

**PENNSYLVANIA HEALTH CARE ASSOCIATION/
CENTER FOR ASSISTED LIVING MANAGEMENT
2007 ANNUAL CONVENTION**

**Personal Care Home Compliance and the New Licensure Regulations:
Issues and Opportunities**

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**Critical Issues in the Licensing of Personal Care Homes
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Introduction

Following the adoption on April 23, 2005, of a comprehensive set of revisions to regulations governing personal care homes by the State Department of Public Welfare (the "Department" or "DPW"), significant changes have occurred and are continuing to occur in the manner in which personal care services are delivered to Pennsylvania residents.² The new rules modified the scope of services required to be provided by personal care homes and established new or substantially modified requirements for the licensing and inspection, physical facilities, staffing, admission and assessment of residents, the administration of medications, resident services and management of personal care homes.

Prior to implementation of the new personal care home regulations, in October 2004, there were 1,689 licensed personal care homes in operation with a resident capacity of 75,958 providing services to 53,240 residents. Of this total, 1,293 homes (77%) were operated by for-profit organizations and 396 homes (23%) were operated by nonprofit entities. As of October 2004, 317 homes served 8 or fewer residents (19%) and 1,372 homes served 9 or more residents (81%). Of the 53,240 residents in personal care homes in October 2004, a total of 10,425 residents (19.6%) received Supplemental Security Income ("SSI") benefits that were accepted as full payment towards the residents' monthly care. In contrast, by September 2007, the total number of licensed facilities dropped to 1,550, representing the closure of 139 facilities; resident capacity fell to 71,031, representing the availability of 4,127 service delivery slots; and actual occupancy fell to 50,288, resulting in the delivery of services to 2,960 fewer individuals. The most significant changes occurred with respect to the number of for-profit facilities, of which 171 or approximately 13% ceased operations, and in the number of SSI residents served, which

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² See 35 Pa.B. 2499 *et seq.* The revised rules replaced a set of regulations which had been in effect since August 28, 1981 without substantial modifications since September 20, 1991. 11 Pa.B. 2997 *et seq.*; 21 Pa.B. 4363 *et seq.*; 55 Pa. Code ch. 2620 (rescinded). An overview and summary analysis of the new regulatory requirements is provided in "The Changing Regulatory Climate for Assisted Living Facilities in Pennsylvania," PA Bar Institute Senior Housing Seminar, June 15, 2006, Raymond P. Pepe and Patricia C. Shea (www.klgates.com) (Newsstand/Author – Pepe, Raymond P./Presentations).

decreased by 1,534 residents or by approximately 14%. Whether this is attributed entirely or only partially to the imposition of these new regulations, the process for inspecting and licensing personal care homes under the April 2005 regulations is not yet complete. Thus, these new regulations are likely to continue to have a substantial ongoing impact on the management, operation, and financial viability of many personal care homes.

While in many areas the requirements of the new personal care home regulations are clear and explicit, where the requirements of new regulations are normative rather than prescriptive, a variety of challenges have been faced by facility operators and DPW. Uncertainty regarding how to interpret and apply new normative requirements has resulted in the issuance by DPW of a 173 page "Licensing Measurement Instrument," ("LMI") which has been revised on multiple occasions since its initial issuance. The most recent version of the LMI issued on August 10, 2007, advised facility operators of more than 60 different changes in interpretations of the personal care regulations being implemented by the Department. In addition, DPW has promulgated new mandatory forms for reporting incidents, requesting regulatory waivers, conducting pre-admissions screenings, preparing personal care assessments, developing support plans, and posting notices regarding resident rights. New training programs have also been developed for administrators, direct care staff, and personnel involved in medication management, and for the orientation of all new employees. The Department has provided recommended forms for use in recording resident financial transactions and quarterly account balances, training activities, fire drills, and medication administration and has promulgated a "recommended" resident agreement, the requirements of which are being treated as mandatory.

Without attempting to be comprehensive, some critical issues being confronted by personal care homes in complying with this new blizzard of regulatory requirements are reviewed and analyzed below.

Are Requirements Imposed by Guidance Documents, such as the LMI, and Model Forms Mandatory?

Administrative regulations represent an agency's exercise of delegated legislative power to create a mandatory standard of behavior.³ In order to adopt regulations, an agency must obtain the approval of the Attorney General and Governor's General Counsel, file the regulations for publication in the Pennsylvania Code and Bulletin with the Legislative Reference Bureau, and comply with the requirements of the Regulatory Review Act. Once regulations are properly published, they have the force and effect of law, are binding upon both the agency and regulated persons, and unless properly amended through the publication of new regulations, will not be set aside unless the agency in adopting the regulations acted unconstitutionally, outside the scope of its statutory authority, or in an arbitrary or capricious manner. Conversely, subject to minor exceptions, regulations not filed with the Legislative Reference Bureau for publication are declared by Pennsylvania law to be "not valid for any purpose."

Agency policies in whatever form promulgated that are not adopted as administrative rules, constitute "statements of policy." Statements of policy may be used by agencies to guide

³ *Chimenti v. Pennsylvania Dep't of Corrections*, 720 A.2d 205.

future actions, but may not constitute "binding norms" which mandate how laws apply to persons and effectively restrict an agency's discretion. Statements of policy which create binding norms constitute improperly promulgated administrative regulations and are not valid for any purpose. In contrast, an agency may utilize statements of policy to assist it in the implementation of its statutory responsibilities, but upon subsequent administrative or judicial review, an agency action taken based upon a statement of policy as opposed to a validly adopted regulation may be accepted or rejected by a reviewing administrative agency or court depending on how accurately the court determines the policy reflects the plain meaning of a statute. In issuing statements of policy in highly technical areas, however, courts will defer to the specialized expertise of administrative agencies.

To determine whether agency guidance documents not published as administrative regulations constitute valid statements of policy versus invalid regulations, courts consider: (1) how the agency itself describes the document; (2) the manner in which an agency implements the guidance document; and (3) whether the document in actual practice restricts the agency's discretion. A mere disclaimer by an agency that a particular policy does not constitute a regulation and is not binding upon either the agency or the public will not in itself shield a guidance document from being classified as an invalid administrative regulation. Similarly, the ability of an agency to waive or vary the requirements of a policy will also not in itself protect a guidance document from being classified as an invalid rule. Instead, an examination must be conducted of the manner and extent to which the guidance document is used to restrict agency action and whether and to what extent it substantially modifies or expands upon the requirements of validly published agency regulations.

As applied to requirements for the licensing of personal care homes incorporated into the Department's LMI and other forms and guidance documents, but not incorporated into the personal care home regulations, if upon review of final action taken by the Department's Adult Residential Facilities Office through the Department's Bureau of Hearings and Appeals ("BHA"), the BHA rules that the requirements contained in the LIM and other guidance documents are mandatory and may not be varied, the requirements almost certainly will constitute invalid administrative regulations. Conversely, if the Bureau of Hearings and Appeals reviews actions taken by the Adult Residential Facilities Office as if the LIM and other guidance documents had never been adopted, but instead determines whether standing alone the actions constitute a reasonable application of requirements of the Public Welfare Code and the Department's regulations, the requirements will most likely be treated as valid statements of policy.

Unfortunately, the issue is not necessarily this simple. As recently explained by the Commonwealth Court in *Eastwood Nursing & Rehab. Ctr. v. Dep't of Pub. Welfare*, 910 A.2d 134 (Pa. Cmwlth. 2006) appeal denied, 927 A.2d 626 (Pa. 2007), an agency policy not properly published as an administrative rule may constitute a binding norm, even if subject to waivers and exceptions and modification by the BHA, if it presently materially restricts the discretion of agency officials, or limits and restricts the factors taken into consideration upon review by the BHA, or if the policy substantially modifies or enlarges otherwise validly adopted regulatory requirements. Applying these tests, there are certainly numerous requirements contained in the LIM and other guidance documents issued by the Adult Residential Facilities Office that may potentially be subject to legitimate challenge.

How Can Disputes Regarding the Interpretation of the New Regulations Be Resolved?

There are several alternatives for resolution of disputes regarding DPW's interpretation of its regulations. These range from informal discussion to formal administrative appeal. The avenue for resolution may vary also depending on the nature of the disagreement and when it arises.

The Nature of the Dispute

When deciding how to approach a dispute over the application of a regulation in a particular circumstance, it is relevant to consider the nature of the dispute. Disputes may fall into several categories as follows:

- (1) A substantive disagreement over what the regulation requires or prohibits or what the most appropriate reading of the regulation should be;
- (2) A disagreement over how the Department is applying the regulation to a particular set of facts;
- (3) A dispute based on inconsistency in how the regulation is being interpreted or applied in different places or at different times;
- (4) A procedural or legal error in how the regulation is being interpreted, enforced or applied;
- (5) A dispute over in which category of violation the noncompliance should fall.

With respect to some of these issues, the Department enjoys significant deference to its position, e.g., in the interpretation of its own regulations and in the choice of sanctions. In other areas, the courts need not afford DPW any discretion, as, for example, in an interpretation of law (other than DPW's substantive regulations) or procedure.

In each of these disputes, there may be one approach to resolution that is most effective. In some instances, multiple approaches may be the most useful mechanism to obtain change. In addition, if more than one facility is challenging the same DPW action or interpretation, there may be other mechanisms for jointly challenging the activity.

Informal Discussion

The opportunity for informal discussion regarding interpretation of regulations starts as early as the date of the inspection, or even before. Before the inspection date, if the Department announces a particular interpretation, either through the LMI, or suggests an interpretation in another situation (e.g., at a training), the facility may want to ask about that interpretation and suggest a different approach. If the parties begin the discussion before the inspection, it allows the issue to be explored before DPW inspectors take an official position, at which time, the Department's view begins to become fixed and more difficult to change. The sorts of issues that most often arise at this time are substantive disputes over the interpretation of the regulation and what it requires. Raising these issues at the earliest possible time is appropriate because the

Department has tremendous discretion in this area and is fairly confident that any reasonable interpretation will be hard to challenge.

Once the inspection commences, DPW inspectors often will advise the facility during inspection of its findings so that the facility can begin to correct as soon as possible. If the facility disagrees with the inspector's statements regarding an alleged violation, management of the facility may begin immediately to discuss the matter with the inspector or the person in charge, if more than one inspector is present. Naturally, the matter should be approached respectfully without substantial debate, but even if the facility agrees to change as the inspector has suggested, it may continue to pursue other avenues for resolution.

For example, the exit conference presents an opportunity to further explain the facility's stance and any objections to DPW's view of a particular matter. Issues that may be relevant to present at this time include: (1) a different interpretation of the same regulation given by a different regional office, (2) an interpretation that is inconsistent with a prior inspection by the same regional office, (3) a substantive disagreement with what the regulation means, or (4) a substantive disagreement with how the LMI is being applied. Understand that this may not change the position of the inspectors on site, but may influence how the finding will ultimately appear (or not appear) in the summary of noncompliance to which the facility will be required to respond.

During or after the inspection, the facility may also contact the DPW Regional Office Director to discuss the issue. If the matter involves inconsistent interpretation among regional offices, it is likely more appropriate to try to resolve the matter through the central office of Adult Residential Facilities, in Harrisburg. Alternatively, the Department of Public Welfare's legal office may assist with issues that involve a legal or procedural issue, as opposed to a disagreement over policy interpretation. Because the legal office operates somewhat independently from the Department program offices, the lawyers may recognize that early resolution of an issue, particularly a procedural or legal matter, could be in the best interest of all parties.

A final avenue for informal review involves going outside the Department to a legislative representative or the Governor's Office. This option should be used sparingly for the most egregious activity of the Department for at least two reasons: (1) if a facility pursues every disagreement with DPW in this manner, the representatives or senators and their staff, as well as the Governor's Office will begin to take these complaints less seriously, and (2) the facility will gain an unfavorable reputation with the Department. Nonetheless, there may be times when the Department's unreasonable action warrants correction through a more objective party, without the expense of challenging the action in court. In these instances it may be helpful to involve your statewide trade association, which maintains relationships across the Administration and General Assembly and may have an understanding of the impact of the Department's position on facilities across the state.

If the facility is unsuccessful in avoiding a finding of noncompliance in the area of dispute, it may have an option of filing an administrative appeal, but only if the finding itself, or in combination with other areas of noncompliance, results in an adverse action to the agency. Prior to an adverse action taking place, however, the facility must file a plan of correction. The

Commonwealth Court has determined that a plan of correction may constitute an admission of a violation of the regulation.⁴ This conclusion restricts the ability of the facility to challenge the finding of a deficiency in a later appeal. Thus, if a facility anticipates that it may challenge the DPW finding on appeal, it should include in its submission of the plan of correction a statement that the plan of correction does not admit to any violation, but is being offered to respond to the Department's findings, with a reservation to challenge the interpretation later if necessary. This statement can be made through a cover letter to the plan of correction.

Formal Appeals

A facility may appeal the following decisions of the Department:

- (1) The denial of a license (certificate of compliance).
- (2) The nonrenewal of a license.
- (3) The revocation of a license.
- (4) The issuance of a provisional license.
- (5) The length of time for which a provisional license is issued.
- (6) The reduction in the maximum capacity of the facility.
- (7) The denial of an increase in the maximum capacity of the facility.
- (8) The imposition of a monetary penalty.

55 Pa. Code §§ 20.81, 2600.263. Appeals from these actions proceed before the BHA under the General Rules of Administrative Practice and Procedure at 1 Pa. Code §§ 31.1 – 35.251. 55 Pa. Code § 2600.12. Appeals from the BHA may be taken to the Commonwealth Court of Pennsylvania.

The Department may revoke or fail to renew a full license, in which case residents must be transferred and the facility must be closed. If the Department issues a provisional license after revoking or failing to renew a full license, the facility may continue to operate while it seeks to achieve full compliance. The Department rarely fails to renew a full license without issuing a provisional license, unless the noncompliance is substantial, resulting in immediate harm to residents, or where there has been a pattern of compliance and noncompliance that causes the Department to believe that the facility is unable to maintain full compliance for any consistent period of time. The Department is obligated not to renew a provisional license if the facility has had four consecutive provisional licenses over a period of two years and remains out of full compliance with the regulations. 62 P.S. § 1008. Revocation of a license in the middle of

⁴ *Com., Dep't. of Health v. Brownsville Golden Age Nursing Home, Inc.*, 520 A.2d 926, 936, n. 6 (Pa. Cmwlth. 1987), appeal denied, 529 A. 2d 1083 (Pa. 1988).

a licensure period is usually reserved for the most serious cases, including but not limited to, fraud, gross incompetence or misconduct in operation of the facility, or abuse of residents.

A common complaint is that the Department is treating a particular facility unfairly and different from other facilities. If the Department's action seems unduly severe in light of the noncompliance at issue, the Department may be acting arbitrarily or abusing its discretion. Whether an action by the Department in a particular case is consistent with past enforcement activity of the Department is sometimes relevant to the appeal, but more often can be a "red herring." First, it may be difficult to gather information on past similar citations by DPW that do not result in an adverse action or result in a more lenient action. Second, the Department can attempt to distinguish prior decisions through the applicable facts. Prevailing on an abuse of discretion argument under these circumstances is not likely to occur until the appeal reaches Commonwealth Court, if at all. In addition, at least as the Department begins to enforce its new set of regulations, it will maintain that it is operating to some extent on a clean slate without the history of applicable past enforcement activity to which its actions may be compared.

If an appeal is filed, consideration should be given to obtaining a stay of the action. Appeals of Departmental decisions regarding the revocation of a personal care home license do not act as a stay of that decision, although the entity responsible for reviewing the action may grant a supersedeas. 62 P.S. § 1057.1. Thus, if an appeal is filed, obtaining a stay of the decision avoids the imposition of the sanction prior to resolution of the dispute. In some cases, this may be unnecessary, or it may be difficult to obtain. For example, the imposition of a provisional license might be an injury to reputation, but it would be difficult to argue that it cannot be imposed while an appeal is pending because the facility may continue to operate.

An appeal may be filed from the issuance of a provisional license. However, what often occurs in these cases is the return of the full license prior to resolution of the underlying dispute. DPW may contend that a matter becomes moot once the full license is restored. However, the Commonwealth Court overruled that position by the Department in a case that involved the issuance of a provisional license and a reinstatement of a full license back to the date that the provisional license was issued.⁵ The Court stated that the appellant had "a significant stake in the outcome of its appeal to the extent that it desired a final resolution as to whether the Department's gross negligence finding, which formed the basis of the issuance of the provisional certificate, was inappropriate."

What Sanctions May Be Imposed for Non-Compliance With New Regulatory Requirements?

Since much of the Department's authority for enforcement stems from the Public Welfare Code, the sanction authority has not changed substantially with the promulgation of the new rules. However, the experience of most facilities is that the Department is taking longer with inspections and is citing noncompliance with greater frequency and in a more detailed fashion. It is anticipated that DPW will use its array of penalties more fully than it had under the old

⁵ *Erie Homes for Children & Adults v. Dep't. of Pub. Welfare*, 833 A. 2d 1201 (Pa. Cmwlth. 2003).

regulations, after the period of adjustment and implementation of the new regulations is completed.

The Public Welfare Code requires the Department to assign a classification to the violation of its regulations, as follows:

- Class I – A violation which indicates a substantial probability that death or serious mental or physical harm to any resident may result;
- Class II – A violation which has a substantial adverse effect upon the health, safety or well-being of any resident;
- Class III – A minor violation which has an adverse effect upon the health, safety or well-being of any resident.

62 P.S. § 1086, 55 Pa. Code § 2600.261.

Failure to satisfy the statutory and regulatory requirements exposes the personal care home operators to monetary penalties. *See* 62 P.S. § 1086(a). The regulations provide that the Department "will assess a penalty for each violation of this chapter." 55 Pa. Code § 2600.262(a). The penalty will vary depending on which classification the Department has given to the cited violation. The penalty begins accruing from the date on which the Department issued a citation to the facility until the date on which the violation is corrected. 55 Pa. Code § 2600.262(b). The Department provides a grace period for correction of Class II and Class III violations. For a Class II violation, the penalty is suspended for five (5) days from the date of the citation if the personal care home corrects the violation within that time. For a Class III violation, the facility has fifteen (15) days to correct before the penalty is imposed.

The amount of the penalties is based on the classification of the violation, as follows:

- Class I - \$20 per resident per day for each Class I violation assessed from the date of the citation.
- Class II - \$5 to \$15 per resident per day for each Class II violation assessed from the date of the citation, unless the violation is corrected within five (5) days.
- Class III – Up to \$3 per resident per day for each Class III violation assessed from the date of the citation; unless the violation is corrected within 15 days of the citation.

Penalties must be paid within thirty (30) days of notice of the violation and the assessed penalty. 62 P.S. § 1085(f), 55 Pa. Code § 2600.262(h). Operators of personal care homes that plan to appeal the penalty and/or the fact of the violation still must forward the assessed fine, not to exceed \$500, to the Secretary of the Department. A letter to the Secretary constitutes the appeal. The penalty will be placed into an escrow account until the appeal is concluded. All or part of the assessment may be refunded where the infraction is found not to have occurred or the amount of the penalty is otherwise reduced. A personal care home that fails to forward the assessment or the notice of the appeal within thirty (30) days waives the right to such an appeal. 55 Pa. Code § 2600.263.

The Public Welfare Code expressly directs the Department to promulgate regulations to ensure that the implementation of the penalties is both uniform and consistent. 62 P.S. § 1086(h).

The Department "shall" temporarily revoke the license of a personal care home if it fails to correct one or more Class I violations within 24 hours of the issuance of the citation or if it fails to correct one or more Class II violations within 15 days of the issuance of the citation. 62 P.S. § 1087, 55 Pa. Code § 2600.266(a). The revocation may be terminated in the event that the personal care home corrects the violation. A temporary revocation of the license can have long-range effects on the owners and operators of the personal care home. If the personal care home is not successful in getting a new license issued within three months, the revocation shall continue for a minimum of 5 years. 55 Pa. Code § 2600.266(e).

The Department may also revoke or refuse to renew a license when the personal care home has been cited for a Class I violation on two or more separate occasions during any two-year period. 55 Pa. Code § 2600.266(f).

The Department also will ban admissions to a home when:

- For any Class I violation.
- For any Class II violation that remains uncorrected without good cause five (5) days after being cited for the violation.
- When a license has been revoked or not renewed.

In certain cases, the Department may petition the court to appoint a master to assume operations of the personal care home. 62 P.S. § 1057.1. The master would be responsible for correcting or otherwise addressing the violations. This may occur when "without good cause" there is one or more Class I or Class II violations that have remained uncorrected "or when the home has demonstrated a pattern of episodes of noncompliance alternating with compliance over a period of at least two years such as would convince a reasonable person that any correction of violations would be unlikely to be maintained..." *Id.*

What Is Required In Fire Safety Inspections and Compliance Reports?

One of the most vexing problems for many personal care homes undergoing re-licensing under DPW's new regulations involves the requirements of 55 Pa. Code §§ 2600.14 and 2600.132 to obtain a written "fire safety approval" and documentation of an "annual fire safety inspection and fire drill conducted by a fire safety expert." Facility operators have often complained that to obtain documentation satisfactory to DPW, they have been required to conduct expensive facility modifications, including some modifications that seem to have little practical benefit in enhancing resident safety. In addition, facility operators have noted difficulties in obtaining professional opinions regarding a safe "fire drill evacuation time" and a "fire safe area" to which evacuations must be conducted. These problems have been compounded by DPW's policies as set forth in the LIM for implementing:

- Restrictions on the use of locking devices on "doors used for egress routes" as required by 55 Pa. Code § 2600.121(b) which the LIM applies to any door that "appears to be an exit;"
- Requirements that all building have at least two independent and accessible exits from every floor "unless regulated by the Department of Labor and Industry, the Department of Health, or the appropriate local building authority" set forth in 55 Pa. Code § 2600.122 which the LIM appears to interpret as always requiring multiple exits that conform to standards suitable to DPW even if approval has been obtained from the Department of Labor Industry or the local building authority unless a waiver is granted by DPW, and;
- Requirements that a smoke detector be located within 15 feet of each bedroom door established by 55 Pa. Code § 2600.130 which the LIM require to be measured from the center of each doorway.

The difficulty with DPW's standards for interpreting and applying its personal care home rules is that the requirements set forth in the LIM are not included in the Department's regulations and conflict with requirements imposed by the Uniform Construction Code Act. For example:

- Requirements for the conduct of fire drills are set forth in the Universal Fire Code and do not mandate a fire safety expert to calculate safe evacuation times or to evaluate the suitability of fire safe areas to which evacuations must occur. Instead, "areas of refuge" designated during building construction plans are deemed suitable as evacuation zones. UFC, §§ 404, 405 & 1007.6
- Procedures for granting exceptions from specific fire safety building design requirements for existing structures are set forth in the Universal Fire Code and typically rely on technical equivalency review procedure, which if satisfied eliminates the need to retrofit buildings. UFC, § 104.8; National Fire Protection Association's *Alternative Approaches to Life Safety* (Standard 101A). By reserving to itself the ability to grant waiver requests from the two evacuation route requirement of 55 Pa. Code § 2600.122, and limiting the period of time for which waivers may be applied, DPW is assuming a technical responsibility it is not equipped to properly perform and is impermissibly mandating the retrofitting of structures that may have been found to be equally safe as those complying with its prescriptive design requirements.
- The Universal Fire Code clearly distinguishes between "means of egress doors" for evacuation purposes versus other doors and distinguishes between the two by require the display of illuminated exit signs. UFC, § 1008/
- The Universal Fire Code also includes detailed standards for the installation of smoke detectors. UFC, § 907.2.10. While DPW has the authority to establish a 15 foot standard for implementing the Universal Fire Code's requirement that smoke detectors be placed "on the ceiling or wall outside each separate sleeping area in the immediate vicinity of bedrooms," the mandate that the maximum 15 foot distance between bedrooms and doorways always be measured from the center of each doorway may conflict with other

design technical design standards and may impose significant costs of facility operators with little practical fire safety benefit.

While generally regulations adopted pursuant to the Pennsylvania Construction Code Act preempt requirements imposed by other state or local agencies, the Department of Public Welfare is authorized to adopt and enforce regulations that exceed the requirements of the Construction Code Act. 35 P.S. § 7210.104(d)(4). As a result, DPW has the statutory authority to adopt regulations which supercede requirements of the Universal Fire Code. Where the Department has not expressly done so by regulation, however, it may not do so by policies incorporated into the LIM. Unfortunately, in most instances it is not cost effective or practical to challenge on a case-by-case basis DPW's imposition of these additional mandates.

How Much Flexibility Exists In Medication Management Procedures?

As compared to the one regulation that existed under the prior regulations, there are now a set of eleven regulations under medication management at sections 2600.181-2600.191. The LMI discusses these sections with 15 pages of explanation. In addition, portions of other regulations touch on medication administration, including section 2600.42 (Specific rights), section 2600.141 (Resident medical evaluation and health care), and section 2600.227 (Development of the support plan). Thus, the short answer to this question is that DPW has not allowed much room for flexibility in the area of medication management.

Granted, this is an area where a mistake can lead to substantial harm, and even death. For that reason, no responsible facility should take the task of medication administration lightly. Nonetheless, the level of detail provided on this subject, and the expectation by DPW that no variance from the process is permitted, results in regulation of this area that is more extensive than in hospitals or nursing facilities.

Despite the prescriptive nature of these requirements, some of the language of the regulations and LMI remains vague. For example, the facility, through the resident assessment must determine whether the resident will self-administer his/her medications or receive assistance with medication administration from the facility. 55 Pa Code §§ 2600.141(a)(7), 2600.181(c), 2600.227(e). The medical evaluation (Form MA-51) gives the clinician the opportunity to check "self," "under supervision", or "no" in response to the statement "Patient is capable of administering his/her own medications." According to the LMI, if the clinician checks "self" or "no", the assessment must be consistent with the MA-51. The LMI also states: "Unless the MA-51 form is checked 'under supervision', the assessment can state other information." LMI, p.137. This explanation highlights the fact that sometimes rather than adding clarity, the LMI can confuse the issue and potentially even cause noncompliance because it can be interpreted in different ways.

In some instances, the explanation only goes so far, leaving certain questions open to differing views by the inspectors. For instance, if it is determined that an individual may self-administer medications, the LMI provides in explanation: "Self-administration permits the following activities (and ONLY the following activities) to be done by the staff: store the medication, remind the resident to take his/her medication, bring the medication to the resident and open the container." Further, the resident must do the following: "[R]ecognize his/her

medication, know the dosage (how many or how much), remove the medication from the container, take/apply the medication and know when the medication must be taken (with only occasional reminders)." The inspector is to determine compliance with these provisions by direct observation, record review and interview. LMI pages 136-137. It is unclear what a facility should do if a resident begins to ask questions about the medication and what it is for. Can the facility expect that if a resident is interviewed by an inspector about his medications and does not supply all of the answers correctly that the facility should not be allowing self administration by that individual? Clearly, reason would dictate that the facility needs to monitor the situation so that if a resident's ability to self administer seems to be going down hill, then a re-assessment is warranted. At what point DPW would expect that to happen, despite the rather rigid details of the LMI, is not clear.

Section 2600.182(c) requires very specific steps for administration of medication for patients who receive this assistance. Facilities report that recording of the time and taking of the medication must occur after each medication is administered, rather than completing documentation after each resident's medication is provided or after a number of residents receive their medications at a central office or station. DPW will cite a deficiency since the regulation requires the time of medication administration, and the record cannot be completed accurately after the fact. If a medication record lists a particular time that the medication is administered, however, the staff person may simply initial the record, which indicates that the medication was administered within sixty minutes either before or after that time indicated in the record. (LMI, p.145).

One area of the regulations that provides some ability of the facility to dictate its own operation is in the area of medication packaging system and choice of pharmacy. The resident may choose his/her pharmacy according to section 2600.42(y), but regardless of whether the facility is assisting with self-administration or is providing medication administration services, it may require a resident to choose a pharmacy that is capable of meeting the facility's policies for packaging of medications. (LMI, p.59). Since the resident's choice of pharmacy is limited by this condition, the home should provide the residents with a list of acceptable pharmacies upon admission and allow the resident to choose from that list.

What Issues Need To Be Considered In Modifying Resident Agreements?

In the same manner as provided by the prior rules, the new personal care home regulations require that prior to admission, or within 24 hours of admission, a written contract must be executed between a resident and a personal care home that is signed by the administrator or the administrator's designee, the resident, the payer, and (with the resident's consent) the resident's "designated person" and the contents of the agreement must be reviewed with and explained to the resident and any designated person. 55 Pa. Code § 2600.25(a) & (b). The resident agreement is required to:

- State the amount of a resident's personal needs allowance (if the resident receives SSI). 55 Pa. Code § 2620(c)(1).

- List the actual amount of allowable charges for each of the home's available services, including the method of payment for long-distance calls and bed hold charges. 55 Pa. Code § 2620(c)(2), (5) & (12).
- Explain the annual assessment, medical evaluation and support plan requirements and procedures. 55 Pa. Code § 2600.25(c)(3).
- Designate the party responsible for payment. 55 Pa. Code § 2600.25(c)(4).
- State the conditions under which refunds will be made, including refunds of admission fees and refunds upon a resident's death. 55 Pa. Code §§ 2600.25(c)(6), 2600.28.
- Specify "financial arrangements" if assistance with financial management is provided to residents. 55 Pa. Code § 2600.25(c)(7).
- Specify the home's rules, including whether the home permits smoking by residents. 55 Pa. Code § 2600.25(c)(8).
- Set forth the conditions under which an agreement may be terminated, including home closure procedures, and grant residents at least 30-days written notice of any requests to change the terms of a contract. 55 Pa. Code §§ 2600.25(c)(9) & (10), 2600.228.
- List the personal care services to be provided to a resident based upon the resident's support plan, the actual rates the resident will be periodically charged, and how, when and by whom payments must be made. 55 Pa. Code § 2600.25(c)(10).
- Explain the residents' rights and complaint procedures. 55 Pa. Code § 2620(a)(13).
- Prohibit the retention by a home of more than one-half of any Senior Citizens Rebate and Assistance Act payments received; designate how any financial management services associated with the handling of assistance received will be provided; and provide that if a home assists a resident in applying for assistance, no charges may be imposed for filling out paperwork. 55 Pa. Code § 2600.25(d).
- Allow contracts to be rescinded in writing for up to 72 hours after initial signature with payment only for actual services provided. 55 Pa. Code § 2600.25(e).
- Prohibit the assignment of assets in return for a life-care contract. 55 Pa. Code § 2600.25(f).
- Specify that services will be available every day of the year. 55 Pa. Code § 2600.25 (h).

In implementing these requirements, the LIM requires the execution of new contracts to replace contracts in effect before October 24, 2005, upon any rate changes or for the first cost-of-living adjustment to SSI or VA benefits after October 24, 2005. The LIM also mandates new contracts upon a change in ownership of a facility "as soon as closing takes place," and prohibits the execution of new contracts in advance of any change in ownership. While as a practical matter, most residences may elect to conform to these requirements, the retroactive impairment contract right is highly questionable, especially when mandated by mere agency guidance documents. The limitation upon the assignment of agreements to new owners without the consent of residents appears to lack any valid constitutional, statutory or regulatory basis.

The LIM also materially supplements the requirements of 25 Pa. Code 2600.25 in the following areas:

- Contracts are required to include any permissible reasons for home-initiated discharge pursuant to 25 Pa. Code § 2600.228 and any conditions under which the resident may terminate the agreement which are "recommended" to repeat verbatim the grounds for termination.
- Contracts are required to set forth the resident's right to relocation advice and assistance pursuant to 25 Pa. Code § 2600.42.
- If contracts specify differing rates for varying levels of care, 30-day advance notice is not required for an increase in rates associated with the movement of a residence to a different level of care, but it is "recommended" that residents be provided 30-days notice of a change in room location, except where there are "life safety concerns."
- Upon the completion of support plans, the list of actual services to be provided to a resident is required to be attached to the contract, and any revisions to support plans must also be attached to resident agreements, including changes associated in rate changes, and also reflected in any other copies of the support plan maintained by a facility.
- Resident rights must be listed in contracts verbatim unless incorporated into agreements by attachment of DPW's resident rights poster.

To implement these requirements, DPW has published a "model" resident agreement. While the LIM expressly states that use of the model agreement is not required, many inspectors are citing homes for failing to comply with personal care home regulatory requirements if the form is not utilized. While superficially unreasonable, this requirement may not be problematic because DPW's model form can be appended to a resident agreement as an exhibit and for the most part consists of provisions generally not subject to variation.

Numerous other issues, however, should also be considered in drafting and modifying agreements to comply with the new regulations, and DPW's mandate for the execution of

- When, how and to what extent are late charges and interest assessed?

- How should advance directives and durable powers of attorney be reflected in resident agreements?
- Should provisions be included in agreements specifying the extent to which the confidentiality of information will be maintained and allowing the disclosure of information regarding residents to third parties in designated circumstances?
- Should limitations on liability, especially related to the loss of damage of resident property be provided in agreements?
- Should agreements clarify the extent of a resident's responsibility for damage to property and allow the assignment of claims against residents to insurance carriers?
- Should residents be mandated to maintain various types of insurance coverage for liability?
- Should agreements specify requirements for the removal of property from a residence promptly following the death of a resident and specify how any abandoned property may be disposed?
- What requirements are imposed regarding medication management, including contractual arrangements with pharmacies?
- What procedures are required relating to the absence of residents from a home, including check-in and check-out requirements?
- Should agreements specify how services, such as meals, will be provided to guests?
- How are resident handbooks and facility rules incorporated into agreements?
- To what extent should limitations upon the use of homes be specified in agreements, such as the use of homes to conduct commercial activities and the operation of equipment that may be hazardous to a facility (such as certain types of appliances)?
- How should DPW's standardized complaint procedures be supplemented and should mediation and/or arbitration be mandated?
- Should agreements clarify that they do not convey any property rights to residents, including landlord tenant rights?
- Should assignments of rights by residents be prohibited and should homes be authorized to assign their rights, including payment rights, to third parties, and should resident agreements be subordinated to mortgages?

- To what extent should agreements clarify the right of operators to inspect apartments to ensure their proper maintenance and safety?
- Should agreement clarify the extent of the responsibility of residents for their own health care and to authorize facilities to incur charges for emergency services?
- Should residents be required to keep homes informed about relevant changes to their health care status?
- Should agreements specify what measures homes will take in the event of natural disasters and should any provisions be included in agreements to facilitate coordination with families to assist in evacuations where time and circumstances allow?

How Are Financial Charges to Residents Affected by the New Regulations?

While 25 Pa. Code § 2600.25(2) requires a fee schedule for each of the home's available services, the LIM allows charges for room and board to be combined and charges for standard items provided to all residents included within the room and board charge, provided each standard serviced is designated and "the contract clearly states that these items are part of the standard monthly room and board rate." The LIM further states that while "basic personal care services," *i.e.*, "dressing, bathing, eating, etc.," may be included within the room and board charge, any "supplemental service," such as laundry, cable TV, private telephone lines, medical administration fees, and private room changes, must be separately stated.

To comply with these requirements, care must be taken in the specifying of the scope of services included within basic fees and authorization should be expressly provided for the recovery of unusual or extraordinary charges, such as payments for emergency medical services.

Has DPW Exceeded the Scope of Its Regulatory Authority?

Agencies generally may only adopt regulations pursuant to a statutory grant of authority providing "clear and unmistakable language setting the exact bounds of the statutory grant."⁶ While an agency's authority to promulgate regulations may be determined to be implicitly rather than explicitly provided by enabling legislation, in order to determine that an agency has been impliedly provided rulemaking authority by a law, the implication must be "manifest."⁷

In 1967, the Department of Public Welfare was directed by 62 P.S. § 211 to develop a state plan and regulations governing personal care homes pursuant to the authority provided by Article IX and X of the Public Welfare Code to regulate nonprofit and for profit homes for adults which provide personal care and services. In addition, at that time the Department was further

⁶ *Volunteer Firemen's Relief Association v. Minehart*, 425 Pa. 82, 227 A.2d 632 (1967); *Pennsylvania Medical Society v. State Board of Medicine*, 546 A.2d 720 (Pa. Cmwlth. 1988).

⁷ *Pennsylvania Association of Life Underwriters v. Department of Insurance*, 482 Pa. 330, 393 A.2d 1131 (1978).

directed by 62 P.S. § 213 to adopt regulations governing the knowledge, education and training of personal care home administrators and direct care staff.

Article IX of the Public Welfare Code, at 62 P.S. § 911 generally authorizes the Department to adopt regulations for the "visitation, examination and inspection of all supervised institutions" and relating to their "buildings, grounds, premises and equipment thereof . . . , and all and every other matter relating to their usefulness, administration, and management, and to the welfare of . . . those residing therein." More specifically, with respect to institutions furnishing food and shelter to three or more persons unrelated to the proprietor, and which provide some care or services "beyond the basic provisions of food, shelter and laundry," including "boarding homes for adults which provide personal care and services," the Department is required by 62 P.S. § 921 to "establish standards for the safe and adequate care of individuals, not inconsistent with the laws of this Commonwealth and the rules and regulations of . . . [other] departments . . . [which set forth] adequate and proper provisions for (i) fire protection, (ii) water supply and sewage disposal, (iii) sanitation, (iv) lighting and heating, (v) ventilation, (vi) safety, (vii) equipment, (viii) bed space, (ix) keeping of records of identification of residents in the institution and their next of kin, of medical care provided and all pertinent admission and discharge data, and (x) humane care."

Article X of the Public Welfare Code, at 62 P.S. § 1021, authorizes the Department "to adopt regulations establishing minimum standards for building, equipment, operation, care, program and services and for the issuance of licenses" for personal care home. In addition, pursuant to 62 P.S. 1057.3, the Department is required to adopt regulations for personal care homes which require that (1) residents not be admitted until an initial standardized assessment has been completed to determine the level of the residents' needs and to ensure that other long-term care settings are not more appropriate for residents; (2) residents receive medical examinations before being admitted or within 30 days of the admission, and thereafter, receive an annual medical examination; (3) residents will be transferred to another appropriate facility when the resident's care needs can no longer be met in a personal care home; (4) notice be provided to residents of "Class I" (*i.e.*, those with a "substantial probability" of causing death or "serious harm" and "Class II" violations (*i.e.*, those with a "substantial adverse effect upon . . . health, safety or well-being") within five days; (5) charges for rent and personal care be disclosed through a "standard written agreement;" (6) charges not be imposed upon SSI recipients for more than their actual monthly income after subtracting a personal needs allowance of not less than \$25, more than one-half of any funds a resident may receive pursuant to the Senior Citizens Rebate and Assistance Act, or any portion of lump sum awards, gifts, or inheritances, gains from property sales, or retroactive government benefits, other than those which retroactively cover periods of time during which the recipients resided in a personal care home; (7) SSI recipients be provided with personal hygiene items and personal laundry services at no additional charge; (8) residents may freely leave and return from a home and have visitors, telephone access, mail and to participate in religious activities; and (9) powers of attorney or guardianships on behalf of residents not be granted to personal care home owners, administrators, or employees. Article X of the Public Welfare Code, at 62 P.S. § 1086, also directs the Department to adopt regulations for the uniform assessment of penalties.

While these sources of statutory authority provide relatively broad authorization to DPW to adopt regulations governing the operations of personal care homes, where explicit

authorization is provided to adopt regulations in particular areas, pursuant to a rule of statutory construction known as "*expressio unius est exclusio alterius*," it is generally recognized that "where certain things are specified in a law, omissions should be understood as excluded."⁸ Furthermore, general grants of regulatory authority contained in a statute (such as provisions of 62 P.S. § 911 authorizing the Department to adopt regulations relating to "all and every other matter relating to [the] usefulness, administration, and management" of personal care homes) provided either before or after more specific grants of authority (such as provisions of 62 P.S. § 911 authorizing the Department to adopt regulations relating to the "buildings, grounds, premises and equipment" of personal care homes), are construed pursuant to the statutory construction doctrine of "*ejusdem generis*" as only including matters similar in nature of "the same class and kind" to those specifically identified.⁹

Applying these principles, the Department may only adopt regulations pertaining to:

- The knowledge, education and training of personal care home administrators and direct care staff.
- Buildings, grounds, premises and equipment.
- Fire protection, water supplies, sewage disposal, sanitation, lighting and heating, ventilation, safety, equipment, bed space, resident records, and "humane care."
- Initial assessments, medical exams, resident transfers, resident notifications regarding violations, the disclosure of charges in resident agreements, SSI recipients, and powers of attorney and guardianships.
- The rights of residents to freely leave and return from a home and have visitors, telephone access, mail and to participate in religious activities.
- Penalty assessments.

⁸ See e.g., *St. Elizabeth's Child Care Ctr. v. Dep't of Pub. Welfare*, 895 A.2d 1280, 1282 (Pa. Cmwlth. 2006) petition for allowance of appeal granted, 919 A.2d 960 (Pa. 2007) (provisions of Article IX of the Public Welfare Code authorizing the Department to visit, examine, inspect and establish standards for the operation of for-profit and not-for-profit child day care centers and provisions of Article X of the Code prohibiting the operation of for-profit child day care centers without a license issued by the Department, did not authorize the Department to adopt rules requiring a "certificate of compliance" for the operation of a not-for-profit child day care center).

⁹ See e.g., *McClellan v. Health Maintenance Organization of Pennsylvania*, 546 Pa. 463, 686 A.2d 801, 806 (Pa. 1996) ("general expressions ... that precede [or follow] a specific list of included items should not be construed in their widest context, but apply only to persons or things of the same general kind or class as those specifically mentioned in the list of examples").

Outside of these areas, requirements contained in the Department's regulations may be subject to potential challenge. As a result, legitimate questions may exist regarding whether the Department's regulatory requirements regarding minimum staffing requirements; medication management; the provision of financial services to residents; resident rights unrelated to leaving and returning to facilities, communications and religious activities; resident contracts; and regulations pertaining to resident charges unrelated to disclosure constitute similar matters of "the same class and kind" as the areas in which the Department is provided regulatory authority.

How Will the Implementation of Assisted Living Regulations Affect Personal Care Homes?

The act of July 25, 2007 (P.L. __, No. 56) (Senate Bill 704, Printer's No. 1272, signed into law as "Act 2007-56") amends the Public Welfare Code to provide for the licensing of assisted living facilities authorized to provide "supplemental health care services" in addition to personal care.¹⁰ While the new legislative measure will not provide for the issuance of assisted living facility licenses until the Department of Public Welfare publishes final regulations in the Pennsylvania Bulletin, and expressly provides that, "Nothing in this act shall be construed to alter existing statutory or regulatory requirements pertaining to personal care homes until regulations required by this act are published,"¹¹ the legislation has the potential to significantly affect both the operations of personal care homes that seek supplemental authorization to provide assisting living residential services, as well as facilities that elect to continue to be licensed only as personal care homes.

Supplemental health care services are defined broadly to encompass all types of health care, whether provided directly or through contractors, subcontractors, agents or designated providers, not required by law to be provided by a facility licensed pursuant to the Health Care Facilities Act, so long as the services can be provided in a manner that is "duly protective of the health, safety, and welfare of residents." While personal care homes are not authorized to provide such services, personal care homes may "assist residents in obtaining health care services in the manner provided by 55 Pa. Code §§ 2600.29 (relating to hospice care and services), 2600.181 (relating to self-administration) through 2600.191 (relating to medications) *or as otherwise provided by regulations adopted by the department* not inconsistent with [§ 1057.3(a)(13) of the Public Welfare Code as amended by Act 2007-56]." (Emphasis added.)

¹⁰ Except with approval of the Department, however, assisted living facilities may not admit individuals who are ventilator dependent, have Stage III or IV decubiti or vascular ulcers not in the healing stage, require continuous intravenous fluids, nasogastric tubes, restraints, or continuous skilled nursing 24-hour per-day nursing care, or reportable infectious diseases unless the Department of Health directs that isolation occur within the facility. In particular, with the approval of the Department, assisted living facilities may, in conformity with standards established by regulations adopted by the Department, admit, or serve residents requiring gastric tubes; tracheostomies; continuous skill nursing on a temporary or intermittent basis; sliding scale insulin administration; intermittent intravenous therapy; insertions, sterile irrigation, and the replacement of catheters; oxygen; and inhalation therapy.

¹¹ Act 2007-56, §§ 10, 11.

Under current regulations, in addition to being authorized to provide hospice services if licensed as a hospice by the Department of Health and to provide medication management services as provided by 55 Pa. Code §§ 2600.29, 2600.181 – 2600.191, pursuant to 55 Pa. Code §§ 2600.142, 2600.143, 2600.161, & 2600.227, personal care homes are also required to:

- "assist the resident to secure preventative medical, dental, vision and behavioral health care;"
- "assist the resident to secure medical care if the resident's health declines;"
- "document the resident's need for medical care;"
- make "reasonable efforts" to obtain the resident's consent for treatment "[i]f a resident has a serious medical or dental condition;"
- "educate and inform the resident about the need for health care" if a resident refuses "routine medical or dental examination or treatment;"
- develop a written emergency medical plan adapted to the needs of each resident;
- ensure that the "special dietary needs" of residents are met in as prescribed by a physician, physician's assistant, certified registered nurse practitioner or dietitian; and
- develop a support plan that documents "the medical, dental, vision, hearing, mental health or other behavioral care services that will be made available to the resident, or referrals for the resident to outside services."

While personal care homes are not required to "pay for the cost of ... medical and behavioral care services" required by residents, current regulations fairly clearly imply that personal care homes may arrange for these services to be provided to residents and separately billed together with personal care services in the same manner as required under Act 2007-56 for assisted living residences.¹² As a result, rather than there being any bright-line distinguishing personal care from assisted living based upon whether or not supplemental health care services are provided, the actual distinction between personal care and assisted living (at least under the current regulatory regime) is whether or not the supplemental health care services are being provided to residents in need of the services of a licensed long-term care facility. Depending on how Act 2007-56, however, a different allocation of roles and responsibilities may emerge and it is possible that personal care homes will be prohibited to continue to assist residents in obtaining supplemental health care services through contractual arrangements between personal care homes and other providers.

¹² 62 P.S. § 1021(a)(2) as amended by Act 2007-56 requires that supplemental health care services provided by assisted living residences "shall be packaged, contracted and priced separately from the resident agreement."

These potential changes may be particularly significant for personal care homes currently authorized to provide Alzheimer or dementia care services. Act 2006-56 establishes a "special care designation" for assisted living residences "that require specialized staff training, service planning, activity programming and security measures for residents receiving cognitive support services," i.e., "assessment, health support services and a full range of dementia-capable activity programming and crisis management." Pursuant to 55 Pa. Code §§ 2600.231 through 2600.239, personal care homes designated as "secured dementia care units" are authorized and required to provide the same type of services.

The implementation of Act 2006-56, will also require the Department of Public Welfare to adopt new regulations concerning:

- The qualifications and training of assisted living facility administrators and direct care staff. 62 P.S. § 213.
- Requires and standards for private living space for each resident unless a resident voluntarily agrees to share facilities. 62 P.S. § 1021(a)(2), (4) & (5).
- The packaging, contracting, and pricing of supplemental health care services. 62 P.S. § 1021(a)(3).
- Informed consent agreements releasing facilities from liability associated with implementing a resident's direction that he or she be permitted to "age in place." 62 P.S. § 1021(a)(7).
- Pre-admission screening. 62 P.S. § 1057.3(a)(1)(i) & (iv).
- Support plans. 62 P.S. § 1057.3(a)(1)(iii).
- The provision of "priority" and specialized care plans for services funded through home and community based waivers for residents for which placement is a skilled nursing facility of "imminent." 62 P.S. § 1057.3(a)(3.1), (3.2) & (12).
- Standards for the design, construction, staffing, operation and safe evacuation of assisted living facilities. 62 P.S. § 1057.3(b)

In the process of developing regulations to implement each of these requirements, it is distinctly possible that DPW will, in each of these areas, both prospectively change regulations applicable to the operation of personal care homes and in the interim modify the official interpretation of current regulations. In this regard, the provisions of Act 2007-56 providing that, "Nothing in this act shall be construed to alter existing statutory or regulatory requirements pertaining to personal care homes until regulations required by [Act 2007-56] are published," provides little practical protection because changes to the LIM may effectively change the applicable requirements for construction, design and operation of personal care home rules without necessitating any alternation of existing regulations.

Finally, at least two provisions of Act 2006-56 take effect immediately. First, DPW is authorized to conduct "abbreviated annual licensure visits" for residences with "a history of exemplary compliance." See 62 P.S. § 221(1). In addition, DPW is mandated to develop all regulations pertaining to both personal care homes and assisted living residences "in consultation with industry stakeholders, consumers and other interested parties." See 62 P.S. § 1021(d).

Conclusion¹³

Personal care home owners and operators are presented with tremendous opportunities to serve the needs of an aging population, but must do so in a complex, rapidly involving and challenging legal environment. They will need to weigh, with the assistance of counsel and others, their acceptance of DPW's imposition of its own interpretation and application of the new regulations, which have varied in the short time that the Department has begun to implement the regulations, with the reasonableness of such interpretations, the benefit to residents, and the cost to the facility before deciding whether and how to respond to findings of noncompliance.

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