

United States Senate

WASHINGTON, DC 20510

July 27, 2023

The Honorable Chiquita Brooks-LaSure
Administrator
U.S. Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Dear Administrator Brooks-LaSure:

We write to urge you to take immediate steps to strengthen our Nation’s nursing home oversight system by increasing transparency and improving monitoring of state survey agencies, which are charged with ensuring the health and safety of 1.1 million residents. As of May 2023, federal data show that 28 percent of the Nation’s 15,000 nursing homes have not received a comprehensive annual inspection for 16 months or more, placing them behind on statutorily mandated annual inspection schedules. One in nine nursing homes have not received an annual inspection in at least two years.¹ The Centers for Medicare & Medicaid Services (CMS) must act to address these troubling shortfalls in the Nation’s nursing home oversight system. Accordingly, given our Committees’ respective jurisdictions and collective responsibilities to nursing home residents, we request regular and prompt updates on the agency’s efforts to address these issues.

The Senate Special Committee on Aging recently convened a hearing that identified troubling shortfalls in the Nation’s nursing home oversight system.² That hearing focused on a Majority staff investigation based on information from every state that identified significant staff shortages hampering states’ ability to conduct nursing home inspections in the timeframes required by federal law. During the hearing, each witness testified that understaffed survey agencies and delayed inspection put residents at risk for harm and poor quality of care.³

The investigation, *Uninspected and Neglected*, revealed that survey agencies responsible for monitoring nursing homes’ compliance with federal standards are in crisis. States reported being unable to effectively conduct required oversight duties due to issues including severe staffing shortages, high turnover rates, and an inexperienced workforce. More than half of the states directly linked nursing home inspection delays to staffing shortages.⁴ Many states have turned to

¹ Majority staff of the Senate Special Comm. on Aging, *Uninspected and Neglected* (May 2023), available at <https://www.aging.senate.gov/imo/media/doc/UNINSPECTED%20%20NEGLECTED%20-%20FINAL%20REPORT.pdf> [hereinafter “Uninspected and Neglected”], at 1.

² Residents at Risk: The Strained Nursing Home Inspection System and the Need to Improve Oversight, Transparency, and Accountability, Before the Senate Aging Comm. On Aging, 118th Cong. (2023), at <https://www.aging.senate.gov/hearings/residents-at-risk-the-strained-nursing-home-inspection-system-and-the-need-to-improve-oversight-transparency-and-accountability>, [hereinafter “Nursing Home Hearing”].

³ Nursing Home Hearing, at 48:30

⁴ *Supra*, note 1, *Uninspected and Neglected*, at 26, *see* Map 4. For additional discussion, *see* Section III(C).

using costly contractors to bridge these gaps, raising concerns about efficiency, effectiveness, and conflicts of interest.⁵

CMS has an integral role to play in addressing many of the current failures of the nursing home oversight system, especially to improve monitoring and reporting on the capacity of state survey agencies to carry out statutorily required inspections in mandated timeframes. In particular, there are two areas that would provide Congress and taxpayers important visibility into state survey agency capacity and improve oversight of federal dollars dedicated to nursing home oversight.

First, CMS should regularly collect staffing information from state survey agencies and report them publicly.⁶ Over the last two decades, staffing shortages have negatively affected survey agencies' ability to carry out high quality and timely nursing home oversight, leaving residents at risk.⁷ Surveyor staffing shortages are the most common challenge states and independent watchdogs cite to explain the gaps and delays in nursing home inspections. Despite persistent survey agency staff shortages, CMS does not systematically collect or report key data such as staffing levels, staff experience, or states' growing use of contract surveyors, leaving Congress and taxpayers in the dark. We urge CMS to promptly begin collecting and reporting survey agency staffing data on a regular basis, to address these gaps and delays.

Staff vacancy rates significantly hamper the state agencies' ability to protect nursing home resident health and safety. The investigation found that 32 state survey agencies have vacancy rates of 20 percent or higher among nursing home surveyors, including nine with vacancy rates of 50 percent or higher.⁸ These shortages have dramatically worsened since a 2003 Government Accountability Office (GAO) report identified survey agency staffing as a barrier to nursing home oversight.⁹ The highest vacancy rate identified in the GAO report was 34 percent, while vacancy rates in 17 States now exceed that rate.¹⁰ More recently, in 2022, the Office of Inspector General (OIG) identified staffing shortages as the "root cause" of survey agencies' problems meeting CMS performance standards.¹¹ Another common problem is high turnover rates among survey agency staff, which leads to increased use of inexperienced surveyors and can increase the time required to complete a survey, sometimes diminishing its quality. The investigation identified 34 states where one-quarter or more of the survey staff had less than two years of experience; in seven survey agencies, at least half of the survey staff had less than two years' experience.¹²

Given these issues, CMS should report on state agencies' capacity to conduct oversight of nursing homes and other federally certified health care providers. Such data should include but

⁵ *Id.*, see Section IV.

⁶ *Id.*, at 69. See Recommendation 2.

⁷ *Id.*, see Section V(C).

⁸ *Id.*, at 17, see Map 1.

⁹ *Nursing Home Quality: Prevalence of Serious Problems, While Declining, Reinforces Importance of Enhanced Oversight*, GAO-03-561 (July 2003) (requested by then Chair of the Senate Finance Committee, Senator Charles Grassley) available at <https://www.gao.gov/assets/gao-03-561.pdf>.

¹⁰ *Supra*, note 1, Uninspected and Neglected, at 18. See also Appendix A, Table 2.

¹¹ *CMS Should Take Further Action to Address States with Poor Performance in Conducting Nursing Home Surveys*, OEI-06-19-00460 (January 2022) [hereinafter HHSOIG 2022 Nursing Home Report] at 1, 10, available at <https://oig.hhs.gov/oei/reports/OEI-06-19-00460.pdf>.

¹² Uninspected and Neglected, at 19-20. See also Map 2.

not be limited to budgeted surveyor positions, surveyor vacancies, turnover rates, surveyors currently in training, salary ranges and salary competitiveness, and the volume of survey work conducted by contract surveyors. Information shared by states showed that CMS has gathered data on many of these issues as recently as 2021, demonstrating that CMS has the ability to publicly report on these issues in a systematic fashion. Such data collection would help CMS better understand—and better address—staffing challenges faced by states. In addition, such data would provide Congress and taxpayers critical information about the functionality of the Nation’s nursing home oversight system.

Second, CMS should increase oversight of contract surveyors, as more states use them to address staffing difficulties and workloads that grew during the COVID-19 pandemic.¹³ Half of the Nation’s survey agencies reported contracting with private companies to conduct nursing home surveys, with even more currently exploring their use.¹⁴ The growing use of contract surveyors has come at a significant cost. In 2022, three national contractors alone conducted more than 600 annual recertification surveys—six percent of the national total—and generated revenue of nearly \$20 million from state survey business.¹⁵ Despite the growing use of contractors—in both frequency and scope—there appears to be no direct federal oversight of their work quality and costs.

The specialized nature of survey work has resulted in a highly concentrated market, allowing contract survey companies to exercise significant market power when contracting with states. Many states cited high costs as a major concern and reported minimal ability to negotiate prices with potential contractors.¹⁶ Contract surveys often cost multiple times the cost of state employees conducting a similar survey. Some states also reported concerns about the quality of contracted surveys, noting that contract surveys have at times significantly deviated from state quality standards.¹⁷ Given the growing role of contractors in the oversight of nursing homes, CMS must ensure contract survey work meets federal quality standards and is cost effective.

The expanding use of contract surveyors also presents potential conflicts of interest.¹⁸ The investigation found instances of contractors rendering survey services to the state or federal governments at the same time they marketed or sold consulting services to health care providers.¹⁹ It is particularly concerning that several states were not aware of these consulting relationships until the investigation brought it to their attention, given that any such relationships create the potential for real and perceived conflicts of interest. Additionally, two companies currently contracted with the federal government to conduct oversight of state survey activities for CMS are simultaneously conducting contract surveys for states.²⁰ Contracting for CMS while also competing for survey agency business creates a scenario where the contractor is serving both the regulator and the regulated entity—a clear conflict of interest that CMS should examine.

¹³ *Id.*, at 69. See Recommendation 3.

¹⁴ *Id.*, at 34, see Map 5.

¹⁵ *Id.*, at 36-37. For additional data regarding three national contract survey companies, see Appendix A, Table 4-Table 7.

¹⁶ *Id.*, see Section V(D) and V(D)(1).

¹⁷ *Id.*, see Section V(D)(2) and V(D)(3).

¹⁸ *Id.*, see Section V(E).

¹⁹ *Id.*, see Section V(E)(1).

²⁰ *Id.*, see Section V(E)(2).

We urge CMS to promptly begin overseeing the use of contract surveyors. In conjunction with collecting and reporting data, CMS should also consider ways to conduct additional oversight of contract surveys, such as targeted federal monitoring surveys, and ensure that real and perceived conflicts of interest are identified and addressed. In addition, CMS is well-positioned to provide states additional guidance and technical assistance regarding the use of contractors to conduct survey activities, which would help ensure efficiency and quality.

We request that you provide our offices detailed information about how CMS intends to take action in these two areas no later than September 11, 2023. In addition, we request that by that date, you provide individual answers to each of the following questions:

1. CMS reported being aware of survey agencies' difficulty recruiting due to uncompetitive salaries.²¹ To what extent does CMS currently oversee survey agency staffing and vacancy rates and other related issues?
2. In 2021, CMS appears to have collected staffing data from states via an online portal administered by a federal contractor. The portal asked states to provide data including vacant surveyor positions, turnover rates, and factors driving vacancies and turnover.²² States also reported providing CMS with data on an *ad hoc* basis.²³
 - a. Please describe the staffing information and data CMS collected through the portal.
 - b. How many states responded to the 2021 survey?
 - c. Has CMS continued to use the portal as a tool to gather staffing information from states? If not, what, if any, factors would prevent CMS from compiling existing data sources and/or using a similar portal to systematically collect and report staffing information going forward?
3. The growing use of contract surveyors, their high costs, questions about quality, and potential conflicts of interest demand additional attention from CMS to ensure quality inspections are taking place and federal funds are being prudently spent.
 - a. To what extent does CMS currently oversee survey agencies' use of contractors?
 - b. To what extent does CMS conduct oversight of states' use of contractors?
4. CMS guidance documents detail several "situations that may raise a question of possible conflicts of interest" for state and federal surveyors, include the acceptance of fees or payments from "a health facility or group of health facilities or association of health facility officers for personal appearances, personal services, consultant services, contract services, referral services, or for furnishing supplies to a health facility."²⁴ Similarly, CMS notes that entities must be free from conflicts of interest in order to be approved to

²¹ *Id.*, at 49. *See also* Appendix D, Exhibit 4.

²² *Id.*, at 49-50. *See also* Appendix D, Exhibit 12, CMS State Agency Plans, n.d., at AGING-01260-AGING-01263.

²³ *Id.*, e.g. *see* Section V(A), Section V(B), and Appendix B.

²⁴ Centers for Medicare & Medicaid Services, "State Operations Manual, Chapter 7 – Survey and Enforcement Process for Skilled Nursing Facilities and Nursing Facilities," accessed June 27, 2023, available at <https://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/som107c07pdf.pdf>, *see* 7202.2.2 - Examples of Potential Conflicts of Interest.

conduct informal dispute resolutions between states and providers.²⁵ However, these guidance documents do not appear to have contemplated the survey agencies' growing use of contract surveyors; the fact that contract surveyors have, or may, provide consulting services to providers; and concurrently working for survey agencies and the federal government.

- a. What guidance and technical assistance does CMS currently provide states regarding the use of contractors to conduct surveys?
 - b. Please describe the extent to which CMS has examined issues related to real and perceived conflicts of interest related to states' use of contract surveyors, as well as current federal contractors. If a conflict of interest review has been conducted, please provide the findings
5. In 2022, OIG recommended that CMS more widely disseminate the results of State Performance Standards System (SPSS) results, which monitor the performance of survey agencies.²⁶ OIG recommended several steps to increase dissemination, including CMS proactively provide SPSS results to stakeholders including state Long-Term Care Ombudsman, nursing home provider organizations, and patient advocacy groups, among others. What steps is CMS taking to increase dissemination of SPSS results to the public, stakeholders, and Congress?

The Nation's 1.1 million nursing home residents should expect high quality care to be delivered in an environment that prioritizes health, safety, and human dignity. Thorough and timely nursing home inspections are key to ensuring these goals are met.

Sincerely,



Robert P. Casey, Jr.
Chairman
Senate Special Committee on Aging



Ron Wyden
Chairman
Senate Committee on Finance



Charles E. Grassley
Ranking Member
Senate Committee on Budget

²⁵ *Id.*, see 7213.6 - Qualifications of an Independent Informal Dispute Resolution Entity or Person(s).

²⁶ *Supra*, note 11, HHSOIG 2022 Nursing Home Report, at 20.