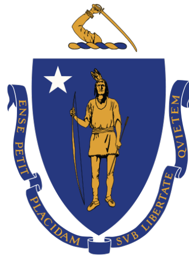
State of California
Office of the Attorney General

ROB BONTA
ATTORNEY GENERAL



THE COMMONWEALTH OF MASSACHUSETTS
ANDREA JOY CAMPBELL
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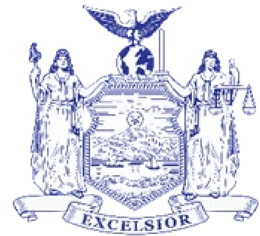

STATE OF NEW YORK
LETITIA JAMES
ATTORNEY GENERAL

November 6, 2023

The Honorable Xavier Beccera, Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Chiquita Brooks-LaSure, Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

RE: CMS-3442-P: Proposed Minimum Staffing Rule for Long-Term Care Facilities

Dear Secretary Beccera and Administrator Brooks-LaSure,

The undersigned Attorneys General of Arizona, California, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, and Vermont write in response to the U.S. Department of Health and Human Services and the Centers for Medicare and Medicaid Services's ("CMS") proposed rule establishing minimum staffing requirements for long-term care facilities ("Proposed Rule"). As state Attorneys General charged with protecting residents in long-term care facilities, we support the administration's continuing efforts to ensure that vulnerable nursing home residents receive safe and reliable care in these facilities, following CMS's recent proposed rule to increase financial transparency for nursing homes, which many of us also supported. We support the Proposed Rule's requirement that long-term care facilities have a registered nurse ("RN") on staff for 24 hours per day as an important step towards protecting those residents. We also support the Proposed Rule's change to CMS's Care Compare website to display the facility's staffing numbers immediately below the CMS staffing rating, which will assist consumers making decisions on care.

However, while well-intentioned, the proposed minimum staffing standards for RNs, certified nurse assistants ("CNAs") and licensed practical nurses ("LPNs") are too low to protect this critically vulnerable population. As explained below, unintended consequences of the Proposed Rule would include incentivizing many for-profit nursing homes to reduce staffing, which would increase harm to vulnerable residents. We strongly recommend that CMS adopt a minimum requirement of 4.1 hours per resident day ("HPRD"), comprised of 2.8 HPRD for

CNAs, .75 HPRD for RNs, and .55 HPRD for LPNs. This standard, which is supported by academic research, is necessary to avoid preventable resident neglect and suffering.

Furthermore, we strongly recommend that the Administration narrow the exemption criteria it has promulgated in the Proposed Rule. First, the "workforce shortage" exemption should be narrowly tailored so it cannot be manipulated by many for-profit nursing homes that have intentionally operated with insufficient staffing in order to divert significant Medicare and Medicaid funds to owners and related parties for personal profit, all while ignoring existing federal regulations requiring them to provide required care and sufficient staffing.[1] Second, to align for-profit nursing home operators' incentives with CMS's intent to increase nursing home staffing, CMS should expand the criteria that makes a facility ineligible for an exemption, including facilities that have recently been cited for failing to meet staffing standards and/or abuse or neglect of residents. Finally, CMS should clearly indicate that the final rule will not preempt any higher state standards or state consumer protection and Medicaid Fraud Control Unit's ("MFCUs") efforts related to staffing or quality of nursing care in long-term care facilities.[2]

The Proposed Rule represents an important first step to bring attention to the issue of staffing in nursing homes and provides a starting point for a national discussion regarding what level of staffing best addresses the needs of the patients in skilled nursing facilities. Notwithstanding the recommendations for improvement, we support and urge CMS to finalize a rule consistent with these recommendations, as part of the federal Administration's efforts to build "a long-term care system where all seniors can age with dignity," and where vulnerable residents of these facilities can receive high-quality services and support in the setting of their choice.[3]

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[1] Existing federal regulations impose these, and many other, legal duties on nursing homes. *See* 42 C.F.R. § 483 *et seq.* The Nursing Home Reform Act, updated in 2016, requires nursing homes to "have sufficient nursing staff with the appropriate competencies and skill sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with the facility assessment required at § 483.70(e)." 42 C.F.R. § 483.35; *see also* 42 C.F.R. § 438.30. The Act also contains a broad mandate that nursing homes "must provide [each resident with] the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with the resident's comprehensive assessment and plan of care." 42 C.F.R. § 483.24; *see also* 42 C.F.R. §§ 483. 20; 483.21; 483.24; 483.25; and 483.35. The Act further states that "[a] facility must treat each resident with respect and dignity and care for each resident in a manner and in an environment that promotes maintenance or enhancement of his or her quality of life, recognizing each resident's individuality." 42 CFR § 483.10(a)(1). Nursing homes are also specifically required to ensure residents "[m]aintain[] acceptable parameters of nutritional status, such as usual body weight" and receive "sufficient fluid intake to maintain [their] proper hydration and health." 42 C.F.R. § 483.25.

[2] While this is implied, CMS's stating so directly would enable state and federal agencies to summarily dispense with spurious defense arguments to the contrary in government enforcement actions.

[3] *Biden-Harris Administration Takes Steps to Crack Down on Nursing Homes that Endanger Resident Safety*, THE WHITE HOUSE.GOV, https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/01/fact-sheet-biden-harris-administration-takes-steps-to-crack-down-on-nursing-homes-that-endanger-resident-safety/.

A. We Appreciate the Administration's Efforts to Address the Root Causes of Resident Neglect and Abuse, Which Often Include Deliberate Understaffing by Corporate Owners and Operators for Personal Profit.

We commend CMS for attempting to strengthen the minimum staffing requirements in long-term care facilities, though the proposed numeric minimums set are too low and need to be higher to protect residents. Many of these facilities have been deliberately understaffed to reduce operating expenses and enable owners, operators and related parties to siphon profit from them, particularly by far too many corporate for-profit owners and operators, for far too long. There is a well-documented association between staffing and nursing home quality of care.[4] Studies show that increases in Registered Nurse (RN) staffing in particular improve patient outcomes.[5] Staff stability, often aided by adequate staffing (which helps prevent burnout), also leads to better health outcomes.[6] CMS recently considered the relationship between staff turnover and quality and it found that when staff turnover decreases, the overall Care Compare star rating increases, suggesting that lower turnover results in higher overall quality.[7] Setting appropriately high HPRD minimums that incentivize for-profit nursing homes to increase staffing is likely to reduce the turnover, because compliance with those minimums would alleviate the poor working conditions created by nursing homes operating with chronic insufficient staffing.

As State Attorneys General, our consumer protection units and MFCUs have authority to investigate and prosecute those responsible for committing abuse or neglect of residents and misappropriation of residents' funds in these facilities.[8] Our state enforcement actions, as well as those by the federal government, have repeatedly exposed the root causes of resident neglect

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[4] Abt Associates, Inc., *Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes, Report to Congress: Phase II Final Report* 9 (Dec. 24, 2001) (reports to Congress "produced strong and compelling evidence of the relationship between staffing ratios and quality of nursing home care"), https://theconsumervoice.org/uploads/files/issues/CMS-Staffing-Study-Phase-II.pdf.

[5] Charlene Harrington, et al., *The Need For Higher Minimum Nursing Staffing Standards in U.S. Nursing Homes*, 9 Health Services Insights 13-19 (April 2016); Jane E. Bostick, et al., *Systematic Review of Studies of Staffing and Quality in Nursing Homes*, 7 Journal of the American Medical Directors Association 366 (July 2006), https://doi.org/10.1016/j.jamda.2006.01.024; Jack Needleman, *Nurse Staffing: The knowns and the Unknowns*, 33 Nursing Economics (Feb. 2015), http://www.nursingeconomics.net/necfiles/2015/JF15/5.pdf; California Association of Long Term Care Medicine, *CALTCM White Paper on Nursing Home Staffing*, https://www.caltcm.org/assets/CALTCM%20White%20Paper%20on%20Nursing%20Home%20Staffing%20-%20FINAL.pdf.

[6] Eric Collier et al., *Staffing Characteristics, Turnover Rates, and Quality of Resident Care in Nursing Facilities,* 1 Research in Gerontological Nursing 157 (July 2008), https://pubmed.ncbi.nlm.nih.gov/20077960/; see also 88 Fed. Reg. 61,356.

[7] CMS, Center for Clinical Standards and Quality/Quality, Safety and Oversight Group, *Nursing Home Staff Turnover and Weekend Staffing Levels* 2 (Jan. 7, 2022), https://www.cms.gov/files/document/qso-22-08-nh.pdf.

[8] *See* 42 U.S.C. § 1396b(q); 42 C.F.R. § 1007.11(b)(1) ("The Unit will also review complaints alleging abuse or neglect of patients or residents in health care facilities receiving payments under Medicaid and may review complaints of the misappropriation of funds or property of patients or residents of such facilities.").

and abuse, which often include behavior by for-profit owners to operate the nursing homes with insufficient staffing to reduce expenses, to continue resident admissions anyway in order to increase revenue, and covertly siphon millions of Medicaid and Medicare funds for themselves and their related parties.

For example, from November 2022 to June 2023, the New York MFCU brought four different lawsuits against New York nursing facility owners, operators, and related parties. These lawsuits allege and have submitted substantial evidence that the owners and operators of these facilities cut staffing levels to reduce expenses, continued admissions, and created poor working conditions for staff by assigning more work than could be completed in a given shift, in order to increase up-front profit-taking by the owners and related parties.[9] The results from these decisions were catastrophic; residents sat in their own urine and feces for hours, suffered malnourishment and dehydration, missed medical appointments, had pressure wounds develop and/or get worse, and sustained falls and other injuries.[10] These lawsuits also allege that the owners and operators of the facilities extracted millions of dollars through fraudulent, inflated payments paid by the facilities to the owners directly or to multiple related parties owned and controlled by the facility owners and/or their family members or other related parties. At the same time, the New York MFCU alleges that these owners violated many state and federal regulations and laws requiring the nursing homes to deliver required care, to operate with sufficient staff to deliver it, and to limit admissions to residents to whom they could provide required care.[11]

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[9] The detailed comprehensive verified petitions in each of the four special proceedings are publicly available through the Attorney General's website, and the petitions and all numerous supporting affidavits are publicly available on the New York state courts website. https://ag.ny.gov/press-release/2022/attorney-general-james-sues-orleans-county-nursing-home-years-fraud-and-resident; https://ag.ny.gov/press-release/2022/attorney-general-james-sues-long-island-nursing-home-repeated-financial-fraud-and; https://ag.ny.gov/press-release/2022/attorney-general-james-sues-long-island-nursing-home-years-fraud-and-resident ; https://ag.ny.gov/press-release/2023/attorney-general-james-sues-owners-and-operators-four-nursing-homes-financial. All numerous supporting affidavits of civilian witnesses, auditor-investigators, detectives, medical analysts and attorneys in each special proceeding are publicly available on each court's website.

[10] *See* https://ag.ny.gov/press-release/2022/attorney-general-james-sues-long-island-nursing-home-repeated-financial-fraud-and https://ag.ny.gov/press-release/2022/attorney-general-james-announces-indictment-long-island-nursing-home-staff.

[11] The New York Attorney General is not only seeking damages in these cases, but also has asked for substantial injunctive relief to protect residents, including removal of the owners and managers, a freeze on admissions at the facilities, appointment of a healthcare monitor to oversee the facilities' healthcare operations, and appointment of a financial monitor to stop the fraudulent payments from the nursing home to related parties. *Attorney General James Sues Orleans County Nursing Home for Years of Fraud and Resident Neglect*, Nov. 29, 2022, https://ag.ny.gov/press-release/2022/attorney-general-james-sues-orleans-county-nursing-home-years-fraud-and-resident; *Attorney General James Sues Long Island Nursing Home for Repeated Financial Fraud and Resident Neglect*, Dec. 13, 2022, https://ag.ny.gov/press-release/2022/attorney-general-james-sues-long-island-nursing-home-repeated-financial-fraud-and; *Attorney General James Sues Long Island Nursing Home for Years of Fraud and Resident Neglect*, Dec. 16, 2022, https://ag.ny.gov/press-release/2022/attorney-general-james-sues-long-island-nursing-home-years-fraud-and-resident; and "Attorney General James Sues Owners and Operators of Four New York Nursing Homes for Financial Fraud and Resident Neglect," June. 28, 2023, https://ag.ny.gov/press-release/2023/attorney-general-james-sues-owners-and-operators-four-nursing-homes-financial. In the last filed special proceeding against Centers Health Care and 26 other respondents, the Attorney General obtained preliminary

The California Attorney General also actively pursues skilled nursing facilities that violate state staffing laws through consumer protection and MFCU enforcement actions, finding that understaffing can result in harms to patients such as unnecessary amputations, the spread of diseases, and a high number of unreported sexual assault cases.[12] In *People of the State of California v. Brookdale Senior Living, Inc.*, Kern County Superior Court, Case No. BCV-21-100539 TSC, the California Attorney General secured a $3.25 million settlement and an injunction enjoining Tennessee-based Brookdale Senior Living, Inc., the nation's largest senior living operator, from making false or misleading statements to CMS concerning its staffing levels in order to secure unearned star ratings on Care Compare.[13] In *People of the State of California v. Mariner Health Care, Inc.*, Alameda Superior Court, Case No. RG21095881, the California Attorney General also recently secured a preliminary injunction enjoining 19 California skilled nursing facilities from failing to employ an adequate number of qualified personnel to carry out all of the functions of the facility as required by state staffing laws.[14]

Similarly, in December 2022, the Massachusetts MFCU announced a $1.75 million settlement with Athena Health Care Systems ("Athena"), a for-profit owner of nursing facilities in three states. This settlement resolved allegations that Athena's facilities, at the corporate owners' direction and as a strategy to improve corporate profits, admitted substantial numbers of residents with histories of substance use disorder, even though the facilities did not have adequate levels of appropriately trained staff to meet the needs of those residents. As part of that resolution, Athena agreed to participate in a program with Alliant Health Solutions, which has received a grant from the U.S. Substance Abuse and Mental Health Services Administration to create "Centers of Excellence for Geriatric Emotional/Mental Health and Substance Use Education." This program will result in updates to Athena's policies, procedures, and trainings and require independent compliance monitoring to ensure that Athena will have appropriate levels of trained staff to meet the needs of residents with histories of SUD.[15]

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injunctive relief in the form of the appointment of an independent health care monitor and an independent financial monitor at the four nursing homes, based on a showing of likelihood of success on the merits.

[12] *Attorney General Bonta Secures Preliminary Injunction Against Chain of Skilled Nursing Facilities for Violations of Federal and State Staffing and Discharge Laws*, Jan. 10, 2023, https://oag.ca.gov/news/press-releases/attorney-general-bonta-secures-preliminary-injunction-against-chain-skilled.

[13] *People v. Brookdale Senior Living*, (Super Ct. Kern County, 2022, No. BCV-21-100539 TSC), https://oag.ca.gov/system/files/attachments/press-docs/BCV-21-100539%20TSC%20Final%20Judgment%20and%20Injunction%20-%20signed.pdf; *Attorney General Bonta Announces $3.25 Million Settlement with Brookdale Senior Living for Misrepresenting Quality of Care and Putting Seniors, People with Disabilities at Risk*, March 11, 2022, https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-325-million-settlement-brookdale-senior-living.

[14] *People v. Mariner Health Care Inc.* (Super. Ct. Alameda County, 2021, No. RG21095881), https://oag.ca.gov/system/files/attachments/press-docs/35474965_01_06_2023_Preliminary_Injunction_v2%20%281%29.pdf.

[15] *AG Healey Secures $1.75 Million Resolution With Nursing Home Chain Over Failure To Meet the Needs of Residents With Substance Use Disorder*, Dec. 21, 2022, https://www.mass.gov/news/ag-healey-secures-175-million-resolution-with-nursing-home-chain-over-failure-to-meet-the-needs-of-residents-with-substance-use-disorder.

In addition, in February 2023, the New York MFCU, the U.S. Attorney for the Northern District of New York, the Department of Health and Human Services Office of the Inspector General, and the U.S. Department of Justice announced a $7.1 million civil settlement paid by the now-closed Saratoga Center for Rehabilitation and Skilled Nursing Care, its owners, unlicensed operator, and landlord for years of fraud and resident neglect.[16] The investigation found that, when the owners applied to New York's health agency in 2014 to get a license to operate Saratoga Center, they and the landlord misrepresented their relationship, claiming it was at "arm's length," and that the owners were seeking private loans to fund their acquisition of the nursing home. In reality, the owners and the landlord were already in business together, and the landlord was funding the purchase of Saratoga Center. In 2017, the landlord pressured the owners to relinquish control of Saratoga Center to the unlicensed operator and other associates but did not report the change to New York's health agency. During the period the unlicensed individuals operated the nursing home, the governments contend that Saratoga Center delivered worthless services to residents, and its physical condition deteriorated to such a degree that it violated federal and state regulations. The operators failed to adequately staff the home, and residents suffered the consequences, including significant medication errors, excessive and unnecessary falls and injuries, and the development of pressure ulcers that went untreated.

These enforcement actions and many others have shown that too many owners of for-profit nursing homes often decide to deliberately operate nursing homes with low staffing levels, as well as poor levels of staff training and compensation, to reduce expenses. Those owners, their families, and related parties can covertly extract millions of Medicare and Medicaid funds for personal profit either directly or through collusive related party transactions – all while ignoring and violating federal regulations requiring the homes to provide required care and sufficient staffing to deliver it. Moreover, these enforcement actions, and the fact that many for-profit nursing home owners own many homes and keep buying more of them belies the oft-repeated false narrative that government reimbursement rates are too low for nursing homes to increase staffing or be profitable investments. To disincentivize this behavior, and encourage operators of nursing homes to staff as necessary to provide required care for all residents, it is critically important that CMS strengthen regulatory requirements with appropriately high minimum staffing requirements. Doing so will complement, rather than undermine, existing federal regulations and ongoing government enforcement efforts.

B. The 24-Hour Requirement for RNs Will Effectively Improve Protections to Residents.

We support CMS's proposal requiring an RN to be on staff at all facilities 24 hours per day. Residents of long-term care facilities are not only vulnerable because of the effects of aging and multiple comorbidities, but also because of the complexity of skilled nursing care involving polypharmacy, infectious disease, wound care, accidents, and a multitude of other safety and

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[16] "Attorney General James Secures Over $7.1 Million from Former Saratoga County Nursing Home for Years of Fraud and Neglect," February 27, 2023, available at *https://ag.ny.gov/press-release/2023/attorney-general-james-secures-over-71-million-former-saratoga-county-nursing*.

quality issues. These residents often have unique needs that require skilled care to maintain the highest practicable physical, mental, and psychosocial well-being.

While LPNs and CNAs currently provide the majority of direct care in long-term care facilities, RNs are able to provide critical guidance and supervision, especially to these residents with significant acuity. An RN can uniquely conduct resident assessment, diagnosis, outcomes identification, planning, implementation, and evaluation. These skills form the foundation of the nurse's decision-making and determine significant actions to be undertaken by all staff. Both the research literature and RN practice have shown that involvement in patient care improves outcomes and well-being. A 2020 report states:

> [h]igher RN staffing levels are associated with better resident care quality in terms of fewer pressure ulcers; lower restraint use; decreased infections; lower pain; improved activities of daily living (ADL) independence; less weight loss, dehydration, and insufficient morning care; less improper and overuse of antipsychotics; and lower mortality rates (Bostick et al., 2006; Castle, 2008; Castle & Anderson, 2011; Dellefield et al., 2015). Higher nurse staffing levels in nursing homes (including RNs) have been found to reduce emergency room use and re-hospitalizations (Grabowski et al., 2008; Spector et al., 2013). Finally, higher nursing staffing levels (including RNs) are significantly related to lower deficiencies (violations of federal regulations) for poor quality issued by state surveyors (Castle et al., 2011; Lin, 2014).[17]

The significance of adequate nursing staff presence and availability on long-term residents' overall health outcomes has never been more tested or apparent after seeing the negative impacts resulting from staffing shortages during COVID-19's inception and spread. Over 200,000 nursing facility residents and staff died due to COVID-19 since the start of the pandemic, accounting for at least 23% of all COVID-19 deaths in the United States.[18] Furthermore, recent analyses have found that, for every two victims of COVID-19 in nursing facilities, there was another resident who died prematurely of other causes.[19] These tragic

[17] Charlene Harrington, et al., *Appropriate Nurse Staffing Levels for U.S. Nursing Homes*, HEALTH SERV. INSIGHTS v. 13, June 29, 2020, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7328494/.

[18] Priya Chidambaram, *Over 200,000 Residents and Staff in Long-Term Care Facilities Have Died from COVID-19*, KAISER FAMILY FOUNDATION, Feb. 3, 2022, https://www.kff.org/policy-watch/over-200000-residents-and-staff-in-long-term-care-facilities-have-died-from-covid-19/.

[19] Matt Sedensky and Bernard Condon, *Not just COVID: Nursing home neglect deaths surge in shadows*, ASSOCIATED PRESS, Nov. 19, 2020, https://apnews.com/article/pandemics-us-news-coronavirus-pandemic-daac7f011bcf08747184bd851a1e1b8e.

outcomes are reflective of facilities that are chronically understaffed[20] and often fail to provide basic support to residents, such as hygiene, wound care, and feeding/hydration.[21]

Conversely, data from facilities from across the country demonstrates that higher total nursing hours were associated with fewer deaths and a lower risk of a COVID-19 outbreak.[22] CMS also cited a study in support of the Proposed Rule regarding COVID-19 deaths and infections in Connecticut nursing homes, showing that even a 20-minute increase in staffing per resident day from an RN was associated with 22% fewer cases of COVID-19 and 26% fewer COVID-related deaths.[23]

These patterns played out in our states. Understaffing and licensed staff shortages in California facilities caused negative patient health outcomes during the COVID-19 pandemic, often with deadly results. Statistics from early in the pandemic showed that whereas residents of skilled nursing facilities make up less than 1% of the state's population, they accounted for 39% of all COVID-19 deaths in the state and 10% of confirmed COVID-19 cases.[24] People of color, who often reside in skilled nursing facilities with less resources, low staffing levels, and a greater number of deficiencies, experienced a larger share of those deaths.[25] In one case, California regulators shut down a skilled nursing facility with understaffing issues after 71 residents and 32 staff contracted COVID-19, and 16 residents died.[26]

Because the experience and oversight of an RN is crucial to manage the care needs of residents, we strongly support CMS's proposed requirement that an RN be on staff at all times at all long-term care facilities. However, to ensure the intent of this rule is given effect, we recommend the language of the proposed rule specify that the registered nurse shall be *in addition* to the Director of Nursing, and that the registered nurse shall be "providing" direct resident care, rather than merely "available to provide" direct resident care, as proposed.

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[20] Charlene Harrington, et al., *Appropriate Nurse Staffing Levels for U.S. Nursing Homes*, HEALTH SERV. INSIGHTS v. 13, June 29, 2020, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7328494/.

[21] *US: Concerns of Neglect in Nursing Homes*, HUMAN RIGHTS WATCH, Mar. 25, 2021, https://www.hrw.org/news/2021/03/25/us-concerns-neglect-nursing-homes.

[22] Nicholas G. Castle, *Nursing Home Caregiver Staffing Levels and Quality of Care: A Literature Review*, 27 Journal of Applied Gerontology 375 (Aug. 2008).

[23] 88 Fed. Reg. at 61,356; *see also* Yue Li, et al., *COVID-19 Infections and Deaths among Connecticut Nursing Home Residents: Facility Correlates*, 68 Journal of the American Geriatrics Society 1899, 1903 (Sept. 2020), https://agsjournals.onlinelibrary.wiley.com/doi/epdf/10.1111/jgs.16689.

[24] Hans Johnson, *Who Lives in California's Nursing Homes?*, Public Policy Institute of California (May 7, 2020), https://www.ppic.org/blog/who-lives-in-californias-nursing-homes/.

[25] California Association of Long Term Care Medicine, *supra*, fn. 4.

[26] Elizabeth Marcellino, *Citing Two Pasadena Cases, State's Inspector General Raises Concerns About Ability to Handle Nursing Home Crises, Complaints*, Pasadena Now (Mar. 23, 2021), https://www.pasadenanow.com/main/states-inspector-general-raises-concerns-about-ability-to-handle-nursing-home-crises-complaints.

C. We Recommend a Higher HPRD Minimum Staffing Standard in Order to Adequately Protect Patients.

Even though we support CMS's efforts to establish a numerically expressed minimum staffing requirement, clinical studies and evidence from government enforcement actions reflect that CMS's Proposed Rule, which establishes a minimum HPRD of 2.45 for CNAs and .55 for RNs, as well as the alternative under consideration of an overall minimum HPRD of 3.48, are both too low. Instead, we recommend that CMS adopt a minimum staffing standard ratio of 4.1 HPRD (with 2.8 HPRD for CNAs, .75 HPRD for RNs, and .55 HPRD for LPNs).

1. <u>This proposal is consistent with clinical research and would not undermine other states with HPRD requirements.</u>

Our proposed minimum staffing requirement is consistent with the results of CMS's 2001 staffing study, which has been extensively peer-reviewed.[27] This study found that 4.1 HPRD was the staffing threshold below which quality of care for long-term care patients was compromised. In line with the 2001 study, the Coalition of Geriatric Nursing Organizations[28] recommended the "hours of direct nursing care for each resident be at least 4.1 hours per resident day with minimum 30% of that consisting of licensed nurses."

This approach would more closely align with other states that have established minimum staffing standards for long-term care facilities. California law requires a minimum of 3.5 HPRD, comprised of RN, LPN,[29] and CNA hours, and 2.4 of which must be provided by CNAs.[30] New York's law sets a numerically expressed minimum of 3.5 HPRD by an RN, LPN or CNA, of which at least 1.1 HPRD must be provided by a licensed nurse and at least 2.2 HPRD must be provided by a CNA.[31] Massachusetts law establishes a required HPRD of 3.58, of which .508 must be provided by an RN.[32] A rule that establishes a federal minimum staffing level below these thresholds would not only create a difference between the level of care in states with these thresholds and those without them, but it would predictably be used by nursing home operators to undermine these state thresholds and government actions seeking to enforce state and federal duties on nursing homes.

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[27] *Id.*; John Schnelle, et al., Relationship of Nursing Home Staffing to Quality of Care (2004), p. 1; Charlene Harrington, et al., The Need for Higher Minimum Staffing Standards in U.S. Nursing Homes (2016), p. 2.

[28] CGNO includes the American Academy of Nursing, Expert Panel on Aging, American Assisted Living Nurses Association, American Association for Long Term Care Nursing, American Association of Nurse Assessment Coordination, Gerontological Advance Practice Nurses Association, Hartford Institute for Geriatric Nursing, National Association of Directors of Nursing Administration in Long Term Care, National Gerontological Nursing Association.

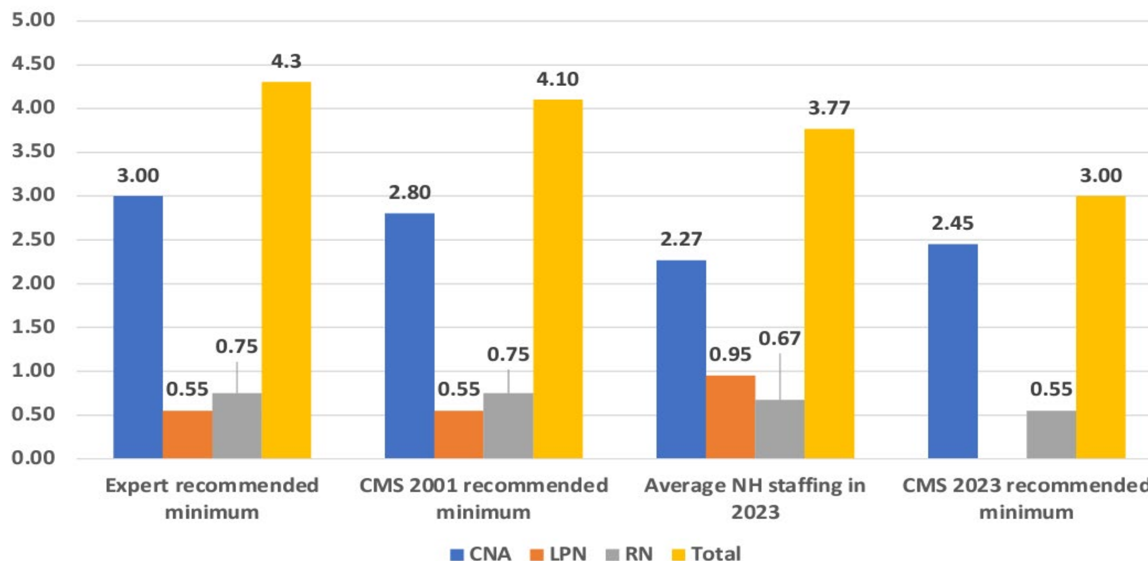
[29] Licensed Practical Nurses are referred to as Licensed Vocational Nurses (LVNs) in the State of California.

[30] Cal. Health & Saf. Code § 1276.65; Cal. Code Regs., tit. 22, § 72329.2.

[31] N.Y. Public Health Law §§ 2803, 2895-b; 10 NYCRR §§ 415.2, 415.13 (2021).

[32] 105 C.M.R. § 150.007.

Setting the minimum recommended in this letter would also be more consistent with existing staffing levels at facilities. CMS staffing data for the first quarter of 2023 reflects that nursing homes reported an average total of 3.63 HPRD nationwide. Similarly, academic research reflects that the national average in 2023 is 3.77 HPRD for nursing homes, as reflected in the chart below from a recent presentation by Charlene Harrington, Ph.D., R.N., available on the website for the Long Term Community Care Coalition:[33]



As such, if this Proposed Rule is adopted in its current form, it could have the unintended consequence of incentivizing homes currently operating at higher HPRDs to lower existing staffing levels to meet the numerically expressed federal standard alone, which would increase the risk of harm to residents.

Finally, the proposed three-year phase in period is too long, and would incentivize for-profit nursing home owners during that period to continue to transfer excessive up-front profit from the homes to themselves and related parties instead of causing the homes to spend more Medicaid and Medicare funds on increasing staffing by raising wages paid to staff and setting higher staffing levels in the homes. We recommend a phase in period of no more than two years.

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[33] See LTCCC "Webinar: New Proposed Federal Nursing Home Standard: The Good, The Bad, and The Data Essentials", September 19, 2023, https://nursinghome411.org/webinar-min-staffing/.

2. CMS's Proposed Rule risks disincentivizing long-term care facilities from ensuring adequate LPN staffing.

Furthermore, we are very concerned that the proposed minimum staffing rule has no LPN HPRD requirement. While the CMS 2001 study found that .55 to .60 LPN HPRD was the threshold below which long- and short-stay quality measures were more likely to be compromised, the proposed staffing requirement would permit nursing homes to operate with low or no LPN hours. This proposal could incentivize many nursing facilities to operate with only or mostly with RNs and CNAs to reach a 3.00 HPRD, and then claim to be "in compliance" with the federally expressed numeric staffing minimum, even though care would be compromised without supplemental LPN hours. This approach, in turn, would result in the assignment of even more duties to already overburdened RN staff, which would cause even more RN turnover, as RNs would justifiably refuse to work in poor working conditions due to burnout or fear of losing their license from working under such conditions.

D. CMS Should Narrow the Hardship Exemption and Further Limit Eligibility for Exemptions of the Requirement.

We recognize the importance of balancing legitimate workforce shortages in the long-term care industry with the need to protect resident safety. However, we believe that without much more stringent eligibility restrictions, the proposed workforce exemption is likely to incentivize many for-profit nursing home owners to perpetuate or begin operation of their homes with practices that increase the risk of harm to residents to enable the owners to siphon Medicare and Medicaid funds from the home for their personal profit. As we have described above, prior and recent government enforcement actions have brought transparency to the reality that too many for-profit nursing home owners have chosen to cut staffing levels when they acquire facilities, and thereafter operate them with low staffing levels that they and their management companies set to reduce expenses and maximize profits while ignoring the nursing home's legal duties under federal and/or state regulations. When operators of for-profit nursing homes engage in these practices, they create such poor working conditions that individuals with other employment options refuse to work at the homes. To avoid incentivizing more of this behavior and the tragic resident neglect it causes, the Proposed Rule must contain strict eligibility criteria that renders operators that engage in these practices ineligible for any workforce exemption.

At a minimum, we recommend that workforce shortage exemptions must be temporary, short-term, limited to true staffing emergencies, and set up to exclude homes from which owners and related parties are siphoning significant funds as profit – while they ignore and violate existing federal regulations designed to protect residents – instead of spending Medicaid and Medicare funds on sufficient staffing. In addition to CMS's existing proposals, we recommend the following to combat potential abuse: 1) any facility with a workforce shortage exemption must be prohibited from admitting new patients until staffing levels have reached the regulatory minimums, unless they are the only facility in the county and make financial disclosures reflecting the owners are not refusing to increase staff pay in order to siphon significant funds for personal profit; (2) there should be an absolute minimum staffing level below which facilities

cannot fall, even with an exemption in place, and (3) workforce shortage exemptions should be limited to a short term, such as three months.

Moreover, CMS's Proposed Rule prohibits a nursing home from being granted an exemption if it meets any of the listed exclusionary criteria: (1) failing to submit Payroll-Based Journal ("PBJ") data; (2) listing by CMS as a Special Focus Facility; (3) has been cited by CMS as having "widespread insufficient staffing with resultant resident harm" or "a pattern of insufficient staffing with resultant resident harm"; or (4) has been cited at the immediate jeopardy level of severity with respect to insufficient staffing, as determined by CMS, at any time in the preceding twelve months. We strongly support these limitations for any proposed minimum staffing rule that is expressed numerically.

Additionally, to ensure that exemptions are temporary, short-term, well-justified, and available only in response to true workforce shortage emergencies, and that an exemption will not exacerbate the danger to patients in an already underperforming facility, we recommend that facilities should not be eligible for exemption if any of the following criteria apply: (1) the facility has already received one workforce shortage exemption in the previous three years; (2) the facility has a CMS overall rating of 2 stars or lower; (3) within the preceding three years, the facility has been the subject of any substantiated complaint, citation, or enforcement action relating to insufficient staffing, neglect, or abuse; and/or the facility's cost reports reflect a significant profit in the preceding year. In addition, we recommend excluding nursing homes that have been found to have extracted profits for themselves and family members while failing to meet federal regulations.[34]

E. We Support CMS's Proposal to Display Compliance with These Standards.

CMS also proposes to display compliance with the new minimum staffing standards on the Care Compare star rating website to benefit those seeking care at skilled nursing facilities, which the undersigned Attorneys General strongly support for the recommended higher minimum standards.[35] To facilitate consumer usage, CMS should prominently display the facility's staffing numbers immediately below the Staffing rating. This approach would allow prospective residents and family members to determine whether the facility has appropriate staffing in a quick, easily accessible manner.

F. CMS Should Not Preempt Higher State Standards.

The Proposed Rule clarifies, and we support, that it would not preempt the applicability of any state or local law providing a higher standard than would be required by the Proposed

[34] This could be done by requiring disclosure of owner salary and related party financial information and setting appropriate exclusion criteria based on funds transferred or net revenue reported.

[35] 88 Fed. Reg. 61,353. CMS already posts information on facility staffing measures on Care Compare, including the average number of hours worked reported for nursing staff, per resident per day. These staffing measures are used to calculate each facility's star rating for the staffing rating domain as part of the CMS Star Quality Rating System.

Rule.[36] Our states have vested interests in the care of their citizens at skilled nursing facilities. To prevent noncompliant skilled nursing facilities from attempting to hide behind the defenses of primary jurisdiction or abstention,[37] CMS should also include language that expressly permits state and local prosecutors to enforce these proposed regulations through state mechanisms, including state False Claims Acts, abuse and neglect statutes, and consumer protection laws. This would further support state and local prosecutors' ability to assist CMS and state regulators in ensuring that patients receive proper care at skilled nursing facilities. Similarly, to avoid undermining existing strong federal regulations governing nursing homes duties, a proposed rule establishing any minimum staffing standards should expressly state that a nursing home's compliance with the HPRD minimums or exemptions is no defense to any enforcement action regarding the existing federal regulations.[38]

G. Conclusion

In summary, the undersigned State Attorneys General support the Administration's efforts to improve the safety and quality of care in long-term care facilities. We encourage the Administration to move forward with a 24-hour RN requirement and strongly encourage the Administration to adopt higher minimum staffing standards, with fewer exceptions, to most effectively protect nursing home residents. Further, to strengthen these necessary requirements, we urge CMS to implement the additional above recommended improvements in the final rule. CMS's swift action in implementing the final rule, with these improvements, will further efforts to improve quality of care in the nation's long-term care facilities, encourage licensed staff recruitment and retention, promote consumer protection and Medicaid program integrity, and support long-term care residents' safety.

Sincerely,

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California Attorney General

Andrea Joy Campbell
Massachusetts Attorney General

Letitia James
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[36] 88 Fed. Reg. 61,373-74.

[37] In both the *Brookdale* and *Mariner* cases, and in other prosecutions of skilled nursing facilities, defendants have raised the related doctrines of abstention and primary jurisdiction. These defenses assert that only regulators, not prosecutors, can enforce certain regulations. While California has prevailed against these defenses, they distract from and frustrate state lawful efforts to require nursing facilities to staff and care for patients according to the law.

[38] *See, e.g.,* 42 C.F.R. § 483 *et seq.*

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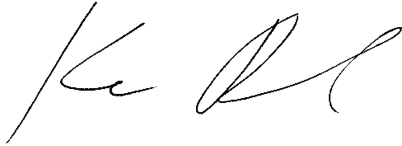

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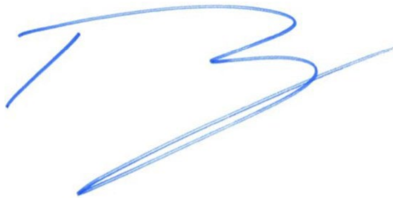

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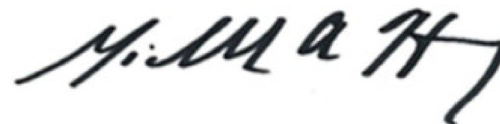

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