Long Term Care Pharmacy Alliance

December 30, 2002

Commissioner Linda Ruthardt
Division of Health Care Finance and Policy
Commonwealth of Massachusetts
Two Boylston St.
Boston, MA 02108

**Re: Comments on Proposed Regulation 114.5 CMR 13.00 – Pharmacy Assessment**

Dear Commissioner Ruthardt:

On behalf of the Long Term Care Pharmacy Alliance (LTPCA), I appreciate the opportunity to submit these comments on the above-referenced proposed regulation. The LTCPA represents the major national companies that provide pharmacy services to residents of long-term care facilities.

We understand that these regulations respond to legislation passed by the Massachusetts General Court and that many of our concerns with the statute cannot be addressed by the Division for Health Care Finance and Policy.

However, we do have concerns that require clarification concerning the implementation of this assessment, and many of these concerns hinge on the peculiar realities of serving patients in the long-term care environment.

**13.02: Definitions**: To avoid confusion, we suggest a re-examination of two of the definitions in the regulations.

**Medicare Prescription**: The definition in the proposed regulation refers to prescriptions "paid for by or on behalf of Medicare under either an indemnity fee-for-service arrangement or a Medicare Health Maintenance Organization."

While prescriptions paid for under the Medicare Part A prospective payment system may fit into this definition, we believe it is important to include specific reference to payments made by nursing facilities to pharmacy providers under Medicare Part A payment methodologies.

**Prescription**: The definition in the proposed regulation is overly expansive and, in some instances, may be construed as to allow the assessment to be levied against over-the-counter products. Our recommendation would be to add specific language that restricts this definition to prescription drug products whose label contains the phrase "federal law prohibits dispensing without a prescription."

www.LTCPA.org
1321 Duke Street, Alexandria, Virginia 22314
Tel: 877.834.7762 Fax: 703.832.0544

**General Concerns**: As the Division is aware, long-term care pharmacies are quite different from retail pharmacies. Among the most important differences with respect to this regulation is the manner in which Medicaid reimburses the pharmacy provider.

In retail settings, claims are generally adjudicated online and in real time, assuring the pharmacy that the claim will be honored by Medical Assistance. With long-term care pharmacy claims, the pharmacy provider may not receive a commitment to cover the claim until well after the drug has been dispensed. A typical example of this would be when the resident has applied for Medical Assistance and is awaiting confirmation that their application has been approved.

In retail settings the prospective recipient would be required to pay cash for the prescription. Long-term care pharmacies typically carry the charge until we receive notification of Medicaid status and the effective date. We may also have an agreement with the facility to bill the facility on these claims, awaiting Medicaid status verification.

Under the proposed regulation, we would assume that we would be required to collect an assessment from the customer to cover the payment to the state for a non-Medicaid prescription. If Medicaid subsequently agrees to establish eligibility retroactively, would we then be required to refund the assessment, assuming we were able to collect it in the first place?

Another area of concern is the terminology used in both the enabling legislation and in the proposed regulation. It is clear that this is intended, in all respects, to be a *de facto* provider tax. Given the more recent pronouncements and actions by the federal Center for Medicare and Medicaid Services (CMS), the legislation attempted to steer a narrow course within which CMS would authorize the tax to be implemented and attract additional federal funds.

The problem arises with the specific avoidance of the word “tax” within both the statute and the proposed regulation. Several of our members have contractual agreements that allow them to pass state tax assessments on to the payer, but do not similarly allow for the more amorphous “assessments” to those payers for reimbursement. The result is that the pharmacy has no recourse for recovering the assessment and it becomes uncollectible.

We strongly recommend that the regulation provide clarification that this statute imposes a tax and may be passed on to either the responsible third party or the recipient of the prescription.

Another important concern is the open-ended nature of the assessment. While the Division has established the assessment at $.065 per prescription, with a temporary rate of $1.30 for the period January 1, 2003 through June 30, 2003, there appears to be a potential for retrospective adjustments to the rate in order to fulfill the mandate for revenue. If so, there will be a possibility that, even if we can collect the assessment from our customers, the revenue requirement may require us to pay additional funds that we will not be able to recover.

Also, by specifically avoiding the use of the word “tax”, we are curious if private plans shielded by the ERISA statute will be able to avoid payment for prescriptions under this

regulation. While this is probably a more significant issue for retail pharmacies, it may pose a substantial hurdle for collection from self-funded third parties.

Another concern: in instances where Medicaid is the secondary payer (*i.e.*, where we bill a third-party non-Medicaid payer for the prescription and Medicaid for the copay), is the prescription exempt from the tax?

Finally, the regulation is unclear as to whether the tax applies to prescriptions filled in Massachusetts but delivered to patients or facilities outside the commonwealth. To avoid constitutional questions raised by taxing interstate commerce, the state should amend the regulation to state clearly that the tax applies only to prescription dispensed to in-state recipients.

We appreciate this opportunity to comment and look forward to the Division's response.

Very sincerely yours,

Stephen J. Northrup
Executive Director