



299 Broadway
New York, NY 10009
Phone 212-417-3700
Fax 212-417-3891
www.mfy.org

Ariana J. Tadler
Board Chair

Jeanette Zelhof
Interim Executive Director

Elise Brown
Ramonita Cordero
Sara J. Fulton
Andrew Goldberg
Kenneth Lau
Christopher Schwartz
Supervising Attorneys

Via email & facsimile

Milton Brown
Office of the Chief Counsel
National Telecommunications and Information Administration
U.S. Department of Commerce
Email: coupon@ntia.doc.gov
Facsimile: (202) 501-8013

June 9, 2008

RE: Comments on Notice of Proposed Rulemaking, 73 Fed. Reg. 22120 (April 24, 2008) (Docket Number: 080324461-8462-01)

Dear Milton Brown:

We are writing to submit comments on the Notice of Proposed Rulemaking, 73 Fed. Reg. 22120 (April 24, 2008), by the National Telecommunications and Information Administration (NTIA). We believe that the NTIA should waive the eligibility requirements for the Digital-To-Analog Converter Box Coupon Program (Coupon Program) to clearly allow the participation of individuals who live in licensed facilities, including adult homes or board & care homes, which provide residential care. As a model, we suggest that the NTIA look to the eligibility requirements and definitions for the U.S. Department of Housing and Urban Development's mortgage insurance program for nursing homes, intermediate care, board & care homes, and assisted-living facilities.

We first became aware of this issue when we were contacted by an adult home resident who was denied a Converter Box Coupon. During January 2008, this resident applied for a Converter Box Coupon. The resident was interested in the program because he owns at least one analog-only television. Unfortunately, his application was immediately denied. The resident appealed, but his appeal was also denied. He received an email from the Consumer Support Center of the Coupon Program, stating: "Your application was denied, because our records indicate your address is a business address. Therefore, your application is still denied." This resident, who is an individual with a disability who receives Social Security benefits, and many other adult home residents like him are now facing the loss of access to entertainment, news, and emergency warnings through analog-only televisions after February 17, 2009.

Background:

The Adult Home Advocacy Project of MFY Legal Services, Inc. (“MFY”) represents residents of adult homes in courts of law and administrative proceedings in New York City. MFY has provided free civil legal services to low-income New Yorkers since its founding in 1963. MFY was originally a unit of Mobilization for Youth, a social welfare organization on Manhattan's Lower East Side. In 1968, however, MFY was incorporated as a separate not-for-profit law firm. The Adult Home Advocacy Project focuses on protecting the rights of individuals who live in adult homes.

The Coalition of Institutionalized Aged and Disabled (CIAD) is a non-profit, consumer-led advocacy organization of adult home and nursing home residents and residents’ councils. CIAD was established in 1973 to bring pride, purpose, and self-determination to residents. Our mission is to provide residents with the information and skills they need to advocate for themselves, to protect and promote the rights of residents, and to improve the quality of their lives and their care. CIAD organizes residents into resident councils, training and nurturing resident leaders, educating residents about their rights, and promoting their participation in the affairs of their own residences as well as broader public policy issues.

An adult home is “an adult-care facility established and operated for the purpose of providing long-term residential care, room, board, housekeeping, personal care and supervision to five or more adults unrelated to the operator.”¹ Adult homes are for “adults who, though not requiring continual medical or nursing care . . . , are, by reason of physical or other limitations associated with age, physical or mental disabilities or other factors, unable or substantially unable to live independently.”² In other words, residents of adult homes are generally individuals who need assistance with the activities of daily living, but who do not need skilled nursing care. A substantial percentage of individuals who reside in adult homes are elderly.

In New York State, there are more than 500 adult homes, which house more than 35,000 individuals.³ Adult homes are regulated by the New York State Department of Health (NYSDOH). In order to operate an adult home, one must obtain an operating certificate from the NYSDOH.⁴ A list of licensed adult homes is available on the NYSDOH’s website.⁵ Adult homes, were “[o]riginally designed for the elderly,”⁶ but, today, they provide care for residents of a wide-range of ages.

¹ 18 N.Y. Comp. Codes R. & Regs. § 485.2(b).

² 18 N.Y. Comp. Codes R. & Regs. § 485.2(a).

³ See Adult Home Reform (Schuyler Center for Analysis and Advocacy), *available at* <http://www.scaany.org/initiatives/AdultHomeReform.php>.

⁴ See 18 N.Y. Comp. Codes R. & Regs. § 485.5.

⁵ See Adult Care Facilities, *available at* http://www.nyhealth.gov/facilities/adult_care/countylist.htm.

⁶ See Adult Home Reform (Schuyler Center for Analysis and Advocacy), *available at* <http://www.scaany.org/initiatives/AdultHomeReform.php>.

Proposed Changes to 47 CFR 301.3:

The Notice of Proposed Rulemaking (NPR) correctly points out that individuals “residing in nursing homes and other senior care facilities, constitute a vulnerable community that may rely on free, over-the-air television to a greater degree than other members of the public.”⁷ This is also true of individuals who live in adult homes.⁸ The isolation of adult home residents has been chronicled in a Pulitzer Prize-winning series of articles in the *New York Times*.⁹ Based on the time we spend visiting adult homes in New York, it is our experience that residents of adult homes often do not have access to the internet, cable or satellite television, or other outlets for entertainment, news, and emergency warnings. We estimate that most adult home residents have a privately-owned television in their room,¹⁰ and that a majority of those televisions rely on the reception of free, over-the-air signals.

We fully agree that the “eligible household” and application requirements in section 301.3(a) and section 301.3(e) should be modified. However, the proposed waiver should clearly include individuals residing in all licensed facilities, including adult homes, which provide residential care. These individuals should be included because many of them are elderly, and, no matter what their age, they constitute a “vulnerable community” that tends to “rely on free, over-the-air television to a greater degree than other members of the public.” Therefore, the reasoning behind the proposed rule change fully applies to individuals residing in all licensed facilities that provide residential care.

Identification of Nursing Homes or Other Care Facilities:

As acknowledged in the NPR, “the terms ‘nursing home’ and ‘senior care facility’ are somewhat generic” and “[t]here are many facilities that care for elderly residents . . . includ[ing] assisted living facilities, continuing care retirement communities, and convalescent rest homes.”¹¹ We believe that the NTIA would be making a factual and legal error if it focused only on a narrow range of licensed facilities, because there are other licensed facilities that provide residential care for senior citizens and other vulnerable members of society. For this reason, we also disagree with the use of “a facility’s inclusion in the CMS OSCAR database as a baseline criterion to establish the eligibility of a facility for the waiver proposed here.”¹²

As a factual matter, nursing homes do not care only for elderly individuals. According to the National Nursing Home Survey, approximately 12 percent of nursing home residents

⁷ 73 Fed. Reg. 22120 (April 24, 2008).

⁸ Here and for the duration of these comments, when we use the term “adult homes” it should be understood to also encompass “board & care homes,” and vice versa.

⁹ See Clifford J. Levy, *For Mentally Ill, Death and Misery*, N. Y. TIMES, Apr. 28, 2002, § 1, at 1; Clifford J. Levy, *Here, Life Is Squalor and Chaos*, N. Y. TIMES, Apr. 29, 2002, at A1; Clifford J. Levy, *Voiceless, Defenseless And a Source of Cash*, N. Y. TIMES, Apr. 30, 2002, at A1.

¹⁰ Note that an adult home resident usually shares a room with another resident.

¹¹ 73 Fed. Reg. 22121 (April 24, 2008).

¹² Id.

are under 65 years of age.¹³ A corollary point is that elderly individuals are often cared for in other types of facilities. For example, as pointed out above, a substantial percentage of adult home residents are elderly. In waiving the eligibility requirements, the NTIA should clearly allow the participation of individuals who live in licensed facilities, including adult homes, which provide residential care.

As a legal matter, we believe that the current regulations for the Coupon Program potentially violate Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Unless the terms “nursing home” and “senior care facility” in the NPR are interpreted to include all licensed facilities, including adult homes, which provide residential care for individuals with disabilities, the proposed modifications would not fully cure that potential violation.

In passing both the Rehabilitation Act and its 1978 amendments,¹⁴ Congress made clear “that it viewed discrimination against the handicapped as an evil on a par with racial, sexual, and ethnic discrimination.”¹⁵ “Congress expressly intended the Rehabilitation Act to ensure that members of the disabled community could ... fully participate in society.”¹⁶ Section 504(a) of the Rehabilitation Act prohibits, among other things, discrimination on the basis of disability “under any program or activity conducted by any Executive agency.”¹⁷ Furthermore, executive agencies are obligated to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy the benefits of a program or activity.¹⁸

Because the NTIA is a bureau of the Department of Commerce (DOC), and the DOC is an executive agency, the Coupon Program is subject to the Rehabilitation Act. It is particularly disturbing that the NTIA currently singles out for exclusion nursing homes and group homes in the “FAQS” listed on the NTIA’s Coupon Program website.¹⁹ As interpreted by the Supreme Court, however, “[S]ection 504 does not [even] require proof of discriminatory intent because ‘[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference -- of benign neglect.’”²⁰

¹³ See The National Nursing Home Survey 2008, Table 1, *available at* http://www.cdc.gov/nchs/data/nnhsd/Estimates/Estimates_Demographics_Tables.pdf#Table01.

¹⁴ See Pub. L. No. 95-602, 92 Stat. 2955.

¹⁵ Allen v. Heckler, 780 F.2d 64, 67 (D.C. Cir. 1985) (citing S. Rep. No. 95-890, 95th Cong., 2d Sess. 18-19 (1978)).

¹⁶ Am. Council of the Blind v. Paulson, 2008 U.S. App. LEXIS 10711, at *2 (D.C. Cir. May 20, 2008) (citing 29 U.S.C. § 701(b)(1)).

¹⁷ 29 U.S.C. § 794(a) (“No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.”).

¹⁸ See Lyons v. Legal Aid Society, 68 F.3d 1512, 1515 (2nd Cir. 1995) (“The Rehabilitation Act does not include a definition of reasonable accommodation, but the regulations promulgated under that Act use virtually the same language as § 12111(9) of the ADA.”).

¹⁹ <https://www.dtv2009.gov/FAQ.aspx> (“Are nursing homes, group homes and other institutions eligible for coupons?”).

²⁰ Am. Council of the Blind, 2008 U.S. App. LEXIS at *5 (quoting Alexander v. Choate, 469 U.S. 287, 295 (U.S. 1985)).

To ensure that individuals with disabilities can participate in the Coupon Program, the NTIA should waive the eligibility requirements to clearly include individuals who live in licensed facilities, including adult homes, which provide residential care. As a model for this expanded definition, we suggest that the NTIA look to the eligibility requirements and definitions for the U.S. Department of Housing and Urban Development's mortgage insurance program for nursing homes, intermediate care, board & care homes, and assisted-living facilities. This program is authorized by Section 232 of the National Housing Act, 12 U.S.C. 1715w, and the regulations are found in 24 CFR 232.

Through this program, "[i]n fiscal year 2006, [HUD] insured mortgages for 222 projects with 24,945 beds/units, totaling \$1.3 billion."²¹ The purpose of HUD's program is:

- (1) The development of nursing homes for the care and treatment of convalescents and other persons . . . who require skilled nursing care and related medical services
- (2) The development of intermediate care facilities and board and care homes for the care of persons who, while not in need of nursing home care and treatment, nevertheless are unable to live fully independently and who are in need of minimum but continuous care provided by licensed or trained personnel²²

The statute also provides detailed definitions of the various types of eligible facilities.²³

In general, to be eligible for mortgage insurance, a facility also has to be licensed or certified by the state, municipality, or other political subdivision in which it is located.²⁴ This potential model provides one way in which the NTIA could overcome the administrative challenges of waiving the eligibility requirements to clearly include individuals who live in all licensed facilities, including adult homes, which provide residential care.

Administrative Challenges

The NPR also notes that the "NTIA is concerned about whether information is readily available that would allow the agency to confirm that the individual making the coupon request (or on whose behalf the request is made) actually resides in a nursing home."²⁵ We will address this question in the context of making this determination with regard to individuals who live in licensed facilities that provide residential care.

This concern appears to have two components: 1) Is the applicant's stated address a licensed facility that provides residential care?; and 2) Does the applicant reside there? With regard to the first question, states generally maintain lists of the facilities that are licensed to provide residential care. For example, one can search for and confirm the

²¹ Mortgage Insurance for Nursing Homes, Intermediate Care, Board & Care and Assisted-living Facilities: Section 232 and Section 232/223(f), *available at* <http://www.hud.gov/offices/hsg/mfh/progdsc/nursingalcp232.cfm>.

²² 12 USCS § 1715w(a).

²³ See 12 USCS § 1715w(b).

²⁴ See 24 CFR 232.2.

²⁵ 73 Fed. Reg. 22121 (April 24, 2008),

licensing status and address of adult homes in New York State by visiting a website maintained by the NYSDOH.²⁶ This also appears to be the case with regard to other states.²⁷ As noted above, HUD's mortgage insurance program defines eligible facilities in this manner.²⁸

With regard to the second question, it is unclear to us why the issue of verification would be any different for residents of licensed facilities that provide residential care than it would be for residents of apartment buildings. That being said, if the NTIA is particularly concerned about the issue of verification in this context, it is worth noting that the vast majority of adult home residents receive public benefits. As a federal agency, the NTIA could presumably arrange to receive computer data from agencies administering the government programs such as Medicaid, Food Stamps, Supplemental Security Income, Veteran's Disability Pension, and Veteran's Surviving Spouse Pension. Such data would include, inter alia, the name and address of each recipient of the above-listed benefits. The NTIA could then utilize this data to verify the name and address of an applicant for a Converter Box Coupon.

Thank you for requesting and considering these comments. Please let us know if we can provide you with any additional information.

Sincerely,



Kevin M. Cremin, Esq.
Adult Home Advocacy Project
MFY Legal Services, Inc.
299 Broadway
New York, NY 10007



Geoff Lieberman
Executive Director
Coalition of Institutionalized Aged and Disabled
425 East 25th Street
New York, NY 10010

²⁶ See Adult Care Facilities, available at http://www.nyhealth.gov/facilities/adult_care/countylist.htm.

²⁷ See, e.g., California's Community Care Licensing Division, available at http://www.cclid.ca.gov/docs/cclid_search/cclid_search.aspx (allowing searches by address for, inter alia, "group homes" and "adult residential facilities").

²⁸ See, e.g., 12 USCS § 1715w(b)(5) (defining the term "board and care home" to mean "any residential facility providing room, board, and continuous protective oversight that is regulated by a State pursuant to the provisions of section 1616(e) of the Social Security Act [42 USCS § 1382e(e)] . . .").

cc:

Kathleen Jarmiolowski, Attorney-Adviser
Office of the Chief Counsel
National Telecommunications and Information Administration
U.S. Department of Commerce
Email: kjarmiolowski@ntia.doc.gov
Facsimile: (202) 501-8013

Katherine Anderson
Office of Civil Rights
U.S. Department of Commerce
Facsimile: (202) 482-0048