of the public health crisis.

**NHPCO Recommendation:** NHPCO recommends that CMS deem hospice workers in nursing homes as essential workers. We also recommend that when surveys resume after the end of the public health emergency, CMS will direct surveyors to review documentation thoroughly and to document hospice providers' attempts to see patients, their work with nursing home staff to assist with telehealth visits, and document the provision of care and support which hospice providers offered to not only the patients' families but also to the nursing home staff.

Thank you for your leadership and again for taking actions to reduce regulatory burden and improve flexibilities for health care providers during the pandemic. We appreciate the opportunity to provide comments and recommendations for flexibilities that should remain after the end of the public health emergency to promote economic recovery and growth and are available to meet to discuss any questions. If you have questions or would like to meet to discuss the recommendations, please contact Judi Lund Person, Vice President, Regulatory and Compliance at jlundperson@nhpco.org or Mark Slobodien, Director, Legislative Affairs at mslobodien@nhpco.org.

Sincerely,

Edo Banach, JD
President and CEO