

Congress of the United States
Washington, DC 20515

October 31, 2023

The Honorable Xavier Becerra
Secretary
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Becerra and Administrator Brooks-LaSure,

We write today to express our serious concerns regarding the Administration's minimum nurse staffing standards proposed rule.¹ This one-size-fits-all, unfunded mandate will jeopardize access to care for the 1.2 million Americans living in more than 15,000 certified nursing homes nationwide – especially those who reside in rural and underserved areas.² Our nation's nursing homes have weathered an unprecedented storm over the past three years. From government spending induced inflation to pandemic provider burnout, community access to long-term care (LTC) services has been strained. Since January 2020, over 400 nursing homes closed their doors and approximately 190,000 nursing home employees left the workforce. Alarming, this trend shows little sign of abatement.^{3,4} Given this current landscape, the Administration's proposal will only serve to further undermine patient access to skilled nursing care. As such, we strongly urge you to withdraw the rule and work with us on tailored solutions addressing the severe health care workforce shortages in our states.

While the health care sector has generally seen a return to pre-pandemic employment levels, with estimated employment in the delivery system up as much as two percent since the start of the pandemic, the LTC sector has not. As previously noted, nearly two hundred thousand workers left the nursing home workforce, an approximate 10 percent decrease in total employment

¹ Medicare and Medicaid Programs; Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting (CMS-3442-P).

² Kaiser Family Foundation (KFF), KFF analysis of CMS Care Compare data, "Total Number of Residents in Certified Nursing Facilities," July 2022, accessed at [Total Number of Residents in Certified Nursing Facilities](#) on October 3, 2023.

³ Data from the Centers for Medicare & Medicaid Services' Quality, Certification & Oversight Reports website, accessed September 5, 2023. <https://qcor.cms.gov/main.jsp>.

⁴ Data from the U.S. Bureau of Labor Statistics, accessed September 5, 2023. https://data.bls.gov/timeseries/CES6562300001?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true

relative to pre-pandemic levels. Other industries within the health care sector, however, experienced a workforce rebound.⁵

It is, therefore, shocking to see the Administration assume that an available, trained workforce is sitting on the sidelines – ready to immediately fill these gaps within the next three to five years. According to KFF, over 80 percent of all nursing facilities nationwide would fail to meet the proposed 0.55 registered nurse hours per resident per day (HPRD) and 2.45 nurse aide HPRD direct care staffing mandate. Most facilities would need to hire additional staff in order to come into compliance with the rule.⁶ Given the staffing losses that the LTC industry has faced, it seems unlikely that many of these facilities would ever be able to find enough employees to meet the proposed minimum staffing mandates.

Not only does the proposed rule fail to account for the availability of trained staff, but it also ignores diverse challenges facing the skilled nursing sector. There is zero flexibility for nursing facilities to determine the most effective and efficient ways to distribute direct care staff and meet individual resident needs. In applying a uniform, minimum staffing ratio to all facilities, regardless of size or case-mix, the proposed rule could incentivize some facilities to overstaff in order to meet arbitrary federal thresholds. This risks diverting qualified nurses away from small, rural and underserved facilities that also must hire additional employees, running counter to the stated intent of the proposal. Furthermore, the rule’s sole reliance on registered nurses (RNs) and nurse aide (NAs) to provide direct patient care, while overlooking the value that other providers, such as Licensed Practical Nurses (LPNs), offer to residents, could lead to a maldistribution of staff and ineffectively divert resources away from an individual facility’s optimum staffing structure.

Complying with the rule will not only be predicated on facilities finding enough workers, but will also require a staggering increase in spending. CMS projects that the policies proposed in the rule will impose a \$40.6 billion unfunded mandate on LTC providers over the next decade, with federal spending in Medicaid alone accounting for over half of these costs. This calculation, however, fails to account for State spending that would be incurred due to State adherence to federal matching requirements. Eventually patients will be forced to pay even more out-of-pocket as facilities inevitably pass these additional costs on to consumers in the form of higher prices.

Perhaps required ratios and increased costs would have some merit if the research that informed the agency’s rulemaking specifically called for them. Instead, the final report from Abt Associates, which the Agency cites as its rationale to impose these policies, states that there is “no obvious plateau at which quality and safety are maximized or ‘cliff’ below which quality and safety decline”. The Administration’s own study is clear that there is no significant correlation between any given staffing ratio and increased quality outcomes for residents. In fact, the report

⁵ <https://www.healthsystemtracker.org/chart-collection/what-impact-has-the-coronavirus-pandemic-had-on-healthcare-employment/#Cumulative%20%20change%20in%20health%20sector%20employment%20by%20setting,%20February%202020%20-%20June%202023>

⁶ <https://www.kff.org/medicaid/issue-brief/what-share-of-nursing-facilities-might-meet-proposed-new-requirements-for-nursing-staff-hours/>

goes on to say that the percentage of lower quality facilities (i.e. those in the lowest quartile of safety and care) would only change by as much as one percent under such staffing ratios.⁷ These data call into question why the agency would place an unprecedented unfunded mandate on nursing facilities and the States while also acknowledging such a marginal expected increase in patient outcomes and quality.

Amid these troubling practicalities of the rule, CMS is also blatantly overstepping Congress' sole authority to set staffing requirements. Sections 1819 and 1919 of the Social Security Act require skilled nursing facilities and nursing facilities to provide licensed nursing services "at least 8 consecutive hours a day, 7 days a week."⁸ While the statute explicitly authorizes the HHS Secretary to waive this requirement under certain enumerated conditions, the statute does not allow the Secretary to issue regulatory requirements that set a floor exceeding the statutory minimum. If there is to be any change to nursing home staffing levels, it will be at the discretion of Congress to make such a change or provide the Secretary such authority.

Given the concerns outlined above, we again urge you to immediately withdraw the proposed rule. We also request that you provide us with the following information no later than November 30, 2023:

1. Please cite the specific rationale for CMS' belief that it has statutory authority to establish a minimum staffing threshold exceeding what the SSA outlines under current law.
2. The proposed rule fails to include any discussion, data, research, or economic impact analysis showing the number of skilled nursing facilities (SNFs) and nursing facilities (NFs) that will be forced to close due to the Administration's \$40.6 billion unfunded mandate. Given the sizeable costs that SNFs and NFs will be forced to bear if this policy is finalized, please provide estimates of the number of facilities, broken down by state, that are expected to go out of business due to the policies contained in the proposed rule.
 - a. If the Administration had a specific rationale for failing to include this information, please provide a detailed explanation why the Office of Management and Budget (OMB) and the CMS Chief Actuary did not account for facility closures in its economic modeling.
3. The proposed rule provides for delayed implementation of the requirements for nursing homes located in rural areas, three years for the 24/7 RN requirement and five years for the RN and NA minimum standard requirement.
 - a. Please provide a detailed summary of the analysis and rationale CMS used to determine those specific timelines.
 - b. Does CMS believe that staff shortages in rural areas will be alleviated by the time these requirements are implemented in rural areas? If not, why did CMS choose the timelines in the proposed rule?
 - c. On a September 15, 2023 call with congressional offices, CMS staff stated that the existing nursing home workforce, according to the U.S. Bureau of Labor Statistics, was sufficiently sized to meet the proposed staffing requirements. If this is the case, why did CMS delay implementation?

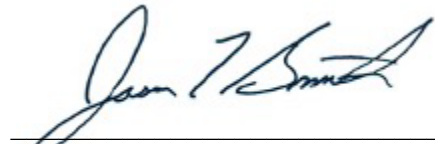
⁷ <https://www.cms.gov/files/document/nursing-home-staffing-study-final-report-appendix-june-2023.pdf>

⁸ 42 U.S.C. 1395i-3(4)(C)(i)

4. Why does the proposed rule rely on the U.S. Census Bureau's definition of "rural," rather than a definition that accounts for variations in staffing availability?
 - a. Did CMS consider a definition that includes a measurement of access to care and, if so, why did CMS choose not to utilize such a definition?
 - b. If CMS considered alternative definitions, please provide a list of alternative definitions CMS considered.
5. The proposed rule contains a process by which a nursing home may receive an exemption from the RN/NA HPRD requirement but does not provide for an exemption from the 24/7 RN requirement in any case. Sections 1819 and 1919 of the Social Security Act allow the Secretary to waive the statutory floor for nursing care required in a skilled nursing facility or nursing facility (eight hours daily, seven days weekly). How will the requirements in the proposed rule, which seem to apply without exemption, interact with the statutory exception?

Thank you for your consideration of these comments as well as your assistance in responding to our data requests. If you have questions, please contact Matthew Hittle of the House Committee on Ways and Means at 202-225-3625, Seth Gold from the House Committee on Energy and Commerce at 202-225-2927, and Erin Dempsey and Stuart Portman from the Senate Committee on Finance at 202-224-4515.

Sincerely,



Jason Smith
Chairman
House Committee on Ways and Means



Cathy McMorris Rodgers
Chair
House Committee on Energy and Commerce



Mike Crapo
Ranking Member
Senate Committee on Finance