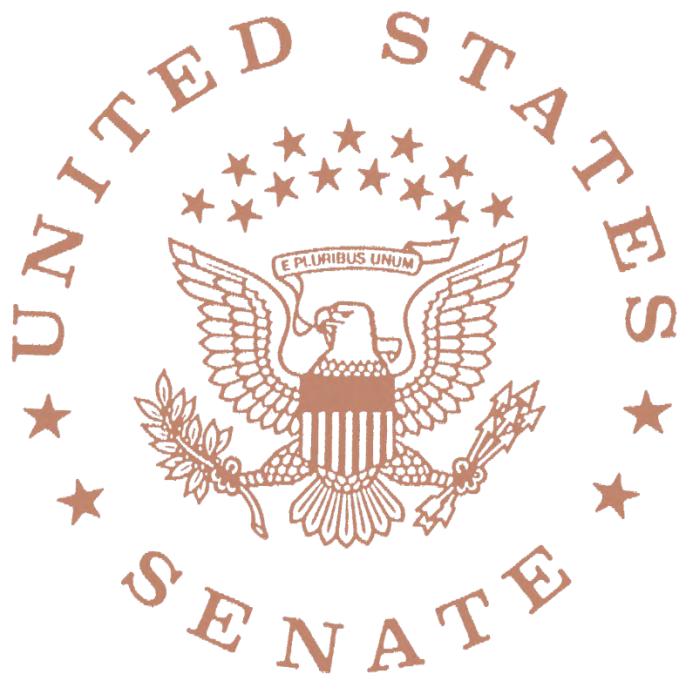


Uninspected and Neglected:

Nursing Home Inspection Agencies
are Severely Understaffed,
Putting Residents at Risk

A REPORT BY THE
MAJORITY STAFF OF THE
U.S. SENATE SPECIAL
COMMITTEE ON AGING



Note to Readers

The following report was developed by the Majority staff of the Senate Special Committee on Aging at the direction of Chairman Casey. This document has been printed for informational purposes. It does not represent findings or recommendations formally adopted by the Committee.

References to “nursing home” throughout this report should be understood to mean skilled nursing or nursing facilities participating in the Medicare and/or Medicaid programs, which are subject to Federal regulations contained in 42 CFR §483.

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FOREWORD



Dear Reader:

Every year, the federal government spends tens of billions of dollars on nursing home care, but Congress appropriates less than 80 cents per resident per day to nursing home oversight. This investigation shows how these inadequate investments for much of the last decade has put older adults and people with disabilities at risk.

Nearly a third of the Nation's 15,000 nursing homes are behind on comprehensive annual inspections, including one in nine that have not received an annual inspection in two years or more. Infrequent annual inspections have led more residents and families to file complaints. However, advocates shared stories of nursing home residents waiting months for complaints to be investigated, even when abuse, neglect, and serious health deficiencies were reported.

More than half the Nation's state inspection agencies said such delays are directly linked to underfunding for—and understaffing—within these critical state offices. The investigation found that 32 agencies have vacancy rates of 20 percent or higher among nursing home inspectors, and nine of those agencies have vacancy rates of 50 percent or higher. More than 80 percent of States pointed to noncompetitive salaries as a barrier to recruiting and retaining inspectors.

This investigation should serve as wakeup call as the number of people over the age of 65 is set to hit 80 million by 2040—twice as many as in 2000. It is past time that we come together to adequately fund long-term care and ensure there is a capable regulatory system to oversee it.

Sincerely,

A handwritten signature in black ink that reads "Bob Casey".

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

I: Introduction

In May 1986, the Senate Special Committee on Aging convened a hearing called “Nursing Home Care: The Unfinished Agenda,” in conjunction with the release of an investigation conducted by then-Chairman John Heinz (R-PA) that uncovered disturbing shortfalls in nursing home oversight.¹ The investigation and hearing came on the heels of a landmark nursing home report by the Institute of Medicine, which laid the groundwork for major reform legislation President Reagan signed into law as part of the Omnibus Budget Reconciliation Act of 1987.² Among the witnesses to testify before the Aging Committee was Conrad Thompson, director of Washington State’s Bureau of Nursing Home Affairs. In his opening statement, Mr. Thompson warned of the “critical need for adequate funds to inspect nursing homes.”³

More than three decades later, a new Aging Committee Majority staff investigation again raises serious questions about the adequacy of the Nation’s nursing home oversight, and the safety of 1.1 million nursing home residents.⁴ Federal data show that, as of early May 2023, 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 across the Nation have not received an annual inspection in two years.

At Chairman Bob Casey’s (D-PA) direction, the Majority staff has spent the last year examining the Nation’s nursing home oversight system, and its ability to ensure the health and safety of nursing home residents. The investigation revealed that the State agencies responsible for monitoring nursing homes’ compliance with Federal standards are in crisis. In letters and data provided to the Committee by every State, the District of Columbia, and Puerto Rico, inspection agencies reported an inability to effectively conduct their jobs due to severe staffing shortages, high turnover rates, and Federal funding that has remained largely flat for the last decade. The Committee found that 31 States and the District of Columbia have vacancy rates of 20 percent or more among the staff responsible for inspecting nursing homes, and nine States have vacancy rates of 50 percent or more. Moreover, a large proportion of the inspection staff on payroll are inexperienced, reducing their effectiveness.

More than half of the States directly linked staffing shortages to nursing home inspection delays. States reported that understaffing strained their ability to keep up with annual recertification surveys and to respond in a timely manner when residents and families file health and safety complaints. A growing number of States have turned to inspectors employed by private

¹ *Nursing Home Care: The Unfinished Agenda (Volume 1): Hearing before the U.S. Senate Special Committee on Aging*, 99th Cong. 1082 (1986) (statement of Conrad Thompson, director, Washington Bureau of Nursing Home Affairs), available at <https://www.aging.senate.gov/imo/media/doc/publications/5211986.pdf> [hereinafter *1986 Aging Committee Hearing*].

² For additional discussion of the legislative history of the Federal Nursing Home Act, see *Health and Hospital Corp. of Marion County, et al., v. Ivanka Talevski, Personal Representative of the Estate of Gorgi Talevski, Deceased*, Brief amicus curiae of Toby S. Edelman. 23 Sept. 2022, available at https://www.supremecourt.gov/DocketPDF/21/21-806/238684/20220923152036326_No.%2021-806_Amicus%20Brief.pdf.

³ *Supra*, note 1, *1986 Aging Committee Hearing*, at 117.

⁴ “Total Number of Residents in Certified Nursing Facilities,” State Health Facts, KFF, accessed May 13, 2023, <https://www.kff.org/other/state-indicator/number-of-nursing-facility-residents/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

companies to bridge gaps—costly contractual arrangements worth millions of dollars that should be subject to additional scrutiny from Federal regulators, watchdogs, and the press.

The staffing shortages and inspection delays endanger nursing home residents. According to letters from Long-Term Care Ombudsmen, who advocate for nursing home residents pursuant to Federal and State law, these delays mean complaints go unanswered and residents suffer. One ombudsman recalled a nursing home resident who was punched in the face by a worker; however, the State did not investigate the complaint for months.⁵ Another ombudsman shared stories of nursing home residents who filed complaints regarding skin breakdown—a serious condition that can lead to infection and death—that was not investigated at all.⁶ A third wrote that “poor conditions in nursing homes are directly connected to insufficient enforcement capacity of survey, certification, and licensing entities.”⁷ Each ombudsman said they believed the lack of a timely response to serious complaints from residents, family, and ombudsman’s offices themselves was due to understaffing at their respective State’s survey agency.⁸

The slow deterioration of the Nation’s nursing home oversight has been highlighted by independent watchdog reports,⁹ press articles,¹⁰ peer-reviewed studies,¹¹ and budget requests submitted by the Centers for Medicare & Medicaid Services (CMS) under President Obama, President Trump, and President Biden.¹² In its FY2021 budget request, the Trump

⁵ Georgia Long-Term Care Ombudsman, phone conversation with Aging Committee Majority staff, April 26, 2023; *see also* Appendix D, Ex. 1, Letter from Georgia Long-Term Care Ombudsman to The Honorable Bob Casey, Jr., May 3, 2023 [hereinafter *Georgia LTC Ombudsman Letter*]; *see also* Centers for Medicare & Medicaid Services (CMS), *Statement of Deficiencies and Plan of Correction for Life Care Center (Fitzgerald, Georgia)*, June 29, 2022, available at <https://www.medicare.gov/care-compare/inspections/pdf/nursing-home/115654/health/complaint?date=2022-06-29> [hereinafter *Fitzgerald Life Care Center Deficiencies Report*] at 6-7, 21.

⁶ Appendix D, Ex. 2, Letter from Colorado Long-Term Care Ombudsman to The Honorable Bob Casey, Jr., April 20, 2023 [hereinafter *Colorado LTC Ombudsman Letter*]; “Bedsore (pressure ulcers),” Mayo Clinic, accessed May 13, 2023, <https://www.mayoclinic.org/diseases-conditions/bed-sores/symptoms-causes/syc-20355893>.

⁷ Appendix D, Ex. 3, Letter from Kansas Long-Term Care Ombudsman to The Honorable Bob Casey, Jr., April 24, 2023 [hereinafter *Kansas LTC Ombudsman Letter*].

⁸ Appendix D contains letters from eight Long-Term Care Ombudsman.

⁹ For example, *see* Government Accountability Office (GAO), *Federal Monitoring Surveys Demonstrate Continued Understatement of Serious Care Problems and CMS Oversight Weaknesses*, GAO-08-517 (May 2008), available at <https://www.gao.gov/products/gao-08-517> [hereinafter *GAO 2008 Federal Survey Monitoring Report*]; Office of Inspector General for the Department of Health and Human Services (HHSOIG), *States’ Backlogs of Standard Surveys of Nursing Homes Grew Substantially During the COVID-19 Pandemic*, OEI-01-20-00431 (July 2021), available at <https://oig.hhs.gov/oei/reports/OEI-01-20-00431.asp>; HHSOIG, *CMS Should Take Further Action to Address States with Poor Performance in Conducting Nursing Home Surveys*, OEI-06-19-00460 (January 2022), at 1, 10, available at <https://oig.hhs.gov/oei/reports/OEI-06-19-00460.pdf> [hereinafter *OIG 2022 Nursing Home Survey Evaluation*].

¹⁰ Michael Scott Davidson, “Massive Backlog of Nursing Home Inspections Takes Human Toll Amid Lawsuits,” *Newsweek*, March 1, 2023, <https://www.newsweek.com/nursing-homes-health-inspections-families-sue-covid-investigation-1783513> [hereinafter *Newsweek Nursing Home Article*]; Jayme Fraser and Nick Penzenstadler, “Many nursing homes are poorly staffed. How do they get away with it?” *USA TODAY*, December 1, 2022, <https://www.usatoday.com/in-depth/news/investigations/2022/12/01/skilled-nursing-facilities-staffing-problems-biden-reforms/8318780001/>.

¹¹ Dawn Linn, et al., “Improving Structural Empowerment and Job Satisfaction Among State Health Facility Surveyors,” *Journal of Doctoral Nursing Practice* 13, no. 1 (2020): 90-100, available at <https://pubmed.ncbi.nlm.nih.gov/32701471/>; Ferrell, Betty R., Gregory L. Alexander, and Mary Ersek, et al. *The National Imperative to Improve Nursing Home Quality: Honoring Our Commitment to Residents, Families, and Staff*. Washington, DC: The National Academies Press, 2022, at 411, available at <https://www.nationalacademies.org/our-work/the-quality-of-care-in-nursing-homes> [hereinafter *National Academies 2022 Report*].

¹² CMS, “Fiscal Year 2017 Justification of Estimates for Appropriations Committees,” n.d., available at <https://www.cms.gov/About-CMS/Agency-Information/PerformanceBudget/Downloads/FY2017-CJ-Final.pdf> [hereinafter *CMS FY2017 Budget Justification*], at 123; CMS, “Fiscal Year 2021 Justification of Estimates for Appropriations Committees,” n.d.,

Administration wrote that insufficient funding had resulted in a shift from proactive to reactive oversight, meaning “issues that could be easily identified during standard health surveys go unaddressed” and could lead to “life threatening (*sic*) circumstances.”¹³ Three years later, the Biden Administration wrote in its FY2024 budget request that stagnant funding, in addition to effects of the COVID-19 pandemic, “has fueled the loss and availability of [survey agency] surveyor resources and resulted in ongoing growth in complaints, with adverse effects on programmatic efficiency, quality and ultimately beneficiary safety,” in all health care settings.¹⁴

Despite these persistent concerns, current funding for this essential oversight tool is woefully inadequate—Congress has not substantially increased funding for nursing home inspections in a decade, with the exception of temporary Coronavirus Aid, Relief, and Economic Security (CARES) Act funding to help States respond to COVID-19 in nursing homes.¹⁵ The CARES Act funding is set to sunset later this year, which States say will make carrying out their work even more difficult.¹⁶ Federal funding for survey and certification of health facilities—most of which goes to States to devote to oversight of nursing homes—is just 2.5 percent higher today than in FY2015.¹⁷ During the same period, the number of Medicare-eligible health facilities across all care settings has increased more than 10 percent; the number of nursing home complaints filed with States has increased more than 20 percent; and the salary of nurses, who make up a large share of the inspection workforce, has increased more than 20 percent.¹⁸

This report examines the capacity of State inspection agencies—known as survey agencies—to oversee nursing homes and the difficulty health facility inspectors—known as surveyors—face doing their jobs amidst severe staffing shortages and increasing workloads. The people working at survey agencies are dedicated professionals who endure long hours conducting emotionally taxing work, often for relatively low pay, each of whom wants to see patient care and safety improved. As the number of people aged 65 or older is set to reach 80 million by 2040—twice the number in 2000¹⁹—ensuring that every nursing home patient receives high quality care demands that the Nation provide these public servants with the resources necessary to properly oversee facilities.

available at <https://www.cms.gov/About-CMS/Agency-Information/PerformanceBudget/FY2021-CJ-Final.pdf> [hereinafter *CMS FY2021 Budget Justification*], at 71; CMS, “Fiscal Year 2024 Justification of Estimates for Appropriations Committees,” n.d., available at <https://www.cms.gov/files/document/cms-fy-2024-congressional-justification-estimates-appropriations-committees.pdf-0> [hereinafter *CMS FY2024 Budget Justification*], at 73.

¹³ *Id.*, CMS FY2021 Budget Justification, at 72.

¹⁴ *Supra*, note 12, CMS FY2024 Budget Justification, at 73.

¹⁵ P.L.116-136.

¹⁶ CMS, “CARES Act Financial Guidance to State Survey Agencies,” April 30, 2020,

<https://www.cms.gov/files/document/cares-act-financial-guidance-state-survey-agencies.pdf>, *see* Section VI.

¹⁷ CMS, “Fiscal Year 2016 Justification of Estimates for Appropriations Committees,” n.d., available at <https://www.cms.gov/about-cms/agency-information/performancebudget/downloads/fy2016-cj-final.pdf> [hereinafter *CMS FY2016 Budget Justification*], at 114; *supra*, note 12, *CMS FY2024 Budget Justification*, at 73. Congress set discretionary funding for Medicare Survey & Certification at \$407.3 million for FY2023. Discretionary funding for the program had been set \$397.3 million annually since FY2015. Of the \$407.3 million, CMS directs \$370.7 million to States, of which \$321.7 million is marked for nursing home oversight.

¹⁸ *See* Section V(D) of this report, “Trump, Biden Administrations Sounded Alarm About Survey Agencies in Budget.”

¹⁹ Administration for Community Living, 2020 Profile of Older Americans, May 2021, at 5,

https://acl.gov/sites/default/files/aging%20and%20Disability%20In%20America/2020Profileolderamericans.final_.pdf, last accessed May 13, 2023.

Thirty-seven years ago, the Aging Committee received testimony that funding cuts being considered at the time posed “the gravest consequences for this Nation’s ability to monitor the quality of health care in our nursing homes across the country.”²⁰ While increased funding may not solve all of the issues survey agencies face today, States have made clear that absent sustained Federal investment, any effort to improve the monitoring of nursing home care quality and resident safety will fall short. This report seeks to detail the barriers currently affecting the Nation’s nursing home oversight system and lay out solutions for Congress, the Federal government, States, and other stakeholders, with the ultimate goal of improving the health and safety of the Nation’s one million nursing home residents.

A. Summary of the Investigation

The Majority staff’s investigation of survey agencies grew out of Chairman Casey’s previous work related to the Special Focus Facilities (SFF) program, which provides for more frequent surveys of the Nation’s poorest performing nursing homes.²¹ In response to Chairman Casey’s inquiries about the SFF program, CMS reported that the program’s capacity shrank and had not recovered due to budget cuts in FY2014 and flat-lined Federal funding since that time.²² In response to these concerns and data showing persistent national survey backlogs, Majority staff began to more broadly examine the capacity of CMS and States to oversee nursing homes participating in the Medicare and Medicaid programs.

Majority staff met with and reviewed reports by the Department of Health and Human Services (HHS) Office of Inspector General (OIG), the Government Accountability Office (GAO), and the 2022 nursing home report issued by the National Academies of Sciences, Engineering and Medicine. In addition, Committee staff interviewed current and former surveyors; reviewed available press reports and academic articles; and spoke with outside experts from academia, the nursing home industry, and the patient advocacy community. Committee staff also met with survey agencies from 10 States and held multiple meetings with CMS on nursing home oversight.

Following these meetings, Chairman Casey sent letters in September 2022 to the 50 States, the District of Columbia, and Puerto Rico seeking firsthand accounts of the challenges survey agencies were facing overseeing nursing homes.²³ Chairman Casey’s letter also requested supporting documents, including correspondence with the Federal government, and contracts between States and companies that provide third-party surveys. All States submitted responses.

²⁰ *Supra*, note 1, 1986 Aging Committee Hearing, at 117.

²¹ For example, see U.S. Senate Special Committee on Aging (Aging Committee), “Casey: 1 in 5 Facilities on Poor-Performing Nursing Homes List Overdue for Inspections,” press release, May 9, 2022, <https://www.casey.senate.gov/news/releases/casey-1-in-5-facilities-on-poor-performing-nursing-homes-list-overdue-for-inspections>; Aging Committee, “Casey, Toomey Introduce Bipartisan Nursing Home Reform Legislation,” press release, March 17, 2021, <https://www.aging.senate.gov/press-releases/casey-toomey-introduce-bipartisan-nursing-home-reform-legislation->; Aging Committee, “Casey, Toomey Secure CMS Commitment to Publicly Release Monthly List of Underperforming Nursing Facilities,” press release, June 5, 2019, <https://www.aging.senate.gov/press-releases/casey-toomey-secure-cms-commitment-to-publicly-release-monthly-list-of-underperforming-nursing-facilities->.

²² Letter from The Honorable Seema Verma, Administrator, CMS to The Honorable Bob Casey, Jr., May 3, 2019, available at <https://www.aging.senate.gov/imo/media/doc/CMS%20Response%20to%20Ranking%20Member%20Casey%20050319.pdf>.

²³ Aging Committee, “Casey Pushes for Information from State Nursing Home Inspectors Amidst Staffing Shortages, Widespread Inspection Delays,” press release, September 13, 2022, <https://www.aging.senate.gov/press-releases/casey-pushes-for-information-from-state-nursing-home-inspectors-amidst-staffing-shortages-widespread-inspection-delays> [hereinafter *Casey Survey Agency Letter*].

In total, the Aging Committee's Majority staff has received and reviewed more than 1,300 pages of documents from States.

In addition to the documents from States, Majority staff obtained more than 400 pages of documents from OIG. The documents from OIG consisted of correspondence between States and CMS dating back to 2014 and transcribed interviews OIG conducted with CMS officials from headquarters and regional offices during the preparation of a 2022 program evaluation. Majority staff also requested and received letters from long-term care ombudsmen in several States providing their perspectives on the ways survey agency staffing problems affect nursing home residents. Chairman Casey subsequently sent letters in March 2023 to Ascellon, CertiSurv, and Healthcare Management Solutions (HMS), three companies that contract with multiple States to conduct surveys of nursing homes and other health care facilities. Finally, Majority staff received information from CMS regarding survey agency staffing issues; however, the agency declined to provide supporting documents, despite repeated written requests.

B. Section of the Report

The report is made up of seven sections:

Section II describes the role of a State survey agency, the job of a surveyor, associated qualification and training requirements, the survey process, and the role the Federal government plays to regulate and fund survey and certification activities.

Section III reviews responses from States regarding staffing shortages and the challenges presented by high turnover rates and an inexperienced survey workforce. The investigation found that 31 States and the District of Columbia had vacancy rates exceeding 20 percent among their surveyor staff. States directly linked these shortages to lags in inspection timeliness. State Long-Term Care Ombudsmen, in turn, shared concerns about how strained survey agency capacity negatively affects the well-being of nursing home residents. The section also examines the detrimental effect untimely surveys are having on the accuracy of Federal star quality ratings on Care Compare that consumers use when evaluating nursing homes. The section also discusses the role that low salaries, burnout, and other factors play in States' challenges recruiting and retaining inspection staff. Finally, the section reviews strategies States are using to address surveyor vacancies and turnover.

Section IV examines States' use of third-party contractors to conduct surveys of nursing homes and other strategies States are using to address staffing shortages. The investigation found that 25 States and Puerto Rico reported using third-party contractors to conduct surveys in nursing homes. Three multistate contractors reported \$52 million in revenue from State survey activities from 2018 to 2022, including nearly \$20 million last year alone. This section also examines concerns about possible conflicts of interest for third-party contractors providing survey services.

Section V demonstrates how CMS and Congress were repeatedly made aware of the worsening staffing problems at survey agencies over the last two decades. The concerns

raised to Congress and CMS include warnings that short-staffed survey agencies were having a negative effect on the health and safety of nursing home residents.

Section VI examines how States used \$100 million in CARES Act funding, secured by Chairman Casey, to assist with oversight of nursing homes during the COVID-19 pandemic. The CARES Act funding is set to expire on September 30, 2023. There is widespread concern among survey agencies regarding their ability to continue conducting new surveys created in response to the COVID-19 pandemic, completing regular recertification surveys, and responding to complaints in a timely manner without CARES Act funding. Thirty-two States and Puerto Rico have expressed concern about insufficient Federal funding for survey agency activities, the sunset of CARES Act funds in September 2023, or both.

Section VII issues recommendations to CMS, States, Congress, and other stakeholders.

The report contains six appendixes:

Appendix A contains data tables derived from qualitative and quantitative data gathered from States, as well as data from three multistate contract surveyor companies.

Appendix B contains an analysis of communications between three State survey agencies and CMS regarding Federal funding concerns.

Appendix C contains correspondence from States in response to Chairman Casey's September 2022 letter.

Appendix D contains correspondence to the Aging Committee from CMS; correspondence from State Ombudsmen; and correspondence from Ascillon, CertiSurv, and Healthcare Management Solutions, the three most prominent companies that provide third-party contract surveyor services to States; and screen shots of a web portal CMS used to collect staffing data from States in 2021.

Appendix E contains contracts and other financial documents related to States' use of third-party contractors to conduct surveys, as detailed in Section IV.

Appendix F contains correspondence between States and CMS that were provided to the Majority staff by HHS OIG.

II: The Role of State Survey Agencies

Nursing homes that receive payment from Medicare and/or Medicaid are subject to regulatory oversight by the Centers for Medicare & Medicaid Services (CMS) and the States in which they operate. Under Section 1864 of the Social Security Act, also known as the 1864 Agreement, States enter into an agreement with the U.S. Department of Health and Human Services to conduct surveys and certifications of health care facilities.²⁴ The regulatory work is carried out by offices within State governments known as survey agencies.²⁵ The work survey agencies conduct overseeing health facilities participating in Federal health programs is jointly funded by Medicare and States.²⁶

Survey agencies are integral to ensuring the health and safety of the roughly 1.1 million residents in the Nation’s 15,000 nursing homes. Survey agencies oversee the Nation’s nursing homes by conducting proactive annual inspections known as “recertification” or “standard” surveys; investigate complaints against the facilities; take enforcement actions when warranted; and make public the results of survey findings.²⁷ These inspection activities are meant to ensure that nursing homes are abiding by conditions of participation for the Medicare and Medicaid programs, including meeting Federal standards for medical care, adequate staffing, emergency preparedness, and safeguarding residents from abuse and neglect.²⁸ Survey agencies conduct similar oversight of other health care facilities participating in the Medicare and Medicaid programs, though requirements vary by setting.²⁹

The following section is primarily based on State responses, discussions with State survey agency officials, a review of CMS’ State Operations Manual and other CMS memoranda, and observation of a standard survey conducted at a Federally certified nursing home.

A. Overview of Nursing Home Surveys

Nursing homes are the colloquial term for health facilities referred to as “skilled nursing facilities” or “nursing facilities” in Federal health regulations.³⁰ Nursing homes generally serve two types of beneficiaries—short-term and long-term—in a residential medical setting. Short-term beneficiaries are typically post-acute patients who receive rehabilitative services that are covered by Part A of the Medicare program or private insurance. Long-term care beneficiaries are often older adults or people with disabilities who require daily skilled nursing care that is covered by Medicare, Medicaid, private insurance, or out-of-pocket payments. Nursing homes can be found in a number of different settings including as stand-alone facilities, as part of a hospital’s medical campus, or as part of a continuing care retirement community. Nursing homes

²⁴ 42 U.S.C. 1395AA; *see also* “Nursing Homes,” CMS, accessed May 13, 2023, <https://www.cms.gov/medicare/provider-enrollment-and-certification/certificationandcompliance/nhs> [hereinafter *CMS Nursing Home Information*].

²⁵ “Quality, Safety & Oversight - General Information,” CMS, accessed May 13, 2023, <https://www.cms.gov/medicare/provider-enrollment-and-certification/surveycertificationgeninfo> [hereinafter *CMS QSO Information*].

²⁶ *See* Appendix C. States provided data regarding State/Federal share of survey costs for survey activities. *See* response to Question 7(b) of Chairman Casey’s September 2022 letter to survey agencies.

²⁷ *Supra*, note 24, CMS Nursing Home Information.

²⁸ *Supra*, note 23, Casey Survey Agency Letter.

²⁹ *Supra*, note 25, CMS QSO Information.

³⁰ 42 CFR §483

constitute the largest share of each State survey agency’s portfolio of surveying activity among the 14 categories of facilities surveyed per their agreements with CMS.³¹

Survey agencies conduct four types of nursing home surveys: (1) certification of new facilities; (2) recertification of established facilities (sometimes referred to as “standard” surveys); (3) complaint surveys; and (4) focused infection control surveys. Standard surveys are statutorily required to occur for most nursing homes at least every 15 months, with a statewide average of 12 months.³² Nursing homes in the Special Focus Facility (SFF) program, which monitors the Nation’s worst performing nursing homes, must undergo standard surveys every six months.³³ Federal law also provides that States can perform a standard survey within two months of “any change of ownership, administration, management of a skilled nursing facility, or the director of nursing in order to determine whether the change has resulted in any decline in the quality of care furnished in the facility.”³⁴

Complaint, or investigation, surveys are performed in response to a complaint lodged against a facility or to a facility reported incident (FRI).³⁵ Complaints may be reported by residents, family members of residents, or an ombudsman. The timeframe in which the complaint survey must be investigated depends on its severity:

1. Immediate jeopardy (IJ) complaints are the most serious and are defined as a situation in which the facility’s noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment or death to a resident.³⁶ In most instances, IJ complaints must be investigated within three business days of the initial report.³⁷
2. “Non-IJ High” complaints occur when the alleged noncompliance with one or more requirements may have caused harm that negatively impacts the individual’s mental, physical, and/or psychosocial status and are of such consequence to the person’s well-being that a rapid response by the survey agency is indicated. Non-IJ high complaints

³¹ GAO, *CMS Needs to Reexamine Its Approach for Funding State Oversight of Health Care Facilities*, GAO 09-64 (February 2009), available at <https://www.gao.gov/assets/gao-09-64.pdf>, at 6.

³² 42 U.S.C. 1395i-3(g)(2)(A)(iii)(II); GAO, *CMS Needs to Continue to Strengthen Oversight of Infection Prevention and Control*, GAO-22-105133 (September 2022), available at <https://www.gao.gov/products/gao-22-105133> [hereinafter *GAO Infection Prevention Report*], at 48.

³³ 42 U.S.C. 1395i-3(f)(8)(B). As noted in Section I, Chairman Casey has conducted extensive oversight of the Special Focus Facility program, and introduced bipartisan legislation to extend its reach, *supra* note 21.

³⁴ 42 U.S.C. 1395i-3(g)(2)(A)(iii)(II).

³⁵ *Supra*, note 32, GAO Infection Prevention Report, at 8.

³⁶ CMS, “State Operations Manual, Chapter 5 – Complaint Procedures,” accessed May 14, 2023, <https://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/som107c05pdf.pdf> [hereinafter *SOM Chapter 5*], see 5075.1 - Immediate Jeopardy (for Nursing Homes, Deemed and Non-Deemed Non-Long Term Care Providers/Suppliers, and EMTALA).

³⁷ *Id.*, see 5075.9 - Maximum Time Frames Related to the Federal Onsite Investigation of Complaints/Incidents, which states “with inadequate resident protection, SA must initiate an onsite survey within 3 business days of receipt of the initial report. With potentially adequate resident protection, SA must initiate an onsite survey within 7 business days of receipt of the initial report.” See also 5110.2 - Condition-Level, IJ. CMS adjusted the required response times for different types of complaints in 2022 following recommendations GAO issued in a 2019 audit. See CMS, *Revised Long-Term Care Surveyor Guidance*, QSO-22-19-NH (June 29, 2022), available at <https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and-memos-states-and/revised-long-term-care-surveyor-guidance>, at 5. See also GAO, *Improved Oversight Needed to Better Protect Residents from Abuse*, GAO-19-433 (June 2019), available at <https://www.gao.gov/products/gao-19-433>.

must be investigated within 18 business days, although the State must maintain an annual average of 15 days.³⁸

3. “Non-IJ Medium” complaints are those that involve lesser risk to patients and must be initiated within 45 calendar days.³⁹
4. “Non-IJ Low” complaints must be monitored for trends but do not require a stand-alone survey and can be treated as a “focus area” in a subsequent complaint or recertification survey.⁴⁰

CMS introduced focused infection control (FIC) surveys in March 2020 in response to the COVID-19 pandemic.⁴¹ These surveys assess nursing home compliance with Federal standards for infection prevention and control intended to limit the transmission of SARS-CoV-2, the virus that causes COVID-19. Survey agencies shifted their work to FIC surveys when CMS temporarily suspended standard surveys between March and August 2020, and survey agencies continued to perform FIC surveys after standard surveys were reinstated. According to Federal data on the Quality, Certification and Oversight Reports system, States performed more than 115,000 FIC surveys from 2020 to 2022.⁴² Guidance for timing and circumstances of FICs has changed over time, most recently in November 2021 when CMS added a requirement that survey agencies conduct FIC surveys on 20 percent of nursing homes in their State each calendar year, performed independently of standard surveys.⁴³ FIC surveys may be triggered by a number of conditions, including COVID-19 case clusters and conditions that put residents at risk, such as low COVID-19 vaccination rates among residents.⁴⁴ In FY2024, the requirement for FIC surveying will end, with future surveys conducted at the discretion of survey agencies.⁴⁵

B. Survey Teams and Surveyor Qualifications

Standard, complaint, and FIC surveys are conducted by teams of trained surveyors, typically consisting of up to five individuals depending on the size of the facility and the nature of the survey.⁴⁶ Each team has a leader who coordinates and supervises survey activities and assigns tasks to team members. Standard surveys and complaint surveys of a clinical nature require the

³⁸ *Supra*, note 36, SOM Chapter 5, *see* 5075.9 - Maximum Time Frames Related to the Federal Onsite Investigation of Complaints/Incidents; *see also* 5110.3 - Condition-Level, Non-IJ.

³⁹ *Id.*

⁴⁰ *Id.*, *see* 5075.9 - Maximum Time Frames Related to the Federal Onsite Investigation of Complaints/Incidents.

⁴¹ *Supra*, note 32, GAO Infection Prevention Report, at 46.

⁴² Appendix A, Table 8.

⁴³ CMS, “Revised COVID-19 Survey Activities, CARES Act Funding, Enhanced Enforcement for Infection Control deficiencies, and Quality Improvement Activities in Nursing Homes,” QSO-20-31-All (last revised January 4, 2021; rescinded March 30, 2023), available at <https://www.cms.gov/files/document/qso-20-31-all-rescinded.pdf> [hereinafter *COVID-19 Survey Activities Memo*]; *see also* CMS, “Changes to COVID-19 Survey Activities and Increased Oversight in Nursing Homes,” QSO-22-02-ALL (November 12, 2021), available at <https://www.cms.gov/files/document/qso-22-02-all.pdf> [hereinafter *COVID-19 Oversight Changes Memo*], at 3.

⁴⁴ *Id.*, COVID-19 Oversight Changes Memo, at 3.

⁴⁵ CMS “Guidance for the Expiration of the COVID-19 Public Health Emergency (PHE),” QSO-23-13-AL (May 1, 2023), available at <https://www.cms.gov/files/document/qso-23-13-all.pdf> [hereinafter *PHE Expiration Memo*], at 6.

⁴⁶ Appendix C, South Carolina, at AGING-00456; CMS, “State Operations Manual, Chapter 7 - Survey and Enforcement Process for Skilled Nursing Facilities and Nursing Facilities,” accessed May 14, 2023, <https://www.cms.gov/regulations-and-guidance/manuals/downloads/som107c07pdf.pdf> [hereinafter *SOM Chapter 7*], *see* 7201 - Survey Team Size and Composition - Length of Survey.

team to include at least one registered nurse.⁴⁷ The composition of the rest of the professionals on a survey team varies; in some States, teams are comprised entirely of registered nurses, such as in Vermont and Alaska.⁴⁸ In other States, survey teams may also include pharmacists, social workers, or registered dietitians.⁴⁹

Surveyors undergo extensive training before they are permitted to perform survey activities without supervision. The CMS State Operations Manual details the Federal Minimum Qualification Standards for long-term care (LTC) facility surveyors.⁵⁰ Trainees must complete the CMS Orientation Program and the LTC Basic Online Training course then take and pass the Surveyor Minimum Qualifications Test (SMQT).⁵¹ New surveyors are closely supervised during the first six to 12 months of their employment before they have achieved sufficient competence to independently conduct survey work. Multiple States have noted that it can take one to two years for surveyors to become fully independent. In its letter, North Dakota reported:

We have had turnover, staff vacancies, and have had a significant number of staff who are new and need to be trained into the nursing home survey process. This places extra workload on our current staff and results in less survey activity being completed as well. It is our belief that it takes a minimum of one year for a health surveyor to be able to survey independently and two years to be completely comfortable in this role.⁵²

Mississippi provided additional insight:

It is important to know that the training component of surveying in Long Term Care facilities is extensive and takes from 4-6 months before a person can take the Surveyor Minimum Qualification Test (SMQT) – a 4-hour test to measure knowledge of, and competence with CMS rules and regulations. These “surveyors in training” can only learn during this period and cannot survey independently until they **actually pass** the SMQT test. Therefore, **they cannot survey alone**, and must be linked with a Preceptor. With many new staff, it requires more Preceptors to train on the job. The learning phase continues after the passing of the SMQT test for at least 1 year. [This is a very different Nursing role than shift work in a hospital where [a Registered Nurse] can be hired today, and work independently tonight on the floor] (sic). There is a much greater investment in the training of these individuals, and the months it takes for each surveyor to become fully prepared for the survey role. (emphasis in original)⁵³

⁴⁷ *Id.*, SOM Chapter 7, *see* 7201 - Survey Team Size and Composition - Length of Survey.

⁴⁸ Appendix C, Vermont, at AGING-00587; Alaska, at AGING-00020. Survey agencies reported that complaints may be investigated during a standard survey, but also may also be investigated independently. Such independent complaint investigation surveys may have only one surveyor reviewing specific concerns that are delineated on the complaint.

⁴⁹ *See, for example*, Appendix C, Connecticut, at AGING-00070; Idaho, at AGING-00184; Minnesota, at AGING-00309; and North Dakota, at AGING-00408.

⁵⁰ CMS, “State Operations Manual, Chapter 4 - Program Administration and Fiscal Management,” accessed May 14, 2023, available at <https://www.hhs.gov/guidance/document/state-operations-manual-chapter-4-program-administration-and-fiscal-management> [hereinafter *SOM Chapter 4*] *see* 4009.1 - Federal Minimum Qualification Standards for LTC Facility Surveyors.

⁵¹ “Long-Term Care Basic Training – Training Menu,” CMS, accessed May 14, 2023, https://qsep.cms.gov/pubs/CourseMenu.aspx?cid=0CMSLTC_Basic_ONL.

⁵² Appendix C, North Dakota, at AGING-00408.

⁵³ Appendix C, Mississippi, at AGING-00315; *see also* Massachusetts, at AGING-00300 and Pennsylvania, at AGING-00431.

C. Standard Survey Process

Standard surveys are typically conducted over three to five days, depending on the size of the facility being surveyed.⁵⁴ The surveyors' work is guided by a complex set of regulations, which are detailed in Appendix PP of the CMS State Operations Manual and the protocol for Long Term Care Survey Procedures.⁵⁵ Appendix PP is an 850-page manual of operations for surveyors that delineates the rights of facility residents and provides guidance for determining whether they have been violated. Surveyors are also required to survey nursing homes for emergency preparedness standards, which are contained in Appendix Z, a 100-page manual.⁵⁶

The standard survey consists of seven general categories of tasks: (1) off-site preparation; (2) an entrance conference with facility personnel and on-site preparatory activities; (3) an initial tour of the facility, observations, and screenings of residents for investigation; (4) selection of a sample of residents for in-depth investigation; (5) resident interviews and related information-gathering; (6) other survey activities (facility task assignments, area-specific inspections); and (7) wrap up and exit conference with the facility.⁵⁷ The other survey activities consist of inspections, observations, and records review for dining room and kitchen activities, infection control, Medicare beneficiary protection notifications, medication administration and storage, the resident council meeting, facility nurse staffing, residents' access to funds, and review of environmental conditions pertaining to problems identified during resident interviews or observations.⁵⁸ Each activity of the survey has a detailed protocol, most of which require extensive documentation.

The survey process begins offsite, with a review of the facility's previous standard, complaint and infection control surveys and the creation of the survey report form in the Automated Survey Process Environment (ASPEN) system, which guides onsite survey activities. ASPEN incorporates data from a second system, Certification and Survey Provider Enhanced Reporting (CASPER),⁵⁹ and other data sources. Surveyors also review previous standard survey reports for the facility as well as complaint and infection control survey reports and use these reports to guide much of their surveying work while onsite. Other pre-visit work includes assigning surveyors to records review, facility inspections, and interviewing of staff, patients, and family members, as well as inspections of different units within the facility, such as kitchen and dining areas, rehabilitation, and Alzheimer's or dementia units.

⁵⁴ Appendix C, Colorado, at AGING-00056; *supra*, note 46, SOM Chapter 7, *see* 7201 - Survey Team Size and Composition - Length of Survey.

⁵⁵ CMS, "State Operations Manual Appendix PP - Guidance to Surveyors for Long Term Care Facilities," accessed May 14, 2023, available at <https://www.cms.gov/medicare/provider-enrollment-and-certification/guidanceforlawsandregulations/downloads/appendix-pp-state-operations-manual.pdf> [hereinafter *SOM Appendix PP*]; CMS, "Long Term Care Survey Process (LTCSP) Procedure Guide," accessed May 14, 2023, available at <https://www.cms.gov/medicare/provider-enrollment-and-certification/guidanceforlawsandregulations/downloads/lcsp-procedure-guide.pdf> [hereinafter *LTC Survey Process*].

⁵⁶ CMS, "Appendix Z- Emergency Preparedness for All Provider and Certified Supplier Types Interpretive Guidance," accessed May 14, 2023, available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_z_emergprep.pdf.

⁵⁷ *Supra*, note 56, LTC Survey Process, at 1.

⁵⁸ *Id.*, at 2.

⁵⁹ "ASPEN," CMS, accessed May 14, 2023, <https://qtso.cms.gov/software/aspem>; "About iQIES," CMS, accessed May 14, 2023, <https://www.cms.gov/medicare/quality-safety-oversight-general-information/iqies>. CMS is transitioning to a new data management system for surveying, the Internet Quality Improvement and Evaluation System, or iQIES.

The survey team is required to arrive unannounced and begins its visit with a brief meeting, known as the entrance conference, with the facility's administrator or a nursing manager. The survey team reviews the roster of current and recently admitted residents and selects individual residents for interviews. Surveyors select a pool of residents for investigation, observe and interview those residents, and review their records. In addition to selecting residents for investigation during the offsite preparation, surveyors screen for other residents to be included in the interview pool by going room to room without facility staff present and observing residents. Once the pool of patients is finalized, surveyors begin their investigations, which may involve interviews with the resident and family members, observation of the resident, and review of the resident's medical records.

The survey team may conduct an extended survey if it suspects sub-standard quality of care but does not have sufficient information to confirm or refute their initial findings. The extended survey involves expanding to review a larger sample of resident assessments, reviews of staffing, in-service training, evaluation of consultant contracts, review of policies and procedures, and review of nursing services, physician services, and administration.⁶⁰

Surveyor staff review and analyze all information collected to determine whether the facility fails to meet one or more of the regulatory requirements. In instances when a facility fails to meet a participation requirement specified in the Social Security Act and detailed in Appendix PP of the State Operations Manual, surveyors may issue a deficiency.⁶¹ Decisions about deficiencies are made collectively by the survey team.⁶² Deficiency decisions are documented along with the evidence to support those decisions on Form-2567, a statement of deficiencies and plan of correction.⁶³ The rigor of supportive documentation is critical since the facility can contest the citation: one surveyor relayed to Majority staff that she and her colleagues had to painstakingly document evidence, like "a homicide detective," to justify deficiencies that rise to the level of harm.

D. The Issuance of Deficiencies to Facilities

Upon completion of the survey, the survey agency issues the statement of deficiencies and plan of correction to the facility, which must make it available to residents and their representatives.⁶⁴ This document specifically reflects the content of each requirement that is not met, identifies the specific deficient entity practices and the objective evidence concerning these practices, identifies the extent of the deficient practice, and identifies the sources of the evidence for the deficiency.⁶⁵ The surveyor determines the scope and severity of the deficiency using a grid consisting of four levels of severity (no actual harm with potential for no more than minimal

⁶⁰ *Supra*, note 56, LTC Survey Process, at 51; *see also* "Extended Survey Defined," CMS, accessed May 14, 2023, https://qsep.cms.gov/BHFS/M1/M1S4_180.aspx.

⁶¹ *Supra*, note 46, SOM Chapter 7, *see* 7001 - Definitions and Acronyms. Deficiency is defined as "a skilled nursing facility's or nursing facility's failure to meet a participation requirement specified in the Act or in 42 CFR Part 483 Subpart B. (42 CFR 488.301)." Noncompliance is defined as "any deficiency that causes a facility not to be in substantial compliance. (42 CFR 488.301)."

⁶² *Supra*, note 56, LTC Survey Process, at 53.

⁶³ CMS, "Form CMS-2567: Statement of Deficiencies and Plan of Correction," accessed May 14, 2023, *available at* <https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/downloads/CMS2567.pdf> [hereinafter *Form 2567*].

⁶⁴ 42 CFR 483.10(g)(11).

⁶⁵ *Supra*, note 63, Form 2567.

harm, no actual harm with potential for more than minimal harm that is not immediate jeopardy, actual harm that is not immediate jeopardy, and immediate jeopardy) and three levels of scope (isolated, pattern, and widespread).⁶⁶

The citations have serious implications for the inspected facility. Enforcement remedies may include termination of the provider agreement; imposition of temporary management of the facility; denial of payment for all Medicare and/or Medicaid residents by CMS; denial of payment for all new Medicare and/or Medicaid admissions; civil money penalties (CMP); state monitoring; transfer of residents; transfer of residents with closure of facility; directed plan of correction; directed in-service training; and alternative or additional State remedies approved by CMS.⁶⁷ The most aggressive remedies are reserved for deficiencies that constitute immediate jeopardy to resident health or safety and are the most severe. In instances of immediate jeopardy, civil monetary penalties of up to nearly \$24,000 per day and per instance can be levied on facilities, an amount that CMS adjusts annually for inflation.⁶⁸ Facilities that are subject to a CMP from either the State or CMS have the option to pursue informal dispute resolution,⁶⁹ and are able to appeal deficiencies to an Administrative Law Judge.⁷⁰

If deficiencies are cited, the nursing home is required to submit and have approved a plan of correction in order to continue program participation.⁷¹ A post-survey revisit may be conducted to reevaluate the sources of the identified deficiencies and to ascertain the status of corrective actions being taken.⁷²

E. CMS' Monitoring of State Survey Agency Performance

CMS oversees survey agency performance by tracking certain data measures and conducting follow-up surveys to ensure uniform enforcement of regulations across different States. The agency also provides regular guidance to States regarding survey processes.

CMS uses the State Performance Standards System (SPSS) to determine whether States meet the requirements of the 1864 Agreement.⁷³ Each State's performance is evaluated in three domains of measures, which include (1) survey and intake process, (2) survey and intake quality, and (3) noncompliance resolution (domain names and measures are periodically changed).⁷⁴ Each fiscal year, CMS establishes performance standards for each measure in the SPSS and prepares a report of each state's performance. States that fail to meet one or more standard must submit a

⁶⁶ *Supra*, note 46, SOM Chapter 7, *see* 7400.3.1 - Matrix for Scope & Severity.

⁶⁷ *Id.*, *see* 7400.1 - Available Federal Enforcement Remedies.

⁶⁸ *Id.*, *see* 7510 - Basis for Imposing Civil Money Penalties; *see also* "Civil Monetary Penalties (Annual Adjustments)," CMS, accessed May 17, 2023, <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Civil-Monetary-Penalties-Annual-Adjustments>.

⁶⁹ *Id.*, *see* 7212 - Informal Dispute Resolution; *see also* 7213 - Independent Informal Dispute Resolution.

⁷⁰ *Id.*, *see* 7526 - Appeal of Noncompliance That Led to Imposition of Civil Money Penalty.

⁷¹ *Id.*, *see* 7317 - Acceptable Plan of Correction.

⁷² *Id.*, *see* 7317.2 - Revisits.

⁷³ *Supra*, note 9, OIG 2022 Nursing Home Survey Evaluation, at 3; *see also* 42 CFR § 488.318; *see also* CMS, "State Operations Manual, Chapter 8 – Standards and Certification," accessed May 14, 2023, *available at* <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/som107c08pdf.pdf>, *see* 8000 - State Performance Standards.

⁷⁴ CMS, "Fiscal Year (FY) 2023 State Performance Standards System (SPSS) Guidance," 22-08-ALL (September 20, 2022), *available at* <https://www.cms.gov/files/document/admin-info-22-08-all.pdf-0>.

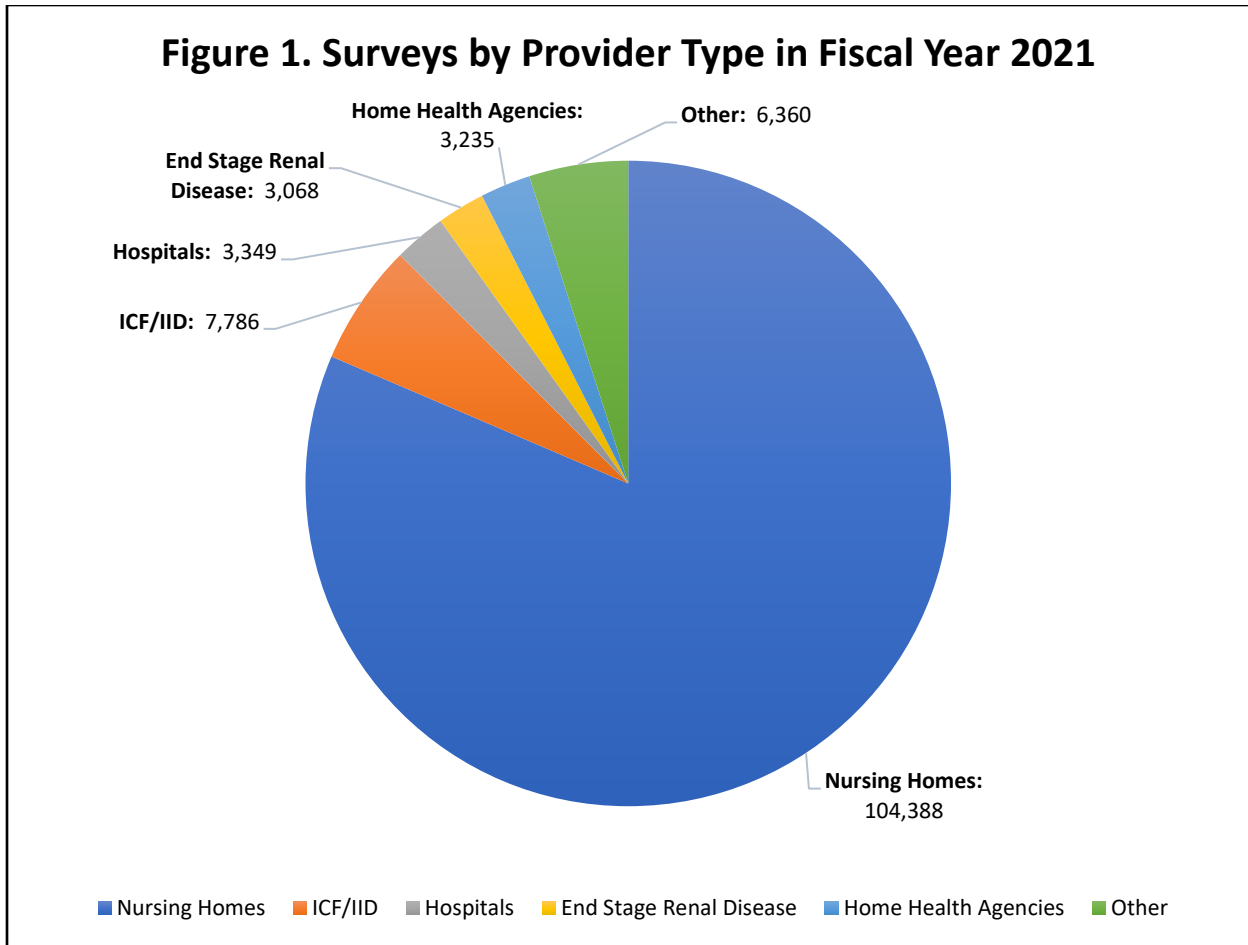


Figure 1 shows the distribution of surveys conducted in Federally certified facilities, by provider type. Nursing homes accounted for 81.4 percent of the 128,186 surveys, followed by were intermediate care facilities or institutions for intellectual disabilities (6.1 percent); hospitals (2.6 percent); home health agencies (2.5 percent); and end stage renal disease (2.4 percent). The remaining facility types are grouped in “Other,” which accounted for 5 percent of surveys.

Source: CMS, “Fiscal Year 2024 Justification of Estimates for Appropriations Committees,” n.d., available at <https://www.cms.gov/files/document/cms-fy-2024-congressional-justification-estimates-appropriations-committees.pdf-0>, at 81, table “FY 2021 Survey and Complaint Visit Table – Actual.”

Notes: “Nursing Homes” include surveys conducted at Skilled Nursing Facilities, Nursing Facilities, and Special Focus Facility Nursing Homes. “Other” include all non-statutory deemed providers.

corrective action plan that identifies each measure scored as “Not Met” in the SPSS and its root cause and details a plan to address the problems.⁷⁵ States’ progress on implementing their corrective action plans are monitored at least quarterly by the CMS Regional Offices. CMS wrote that it was unable to provide documents related to the SPSS process for FY2019 to FY2021, which the agency attributed to the COVID-19 pandemic. CMS reported releasing

⁷⁵ *Id.*, at 6.

updated SPSS guidance for FY2022 in March 2022 and updated SPSS guidance for FY2023 in September 2022.⁷⁶

In addition to data monitoring, CMS also assesses the quality of survey agency performance by conducting Federal comparative surveys. Federal comparative surveys are conducted by CMS surveyors within two months of a State agency's survey of the same facility.⁷⁷ The two surveys are compared to assess the quality of the State's survey—e.g., whether deficiencies are being properly issued—in an effort to improve uniformity of regulatory enforcement nationwide.⁷⁸

F. Federal Funding for Survey Agencies

States' work overseeing Federally certified facilities is partly funded by CMS through the Medicare Survey & Certification Program. According to the FY2024 budget request, 90 percent of these funds go directly to State survey agencies to support oversight of health care providers.⁷⁹ The CMS budget request notes that nursing homes alone accounted for 81 percent of the 128,000 initial, recertification, complaint, and infection control surveys conducted during FY2021 (see Figure 1).⁸⁰ As Section III and Section V demonstrate, flat-lined Federal funding over the past decade is one of the key factors that have reduced the capacity of survey agencies to conduct their work overseeing nursing homes.

⁷⁶ Appendix D, Ex. 4, Letter from Lee A. Fleisher, M.D., Chief Medical Officer and Director of the Center for Clinical Standards and Quality, Centers for Medicare & Medicaid Services to The Honorable Bob Casey, Jr., May 4, 2023 [hereinafter *CMS May 2023 Letter to Chairman Casey*], at AGING-01418-AGING-01419.

⁷⁷ *Supra*, note 9, GAO 2008 Federal Survey Monitoring Report.

⁷⁸ CMS, "Guidance for Federal Monitoring Surveys (FMS)," 21-07-ALL (September 3, 2021), available at <https://www.cms.gov/files/document/admin-info-21-07-all.pdf>, at 2.

⁷⁹ *Supra*, note 12, CMS FY2024 Budget Justification, at 79.

⁸⁰ *Id.*, at 81

Section III: Survey Agencies Stretched to the Brink

Chairman Casey sent letters in September 2022 to survey agencies in the 50 States, Puerto Rico, and the District of Columbia to better understand their capacity to carry out oversight of nursing homes participating in the Medicare and Medicaid programs. In response, States reported that severe staffing shortages and high turnover rates, driven largely by the inability to offer competitive salaries, hampers their ability to conduct annual surveys on time and promptly investigate complaints. Such delays negatively affect nursing home residents, according to letters from State Long-Term Care Ombudsmen, who expressed concern about the ability of strained survey agencies to effectively ensure the well-being of nursing home residents. The delays also diminish the timeliness and accuracy of Medicare’s star rating system on Care Compare, the website that many consumers use when evaluating nursing home quality. States shared stopgap measures they are using to address staffing shortages, ranging from administrative changes to salary increases and the use of contract survey agencies.

A. Severe Staffing Shortages Hinder Nursing Home Oversight

Surveyor staffing shortages are the most common challenge States and independent watchdogs cite to explain the gaps and delays in nursing home inspections. In 2022, the Office of Inspector General (OIG) identified staffing shortages as the “root cause” of survey agencies’ problems meeting the Centers for Medicare & Medicaid Services’ (CMS) performance standards.⁸¹ Data furnished by States show that staffing shortages at survey agencies have dramatically worsened since a 2003 Government Accountability Office (GAO) report identified survey agency staffing as a barrier to nursing home oversight, and published vacancy rates from 42 States.⁸²

According to State letters to Chairman Casey, 31 survey agencies have surveyor vacancy rates of 20 percent or higher.⁸³ Nine survey agencies have vacancy rates of 50 percent or higher (see Map 1). Kentucky (83 percent), Alabama (80 percent), and Idaho (71 percent) had the highest vacancy rates in the Nation.

Alabama wrote, “the staffing numbers have reached a critical level,” with the State reporting 41 surveyor vacancies among its 51 budgeted positions.⁸⁴ Delaware, where eight of 21 surveyor positions were vacant, wrote that “prior to the pandemic, staffing was a major challenge,” adding that “the pandemic has made an already grim situation even worse.”⁸⁵ Citing additional difficulties training new hires due to the lack of experienced staff, the State said, “the cumulative effect is that the required survey workload is not completed in a timely manner, the exception being urgent situations like those that involve immediate jeopardy.”⁸⁶ Missouri, which compared

⁸¹ *Supra*, note 9, OIG 2022 Nursing Home Survey Evaluation, at 11.

⁸² Appendix A, Table 1; *see also* GAO, *Nursing Home Quality: Prevalence of Serious Problems, While Declining, Reinforces Importance of Enhanced Oversight*, GAO-03-561 (July 2003), available at <https://www.gao.gov/assets/gao-03-561.pdf> [hereinafter *GAO 2003 Nursing Home Oversight Report*], at 78, Table 9: State Survey Agency Responses to Questions about Surveyor Experience, Vacancies, Hiring Freezes, Competitiveness of Salaries, and Minimum Required Experience.

⁸³ Appendix A, Table 2.

⁸⁴ Appendix C, Alabama, at AGING-00001; Alabama, at AGING-00008.

⁸⁵ Appendix C, Delaware, at AGING-00161; Delaware, at AGING-00164.

⁸⁶ Appendix C, Delaware, at AGING-00161.

Several different measures show how vacancy rates at survey agencies have worsened significantly since GAO's 2003 report:

- The highest vacancy rate identified in the GAO report was 34 percent; the Majority staff's investigation found that vacancy rates in 17 States now exceed that rate.⁸⁹
- The average surveyor vacancy rate of States in the 2003 report was 11 percent; the Majority staff's investigation shows the national vacancy rate is now 29 percent.⁹⁰
- GAO reported vacancy rates for 42 States; the Majority staff's investigation found that 34 of those States have higher vacancy rates today.⁹¹
- Several States have experienced significant increases in their vacancy rates from the time of the GAO report to this investigation, including Kentucky (17 percent to 83 percent), Alabama (10 percent to 80 percent), New York (4 percent to 59 percent), New Jersey (23 percent to 53 percent), and Kansas (4 percent to 51 percent).⁹²

States painted a picture of longstanding problems with survey shortages. Utah's survey agency director wrote, "in 28 years of experience with the Utah State Survey Agency, there have been very few periods of time when all surveyor positions were filled."⁹³ Similarly, Nevada wrote:

Over the last 5 years Nevada's [survey agency] has experienced approximately 61% turnover for [Surveyor Minimum Qualifications Test] qualified surveyors and approximately 80% turnover for [life safety code] qualified surveyors. In addition, Nevada's [survey agency] has experienced an ongoing vacancy rate of approximately 25% of its total surveyor employees. Currently there are 8 vacancies out of 19 total nursing home surveyor positions, or a 42% vacancy rate for nursing home surveyors.⁹⁴

Oregon reported that "surveyor recruitment and retention has been a challenge for [Oregon Department of Human Services] for many years," adding that 12 of the State's 52 budgeted surveyor positions were vacant.⁹⁵ North Carolina similarly indicated the perennial nature of staffing shortages, and its impact on survey performance:

For a number of years, [North Carolina's] Nursing Home Licensure Section has struggled to meet the Centers for Medicare and Medicaid's (CMS) performance standards per the terms of NC Department of Health and Human Services' (DHHS) 1864 Agreement. This is due, in part, to being understaffed. Currently there are 96 surveyors responsible for surveying 439 licensed nursing homes in NC (typically requiring a team of 4-5 about one week to complete).⁹⁶

⁸⁹ *Supra*, note 82, GAO 2003 Nursing Home Oversight Report, at 78; *see also* Appendix A, Table 2.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Appendix C, Utah, at AGING-00575.

⁹⁴ Appendix C, Nevada, at AGING-00353.

⁹⁵ Appendix C, Oregon, at AGING-00422.

⁹⁶ Appendix C, North Carolina, at AGING-00389.

When it comes to staffing shortages, States are not alone. CMS wrote that the number of employees conducting such work has been falling, due largely to retirements:

Over the past 10 years, positions within the Survey and Operations Group in CMS's Center for Clinical Standards and Quality have declined 15%, to a total of 227 federal positions. Of those 227 federal positions, CMS currently has approximately 80 federal nursing home surveyors that conduct 1,500 health, life safety code, and emergency preparedness federal monitoring surveys. The number of surveys each surveyor conducts will depend upon the type and complexity of the survey. Federal monitoring surveys include recertification, complaint, or accompaniment of a state to evaluate their performance. Remaining staff in the Survey and Operations Group cover nursing home enforcement cases (over 19,000 cases in FY 2022), surveys and enforcement for all other provider-types, state performance, and data analytics.⁹⁷

1. High Turnover Rates Contribute to an Inexperienced Surveyor Workforce

Staffing vacancies are not simply a problem of insufficient numbers of surveyors. High turnover rates are contributing to survey staff with limited experience on the job (see Map 2). As North Dakota described, “in the five years of data requested, North Dakota has hired 20 surveyors and 14 surveyors have left.”⁹⁸ Arkansas reported, “we are currently budgeted for 62 full-time surveyors and since COVID-19 started in 2020 have lost 67 surveyors and only been able to hire 50 replacements.”⁹⁹

Some States indicated that up to two years of training and experience may be needed for a surveyor to perform effectively, providing a benchmark for gauging the general experience of a State agency's surveyor team.¹⁰⁰ Data provided by the States revealed a wide range of inexperienced surveyor staff, ranging from 2.4 percent of staff in Nebraska with two years or less of experience to 80 percent of staff in Idaho.¹⁰¹ At 34 survey agencies, one-quarter or more of the surveyor staff had less than two years' experience. In seven other survey agencies, at least half of the survey staff had less than two years' experience.

State agencies reported that inexperienced surveyors limit the agency's performance by increasing the time required to complete a survey and sometimes diminishing its quality. California explained that “new staff are not qualified to take the Surveyor Minimum Qualifications Test (SMQT) exam, which certifies them to conduct federal long-term care work, until they have completed nearly forty weeks of training.”¹⁰² The agency further noted that

⁹⁷ *Supra*, note 76, CMS May 2023 Letter to Chairman Casey.

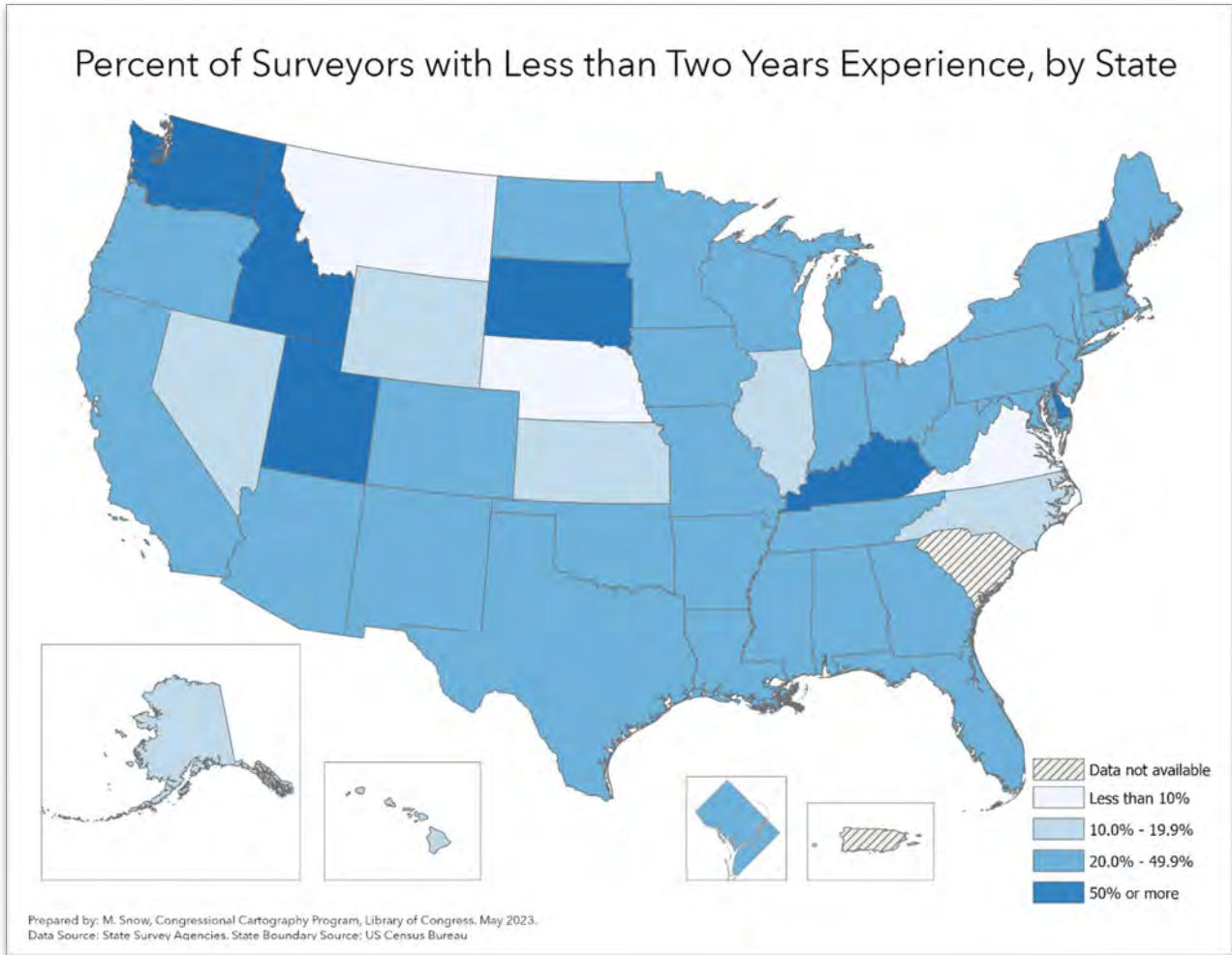
⁹⁸ Appendix C, North Dakota, at AGING-00408.

⁹⁹ Appendix C, Arkansas, at AGING-00034.

¹⁰⁰ *See e.g.*, Appendix C, Georgia, at AGING-00177; Montana, at AGING-00334; Massachusetts, at AGING-00300; and North Dakota, at AGING-00408.

¹⁰¹ Appendix A, Table 3.

¹⁰² Appendix C, California, at AGING-00042.

Map 2. Percent of Surveyors with Less than Two Years Experience, by State

inexperienced staff are not as efficient as more experienced surveyors, which “severely limits” its “ability to maintain productivity and efficiency levels during periods of high turnover.”¹⁰³ New Jersey noted the additional turnover strains existing employees: “Staff turnover creates additional work to recruit, hire, onboard, and train new staff. Federal training requirements are extensive, lasting approximately one year. The need to train new staff during the survey process creates additional work and can lengthen the survey time.”¹⁰⁴

In discussing the complexity of the surveying process, State agencies emphasized the extensive training and investment of resources required to enable new surveyors to work independently and competently. For instance, new surveyors require close supervision by seasoned surveyor staff, who would otherwise apply their time directly to survey-related activities. As Connecticut explained, “The training to become SMQT certified is labor intensive. Due to this labor-intensive process, the Department’s training model encompasses multiple staffing resources who have

¹⁰³ *Id.*

¹⁰⁴ Appendix C, New Jersey, at AGING-00365.

significant experience in survey and certification activities making them unable to perform survey duties.”¹⁰⁵ A common theme expressed by States was the loss of new surveyors shortly after devoting scarce resources to their training. California put it succinctly: “We find that we often invest the time to train new staff then they leave for a higher paying role before they become productive contributors.”¹⁰⁶

B. Low Salaries, Retirement, Burnout Among Reasons Surveyors Leave Field

Staffing shortages reported by the States resulted from a combination of factors, such as employees finding new jobs or retiring and difficulty hiring new surveyors. Turnover rates in many States remain high, which survey agencies attributed to a range of factors including salaries (42 States), retirements (24 States) and burnout (20 States), as well as COVID-19 exposure and career changes (see Figure 2).

West Virginia, which has a 42 percent vacancy rate, reported having difficulty offering salaries to surveyors that were “competitive on a national level or those in the private sector.”¹⁰⁷ The State went on to describe challenging aspects of surveyor positions, which aligned with observations from other State survey agency officials:

The job is very demanding and nearly impossible if you have a family. Surveyors are in the field away from home 4-5 days per week, 52 weeks out of the year. This demand on the job eliminates an entire population of workers who have families or obligations at home. The job is also very emotionally demanding and requires a lot of strength to perform. Surveyors are in a work environment that is not always hostile but is one where they are not typically welcomed. This can be very stressful week after week. Add to this the stresses of the public health emergency and it has been a very difficult time. The majority of our surveyors either have compromising health conditions or factors themselves or live with those who are in this situation. The public health emergency has added to these already stressful circumstances.¹⁰⁸

The inability to provide competitive salaries to surveyors was a pervasive problem among States (see Map 3). New Hampshire wrote, “we have difficulty retaining staff and have lost one nursing home administrator and three nurses to competing jobs after one year of work due to the private sector offering signing bonuses and large annual salaries with which we cannot compete.”¹⁰⁹ Florida’s survey agency, which reported 58 of its 229 surveyor positions vacant, said that even with pay raises approved by the Legislature, “the pay is not competitive with current sign-on bonuses or base rates offered in private-sector hospitals and nursing homes.”¹¹⁰

The stress of surveying and associated burnout and low morale was also cited by numerous survey agencies. Reported causes of burnout included the long hours and difficulty of the work,

¹⁰⁵ Appendix C, Connecticut, at AGING-00070.

¹⁰⁶ Appendix C, California, at AGING-00043.

¹⁰⁷ Appendix C, West Virginia, at AGING-00641, AGING-00644.

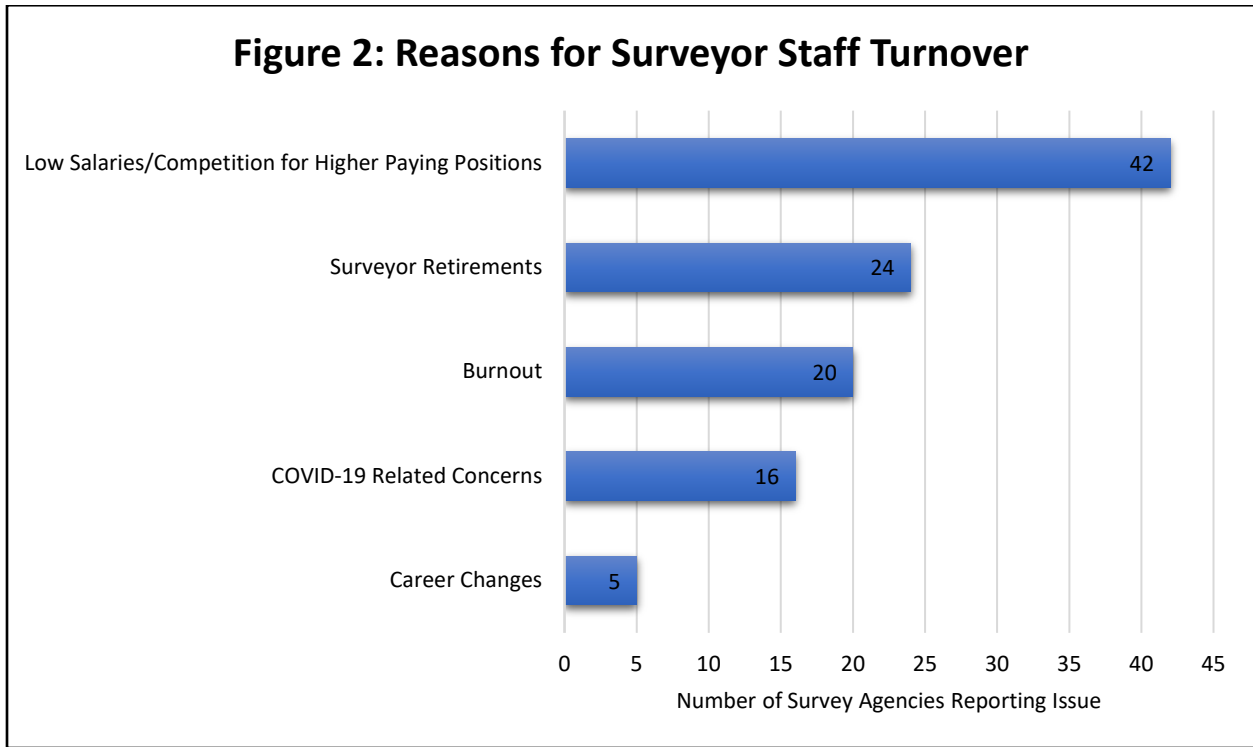
¹⁰⁸ Appendix C, West Virginia, at AGING-00641.

¹⁰⁹ Appendix C, New Hampshire, at AGING-00358.

¹¹⁰ Appendix C, Florida, at AGING-00173, AGING-00175.

large number of backlogged surveys, long distance travel and days away from home, frequent turnover of staff, and COVID-19 related stresses.¹¹¹ Maine’s description of burnout was typical:

The State Agencies have no way to train new staff other than to have existing staff take on that burden of training (CMS provides only online training, which is insufficient), in addition to doing their own surveying work. The staff who are doing the new surveyor training are fatigued from the repetitive training cycle that seems to bear no fruit: new staff leave soon after starting due to lower-than-private-practice pay, long hours, and extensive statewide travel, which means multiple nights away from home for most surveys. Once new staff leave, if others can be hired, existing staff start that training cycle again. The constant training of new staff and the increasing complexity of the complaints, along with increased survey requirements, means surveys and thorough complaint investigations take more time. This severe and urgent workload increases surveyors’ stress and contributes to already-high burnout.¹¹²



Source: State Responses to Aging Committee.

¹¹¹ See e.g., Appendix C, Alabama, at AGING-00002; Colorado, at AGING-00058; Maine, at AGING-00246; Montana, at AGING-00332; Virginia, at AGING-00595; Washington, at AGING-00632.

¹¹² Appendix C, Maine, at AGING-00246.

Map 3: 42 States Attributing Surveyor Turnover to Low Salaries

Noting that it had lost 30 trained surveyors and hired 61 over the past five years, Mississippi listed a host of factors contributing to burnout:

The work is physically hard, mentally challenging and takes them away from home weekly in overnight status. We had 3 staff pass away during the pandemic, including our in-house IT person. It took 18 months to replace him. We have struggled with staff and family members of staff getting COVID which wreaked havoc with the survey schedule. We have had several staff take advantage of early retirement and lost others due to the disparity in the pay. During the pandemic, 90% of our survey staff were put on orders by the Governor. Four staff who were assigned to the Epidemiology Dept. to assist during COVID, transferred to that department permanently, stating it was “easier work” than surveying, with the same pay.¹¹³

¹¹³ Appendix C, Mississippi, at AGING-00316.

Burnout was cited frequently as a contributor to retirement of senior surveyors.¹¹⁴ Oklahoma, which had a surveyor vacancy rate of 45 percent, was heavily affected by retirements, noting more than 75 percent of its surveyors retired between 2019 and 2022.¹¹⁵

1. Challenges Attracting New Surveyors

Many of the factors contributing to loss of staff also impede hiring, with the top challenge being the inability to compete with the competitive salaries offered by hospitals and nursing homes.¹¹⁶ Pennsylvania officials compared their entry level pay for a registered nurse at \$61,868 with that of nurses in clinical settings in the State at \$90,000 with an opportunity for an additional \$20,000 sign on bonus.¹¹⁷ The average salary for a Registered Nurse Specialist working for the Florida survey agency is \$45,173, in contrast to the average statewide Registered Nurse salary of \$72,000.¹¹⁸ Delaware reported that nurses working as state surveyors could earn \$10,000 to \$20,000 more annually in the private sector.¹¹⁹ The Missouri State agency's starting salary of \$60,000 is \$32,000 less than salaries offered in hospital settings and \$22,000 less than salaries in long term care.¹²⁰

Some States that would increase salaries to be more competitive have encountered bureaucratic and legislative barriers to doing so. The Michigan Civil Service Commission fixes rates of compensation based on job classifications, limiting flexibility for the State survey agency.¹²¹ Utah described how the flat-lined Federal budget for surveying puts them at a particular disadvantage:

As a state agency, we have few options available. Because our federal budget has remained stagnant, with a 0-0.5% increase each year, we lose ground when the state provides existing survey staff an annual salary increase — typically 2 to 5% — outpacing the federal budget increase each year. This has been the case for many years and has slowly eroded our ability to attract more qualified candidates and fill positions.¹²²

Even with funding, some States have continued to have difficulty filling surveyor positions because of a lack of qualified candidates.¹²³ Arizona survey agency officials reported:

Due to the agency's long term care complaint backlog, the Arizona State Legislature allocated sixteen (16) additional positions and an additional \$1 million in funding to ADHS in 2020. Unfortunately, it has been challenging to fill the additional positions, which has resulted in only a small portion of the funding being used. Prior to 2020, ADHS had twenty-one (21) positions allocated for long term care surveyors. Currently, twenty-two (22) long term care surveyor positions are

¹¹⁴ See e.g., Appendix C, Washington, at AGING-00632.

¹¹⁵ Appendix C, Oklahoma, at AGING-00418.

¹¹⁶ See e.g., Appendix C, Georgia, at AGING-00178; Kentucky, at AGING-00225; Louisiana, at AGING-00233; North Dakota, at AGING-00408; West Virginia, at AGING-00640; Utah, at AGING-00577.

¹¹⁷ Appendix C, Pennsylvania, at AGING-00432.

¹¹⁸ Appendix C, Florida, at AGING-00174.

¹¹⁹ Appendix C, Delaware, at AGING-000162.

¹²⁰ Appendix C, Missouri, at AGING-000327.

¹²¹ Appendix C, Michigan, at AGING-00304.

¹²² Appendix C, Utah, at AGING-00576.

¹²³ See e.g., Appendix C, Connecticut, at AGING-00069.

filled, five (5) of which are currently in training. ADHS continues to actively recruit for the fifteen (15) remaining vacant surveyor positions.¹²⁴

C. States Reported Staffing Shortages Result in Survey Delays

More than half the Nation’s survey agencies directly linked survey delays to staffing shortages (see Map 4).¹²⁵ Whether due to separations or difficulty hiring, States reported that staffing shortages strain their ability to conduct standard and complaint surveys within mandated timeframes. Staffing shortages also affect the quality of their surveying work. These data align with GAO’s 2003 report, in which States indicated they were unable to investigate complaints on time because of staff shortages.¹²⁶

Virginia’s survey agency reported that as of October 2022, it had “468 complaints needing to be investigated, with 211 (or 45%),” that were overdue. Virginia also had a significant backlog of recertification surveys, with 74 overdue at the time.¹²⁷ Colorado said that in order to meet Federal timelines, its four survey teams would need to complete an average 4.5 recertification surveys per month, including onsite inspections, writing deficiencies, and activities needed to close out a survey.¹²⁸ The State said it was not able to keep up with the required work:

For most surveyors, this also would mean they would travel out of town and spend 3-4 nights in a hotel at least two times a month. With the current staff, the survey agency completes 4-6 recertification surveys per month. ... The total number of recertification surveys completed at most within the last year has been on average 10 per month, when the recertification schedule requires 18 per month.¹²⁹

South Carolina similarly reported that in order to complete recertification surveys in a timely manner, it must have four teams of surveyors, each of which must have at least one registered nurse (RN).¹³⁰ However, due to vacancies, the survey agency only has one RN on staff, meaning that it only had one functional survey team to conduct recertification surveys.¹³¹ Moreover, five of the State’s 11 surveyors had not obtained SMQT certification, meaning they had to be accompanied by certified staff.¹³² As discussed in Section IV, South Carolina is one of several States that has turned to contract surveyors to address these gaps.

¹²⁴ Appendix C, Arizona, at AGING-00022.

¹²⁵ See e.g., Appendix C, Alabama, at AGING-00004; Delaware, at AGING-00161; District of Columbia, at AGING-00168; Georgia, at AGING-00177; Missouri, at AGING-00326; Minnesota, at AGING-00309; Nevada, at AGING-00353; New Mexico, at AGING-00375; New York, at AGING-00382; North Carolina, at AGING-00393; North Dakota, at AGING-00408; Oklahoma, at AGING-00418; Oregon, at AGING-00423; Pennsylvania, at AGING-00432; Puerto Rico, at AGING-0045; South Dakota, at AGING-00457; Tennessee, at AGING-00530; Texas, at AGING-00552; Vermont, at AGING-00587.

¹²⁶ *Supra*, note 82, GAO 2003 Nursing Home Oversight Report, at 23.

¹²⁷ Appendix C, Virginia, at AGING-00594.

¹²⁸ Appendix C, Colorado, at AGING-00056.

¹²⁹ *Id.*

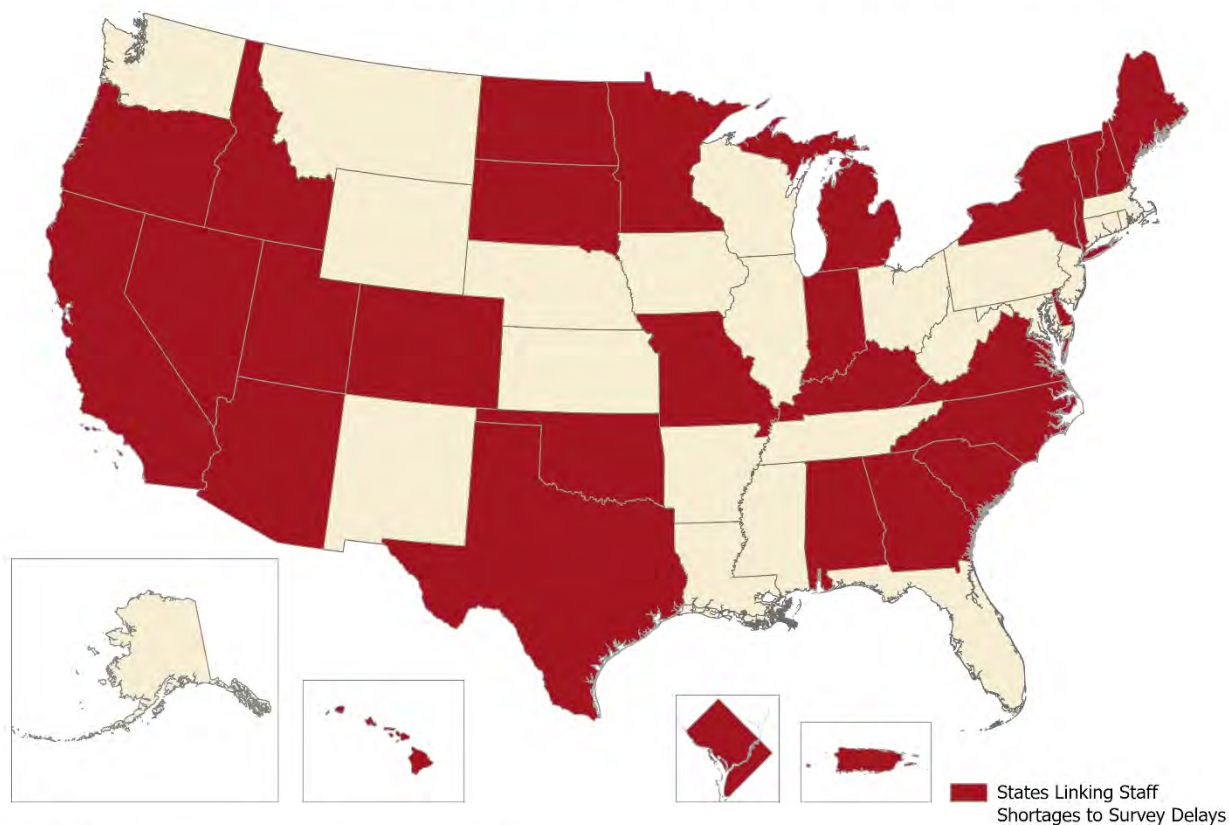
¹³⁰ Appendix C, South Carolina, at AGING-00456.

¹³¹ *Id.*

¹³² *Id.*

Map 4: 27 States, DC and PR Linked Survey Delays to Staff Shortages

27 States, DC and PR Linked Survey Delays to Staff Shortages



Prepared by: M. Snow, Congressional Cartography Program, Library of Congress, May 2023.
Data Source: State Survey Agencies, State Boundary Source: US Census Bureau

A State's geography can also exacerbate the effects of staffing shortages. For example, Colorado was one of several States that described how its geographic expanse contributed to significant travel time for surveyors:

Colorado is comprised of 104,094 square miles and is the 8th largest state in the country. The state is divided by the Continental Divide that needs to be crossed to provide survey activities to the nursing homes located on the “Western Slope” of the state. Travel to nursing homes on the Western Slope can take up to 8 hours and up to 5 hours to reach the nursing homes in the Southeast part of the state. There is a team of four surveyors located on the Western Slope to complete survey activities in the majority of the nursing homes in that part of the state. Because of surveyor shortages and the number of surveys that need to be completed, surveyors located in the Denver area are traveling over the Divide to perform survey activity.¹³³

¹³³ Appendix C, Colorado, at AGING-00056.

Idaho, Kansas, Maine, Montana, Texas, and Washington were among the States that similarly noted how geographic factors ranging from large travel distances to heavy traffic further pressured strained survey agencies.¹³⁴

In addition to missed survey timelines, several States explicitly linked understaffing and inexperienced surveyors to lower quality surveys, resulting in missed deficiencies.¹³⁵ Kentucky wrote of the snowball effect staffing shortages were having in its survey agency and its ability to conduct timely, high-quality work:

Sixty-seven percent of our workforce have two years or less of surveying experience, which affects the quantity and quality of our work product. So training is crucial for these staff, however, at this time, Kentucky's five trainer positions are vacant. Although we continue to post positions and conduct interviews routinely, once candidates are offered the position, they decline citing the low pay. This leads to our need to re-post more positions, review more applications, and conduct more interviews than we have ever had to do before and adds significantly to our daily workload. This also takes time away from our CMS work duties.¹³⁶

Nevada officials similarly pointed out that “the lack of experience in the long-term care survey process as well as complaint investigations results in inefficiencies, missed deficiencies and ultimately diminished capacity to assure quality of care.”¹³⁷ North Carolina stated that “newer staff with less survey experience make more mistakes as they survey leading to missed identification of deficiencies, incorrectly identified deficiencies, etc. that also requires more quality assurance activity.”¹³⁸

D. Surveyor Shortages Negatively Affect Resident Safety, and Transparency

Nursing home residents are the people who ultimately suffer when understaffing at State survey agencies reduce their capacity to oversee health facilities in the Medicare and Medicaid programs. When recertifications are delayed months or years beyond the statutory timelines, it means that nursing homes are not subject to the comprehensive inspections best suited to uphold care quality and protect resident safety. Declining regularity of recertification surveys has led to a growing number of complaints being filed, which States have had trouble responding to in a timely manner, leaving residents in potentially dangerous situations. Finally, delayed recertification surveys diminish the timeliness and accuracy of tools used by residents and their families to evaluate the quality of care at a nursing home.

1. Long-Term Care Ombudsmen Raise Concerns About Surveyor Shortages

Nursing home residents are put at risk when short-staffed survey agencies are unable to conduct timely inspections, according to State Long-Term Care Ombudsmen, who are authorized by the Older Americans Act and State law to advocate on behalf of residents living in nursing homes and other long-term care settings. Ombudsmen from eight States provided letters raising broad

¹³⁴ Appendix C, Idaho, at AGING-00182; Kansas, at AGING-00219; Maine, at AGING-00245; Montana, at AGING-00332; North Carolina, at AGING-00393; Texas, at AGING-00550; Washington, at AGING-00630.

¹³⁵ Appendix C, North Carolina, at AGING-00392; Puerto Rico, at AGING-00445.

¹³⁶ Appendix C, Kentucky, at AGING-00225.

¹³⁷ Appendix C, Nevada, at AGING-00354.

¹³⁸ Appendix C, North Carolina, at AGING-00393.

concerns about the capacity of survey agencies to investigate complaints and conduct comprehensive annual inspections in a timely manner at nursing homes.¹³⁹ Several ombudsmen also provided specific examples of complaints related to serious health conditions, abuse, and neglect that went months before being investigated by survey agencies—if they were investigated at all. These letters are contained in Appendix D.

Nebraska’s Ombudsman reported that vacancies, notably for the manager position, at the survey agency “made it difficult for the Long-Term Care Ombudsman program to receive information regarding the direction to give families and residents of nursing facilities.”¹⁴⁰ Noting that residents had experienced “numerous” episodes of “neglect with things such as bathing, toileting, and many other activities of daily living,” the letter added:

Once the Centers for Medicare and Medicaid Services (CMS) issued guidance that the survey agencies and the Ombudsman were allowed to resume visits, the lack of survey staff was more apparent as annual surveys and complaint surveys were delayed. This was frustrating to families who filed complaints regarding the neglect of their loved ones, and they expressed this to the Ombudsmen across the state.¹⁴¹

Kansas’ Long-Term Care Ombudsman similarly said it was difficult to resolve issues for residents when survey agencies are understaffed:

[T]he survey agency appears to not have adequate capacity in numbers of surveyors, other staff, or other resources to fulfill their responsibilities. When adequate regulatory oversight is not present, it also negatively impacts the understaffed Ombudsman program’s ability to resolve issues for residents.¹⁴²

Connecticut’s Long-Term Care Ombudsman wrote that survey agencies are meant to “offer protection and accountability to some of the most at risk and vulnerable members of our society,” but that surveyor vacancies and survey timeliness have affected their ability to carry out that mission.¹⁴³ As a result, some residents and families in the State “have been waiting for months if not years for state survey teams to investigate their complaints or for standard surveys to take place, and for accountability to be ensured in skilled nursing facilities.”¹⁴⁴

Other Long-Term Care Ombudsman provided specific instances of patients waiting on complaints to be investigated. The Georgia Ombudsman cited the example of a nursing home where multiple complaints filed by a regional ombudsman went unanswered for months.¹⁴⁵ When the survey agency did eventually investigate the complaints, it found the facility’s “failure to implement an effective abuse prevention program resulted in a pattern of abuse including involuntary seclusion, verbal, mental, sexual, and physical abuse, involving both staff to resident and resident and resident incidents.”¹⁴⁶ The survey agency’s June 2022 report described a March

¹³⁹ The Aging Committee received letters from Long-Term Care Ombudsmen from Colorado, Connecticut, Georgia, Indiana, Kansas, Nebraska, North Carolina, and Pennsylvania. *See* Appendix D.

¹⁴⁰ Appendix D, Ex. 5, Letter from Nebraska Long-Term Care Ombudsman to The Honorable Bob Casey, Jr., April 25, 2023.

¹⁴¹ *Id.*

¹⁴² *Supra*, note 7, Kansas LTC Ombudsman Letter, at AGING-001342.

¹⁴³ Appendix D, Ex. 6, Letter from Connecticut Long-Term Care Ombudsman to The Honorable Bob Casey, Jr., April 14, 2023 [hereinafter *Connecticut LTC Ombudsman Letter*].

¹⁴⁴ *Id.*, at AGING-01333.

¹⁴⁵ *Supra*, note 5, Georgia LTC Ombudsman Letter, AGING-01417.

¹⁴⁶ *Id.*

incident where a staff member punched a resident in the mouth, which resulted in police responding and filing a report.¹⁴⁷

The Indiana Ombudsman, meanwhile, wrote of a woman who submitted a complaint in August 2022 regarding “her husband’s motorized wheelchair being taken away, and despite Ombudsman follow-up efforts, the complaint was not investigated by the survey agency until [January 2023].”¹⁴⁸ Colorado’s Ombudsman related the story of residents receiving insufficient health care:

In November 2022 a local ombudsman received a call from nursing home residents, who reported having to wait long periods of time after making requests for assistance and having skin breakdown due to not receiving timely incontinence care. The residents reported that it appeared there were not enough staff to assist all the residents. The local ombudsman visited these residents and together they called the regulatory agency nursing home complaint line. The ombudsman assisted one of the residents with making this call and reports following up with the resident who stated they did not receive a return call. No one appears to have received a return call.¹⁴⁹

The Colorado, Connecticut, Georgia, and Pennsylvania ombudsmen each called for increased funding for survey agencies.¹⁵⁰

2. Delayed Surveys Affect the Timeliness and Accuracy of Care Compare Data

Survey delays limit the information available to the public to make informed decisions on nursing home care for themselves and their families. In some cases, CMS’ Care Compare website relies on survey results from as early as 2015, diminishing the timeliness and accuracy of information marketed to consumers as a quick reference to evaluate facility quality.

CMS’ Care Compare website allows the public to search for providers, including nursing homes, by location. The site provides a rating for each facility on a five-star scale, where one star represents the lowest quality facility and five stars is the highest.¹⁵¹ The overall star rating is derived from individual ratings in three categories—staffing, quality measures, and health inspections.¹⁵² The star rating for health inspections, in turn, is based on each facility’s three most recent recertification surveys, referred to as cycle 1 (most recent), cycle 2, (second most recent) and cycle 3 (third most recent).¹⁵³ The system assigns point values to deficiencies identified in each survey based on severity, and a formula assigns weights to each survey, with the most recent cycle carrying the most weight for the health inspection rating.¹⁵⁴

Majority staff’s analysis of CMS data show that:

¹⁴⁷ *Supra*, note 5, Fitzgerald Life Care Center Deficiencies Report.

¹⁴⁸ Appendix D, Ex. 7, Letter from Indiana Long-Term Care Ombudsman to The Honorable Bob Casey, Jr., April 28, 2023.

¹⁴⁹ *Supra*, note 6, Colorado LTC Ombudsman Letter, at AGING-01331.

¹⁵⁰ *Id.*; *supra* note 143, 143 LTC Ombudsman Letter; *supra*, note 5, Georgia LTC Ombudsman Letter. *See also* Appendix D, Ex. 8, Letter from Pennsylvania Long-Term Care Ombudsman to The Honorable Bob Casey, Jr., May 10, 2023.

¹⁵¹ CMS, “Design for Care Compare Nursing Home Five-Star Quality Rating System: Technical Users’ Guide,” January 2023, available at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/usersguide.pdf> [hereinafter *Care Compare Users’ Guide*], at 1.

¹⁵² *Id.*, at 1.

¹⁵³ *Id.*, at 4.

¹⁵⁴ *Id.*, at 3.

- Nearly 1,900 nursing homes had their cycle 3 survey conducted in 2015, 2016, or 2017.¹⁵⁵
- More than 1,400 nursing homes had their cycle 2 survey conducted prior to 2019 and as early as 2016.¹⁵⁶
- More than 1,500 nursing homes had their cycle 1 survey conducted prior to March 18, 2020, the month when CMS temporarily suspended recertification surveys in response to the COVID-19 pandemic.¹⁵⁷

Of the 1,523 nursing homes where the most recent standard surveys were conducted prior to March 18, 2020, CMS data show:

- 23 are Special Focus Facility (SFF) candidates, meaning they meet the qualifications to be placed in the Federal program that provides additional oversight for the Nation’s lowest performing nursing homes;
- 82 have abuse deficiency indicators;
- 42 changed ownership in the prior year;
- 559 have an overall quality star rating of 1 or 2; and
- 260 have an overall quality star rating of 1.¹⁵⁸

Majority staff identified 14 nursing homes in five States—Idaho, North Carolina, Maryland, Massachusetts, and Oregon—where all three surveys were conducted in 2018 or earlier.¹⁵⁹ Of those 14 nursing homes, four facilities had a 1-star rating.¹⁶⁰

CMS instructs users of Care Compare to utilize it as one source of information to evaluate a health facility, in addition to talking to doctors, social workers or other health care providers, noting that “information on this site isn’t an endorsement or advertisement.”¹⁶¹ Despite that caveat, data deficiencies and delays are problematic because consumers and providers view it as an important source of information to gauge the quality of nursing homes and other health providers. The National Institute on Aging,¹⁶² AARP,¹⁶³ and American Geriatric Society¹⁶⁴ are

¹⁵⁵ “Provider Information: Nursing homes including rehab services: Provider Information,” CMS, accessed May 13, 2023, <https://data.cms.gov/provider-data/dataset/4pq5-n9py>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ “About this tool,” Medicare.gov, accessed May 13, 2023, <https://www.medicare.gov/care-compare/resources/about-this-tool>.

¹⁶² “How to Choose a Nursing Home,” National Institute on Aging, accessed May 13, 2023, <https://www.nia.nih.gov/health/how-choose-nursing-home>.

¹⁶³ “Finding a Nursing Home: Don’t Wait Until You Need One to Do the Research,” AARP, August 1, 2022, <https://www.aarp.org/caregiving/basics/info-2019/finding-a-nursing-home.html>.

¹⁶⁴ “Tip Sheet: Finding Quality Nursing Home Care,” Health In Aging, accessed May 13, 2023, <https://www.healthinaging.org/tools-and-tips/tip-sheet-finding-quality-nursing-home-care>.

among the government agencies and organizations that direct people to use Care Compare as part of the nursing home selection process.

The power of Care Compare’s star ratings to influence consumers and shape the health care market is evidenced by owners and operators of nursing homes that report their facilities’ star ratings in annual investor reports and list star ratings among their business risks.¹⁶⁵ A *New York Times* analysis in 2021 determined that nursing homes, on average, are the most profitable when they have the highest star ratings, while the poorest rated nursing homes are not profitable.¹⁶⁶ California prosecutors have accused multiple nursing home operators of seeking to manipulate star ratings by providing false data to CMS, in one case leading to a multi-million dollar settlement.¹⁶⁷

The concerns about data timeliness add to issues raised in recent years by independent watchdogs and the press about Care Compare and the five-star rating system. Most recently, an April 2023 OIG audit found that CMS inaccurately reported one or more deficiencies that surveyors identified during yearly and complaint inspections in 67 of the 100 nursing homes sampled.¹⁶⁸ Based on that analysis, OIG estimated that 10,303 nursing homes had one or more deficiencies identified during inspections that were not accurately reported on Care Compare.¹⁶⁹ The *New York Times* reported that at least 2,700 incidents were not factored into Care Compare’s rating system, including serious incidents that occurred in five-star facilities.¹⁷⁰ The *Times* also reported that 2,400 of the more than 3,500 nursing homes with a five-star rating were cited for problems with infection control or patient abuse—and those are just the ones that have been reported.¹⁷¹

¹⁶⁵ E.g., see The Ensign Group, Inc., *Form 10-K for the Fiscal Year Ended December 31, 2022*, February 2, 2022, available at <https://www.sec.gov/ix?doc=/Archives/edgar/data/1125376/000112537623000018/ensg-20221231.htm>, at 53; National HealthCare Corporation, *Form 10-K for the Fiscal Year Ended December 31, 2022*, February 17, 2023, available at https://www.sec.gov/ix?doc=/Archives/edgar/data/1047335/0001047335230003830/nhc20221231_10k.htm, at 5.

¹⁶⁶ Jessica Silver-Greenberg and Robert Gebeloff, “Maggots, Rape and Yet Five Stars: How U.S. Ratings of Nursing Homes Mislead the Public,” *The New York Times*, March 13, 2021, <https://www.nytimes.com/2021/03/13/business/nursing-homes-ratings-medicare-covid.html>.

¹⁶⁷ State of California Department of Justice, Office of the Attorney General (California Attorney General), “Attorney General Becerra Sues Nursing Home Chain for Misrepresenting its Quality of Care and Putting Seniors, People with Disabilities at Risk,” press release, March 15, 2021, <https://oag.ca.gov/news/press-releases/attorney-general-becerra-sues-nursing-home-chain-misrepresenting-its-quality>. In March 2022, the State of California reached a settlement with Brookdale Senior Living, Inc., that enjoined the company from “making, or causing to be made, false or misleading statements to the Centers for Medicare & Medicaid Services (‘CMS’) concerning such skilled nursing facility(ies), including, but not limited to, providing, or causing to be provided, false or misleading information that is used for the formulation or calculation of CMS’s Five-Star Quality Ratings.” The company agreed to pay more than \$3 million in penalties and was subject to a court-appointed monitor for 18 months, subject to extension, at the company’s expense. See *The People of California v. Brookdale Senior Living, Inc.*, Superior Court of the State of California, County of Kern – Metropolitan Division (BCV-21-100539), March 11, 2022. See also California Attorney General, “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,” press release, March 11, 2022, <https://oag.ca.gov/news/press-releases/attorney-general-bonta-secures-preliminary-injunction-against-chain-skilled>.

¹⁶⁸ HHSOIG, *CMS Did Not Accurately Report on Care Compare One or More Deficiencies Related to Health, Fire Safety, and Emergency Preparedness for an Estimated Two-Thirds of Nursing Homes*, A-09-20-02007 (April 2023), at 7, available at <https://oig.hhs.gov/oas/reports/region9/92002007.asp>.

¹⁶⁹ *Id.*, at 8.

¹⁷⁰ Robert Gebeloff, Katie Thomas, and Jessica Silver-Greenberg, “How Nursing Homes’ Worst Offenses Are Hidden From the Public,” *The New York Times*, December 9, 2021, <https://www.nytimes.com/2021/12/09/business/nursing-home-abuse-inspection.html>.

¹⁷¹ *Id.*

E. States Used Different Strategies to Address Surveyor Vacancies and Turnover

States described a range of strategies they were taking to complete required survey work in the face of staffing shortages. Many States took internal steps to boost staff or address operational challenges, for example:

- Connecticut utilized school nurses to fill survey roles and complete FIC surveys.¹⁷²
- Pennsylvania is among the States that hired retired surveyors to return to survey work temporarily, however, the State was limited in regard to the number of days it could use retired surveyors annually.¹⁷³
- Montana’s survey agency secured approval from the State to allow surveyors to work remotely, rather than being based in its capital, Helena, which bolstered recruiting. The State noted that its geographic expanse often requires surveyors to drive up to 10 hours in inclement weather.¹⁷⁴
- Wisconsin changed procedures on how it handles complaints. Complaints are typically handled by the regional office where a nursing home is located, but the State “now schedules complaints on a statewide basis to help regional offices that are experiencing higher complaint volumes.”¹⁷⁵

Other States sought to improve the hiring pool through more targeted recruiting. For example, Washington hired a temporary staffer to work exclusively on recruitment and retention, attending job fairs, creating announcements for numerous publications, and travelling to colleges around the State to pitch survey agency work.¹⁷⁶ “They also worked closely with managers to enhance job announcements and assisted with maneuvering any HR system challenges that sometimes impede a quick process,” the State wrote. “As a result of this work, the agency was able to reduce the vacancy rate significantly.”¹⁷⁷

Several States sought to improve recruiting by boosting pay. For example, Louisiana conducted a staffing study in 2021 that found “the average annual pay for a registered nurse in Louisiana was just over \$75,000 with the majority of salaries ranging between \$60,826 and \$92,841 annually,” far above the \$52,666 salaries offered to surveyor candidates at the time.¹⁷⁸ The State has since increased salaries for RNs to \$76,045, and changed its work week from five eight-hour days to four 10-hour days. Both measures have helped the State more effectively recruit.¹⁷⁹

As discussed in Section IV, one of the most significant—and costly—steps States took to address vacancies and backlogs was to increase their use of contract surveyors, hired on a temporary basis from private companies.

¹⁷² Appendix C, Connecticut, at AGING-00072.

¹⁷³ Appendix C, Pennsylvania, at AGING-00431.

¹⁷⁴ Appendix C, Montana, at AGING-00333.

¹⁷⁵ Appendix C, Wisconsin, at AGING-00651.

¹⁷⁶ Appendix C, Washington, at AGING-00632.

¹⁷⁷ *Id.*

¹⁷⁸ Appendix C, Louisiana, at AGING-00234.

¹⁷⁹ *Id.*

IV: Growth of Contractors Conducting Nursing Home Oversight

As discussed in Section III, many States have struggled to complete their mandated survey work within the timeframes set out in Federal law. In order to complete required survey work in a timely manner, many State survey agencies have turned to private contractors to supplement State surveyor work.¹⁸⁰ In recent years, such contractual arrangements have increased in frequency and scope.

Prior to the COVID-19 pandemic, States used third-party contractors primarily on an *ad hoc* basis, with contractors performing occasional work to support State survey agencies in long-term care facilities.¹⁸¹ The COVID-19 pandemic and the advent of focused infection control surveys contributed to the rapid growth in both the number of States turning to third-party contractors and the amount of survey work States outsourced to these companies.¹⁸² Contracting companies saw their businesses grow exponentially, with one of the newest companies in this space reporting a seven-fold increase in completed recertification surveys alone from 2020 to 2022.¹⁸³ Three contractors with the largest geographic operating footprints reported that their work conducting surveys for States generated \$52 million revenue from 2018 to 2022, including nearly \$20 million in 2022 alone (see Table 2).

Despite States' funding concerns, a combination of factors, including caps on State employee salaries, pressure to meet statutory survey timelines, the timing of budget cycles, and use-it-or-lose-it funding, has led States to use costly contractors to supplement their survey work. For example, Idaho reported that despite obtaining salary increases for surveyors from the State Legislature, the salaries remained uncompetitive, contributing to vacancies.¹⁸⁴ As a result, Idaho's survey agency has used surplus personnel funds to pay for contract surveyors.¹⁸⁵ Similarly, as detailed in Section VI, there are instances where States must return unexpended Federal funds, creating pressure to use contractors to catch up on survey backlogs despite their cost. The following section reviews States' use of third-party contractors for survey activities, and related issues, including cost, quality, and conflicts of interest.

A. The Role of Contract Surveyors in Nursing Home Oversight

A growing number of States contract with private companies to complete initial certifications, recertifications, complaint investigations, and focused infection control (FIC) surveys. Thirty-three States reported using some form of third-party contracting services or extra-agency employees for survey work. Twenty-six survey agencies reported using contractors to help

¹⁸⁰ Appendix C, Alabama, at AGING-00004; South Carolina, at AGING-00458.

¹⁸¹ Appendix C, South Carolina, at AGING-00457; Texas, at AGING-00553.

¹⁸² Appendix C, Minnesota, at AGING-00310, AGING-00313; Idaho, at AGING-00184; Iowa, at AGING-00216.

¹⁸³ E-mail from Robert Feurer, CertiSurv, to Aging Committee Majority staff, May 1, 2023, on file with the Committee.

CertiSurv was founded in August of 2019 after the company Providigm decided to stop survey work—CertiSurv was spun off as a separate company. In calendar year 2022, CertiSurv completed 339 recertification surveys for their State survey clients, constituting a seven-fold increase compared with the 47 recertification surveys completed in their first full year of business in 2020.

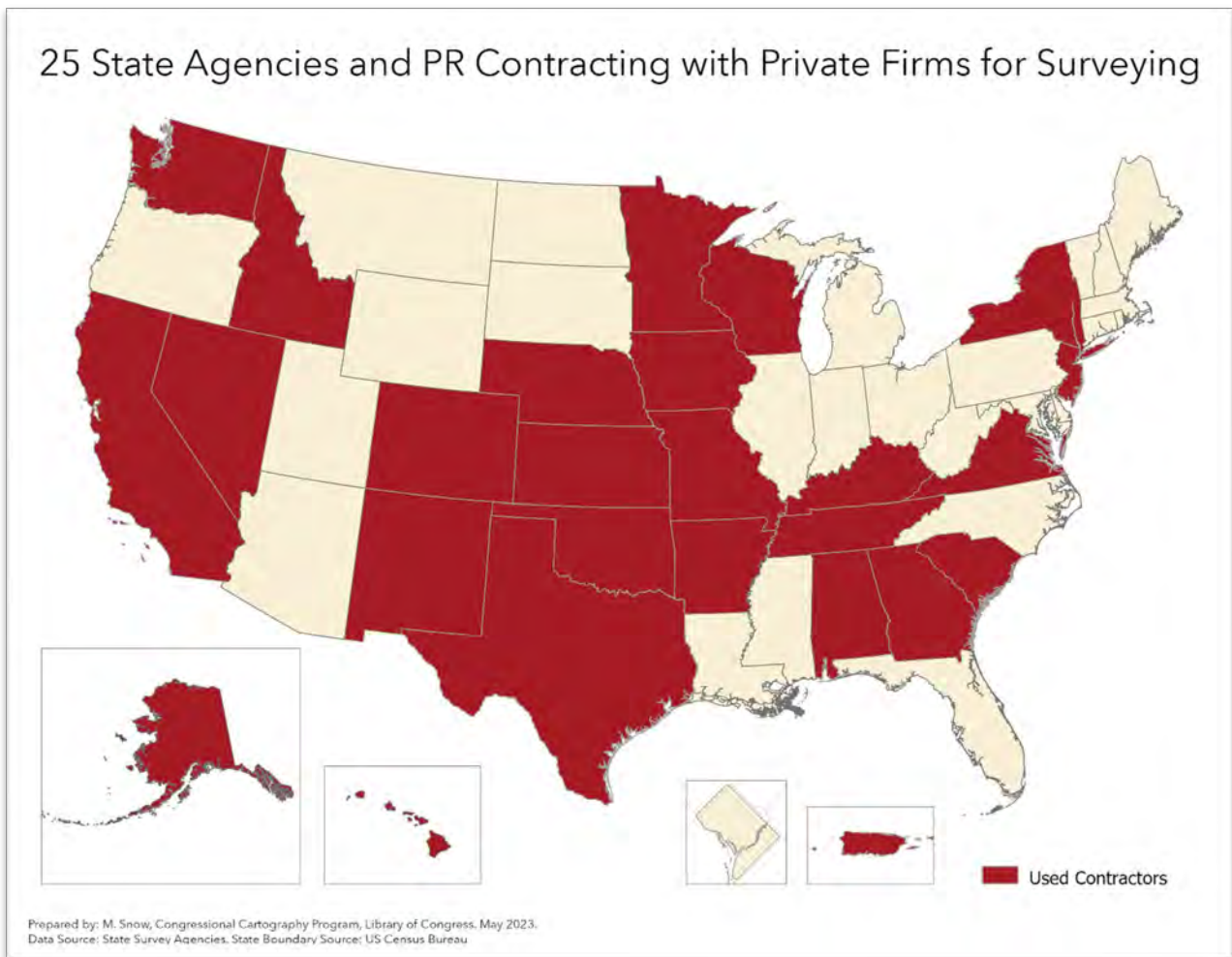
¹⁸⁴ Appendix C, Idaho, at AGING-00184.

¹⁸⁵ *Id.*

complete recertification surveys, with some States contracting for other work as well.¹⁸⁶ (See Map 5).

The market for third-party contractors in the long-term care survey space is very concentrated as the services provided to States are highly specialized with few companies equipped to fulfill CMS regulations regarding surveyor qualifications and process. For example, surveyors must meet the same Federal Minimum Qualifications Standards requirements as State-employed

Map 5: 25 State Agencies and Puerto Rico Contracting with Private Firms for Surveying



¹⁸⁶ Appendix C, Michigan, at AGING-00304, indicating Michigan only using third-party contractors for Informal Dispute Resolution; Ohio, at AGING-00414, indicating Ohio only using third-party contractors for Informal Dispute Resolution; Maryland, at AGING-00292, indicating Maryland only using third-party contractors for infection control surveys; Rhode Island, at AGING-00452 and 00453, indicating Rhode Island only using third-party contractors for infection control surveys; Louisiana, at AGING-00235, indicating Louisiana contracts with their Office of State Fire Marshal to conduct life safety code surveys only; Illinois, at AGING-00205 and 00206, indicating Illinois hired retired surveyors directly on temporary appointments to assist with all manner of surveys; North Carolina, at AGING-00396, indicating North Carolina hired retired surveyors directly on temporary appointments to assist with all manner of surveys.

surveyors, a process that can take over a year.¹⁸⁷ Companies typically hire certified surveyors who obtained certification while working for a State survey agency or CMS.¹⁸⁸ Both the States and the private companies cited the limited number of Surveyor Minimum Qualifications Test (SMQT) -certified surveyors as a perennial obstacle to conducting timely survey work.¹⁸⁹

Due to these limited numbers, contract survey companies are able to exercise significant market power when contracting with States. Many States reported that they have minimal ability to negotiate prices with potential contractors.¹⁹⁰ The contractors submit a schedule of service prices (see example in Exhibit 1), and the States determine if they can afford the proffered amount.¹⁹¹

Furthermore, States often only receive one or two responses to their contracting solicitations and need such immediate help they do not feel they have the leverage to negotiate prices.¹⁹² For example, Minnesota only received one response to its solicitation and was willing to take any work the contractors could do.¹⁹³ Contract survey companies echoed many of the points made by States, namely that formal procurement processes do not lend to timely negotiation, as changes made to the terms and conditions can invalidate a response.

B. States Utilize Third-Party Contractors Differently

States differ in how they incorporate contract surveyors into their oversight of nursing homes. While most States use contract survey teams to complete surveys independently, some States embed a State-employed surveyor onto contract survey teams with the State employee serving as survey team leader.¹⁹⁴ Nebraska used a hybrid model where a State employee surveyor embedded with a contractor survey team for a training period to supervise the team and ensure compliance with State protocols; however, this model stopped as vacancies within the Nebraska survey agency rose and the state began sending out unaccompanied contract teams.¹⁹⁵

¹⁸⁷ CMS, note 50, SOM Chapter 4, *see* 4009.1 - Federal Minimum Qualification Standards for LTC Facility Surveyors; Appendix D, Ex. 9, Letter from Ade Adebisi, President, Ascellon, to The Honorable Bob Casey, Jr., April 25, 2023 [hereinafter *Ascellon Letter*], at AGING-01294.

¹⁸⁸ Ascellon, phone conversation with Aging Committee Majority staff, March 16, 2023; CertiSurv, phone conversation with Aging Committee Majority staff, March 16, 2023; HMS, phone conversation with Aging Committee Majority staff, March 20, 2023.

¹⁸⁹ Appendix D, Ex. 10 Letter from Eric Whytsell on behalf of Healthcare Management Solutions, LLC to The Honorable Robert P. Casey, Jr., April 27, 2023 [hereinafter *HMS Letter*].

¹⁹⁰ South Carolina Department of Health, phone conversation with Aging Committee Majority staff, March 23, 2023; Colorado Department of Public Health & Environment, phone conversation with Aging Committee Majority staff, March 20, 2023; Appendix E, Ex. 1, South Carolina: Invitation to Bid, November 17, 2020, at AGING-01364; Appendix E, Ex. 2, State of Arizona Department of Health Services: Notice of Request for Proposal (RFP), July 29, 2022, at AGING-01174.

¹⁹¹ Appendix E, Ex. 3, Contract between the Alabama Department of Public Health and CertiSurv, LLC, December 1, 2021 [hereinafter *Alabama-CertiSurv Contract*], at AGING-01239; *supra*, note 187, Ascellon Letter, at AGING-01293.

¹⁹² Iowa Department of Inspections and Appeals, phone conversation with Aging Committee Majority staff, March 23, 2023; Colorado Department of Public Health & Environment, phone conversation with Aging Committee Majority staff, March 23, 2023. *See also* Appendix C, Iowa, at AGING-00216 and Missouri, at AGING-00327.

¹⁹³ Minnesota Department of Health – Health Regulation Division, phone conversation with Aging Committee Majority staff, March 20, 2023.

¹⁹⁴ Colorado, Georgia, Iowa, and South Carolina reported they do not have a State employee serve on contract survey teams. Colorado Department of Public Health & Environment, phone conversation with Aging Committee Majority staff, March 20, 2023; Georgia Department of Community Health, phone conversation with Aging Committee Majority staff, April 10, 2023; Iowa Department of Inspections and Appeals, phone conversation with Aging Committee Majority staff, March 23, 2023; South Carolina Department of Health, phone conversation with Aging Committee Majority staff, March 23, 2023. *See also* Appendix C, Minnesota, at AGING-00310; Idaho, at AGING-00185. Idaho and Minnesota reported mandating a State employee embed on all contract survey teams.

¹⁹⁵ Nebraska Department of Health and Human Services, phone conversation with Aging Committee Majority staff, March 30, 2023.

States also use different methods to select which facilities contractor survey teams will survey versus State staff. Some States send contractor surveyors to facilities with lower numbers of complaints or high performing facilities.¹⁹⁶ This prioritization is intended to keep costs down given that additional complaints increase the cost of a contract survey, as well as maximizing the number of surveys contractors can complete by minimizing the number of days needed to conduct a survey.¹⁹⁷ States favoring this approach also cited their preference to have their own staff survey facilities with large numbers of complaints to maintain more direct oversight of these potentially higher risk facilities.¹⁹⁸ Other States specifically directed contractors to facilities with a high burden of complaints, hoping to free up State employees for more surveys.¹⁹⁹ Some States simply directed contractors to facilities that were “next up” according to survey deadlines.²⁰⁰

C. Three Large Multi-State Players in the Survey Contractor Market

Over the past five years, Ascillon, CertiSurv, and HMS have accounted for a large—and growing—share of the long-term care contractor survey market. HMS and Ascillon have both been in the market for over a decade and advertise their long-term experience and expertise in performing health care facility inspections to States who are struggling to complete workloads.²⁰¹ CertiSurv, founded in 2019, has rapidly built a large survey business, with plans to continue growing.²⁰² The three companies have tripled the combined number of recertification surveys they conduct for States since 2018, fueling a three-fold increase in revenue (see Table 1 and Table 2). The surge in FIC surveys during the pandemic and increased volume of contracted complaint surveys also contributed to the companies’ revenue growth.²⁰³

These three companies conducted 628 recertification surveys nationally in 2022, which accounted for 6.6 percent of nearly 9,500 recertification surveys conducted at nursing homes across the United States that year (see Table 1).²⁰⁴ Put another way, the companies conducted more recertification surveys than the combined total of nursing home recertification surveys carried out by 15 States, Puerto Rico, and the District of Columbia in 2022.²⁰⁵ All three companies offer surveying services for both long-term care and non-long-term care facilities to

¹⁹⁶ Colorado Department of Public Health & Environment, phone conversation with Aging Committee Majority staff, March 20, 2023; Idaho Department of Health & Welfare, phone conversation with Aging Committee Majority staff, March 20, 2023; Iowa Department of Inspections and Appeals, phone conversation with Aging Committee Majority staff, March 23, 2023.

¹⁹⁷ Appendix E, Ex. 4, State of Iowa Master Agreement with Healthcare Management Solutions, LLC, March 1, 2023, at AGING-01281 [hereinafter *Iowa-HMS Master Agreement*]. Iowa’s contract with HMS shows a cost of \$9,625 for an additional surveyor for greater than three attached complaints.

¹⁹⁸ Idaho Department of Health & Welfare Division of Licensing & Certification, phone conversation with Aging Committee Majority staff, March 20, 2023; Nebraska Department of Health and Human Services, phone conversation with Aging Committee Majority staff, March 30, 2023.

¹⁹⁹ Georgia Department of Community Health, phone conversation with Aging Committee Majority staff, April 10, 2023.

²⁰⁰ Appendix C, South Carolina, at AGING-00458.

²⁰¹ Appendix E, Ex. 5, Contract for Services of Independent Contractor, the State of Nevada and Healthcare Management Solutions, LLC, December 12, 2021, Appendix DD: Vendor Proposal [hereinafter *Nevada-HMS Contract*], at AGING-01018; “Healthcare Services,” Ascillon, accessed May 14, 2023, <https://ascillon.com/healthcare/>.

²⁰² *Supra*, note 10, Newsweek Nursing Home Article.

²⁰³ Appendix A, Table 4, Table 5, Table 6, Table 8.

²⁰⁴ “Quality, Certification and Oversight Reports,” CMS, accessed May 14, 2023, available at <https://qcor.cms.gov/main.jsp>. As of May 14, 2023, the Recertification Survey Counts Report showed that States conducted 9,480 recertification surveys in 2022.

²⁰⁵ *Id.* As of May 4, 2023, the Recertification Survey Counts Report showed that the following 15 States, Puerto Rico, the District of Columbia, and Guam, carried out 627 recertification surveys in 2022. The States were New Mexico, Rhode Island, Montana, Maine, North Dakota, Utah, Nevada, Hawai’i, Kentucky, Maryland, Vermont, Wyoming, Delaware, Idaho, and Alaska.

ensure compliance with Federal regulations.²⁰⁶ For long-term care facilities, the surveys may include initial recertification and recertification surveys, revisit surveys, and FIC surveys.

Table 1. Recertification Surveys Completed by Three Multi-State Survey Contractors

	Ascellon	CertiSurv	HMS	Totals
2018	121	--	72	193
2019	66	9	101	176
2020	0	47	23	70
2021	52	103	92	247
2022	44	339	245	628
Totals	283	498	533	1,314

Source: Company letters (see Appendix D). Note: CertiSurv was incorporated in 2019.

Table 2. State Survey Revenue for Three Multi-State Survey Contractors

	Ascellon	CertiSurv	HMS	Total
2018	\$2,692,816	--	\$3,232,442	\$5,925,258
2019	\$1,813,439	\$322,500	\$4,514,549	\$6,650,488
2020	\$1,031,056	\$4,209,185	\$4,042,297	\$9,282,538
2021	\$2,062,349	\$3,790,164	\$4,585,009	\$10,437,522
2022	\$1,110,746	\$8,774,809	\$10,007,135	\$19,892,690
Total	\$8,710,406	\$17,096,658	\$26,381,432	\$52,188,496

Source: Company letters (see Appendix D). Note: CertiSurv was incorporated in 2019.

D. States Report Concern About Cost of Hiring Contractors

Surveys conducted by contractors are substantially more expensive than surveys conducted by survey agency staff directly employed by States. Of the 26 States using contracting, the vast majority cited the high cost of contracted services as a major drawback to using contractors.²⁰⁷ Of the States who do not use contractors, several cited the prohibitive costs as the major barrier.²⁰⁸ States are allocating millions of dollars a year to these contracts, constituting a significant percentage of their annual budgets. In 2023, South Carolina signed three two-year

²⁰⁶ "Healthcare Services," Ascellon, accessed May 14, 2023, <https://ascellon.com/healthcare/>; "Learn More – State Agency Services," CertiSurv, accessed May 14, 2023, <https://www.certisurv.com/state-agencies/faq>; "Survey, Consulting, and Technical Support Capability Statement," HMS, accessed May 14, 2023, <https://hcmsllc.com/our-survey-consulting-and-technical-support-capabilities/>.

²⁰⁷ See e.g., Appendix C, Texas, at AGING-00554; Nebraska, at AGING-00348; Nevada, at AGING-00354.

²⁰⁸ Appendix C, Utah, at AGING-00580; West Virginia, at AGING-00642.

contracts for a combined total potential value of just under \$6 million.²⁰⁹ By comparison, South Carolina’s FY2023 allocated budget amount is just \$2.7 million.²¹⁰ Similarly, Colorado has an active 18-month contract with a maximum cumulative amount of just over \$2.1 million.²¹¹ Nevada signed a three-year contract with a maximum allowable amount of \$4 million.²¹²

The discrepancy between the cost of contractor services and State employee surveyor services can be stark, with contract surveys often costing multiple times the expense of a similar survey conducted by State employees. In Colorado, a recertification survey by a contractor costs \$25,000 to \$30,000, compared to \$8,000 for one completed by State-employed surveyors.²¹³ Texas noted an example of a single contracted survey costing the State \$250,000.²¹⁴ In Idaho, the hourly rate for the contract surveyor is double the hourly rate of the highest paid State employee surveyor, even before adding in the additional cost for per diem and travel expenses for the contractors.²¹⁵

Contracts typically include pricing tables that lay out what contractors are paid upon submission of invoices documenting their work. Exhibit 1 provides an example of such a table contained in a 10-month contract between the Alabama Department of Public Health and CertiSurv, executed in

Exhibit 1: Example of Pricing Schedule from Contract between Alabama and CertiSurv

Survey Type	Pricing	Per Surveyor
Complaint Investigation (not part of a Recertification)	\$5,950 per surveyor	\$5,950
Long-Term Care Recertification w/3 Surveyors	\$21,750	\$7,250
Long-Term Care Recertification w/4 Surveyors	\$27,950	\$6,987
Long-Term Care Recertification w/5 Surveyors	\$34,750	\$6,950
Additional L TC Recertification Surveyors above team of 5	\$6,925 per surveyor	\$6,925
ICF/IID Recertification w/1 Surveyor	\$5,750	\$5,750
ICF/IID Recertification w/2 Surveyors	\$10,900	\$5,450

²⁰⁹ Appendix E, Ex. 6, State of South Carolina, Revised Intent to Award to Ascillon Corporation, February 21, 2023, at AGING-01235.

²¹⁰ Exhibit C, South Carolina, at AGING-00510.

²¹¹ Appendix E, Ex. 7, Colorado Contract Modification Submittal Checklist with CertiSurv LLC, June 1, 2022 [hereinafter *Colorado-CertiSurv Modification*], at AGING-00683.

²¹² *Supra*, note 201, Nevada-HMS Contract, at AGING-00959.

²¹³ *Supra*, note 211, Colorado-CertiSurv Modification, at AGING-00691; Colorado Department of Public Health & Environment, phone conversation with Aging Committee Majority staff, March 20, 2023.

²¹⁴ Appendix C, Texas, at AGING-00554.

²¹⁵ Appendix C, Idaho, at AGING-00200; Appendix E, Ex. 8, State of Idaho contract with Healthcare Management Solutions, LLC, January 1, 2020 [hereinafter *Idaho-HMS Contract*], at AGING-00918. Compares Idaho surveyor hourly rate of \$26-49/hour to \$81-96/hour for contractor hourly rate before per diem and travel expenses are included.

2021.²¹⁶ The table in Exhibit 1 provides an example of prices States are charged, based on survey type, with the unit cost for each survey type along with the cost per surveyor.

The data provided by States is consistent with pricing data from contractors, who cited a range of \$25,000 to \$40,000 for a standard four-person survey team (equating to roughly \$6,000 to \$9,000 per surveyor per recertification survey).²¹⁷ Ascellon reported a daily rate of \$800 per surveyor for daily rate contracts.²¹⁸ In addition to the salaries provided to the contract surveyors, companies said that their pricing includes factors such as expected surveyor expenses, travel, current survey capacity weighed with upcoming demand, income tax rates within a State, and other regulatory requirements.²¹⁹

1. Two Contracted Surveys Equals Annual Salary for State Employees

In an environment where State surveyor salaries are already lower than competitive salaries for other nursing jobs in the State, contractor salaries further widen these disparities. State-reported data show that the average salary ranges for Registered Nurse (RN) surveyors are typically under the RN market rate, one factor States consistently cited for difficulty recruiting survey staff. In Idaho, for example, RN surveyors start at half the average hourly wage of RNs in other roles (\$31/hour versus \$67/hour).²²⁰ However, even the market rate for RNs in Idaho is significantly less than the contracted surveyor salary rate of \$81 to \$96 per hour.²²¹

As a result of these pay disparities, State survey agencies are spending much more for contractor-conducted certification surveys. In some instances, the cost of two or three recertification surveys is equal to an annual surveyor employee salary. For example, in Iowa, the pay range for an RN surveyor employed by the State is \$66,600 to \$93,800,²²² while CertiSurv charged the State \$33,300 to survey a single nursing home with 96 to 174 beds, and \$40,950 for a nursing home with 175 or more beds.²²³ In Minnesota, an RN surveyor is paid \$68,736 to \$101,852,²²⁴ while HMS set the rate for a four-day survey at \$34,804 for a four-person team, and \$43,335 for a five-person team.²²⁵ Meanwhile, South Carolina's survey agency spent more on third-party contracts than on its entire personnel budget for Fiscal Year 2022.²²⁶ Such pay disparities may lead to an underinvestment in State employee surveyors, who can work on many more surveys throughout the year for less than the price of two additional recertification surveys.

While State's use of contractors for individual complaint investigation surveys appears to be relatively limited, FIC surveys have been a significant source of business for contract surveyors.²²⁷ As discussed in Section II of this report, FIC surveys that CMS mandated in 2020

²¹⁶ *Supra*, note 191, Alabama-CertiSurv Contract, at AGING-01239.

²¹⁷ *Supra*, note 189, HMS Letter, at AGING-01306; Appendix D, Ex. 11, Letter from Robert Feurer, CEO, CertiSurv to The Honorable Robert P. Casey, Jr, April 17, 2023 [hereinafter *CertiSurv Letter*], at AGING-01325.

²¹⁸ *Supra*, note 187, Ascellon Letter, at AGING-01293.

²¹⁹ *Supra*, note 217, CertiSurv Letter, at AGING-01325.

²²⁰ Appendix C, Idaho, at AGING-00217.

²²¹ *Supra*, note 215, Idaho-HMS Contract, at AGING-00918.

²²² Appendix C, Iowa, at AGING-00217.

²²³ *Supra*, note 197, Iowa-HMS Master Agreement, at AGING-01254.

²²⁴ Appendix C, Minnesota, at AGING-00311.

²²⁵ Appendix E, Ex. 9, State of Minnesota Professional and Technical Services Contract with Health Management Solutions, LLC, August 2022, at AGING-00939.

²²⁶ Appendix C, South Carolina, at AGING-00505-AGING-00506. South Carolina estimated its survey agency personnel budget needed \$888,175 to fund 18.56 full-time equivalent positions for surveyors, administrative, and support staff. In FY2022, South Carolina had three contracts in the long-term care space worth a total of \$1,111,522.

²²⁷ Appendix A, Table 5.

in response to the COVID-19 pandemic added significantly to State workloads. States have reported that FIC surveys typically take one or two days to complete at a nursing home. Ascillon, CertiSurv, and HMS alone reported conducting 1,300 such surveys from 2020 to 2022.²²⁸ While those surveys account for a small percentage of the 115,000 FIC surveys States conducted during that timeframe, their cost was significant.²²⁹ At a cost of \$5,000 to \$7,100 per survey, State outlays for infection control surveys to these three companies likely topped \$10 million, based on pricing and volume of work.²³⁰ At these prices, a one or two-day FIC survey by a contractor was roughly equivalent to the monthly salary of a full-time surveyor in many States.

2. States' Concern about Contractors' Ability to Keep Up with Workflow

As the number of States employing contractors has increased, multiple States reported contractors have had less capacity to assist with survey needs or were simply unable to offer services.²³¹ Some States reported that while contractors were historically able to provide significant assistance, capacity has tightened as nationwide demand for contract survey services has increased.²³² Even with contracts in place, there is no guarantee surveys will be completed, particularly if the contract does not contain specific language about the number of surveys required during the contract term. Minnesota noted that though it has a contract with HMS, the company's ability to conduct surveys varies.²³³ South Carolina similarly noted that one of the largest drawbacks to using contractors is having to wait for their availability.²³⁴ This dependence on contractors' availability along with difficulty enforcing timelines is significant for States like South Carolina, where contract surveyors complete more recertification surveys per year than State agency personnel (see Exhibit 2).²³⁵

From a contractor perspective, companies noted that the same workforce challenges that plague States also affect them and their own capacities. To manage this increased work demand, contractors reported that they do not enter into contracts that specify a required number of surveys to be completed for States, instead preferring terms to complete surveys, as able. For example, Ascillon provides their availability to States month-to-month, creating a monthly schedule.²³⁶ That said, all three contractors maintain they are in a position to satisfy work requests under their existing contracts.²³⁷ CertiSurv noted:

For all contracts that have had a specific number of surveys required, all the required surveys have been completed. However, some states have open ended

²²⁸ *Supra*, note 187, Ascillon Letter, at AGING-01293; *supra*, note 217, CertiSurv Letter, at AGING-01324; *supra*, note 189, HMS Letter, at AGING-01305.

²²⁹ "Quality, Certification and Oversight Reports," CMS, accessed May 14, 2023, available at <https://qcor.cms.gov/main.jsp>. As of May 14, 2023, the Recertification Survey Counts Report showed that States conducted 115,269 infection control surveys from 2020 to 2022.

²³⁰ Appendix C, South Carolina, at AGING-00500; *supra*, note 210, Colorado-CertiSurv Modification, at AGING-00691; Appendix A, Table 5.

²³¹ Appendix C, Georgia, at AGING-00179; Maine, at AGING-00247; Minnesota, at AGING-00310; Missouri, at AGING-00327.

²³² Appendix C, Iowa, at AGING-00216.

²³³ Appendix C, Minnesota, at AGING-00310.

²³⁴ Appendix C, South Carolina, at AGING-00458.

²³⁵ Appendix C, South Carolina, at AGING-00512.

²³⁶ *Supra*, note 187, Ascillon Letter, at AGING-01294.

²³⁷ *Id.*; *supra*, note 217, CertiSurv Letter, at AGING-01326; *supra*, note 189, HMS Letter, at AGING-01308.

contracts that allow us to do ‘as many surveys as possible’ and in those instances, there are time that states would like us to do more surveys than we are able to do.²³⁸

HMS has had a similar experience, receiving more requests for surveys than they have capacity. Similar to States, HMS is constrained by its ability to hire qualified surveyors.²³⁹ They noted they are not in default on any contracts and do not accept contracts that require a defined number of surveys unless they know they have the capacity to complete them.

While open-ended contracts do not require specified numbers of surveys, such arrangements leave States in a difficult position—no surveyors to get the work done. The month-to-month variability makes long-term planning for survey deadlines very difficult and makes budgeting for future services to be rendered challenging. Coupled with the internal hiring difficulties State survey agencies are facing, the inconsistency of contractors’ work for them is yet another challenge to a State’s overall workforce capacity.

Exhibit 2: Surveys Completed by South Carolina Surveyors versus Contractors

SNF RECERTIFICATION SURVEY COSTS = 194 TOTAL (includes 189 Recertification surveys plus 50% backlog per SPSS)		
	Total Number of Recertification Surveys	Associated Costs Estimates
State Agency Personnel	48	TBD
Contracted Surveys	72	\$2,109,800

3. States’ Concern About Quality of Contract Work

All State survey agencies incorporate quality assurance (QA) processes and procedures as part of their survey workflow.²⁴⁰ Once completed by the on-site survey team, surveys are sent to States’ QA personnel to ensure compliance with internal State policies as well as Federal requirements for survey work product. States differ in how they staff QA personnel, with some employing personnel who focus solely on QA, while others have staff who complete QA as a part of their job duties.²⁴¹ Regardless of the structure of their QA departments, States reported that contractor completed surveys undergo the same QA process as surveys conducted by State personnel.²⁴²

Notably, States were split in their opinions and experiences with contractor work product. While the majority of States reported occasional, stylistic, or cosmetic differences between contractor and State personnel work products, others noted that contractor work product significantly

²³⁸ *Supra*, note 217, CertiSurv Letter, at AGING-01326.

²³⁹ *Supra*, note 189, HMS Letter, at AGING-01308.

²⁴⁰ 42 C.F.R. § 483.75 Subpart B.

²⁴¹ Appendix C, South Carolina, at AGING-00481; California, at AGING-00053; Texas, at AGING-00550.

²⁴² Appendix C, Idaho, at AGING-00184; Texas, at AGING-00554.

deviated from State quality standards, and cost time in the quality assurance process.²⁴³ Colorado reported needing to complete significant quality assurance in working with their contractors:

Once the deficiencies are written and sent by the contractor, the program completes a QA to ensure the states' survey standards are met. There are frequent exchanges between the contractor and the survey agency to ensure deficiencies are written with correct and substantiated evidence that supports the deficiency. It averages out to require an extra 10 hours per week per survey that is needed to provide the supervision and oversight of the contractors.²⁴⁴

Nebraska similarly noted that contractors did not cite enough evidence in their documentation when issuing citations:

Challenges of using contracted surveyors include ... monitoring the work performed by contracted surveyors to ensure it meets Nebraska State Agency standards. The LTC Program Manager has reviewed all the surveys completed by contracted surveyors and has requested additional information in instances when the survey product did not meet Nebraska State Agency standards.²⁴⁵

Mississippi had a particularly negative experience in working with contractors, reporting:

In 2017 we hired 2 contract companies to assist with a backlog of surveys. We spent several million dollars, and we were extremely displeased with the results, or lack thereof... We discovered that they did not call Immediate Jeopardies when warranted and 'left that to the state to do' upon reviewing their deficiencies. We had zero return on our incredibly costly investment – a mistake we will not make again.²⁴⁶

Not all States took issue with the quality of contractor work product; one praised the brevity and conciseness, even instructing their own employee surveyors to emulate the writing style.²⁴⁷

From their perspective, all contractors maintain they conducted rigorous internal quality assurance, and suggested that their surveys should not require as much oversight as a result.²⁴⁸ These internal processes were cited as a benefit to States, with one company stating they do more oversight than the State survey agencies do.²⁴⁹ This assertion from the contractors contrasted with the observations from State survey staff suggest quality assurance is an area worth further scrutiny and clarity in oversight.

E. Contractors Conducting Multiple Streams of Work Raise Conflict of Interest Concerns

The nature of the contract surveyors' businesses raises conflict of interest concerns, particularly as States have come to rely more heavily on their services. During the investigation, staff

²⁴³ Appendix C, Kentucky, at AGING-00226; Alabama, at AGING-00005; Colorado, at AGING-00060.

²⁴⁴ Appendix C, Colorado, at AGING-00060.

²⁴⁵ Appendix C, Nebraska, at AGING-00348.

²⁴⁶ Appendix C, Mississippi, at AGING-00317.

²⁴⁷ Iowa Department of Inspections and Appeals, phone conversation with Aging Committee Majority Staff, March 23, 2023.

²⁴⁸ *Supra*, note 187, Ascellon Letter, at AGING-01294; *supra*, note 217, CertiSurv Letter, at AGING-01326; *supra*, note 189, HMS Letter, at AGING-01308.

²⁴⁹ CertiSurv, phone conversation with Aging Committee Majority Staff, March 16, 2023.

identified three distinct areas of concern regarding contractors' activities: consulting with providers, Federal government contracts, and data collection practices.

1. Consulting Relationships with Providers

The Majority staff's investigation found instances of contractors rendering survey services to the State and Federal governments at the same time they sold or marketed consulting services to health care providers. It appears that States may not have been made aware of such consulting relationships. While provider consulting among survey contracting companies appears to be relatively limited, any such relationships create the potential for real and perceived conflicts of interest due to companies working for both a regulator and a regulated entity.

Ascellon, which conducts health surveys for State agencies and Life Safety Code monitoring surveys for CMS, stated that it had performed mock surveys with health care facilities.²⁵⁰ The company also advertises mock survey and training services and quality assurance program improvement consulting services on their website.²⁵¹ Ascellon told Majority staff such consulting services are only rendered when the company determines it is unlikely to conduct a Federal survey at the same facility.²⁵² The company also noted having a "firewall" between the two departments and that they do not assign the same employees to consulting work and survey work.²⁵³ Ascellon did not provide a company-wide conflict of interest policy in response to a request, only a conflict of interest agreement for individual employees.²⁵⁴ As such, it is not clear what, if any, written policies Ascellon maintains to govern such relationships.

CertiSurv recently abandoned its work consulting for health care providers, following inquiries from Majority staff on the matter and the arrangement being highlighted by the press.²⁵⁵ In response to questions from Chairman Casey, the company stated:

[CertiSurv] does not currently provide services to CMS, health care providers, or any other entities providing or overseeing health care. In 2022, CertiSurv provided consulting services to three different long term care facilities. Fees for these services were less than 0.3% of CertiSurv's total revenue.²⁵⁶

Similarly, the Long Term Care Institute, which provides survey services to Wisconsin, advertises "compliance consulting" and "regulatory consulting" to providers on its website.²⁵⁷ Among the regulatory services the company offers to nursing homes and skilled nursing facilities are surveys.²⁵⁸ The company notes that it "works with government agencies to conduct external regulatory surveys using the Centers for Medicare & Medicaid Services (CMS) survey processes," and that "since 1999, we have conducted over 1,145 external regulatory surveys."²⁵⁹

²⁵⁰ Ascellon, phone conversation with Aging Committee Majority staff, March 16, 2023.

²⁵¹ "Healthcare Services," Ascellon, accessed May 14, 2023, <https://ascellon.com/healthcare/>.

²⁵² Ascellon, phone conversation with Aging Committee Majority staff, March 16, 2023.

²⁵³ Ascellon, phone conversation with Aging Committee Majority staff, March 16, 2023.

²⁵⁴ *Supra*, note 187, Ascellon Letter, at AGING-01297.

²⁵⁵ CertiSurv, phone conversation with Aging Committee Majority staff, March 16, 2023; *see also Supra*, note 10, Newsweek Nursing Home Article.

²⁵⁶ *Supra*, note 217, CertiSurv Letter, at AGING-01327.

²⁵⁷ "Regulatory Consulting," Long Term Care Institute, Inc. (LTCI), accessed May 14, 2023, <https://www.ltcior.org/regulatory-compliance-consulting/>.

²⁵⁸ "Skilled Nursing & Nursing Homes," LTCI, accessed May 14, 2023, <https://www.ltcior.org/skilled-nursing-compliance/>.

²⁵⁹ "Regulatory Surveys," LTCI, accessed May 14, 2023, <https://www.ltcior.org/regulatory-surveys/>.

While the company told Majority staff that it does not currently conduct consulting for providers,²⁶⁰ its website shows that it continues marketing those services to providers.

HMS reported that it does not provide survey services, management consulting, or other technical services to long-term care providers so as to avoid potential conflicts of interest should they be asked to survey a facility later.²⁶¹ Following Chairman Casey's inquiry on the matter in March 2023, the company added "Conflicts of Interest arising from providing services to healthcare facilities which HMS may later inspect for compliance with Medicare and Medicaid regulations" to risk areas in its conflict of interest policy, though the policy does not elaborate on how to address or mitigate such risks.²⁶² HMS' updates to its conflict of interest manual were made in April 2023; the previous updates were made in February 2020.²⁶³

From the State survey agency perspective, many were unaware that companies had provided consulting services to individual facilities or had active contracts to provide these services.²⁶⁴ States indicated that simultaneous provision of consulting services and assistance in survey work in the same facility constituted a conflict of interest and would violate State laws. For many States, it was less clear to them if providing consulting services to a facility in a State and assisting with survey work in the same State constituted a potential conflict of interest.²⁶⁵ In both cases, States indicated such information should be disclosed in the contracting process.

While it appears that companies themselves have identified consulting with individual facilities in States where they conduct surveys as presenting potential conflicts of interest, currently there is minimal to no oversight of this issue. In several cases, States were not even aware such a scenario was possible, and no State was keeping track of such occurrences.²⁶⁶ At present, companies that provide consulting services are policing themselves without formal guidance or oversight from relevant regulatory bodies.

2. Federal Surveying and Technical Assistance Contracts

The second major area of concern regards existing contracts two of the major contractors have with the Federal government regarding oversight of State survey activities, as is the case with both HMS and Ascillon.

HMS has worked as a contractor for CMS for more than a decade, including for the Center for Clinical Standards and Quality (CCSQ), which oversees inspections of nursing homes and other

²⁶⁰ Long Term Care Institute, phone conversation with Aging Committee Majority staff, March 20, 2023.

²⁶¹ *Supra*, note 189, HMS Letter, at AGING-01310.

²⁶² *Supra*, note 189, HMS Letter, at AGING-01313.

²⁶³ Email from Eric Whytsell (on behalf of HMS) to Peter Gartrell (Aging Committee Majority staff), April 28, 2023 (on file with the Committee).

²⁶⁴ Idaho Department of Health and Welfare, phone conversation with Aging Committee Majority staff, March 20, 2023; Colorado Department of Public Health and Environment, phone conversation with Aging Committee Majority staff, March 20, 2023. State employees in both Colorado and Idaho were unaware contracting companies offered any form of consulting services.

²⁶⁵ Georgia Department of Community Health, phone conversation with Aging Committee Majority staff, April 10, 2023; Minnesota Department of Health, phone conversation with Aging Committee Majority staff, March 20, 2023. State employees in both Georgia and Minnesota stated that if there were appropriate protections in place they would not necessarily view such a scenario as a conflict of interest.

²⁶⁶ Minnesota Department of Health, phone conversation with Aging Committee Majority staff, March 20, 2023; Iowa Department of Inspections and Appeals, phone conversation with Aging Committee Majority staff, March 23, 2023; Georgia Department of Community Health, phone conversation with Aging Committee Majority staff, April 10, 2023. Minnesota, Iowa, and Georgia noted there is no mechanism to track consulting services provided by contractors in their respective states.

health care facilities.²⁶⁷ Among the contracts HMS maintains with CMS is one for “oversight of state performance – federal and state survey/certification and technical assistance to state agencies.”²⁶⁸ As part of the contract, HMS supplies surveyors to CMS survey teams to assist in completing comparative surveys, including in States where HMS has contracts with State survey agencies.²⁶⁹ CMS reported that it provides this type of technical assistance to as many as three States annually—tasks include assessing a survey agency’s operations, providing recommendations for improvement, and providing technical training for more standardized and efficient operations.²⁷⁰ HMS’ contracting arrangements raise multiple potential conflicts of interest. The most direct potential conflict of interest is that an HMS-employed surveyor—or team of surveyors—could be involved in completing a State recertification survey and could also be involved in conducting a CMS comparative survey for the same facility. Another scenario is that HMS may conduct CMS comparative surveys in a State where the company currently has business or is seeking business. Both scenarios create circumstances in which the company’s contractual obligations with the Federal government potentially conflict with its obligations to a State. Such a dual role creates a situation where the company could be incentivized to be lenient with the State during a Federal monitoring survey, either to uphold work it had already performed or work it hopes to perform in the future. Conversely, the company could be incentivized to be more aggressive, since States are typically responsible for resolving deficiencies during Federal monitoring surveys and additional violations could generate more billable business.

When such scenarios were raised to HMS, company officials agreed that though it was possible, company policies and CMS practices mitigated any potential conflicts of interest.²⁷¹ HMS noted that HMS-employed surveyors do not lead CMS comparative survey teams or make final determinations of deficiency, but only bring findings to the table.²⁷² While such a strategy may limit an individual surveyor’s scope within a single survey, it does not necessarily reduce the organizational risk that HMS-employed surveyors can influence the culture of a CMS comparative survey.

HMS also is in the position to both advise States under its Federal technical assistance contract and benefit through survey work it rendered to survey agencies. For example, when South Carolina was having difficulty meeting Federal performance standards, CMS recommended that the State’s survey agency meet with HMS to assist “in identifying program shortcomings and areas that we can build a program structure to better support current CMS workload and future workload.”²⁷³ After meeting with HMS in 2016, the South Carolina survey agency reported to CMS that in order to meet benchmarks set by the Federal agency, it pursued contracts for nursing

²⁶⁷ “Recipient Profile: Healthcare Management Solutions, LLC,” USASpending.gov, accessed May 14, 2023, *available at* <https://www.usaspending.gov/recipient/1795f6db-9ee4-9cd5-4d3f-55a1c3730d3c-P/latest>; “Contract Vehicles,” HMS, accessed May 14, 2023, *available at* <https://hcmsllc.com/contract-vehicles/>.

²⁶⁸ “Contract Summary,” USASpending.gov, accessed May 15, 2023,

https://www.usaspending.gov/award/CONT_AWD_75FCMC19F0074_7530_GS00F295CA_4732/.

²⁶⁹ HMS, phone conversation with Aging Committee Majority staff, March 20, 2023.

²⁷⁰ *Supra*, note 76, CMS May 2023 Letter to Chairman Casey, at AGING-01418.

²⁷¹ *Supra*, note 189, HMS Letter, at AGING-01313.

²⁷² HMS, phone conversation with Aging Committee Majority staff, March 20, 2023.

²⁷³ Appendix C, South Carolina, at AGING-00459.

home surveys with several contractors, including HMS.²⁷⁴ As noted earlier in this section, South Carolina subsequently employed HMS as one of its contract surveyors.²⁷⁵

While South Carolina was aware of the dual role that HMS played, not all States are aware of the relationships. HMS reported that it does not affirmatively disclose its contractual relationships with CMS or other States unless asked:

HMS believes all states are aware of its contractual relationship with CMS but the company does not provide a list of the other states with which it is working unless asked. However, HMS routinely provides state contacts as references to other state agencies when requested.²⁷⁶

While some States were aware of HMS' contract with CMS, others were not. None of the States Majority staff spoke with recalled having a conversation with HMS about its CMS work. Iowa staff reported they found out by chance that HMS was a Federal contractor, via a call with CMS, since HMS did not disclose its CMS work during the contracting process.²⁷⁷ Georgia staff also learned of the Federal contract work from CMS, but did not recall hearing HMS say it.²⁷⁸ States said HMS' contracting work was relevant information that should be disclosed in the contracting process to avoid running afoul of State conflict of interest laws and contract clauses.²⁷⁹ Without such information, survey agencies may be unable to confirm they are following State laws on procurement and conflicts of interest, and it creates possible issues with compliance with internal policies down the line. In addition to its Federal survey and technical assistance work, CMS also tasked HMS with collecting staffing data from State survey agencies for CMS in June 2021.²⁸⁰ Many States cited concern over uploading their protected data into a system operated by a private company with which they have existing contracts. States felt such an arrangement amounted to providing trade secrets or giving the company a competitive advantage in the market.²⁸¹ While the company told Majority staff that such data was strictly segregated, the arrangement deserves additional oversight and consideration by CMS.

HMS is not the only contractor that conducts survey work for States and the Federal government. Ascillon reported active contracts with both CMS and the Department of Veterans Affairs (VA).²⁸² Ascillon's work for CMS is limited to conducting follow-up life safety code surveys in

²⁷⁴ Appendix C, South Carolina, at AGING-00460.

²⁷⁵ See also, Appendix A, Table 7.

²⁷⁶ *Supra*, note 189, HMS Letter, at AGING-01310.

²⁷⁷ Iowa Department of Inspections and Appeals, phone conversation with Aging Committee Majority staff, March 23, 2023.

²⁷⁸ Georgia Department of Community Health – Healthcare Facility Regulation Division, phone conversation with Aging Committee Majority staff, April 10, 2023.

²⁷⁹ Contract between the Nebraska Department of Health and Human Services and Healthcare Management Solutions, LLC, September 6, 2017, at AGING-00949, stating, "In the performance of this contract, the Contractor shall avoid all conflicts of interest and all appearances of conflict of interest. The Contractor shall immediately notify DHHS of any such instances encountered so that other arrangements can be made to complete the work."

²⁸⁰ Email from Kelley Leonette (HMS) to Peter Gartrell (Aging Committee Majority staff), December 14, 2022, on file with the Committee. HMS; phone conversation with Aging Committee Majority staff, December 13, 2022) [hereinafter *HMS Correspondence*].

²⁸¹ Minnesota Department of Health – Health Regulation Division, phone conversation with Aging Committee Majority staff, March 20, 2023; Wisconsin Department of Health Services – Division of Quality Assurance, phone conversation with Aging Committee Majority staff, on January 26, 2023.

²⁸² *Supra*, note 187, Ascillon Letter, at AGING-01296; "Recipient Profile: Ascillon Corporation," USASpending.gov, accessed May 14, 2023, available at <https://www.usaspending.gov/recipient/1795f6db-9ee4-9cd5-4d3f-55a1c3730d3c-P/latest>.

various States, with annual revenue ranging up to \$1 million a year.²⁸³ The company noted it does not conduct life safety surveys for States;²⁸⁴ however Majority staff believe the simultaneous existence of active contracts with States related to nursing homes still present potential conflicts. In addition, Ascillon's VA contract is to conduct required surveys for VA nursing homes and State-funded homes for veterans, with an annual revenue of up to \$12 million.²⁸⁵ While CertiSurv does not have any active Federal contracts, the company expressed interest in expanding into Federal contracting and has actively investigated next steps to do so.²⁸⁶

²⁸³ "Award Profile: Contract Summary between Department of Health and Human Services (HHS) and Ascillon Corporation," accessed May 14, 2023, *available at*

https://www.usaspending.gov/award/CONT_AWD_75FCMC23F0045_7530_GS10F0244S_4730.

²⁸⁴ Ascillon, phone conversation with Aging Committee Majority staff, March 16, 2023.

²⁸⁵ Ascillon, phone conversation with Aging Committee Majority staff, March 16, 2023.

²⁸⁶ CertiSurv, phone conversation with Aging Committee Majority staff, March 16, 2023.

V: Surveyor Staffing Warnings Date to Early 2000s

Over the last two decades, State officials and independent watchdogs repeatedly warned CMS and Congress that staffing shortages and insufficient Federal funding were negatively affecting survey agencies' ability to carry out high-quality and timely nursing home oversight, leaving residents at risk. Despite the repeated and escalating warnings, Congress failed to provide funding that CMS Administrators in Democratic and Republican administrations said was needed to meet statutorily required timelines for overseeing nursing homes and other health care providers. The following section:

- Describes a series of instances when States raised funding or staffing concerns to CMS;
- Analyzes actions CMS took when States failed to meet Federal performance standards;
- Reviews key findings from reports published by OIG, GAO, and the National Academies of Sciences, Engineering and Medicine; and
- Details warnings CMS provided to Congress about faltering oversight of nursing homes and other health care facilities.

A. States Raised Staffing, Funding Concerns in Calls, Budget Justifications to CMS

States regularly and repeatedly informed CMS that severe understaffing and flat-lined Federal funding rendered them unable to meet statutory timelines to inspect nursing homes and other health care facilities. Such concerns were communicated to CMS regional offices and headquarters staff in a variety of ways—phone calls, meetings, letters, memos, and budget documents. Numerous States described how they made CMS aware of their concerns regarding staffing and funding, including:

- Alabama, which cited phone calls and meetings it had with CMS regional officials, as well as written correspondence, raised concern about staffing challenges and the survey agency's 34 percent turnover rate.²⁸⁷ The State told CMS in a 2021 letter that it was “at a level of staffing and functionality that affects its ability to carry out key responsibilities,” and would not be able to meet workload requirements “in the foreseeable future.”²⁸⁸
- Maryland noted that its calls with CMS' regional office “routinely included discussions about long term care staffing needs and pending workloads.” The State also reported that it submits staffing and workload information on a quarterly basis through the “Pending Overdue Workload Questionnaire.”²⁸⁹
- Michigan reported that “staffing volumes” has been the topic of “many discussions” during monthly calls between the Association of Health Facility Survey Agencies (the

²⁸⁷ Appendix C, Alabama, at AGING-00005.

²⁸⁸ Appendix C, Alabama, at AGING-01216.

²⁸⁹ Appendix C, Maryland, at AGING-00292. CMS' Region 3 Office is in Philadelphia. The region includes Delaware, the District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia.

organization that represents survey agencies) and CMS. Michigan also said that “stagnant annual discretionary grant funding” was a persistent concern States raised with CMS’ regional office.²⁹⁰

- North Carolina discussed staffing problems and survey backlogs with CMS’ regional office in recent years and had submitted supplemental budget requests ranging from \$770,000 to \$1.1 million in FY2018, FY2019, and FY2020.²⁹¹
- Puerto Rico requested that CMS approve Federal funding for up to 12 new survey agency personnel; however, CMS only approved six of the requested positions.²⁹²
- Tennessee sought—and was approved for—a one-time grant of \$900,000 from CMS in order to address the State’s challenges with recruitment and retention of survey staff.²⁹³
- Texas had conversations with CMS’ regional office from 2019 to 2022 regarding “the need to increase the [survey and certification] budget for Texas due to our increasing workload and not having enough FTEs or the ability to increase salaries to recruit and retain staff.”²⁹⁴
- Virginia repeatedly told CMS about struggles hiring staff, including in a 2019 email in which the agency highlighted a 31 percent turnover rate among staff and a 248 percent increase in overtime as the survey agency attempted to meet survey timelines.²⁹⁵

Multiple States also provided their communications with CMS dating back to 2017, which showed how States detailed the issues they were facing to the Federal agency. All of the direct communications States provided are contained in Appendix C. In addition, analysis of direct communications between three States and CMS regarding Federal funding concerns can be found in Appendix B.

Despite the persistent concerns States raise to CMS, the agency wrote that it “does not routinely collect data from [survey agencies] specifically regarding their staffing shortage challenges,” but closely monitors survey agencies’ overall performance through the State Performance Standard System (SPSS).²⁹⁶ Majority staff identified at least one instance where CMS solicited staffing data from survey agencies in 2021, which HMS confirmed it had collected on behalf of the agency, and three State directors said that their agencies provided staffing data to CMS through a “State Agency Plans” portal and provided a screenshot of the survey.²⁹⁷ However, it is not clear to whom the vacancy data was made available at CMS or how the agency may have used it.

²⁹⁰ Appendix C, Michigan, at AGING-00304. CMS’ Region 5 Office is in Chicago. The region includes Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

²⁹¹ Appendix C, North Carolina, at AGING-00397.

²⁹² Appendix C, Puerto Rico, at AGING-00445.

²⁹³ Appendix C, Tennessee, at AGING-00531.

²⁹⁴ Appendix C, Texas, at AGING-00555.

²⁹⁵ Appendix C, Virginia, at AGING-00603.

²⁹⁶ *Supra*, note 76, CMS May 2023 Letter to Chairman Casey, at AGING-01418.

²⁹⁷ *Supra*, note 280, HMS Correspondence; *see also* Appendix D, Exhibit 12, CMS State Agency Plans, n.d., at AGING-01260-AGING-01263.

CMS reported it is “anecdotally” aware of survey agencies’ difficulty recruiting due to uncompetitive salaries.²⁹⁸

B. Corrective Action Plans Highlight Understaffing’s Role in Inadequate Oversight

When States fail to meet survey performance standards set by CMS, they enter into “corrective action plans,” which are meant to address the performance shortfalls in collaboration with CMS’ regional offices.²⁹⁹ Corrective action plans are one of several steps CMS can take to address States that fail to meet performance goals, including “training, directed quality improvement plan, and technical assistance ... [and] an escalation protocol that can involve contacting senior state officials, including the Governor, with a request for action.”³⁰⁰ However, CMS conceded it has “few practical options to address intractable problems, such as limited federal funding and chronic staffing shortages in [survey agencies].”³⁰¹

The following review of corrective action plans from three States—Kansas, Hawai’i, and Georgia—are based on documents provided by OIG. The correspondence between these States and CMS are among corrective action plans from 15 States that OIG used to develop its 2022 program evaluation examining Federal oversight of nursing homes.³⁰² In many instances, these documents underscored that staffing frequently affected States’ ability to conduct oversight of nursing homes and other providers participating in the Medicare and Medicaid programs. The documents also show that staffing problems at survey agencies were an issue CMS was dealing with years prior to the COVID-19 pandemic.

1. Kansas: In 2015, Two Surveyors Were Responsible for 400 Health Facilities

In a letter to the Secretary of the Kansas Department of Health and Environment (KDHE) in 2015, CMS expressed “grave concern” regarding the State’s ability to adhere to the provisions of its 1864 Agreement.³⁰³ The letter said there was an “immediate need” for the State to improve the Department’s “organization, management and oversight of all regulatory systems and functions,” which was “crucial for KDHE to consistently implement Federal regulations governing the health, safety of and well-being of people receiving care in Medicare and Medicaid certified facilities.”³⁰⁴ The letter went on to highlight a drastic decline in the number of surveyors at the Department:

Prior to 2012, KDHE reported they had 10.5 field surveyors, one quality performance surveyor, two office managers and a Director. In March of 2015, CMS was informed that KDHE had 2.5 field surveyors and one office manager. From our discussions with the State, it appears that KDHE has been unable to hire staff

²⁹⁸ *Supra*, note 76, CMS May 2023 Letter to Chairman Casey, at AGING-001419.

²⁹⁹ CMS, “Fiscal Year 2023 State Performance Standards System Guidance,” September 20, 2022, *available at* <https://www.cms.gov/files/document/admin-info-22-08-all.pdf-0>, at 6.

³⁰⁰ *Supra*, note 76, CMS May 2023 Letter to Chairman Casey, at AGING-001419.

³⁰¹ *Id.*

³⁰² *Supra*, note 9, OIG 2022 Nursing Home Survey Evaluation.

³⁰³ Appendix F, Ex. 1, Letter from Nadine Renbarger, Associate Regional Administrator Midwest Division of Survey and Certification, CMS, to Susan Mosier, Secretary, Kansas Department of Health and Environment, Kansas, December 4, 2015, at HHSOIG-0382.

³⁰⁴ *Id.*

in sufficient numbers to complete the expected workload due to Administrative obstacles and non-competitive wages.³⁰⁵

Describing the Department as “critically understaffed,” the letter described the massive workload facing the remaining surveyors and resulting oversight shortfalls that had occurred:

According to our most recent information, KDHE has only two full-time Non-Long Term Care (NLTC) surveyors. As a result, these two staff persons are responsible for all survey and certification actions for the 151 hospitals, 53 dialysis centers, 165 rural health clinics, 62 ambulatory surgical centers, 22 outpatient physical therapy providers, and one outpatient rehabilitation center. The two surveyors available to KDHE are relatively new employees and lack investigative experience. The lack of available and experienced staff has led to a number of programmatic failures.³⁰⁶

The letter requested that the State review the failures at the survey agency and provide CMS with a plan for addressing the systemic problems that contributed to them. Absent corrective action, CMS warned the State’s 1864 Agreement could be revoked if Kansas failed to address CMS’ concerns.³⁰⁷

2. Hawai’i: In Mid-2010s, Understaffing Contributed to Chronically Late Nursing Home Surveys

In 2015, CMS and the State of Hawai’i corresponded about the State’s failure to meet performance standards for overseeing health facilities. In a May letter to CMS, the Director of Hawai’i’s Department of Health cited a lack of staff as the main driver behind the State’s “suboptimal performance,” identifying difficulties hiring qualified staff and challenges obtaining approvals to create more positions.³⁰⁸ In fact, the first objective of the attached corrective action plan was to “IMPROVE ON STAFF RESOURCES.” The Director’s letter sought a written commitment from CMS to provide Federal funding for additional staff positions in order to help the Department secure additional funding from the State.³⁰⁹

In October, CMS sent the written commitment the Director had sought five months earlier. After conducting a staffing analysis examining the time needed to complete State licensing and Federal certification, the survey agency determined it needed seven surveyors and two administrative support positions—needs it began communicating in 2013.³¹⁰ However, CMS said that it would only be willing to fund four surveyors and two administrative support staff over a two-year period.³¹¹ Furthermore, CMS funding would be contingent on the approval and funding of the positions by the State.³¹² Even having granted the request, CMS signaled its discomfort with the arrangement it had entered into with Hawai’i:

³⁰⁵ *Id.*, at HHSOIG-0383.

³⁰⁶ *Id.*

³⁰⁷ *Id.*, at HHSOIG-0385.

³⁰⁸ Appendix F, Ex. 2, Letter from Virginia Pressler, Director of Health, Hawai’i, to Steven Chickering, Associate Regional Administrator, Western Division of Survey and Certification, CMS, May 6, 2015, at HHSOIG-0001.

³⁰⁹ *Id.*, at HHSOIG-0003.

³¹⁰ *Id.*, at HHSOIG-0004.

³¹¹ Appendix F, Ex. 3, Letter from Renard Murray, Consortium for Quality Improvement and Survey Certification Operations, CMS, to Virginia Pressler, Director of Health, Hawai’i, October 14, 2015, at HHSOIG-0348.

³¹² *Id.*

While it is not normally CMS's intent to intervene in a state's internal personnel matters, CMS recognizes that the situation in Hawai'i is serious and merits prompt attention and, therefore, is willing to take this extraordinary step to assist you and [the Office of Health Care Assurance] obtain an adequate number of staff necessary to perform certification surveys aimed at protecting Medicare and Medicaid beneficiaries from poor quality of health care or threats to safety.³¹³

The CMS letter raised concern that during Federal FY2014, Hawai'i performed recertification surveys at 29 of its 46 nursing homes, and that, on average, it was surveying nursing homes every 19.1 months.³¹⁴ Federal law requires that nursing homes be surveyed every 15 months. The letter from CMS acknowledged staffing challenges Hawai'i faced. It noted that "the management team has taken measures to address staffing shortfalls," but had "been limited by the challenges related to the adequacy of the number of qualified staff and to the recruitment and retention of staff."³¹⁵ While conceding that staffing challenges were not within the Department's "direct control," CMS nonetheless registered concern about the future impact of understaffing:

This lack of qualified staff appears to have negatively impacted prior years' performances and, if left unaddressed will likely contribute to Hawai'i's continued inability to meet federal survey workload expectations.³¹⁶

3. Georgia: In 2016, Survey Agency Was 60 days From Losing Medicare Funding Due to Woes CMS likewise raised "grave concerns" about the performance of Georgia's survey agency in an August 2014 letter, noting that performance problems had progressively worsened during the preceding three years.³¹⁷ CMS said it had raised concerns about "staffing levels, training, initial provider/supplier certifications, survey outcomes, long-term care (LTC) re-certification and enforcement issues and the apparent and admitted inability of the Survey Agency to meet mandated workload requirements."³¹⁸ The letter went on to note that Georgia's survey agency was late in conducting standard surveys for 92 percent of its nursing homes,³¹⁹ adding in blunt terms its concern about the current pace of nursing home surveys:

Additionally, we are in the tenth month of the current fiscal year and only **51.3%** of the [long-term care] providers have been surveyed. For the past fiscal year (FY 2013), **14.6%** of the [long-term care] providers were not surveyed at all during the required timeframe. These actions and results are unacceptable. (emphasis included in original).³²⁰

³¹³ *Id.* CMS raised similar concerns about intervening in State affairs in response to a GAO recommendation issued in 2009 suggesting the agency establish a national pool of surveyors to assist survey agencies experiencing difficulty meeting survey standards, see GAO, *Addressing the Factors Underlying Understatement of Serious Care Problems Requires Sustained CMS and State Commitment*, GAO-10-70 (November 2009), available at <https://www.gao.gov/products/gao-10-70> [hereinafter *GAO 2009 Survey Understatement Report*], at 50-51.

³¹⁴ *Id.*, at HHSOIG-0347.

³¹⁵ *Id.*, at HHSOIG-0348.

³¹⁶ *Id.*

³¹⁷ Appendix F, Ex. 4, Letter from Consortium for Quality Improvement and Survey Certification Operations, CMS, to Clyde Reese, Commissioner, Georgia Department of Community Health, August 1, 2014, at HHSOIG-0372.

³¹⁸ *Id.*

³¹⁹ *Id.*, at HHSOIG-0373.

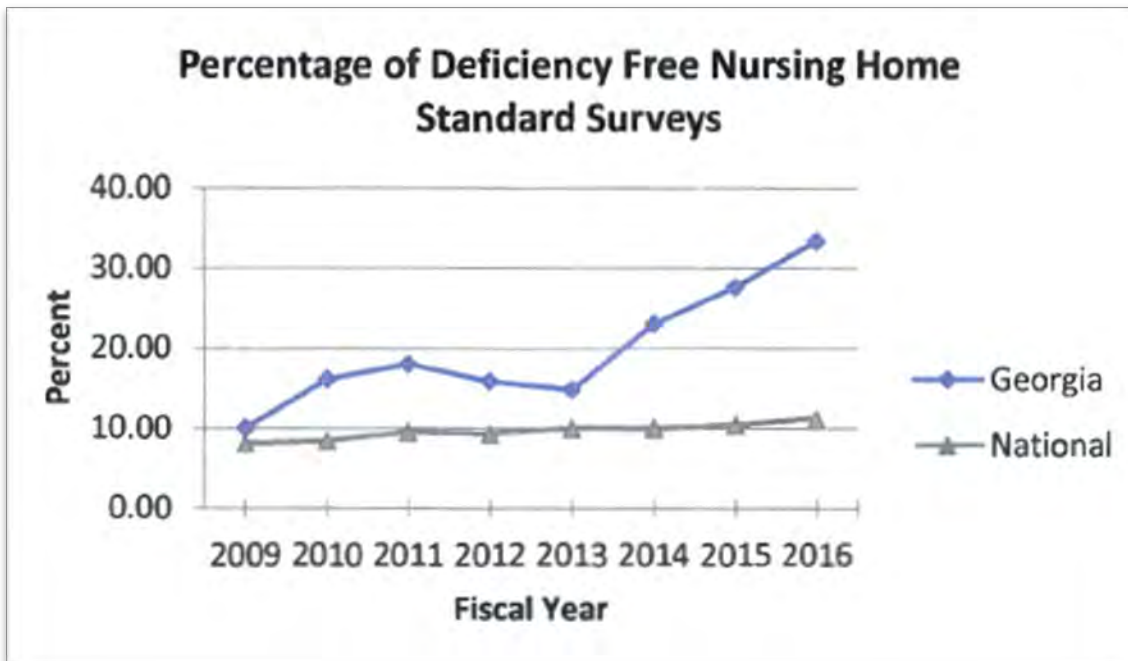
³²⁰ *Id.*

By March 2016, CMS had escalated the survey agency’s failures to Georgia Governor Nathan Deal, threatening termination of the 1864 Agreement within 60 days if the State did not institute substantive corrective actions.³²¹ Inadequate staffing was central to the performance concerns dating back five years:

Since 2011, [the Health Facilities Regulation Division] has had significant survey and certification performance issues which are described below ... Many of these result from ongoing staff vacancies (two regional director positions and over twenty surveyor positions), frequent leadership turnover, insufficient staff training, inadequate orientation processes and limited ability to track and provide oversight of core survey and certification functions performed by staff. [The Health Facilities Regulation Division’s] organizational challenges, steep knowledge gap in program operations, insufficient staffing and lack of tangible progress on a corrective action plan have resulted in the [survey agency’s] inadequate performance...³²²

CMS detailed wide-ranging failures by the State agency including delayed standard and complaint surveys; late notification of nursing homes about their deficiencies; and poor survey quality review. CMS raised concerns about the unexpectedly high proportion of nursing homes found to be deficiency-free on standard surveys—more than 30 percent—which greatly exceeded

Exhibit 3: Nursing Home Deficiency Rates in Georgia versus United States



³²¹ Appendix F, Ex. 5, Letter from Renard Murray, Consortium for Quality Improvement and Survey Certification Operations, CMS, to Nathan Deal, Governor, Georgia, March 11, 2016, at HHSOIG-0315.

³²² *Id.*

the national average of 10 percent, a further indication of inattention and poor quality inspections (see Exhibit 3).³²³ CMS wrote that Georgia ranked 52nd among States and Territories for the average number of deficiencies issued.³²⁴ CMS further observed that some of the deficiency-free surveys occurred when “potential or actual harm was observed by surveyors and did exist.”³²⁵

CMS identified multiple instances of enforcement failures, including one episode in which a nursing home failed to implement a resident’s plan of care. The resident subsequently fell out of bed, sustained a subdural hematoma, and died at the hospital. The survey agency failed to issue a statement of deficiencies to the provider for three months and missed the 90-day deadline for transmitting required information about the incident to CMS.³²⁶ CMS expressed concern that under-reporting deficiencies would adversely affect oversight of nursing homes in the Special Focus Facility (SFF) program and the reliability of the Five-Star Rating system on the Medicare Care Compare website.³²⁷ CMS was unrelenting in its criticism of Georgia’s management of its nursing home oversight program:

...surveyors lack knowledge of the Federal participation requirements; often failed to utilize sound clinical judgment in determining survey outcomes; and failed to utilize CMS guidance and protocols to accurately determine scope and severity. The active recruitment of retired surveyors has only exacerbated the problem. Some contract staff lack current knowledge of the federal requirements, and the [survey agency] has not validated the knowledge, skills and abilities of newly recruited staff, nor assigned newly hired personnel with seasoned mentors. Newly hired staff is floundering with the survey process and have left facility after facility after having conducted an inadequate investigation.³²⁸

A series of corrective action plans Georgia submitted to CMS in the years that followed focused on the State’s efforts to improve staffing levels.

C. Public Reports Raised Concern About Staffing from the 2000s Onwards

In addition to these documented concerns about understaffing in correspondence to and from States, independent watchdogs have repeatedly raised concerns about understaffing at survey agencies over the last two decades. Each of these reports were brought to the attention of CMS, and multiple reports also have been directed to Congress.

1. GAO Reports in 2000s Found Staff Shortages, Turnover Affected Inspection Quality

In 2003, the Government Accountability Office (GAO) published data from 42 survey agencies regarding staffing, including vacancy rates and the experience of surveyors. The 2003 report identified problem areas, including surveyor vacancies (which ranged up to 34 percent among States that provided data) and inexperience among surveyors (10 states and the District of

³²³ *Id.*, at HHSOIG-0323.

³²⁴ *Id.*, at HHSOIG-0324.

³²⁵ *Id.*, at HHSOIG-0316.

³²⁶ *Id.*, at HHSOIG-0328.

³²⁷ *Id.*, at HHSOIG-0325.

³²⁸ *Id.*, at HHSOIG-0330.

Columbia reported that at least 50 percent of their survey staff had two years or less of experience).³²⁹

The 2003 report drew direct connections between understaffing, inexperienced surveyors, and negative impacts on the quality of nursing home surveys. In one unnamed state, GAO noted that the survey agency prioritized complaints “on the basis of staff availability rather than on the seriousness of the complaints.”³³⁰ Similarly, 12 of the 16 states contacted by GAO “indicated that they were unable to investigate complaints on time because of staff shortages.”³³¹ As an example, the report noted that “Oklahoma investigated only 3 of the 21 immediate jeopardy complaints that CMS sampled within the required 2-day period and none of 14 sampled actual harm complaints in 10 days.”³³²

GAO noted that budget shortfalls led the Maryland survey agency to make staff cutbacks in 2002, which resulted in quality assurance reviews “being less systematic than originally planned.”³³³ In Colorado, just two long-term care supervisors “reviewed all 1,351 deficiencies cited in fiscal year 2001.”³³⁴ State officials informed GAO that such quality assurance reviews “have identified shortcomings in the investigation and documentation of deficiencies, such as the failure to interview residents or the classification of deficiencies as process issues when they actually involved quality of care.”³³⁵

In 2009, GAO revisited the issue of nursing home oversight at the request of Senator Herb Kohl, then-Chairman of the Aging Committee and Senator Chuck Grassley, then-Ranking Member of the Senate Committee on Finance. The 2009 report similarly highlighted survey agency staffing as a major obstacle for oversight and enforcement at nursing homes, including survey quality:

Workforce shortages and training inadequacies affected states’ ability to complete thorough surveys, contributing to understatement of nursing home deficiencies. ... In states with fewer staff to do the work, time frames were compressed. The increased workload burden may have had an effect on the thoroughness of surveys in those states and surveyors’ ability to attend training.³³⁶

2. Recent OIG Reports Found States Missing CMS Standards, Widespread Understaffing

More recent reports conducted by the Office of the Inspector General (OIG) for the Department of Health and Human Services found that the issues GAO identified in the 2000s continued into the 2010s. For example, a 2020 program evaluation examining response times to nursing home complaints from 2016 to 2018 identified survey agency staffing and stagnant Federal funding as problems affecting States:

³²⁹ *Supra*, note 82, GAO 2003 Nursing Home Oversight Report, at 78, Table 9: State Survey Agency Responses to Questions about Surveyor Experience, Vacancies, Hiring Freezes, Competitiveness of Salaries, and Minimum Required Experience. *See also* Appendix A, Tables 2 and 3, which compare rates in the 2003 GAO report versus data States reported to the Aging Committee during this investigation.

³³⁰ *Id.*, at 24.

³³¹ *Id.*, at 23.

³³² *Id.*

³³³ *Id.*, at 20.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Supra*, note 313, GAO 2009 Survey Understatement Report, at 22.

Generally, we found that the States we communicated with face challenges with receiving high volume of complaints, triaging complaints, and having adequate human resources to investigate complaints. CMS has worked with States to address these challenges, yet few States have made progress. Moreover, CMS's survey and certification funding has not increased along with the volume of complaints.³³⁷

OIG concluded that its analysis raised "questions about some States' ability to address serious nursing home complaints and also about the effectiveness of CMS' oversight of States," noting that "many States are consistently failing to meet required timeframes for investigating the most serious nursing home complaints."³³⁸

A subsequent program evaluation published by OIG in 2022 was more pointed about the role of understaffing at survey agencies, identifying "staffing shortages as a root cause of State survey performance problems."³³⁹ The evaluation, which examined States' compliance with performance standards set by CMS from FY2015 to FY2018 found that "of the performance failures related to survey timeliness (41 percent of all performance failures), nearly half had corrective action plans or other correspondence identifying staffing as the root cause or posed increased staffing as a solution to the performance failure."³⁴⁰ The evaluation further found that "the most common staffing-related description centered on the inability to attract and retain surveyors, often due to not being able to offer high enough salaries to compete in local markets."³⁴¹ CMS staff reported to OIG that "many of the staffing shortages occur in States with widespread nurse shortages and that these States have difficulty attracting and retaining nurses to conduct surveys."³⁴²

OIG identified similar concerns about staffing shortages in a series of audits released from 2019 to 2021 that examined State oversight of emergency preparedness requirements at nursing homes, noting that survey agency shortages created barriers to enforcement.³⁴³

3. National Academies' 2022 Nursing Home Report Says Agencies Need More Support
The National Academies of Sciences, Engineering, and Medicine (NASEM) cited many of these audits and evaluations in its 2022 report examining nursing home quality in the United States. The NASEM report concluded that "state survey agencies need more surveyors (in sheer numbers), competitive compensation, and enhanced training to ensure that surveyors have the qualifications and supports needed to effectively carry out their responsibilities."³⁴⁴ In testimony

³³⁷ HHSOIG, *States Continued to Fall Short in Meeting Required Timeframes for Investigating Nursing Home Complaints: 2016-2018*, OEI-01-19-00421 (September 2020), available at <https://oig.hhs.gov/oei/reports/OEI-01-19-00421.pdf> [hereinafter *OIG 2020 Nursing Home Program Evaluation*], at 14.

³³⁸ *Id.*

³³⁹ *Supra*, note 9, OIG 2022 Nursing Home Survey Evaluation, at 11.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ HHSOIG, *Audits of Nursing Home Life Safety and Emergency Preparedness in Eight States Identified Noncompliance With Federal Requirements and Opportunities for the Centers for Medicare & Medicaid Services to Improve Resident, Visitor, and Staff Safety*, A-02-21-01010 (July 2022), available at <https://oig.hhs.gov/oas/reports/region2/22101010.pdf>, at 15. For a discussion of State responses to OIG's audits regarding staffing and emergency preparedness regulations, see U.S. Senate Committee on Finance and U.S. Senate Special Committee on Aging, *Left in the Dark: The impact of the 2021 Texas Blackout on Long-Term Care Residents and the Need to Improve Emergency Preparedness* (February, 22, 2023), available at <https://www.finance.senate.gov/imo/media/doc/02222023%20Left%20in%20the%20Dark%20-%20Wyden-Casey%20final.pdf>, at 48 "Staffing Shortages and Inadequate Funding Negatively Affect State and Local Oversight."

³⁴⁴ *Supra*, note 11, National Academies 2022 Report, at 410.

to the NASEM, Alice Bonner, who previously oversaw nursing home survey and certification in the CMS Office of Clinical Standards, called surveyors “one of the most important jobs in health care” who are “critical to people who live in nursing homes and who work in nursing homes.”³⁴⁵

D. Trump, Biden Administrations Sounded Alarm About Survey Agencies in Budget

It is clear from public communication, budget requests, and records from private interviews that CMS leadership has internalized concerns raised by States, the findings of watchdog reports, and observations of regional offices that repeatedly pointed to understaffing as a major impediment to nursing home oversight.

CMS Administrator Chiquita Brooks-LaSure cited “chronic staffing shortages” as a barrier for CMS to “address intractable problems” of State survey agencies failing to meet performance standards in a December 2021 letter responding to OIG’s 2022 performance evaluation.³⁴⁶ Characterizing staffing as a “foundational issue ... tied to inadequate budgets,” she detailed the difficulties States faced doing their jobs:

Many [survey agencies] are unable to offer salaries that are competitive with local private sector salaries, which weakens their ability to attract employment candidates. It also is important to note that survey workloads, especially complaint surveys, have increased rapidly since 2015 (complaint investigations grew by over 5,500 cases between FY 2015 and FY 2019), while the level of funding has remained flat at \$397 million since FY 2015. The ongoing growth in complaints and associated survey workload inhibit the [survey agencies’] ability to address issues proactively through standard surveys. In some cases, issues that could be easily identified during standard surveys go unaddressed and become more difficult and expensive to correct. Without adequate funding, these foundational state issues will persist.³⁴⁷

Former CMS Administrator Seema Verma, who led the agency during the Trump Administration, similarly observed in a 2020 memo to OIG the negative impact that flat-lined budgets were having on the agency’s ability to oversee nursing homes and other health care facilities:

...it is important to recognize the resource constraints CMS and states face, which hinder efforts to strengthen enforcement against health care facilities. As OIG notes in the draft report, complaint-based surveys have increased by 20 percent since 2013, but the survey and certification budget has remained flat since 2015 with the exception of a pandemic-related, one-time addition of funds in the Coronavirus Aid, Relief and Economic Security (CARES) Act. ... Increased funding would enable CMS to continue to meet statutory survey requirements while dealing with the increase in volume and severity of complaints and rising survey costs.³⁴⁸

Officials at CMS’ regional offices similarly raised concern about staffing and budgetary challenges that state survey agencies face, according to a review of interview transcripts

³⁴⁵ *Id.*, at 411.

³⁴⁶ *Supra*, note 9, OIG 2022 Nursing Home Survey Evaluation, Appendix C, at 30.

³⁴⁷ *Id.*

³⁴⁸ *Supra* 337, OIG 2020 Nursing Home Program Evaluation, Appendix D, at 29.

conducted by OIG in preparation of its 2022 program evaluation.³⁴⁹ In interviews, regional office staff repeatedly reiterated the concerns shared by states:

- A Chicago regional office official noted, “the states, in my view, are significantly underfunded. State funding to perform these survey obligations has essentially been flat for a decade. Meanwhile, the number of surveys in our environments have increased. So, the workload has increased.”³⁵⁰
- One official in CMS’ Atlanta regional office said, “the pay scale is lower than the private sector and they have a hard time improving. Because these are ongoing factors that none of us have control over, it’s going to be an ongoing thing that we monitor and look at. And you’ve seen some of the [corrective action plans], staffing and funding is part of almost all of them.”³⁵¹
- A Denver regional office official spoke to increasing incidents and complaints without corresponding budget increases and noted additional challenges of travel and job competition in rural areas.³⁵²
- An official from the New York regional office discussed retirements, low salaries, travel, and time away from home as significant challenges for States recruiting and retaining staff.³⁵³

The Trump Administration pushed for higher discretionary funding for Survey & Certification in each of its budget justifications to Congress, noting that annual discretionary appropriations had been frozen since FY2015. The budget justification also pointed out that the number of complaints were rising, and States were facing higher hourly costs to survey.³⁵⁴ Seeking an 11 percent funding increase in its FY2021 budget, the Trump Administration told Congress that the ongoing funding freeze was limiting the program’s “capacity to perform routine recertification and validation surveys,” putting patients in harm’s way:

As a result, [survey agencies’] ability to address issues proactively through standard surveys is limited, making complaint surveys the primary oversight mechanism for many provider types. In some cases, issues that could be easily identified during standard health surveys go unaddressed becoming more difficult and expensive to correct. At times, these issues escalate to possibly life threatening (sic) circumstances, as substantiated through reported complaints. With the additional funding in this request, CMS will continue to address complaints but also will increase the [survey agencies’] ability to complete standard surveys, recertification, and validations.³⁵⁵

³⁴⁹ HHSOIG, *CMS Regional Office Interviews*, n.d. On file with the Committee. These interviews were conducted as part of HHSOIG’s 2022 program evaluation of nursing home oversight, *see supra*, note 9, OIG 2022 Nursing Home Survey Evaluation.

³⁵⁰ *Id.*, at HHSOIG-0406.

³⁵¹ *Id.*, at HHSOIG-0400.

³⁵² *Id.*, at HHSOIG-0422.

³⁵³ *Id.*, at HHSOIG-0398.

³⁵⁴ *Supra*, note 12, CMS FY2021 Budget Justification, at 72-74.

³⁵⁵ *Id.*, at 71.

Since FY2015, administrations of both parties called on Congress to increase Survey & Certification funding, as shown in Table 3.

Table 3: CMS Survey & Certification Budget Requests FY2015-FY2023

Fiscal Year	Administration	Budget Request	Proposed Increase from Previous Year's Enacted Funding	Enacted Funding
2015	Obama	\$424.4 million	13.1%	\$397.3 million
2016	Obama	\$437.2 million	10.0%	\$397.3 million
2017	Obama	\$437.2 million	10.0%	\$397.3 million
2018	Trump	\$406.1 million	2.2%	\$397.3 million
2019	Trump	\$421.1 million	6.0%	\$397.3 million
2020	Trump	\$442.2 million	11.3%	\$397.3 million
2021	Trump	\$442.2 million	11.3%	\$397.3 million
2022	Biden	\$472.2 million	18.9%	\$397.3 million
2023	Biden	\$494.3 million	21.3%	\$407.3 million
2024	Biden	\$565.8 million	38.9%	--

Source: CMS, Justification of Estimates for Appropriations Committees, FY2015-2024.

Despite these bipartisan requests,³⁵⁶ Congress has held Survey & Certification funding in annual appropriations steady at \$397 million from FY2015 until FY2022. The only exception was supplemental CARES Act funding specifically targeted at helping States address COVID-19's deadly toll on nursing home residents through targeted infection control surveys.³⁵⁷ After eight years of stagnant funding, Congress finally added \$10 million to the program's funding in FY2023—a 2.5 percent increase.³⁵⁸ Cost drivers affecting States have far outpaced the funding increase Congress provided at the end of 2022:

- **Nursing salaries:** Average salaries for registered nurses, who make up a large proportion of the surveyor workforce, increased 29 percent from 2014 to 2022.³⁵⁹
- **Work volume:** Complaint surveys increased 28 percent from FY2014 to FY2021, across all provider types.³⁶⁰ Complaints in nursing homes alone have increased 16 percent since FY2015, according to CMS.³⁶¹

³⁵⁶ *Supra*, note 12, CMS FY2024 Budget Justification, at 79.

³⁵⁷ Senator Bob Casey, "Senator Secures Key Resources For PA Children and Families, Seniors and People with Disabilities," press release, December 31, 2020, <https://www.casey.senate.gov/news/releases/in-2020-casey-produces-results-for-pa-constituents>.

³⁵⁸ *Supra*, note 12, CMS FY2024 Budget Justification, at 69.

³⁵⁹ BLS Data Viewer, "Employer Cost for Employee Compensation," accessed May 14, 2023, *available at* <https://beta.bls.gov/dataViewer/view/timeseries/CMU102000012N000D>. Wages and salaries cost per hour worked for civilian workers in registered nurse occupations for the first quarter of 2014 was \$33.88 and for the fourth quarter of 2022 was \$43.80.

³⁶⁰ CMS, "Fiscal Year 2015 Justification of Estimates for Appropriations Committees," n.d., *available at* <https://www.cms.gov/about-cms/agency-information/performancebudget/downloads/fy2015-cj-final.pdf> [hereinafter *CMS FY2015 Budget Justification*], at 124; *supra*, note 12, CMS FY2024 Budget Justification, at 81.

³⁶¹ *Supra*, note 76, CMS May 2023 Letter to Chairman Casey, at AGING-01419.

- **COVID-19 oversight.** Survey agencies conducted 115,000 infection control surveys from 2020 to 2022, in addition to annual recertification and complaint surveys.³⁶²
- **Oversight responsibility:** The number of facilities participating in the Medicare and Medicaid programs increased 16 percent from FY2014 to FY2021.³⁶³

In its FY2024 budget request, CMS provided more detailed explanations than it has previously about the issues facing survey agencies overseeing nursing homes and other providers. The budget specifically identified staffing shortages, inflation, and stagnant funding as barriers hindering effective nursing home oversight.³⁶⁴ CMS went on to explain how these factors, in addition to the continuing growth of complaint surveys, are negatively affecting health care quality and patient safety:

The [Survey & Certification] program annual discretionary appropriation has remained relatively flat since FY 2015, which, over time, has limited the program’s capacity to perform standard initial, recertification and validation surveys. This dynamic, compounded by the effects of the [COVID-19 public health emergency], has fueled the loss and availability of [survey agency] surveyor resources and resulted in ongoing growth in complaints, with adverse effects on programmatic efficiency, quality and ultimately beneficiary safety. This has reframed the environment in which the [Survey & Certification] program operates. Staffing limitations associated with flat budgets creates an atmosphere where ongoing complaint workloads, and their continued growth, inhibits the [survey agencies’] ability to address noncompliance proactively and more efficiently through standard certification and recertification surveys. As a result, complaint surveys have become the primary oversight mechanism for most provider types.³⁶⁵

CMS said the budget request was needed to address a backlog of over 30,000 complaints, account for the sunset of CARES Act funds expiring in September, and to “address inflationary pressures in state staffing salaries and other expenses, as well as funding to improve non-statutory surveys frequencies.”³⁶⁶ The agency projected that the funding level would help “make some inroads toward addressing the backlog and increasing number of complaint surveys and will keep statutorily mandated survey levels at 100 percent.” It would also “provide[] additional resources needed for states to hire and retain surveyor staff at wage levels competitive with private industry.”

³⁶² Appendix A, Table 8.

³⁶³ *Supra*, note 360 CMS FY2015 Budget Justification, at 124; *supra*, note 12, CMS FY2024 Budget Justification, at 81. CMS reported 65,056 facilities at the beginning of FY2021 compared to 56,181 in FY2014.

³⁶⁴ *Supra*, note 12, CMS FY2024 Budget Justification, at 71.

³⁶⁵ *Id.*, at 73.

³⁶⁶ *Id.*, at 74-75.

VI: States Used CARES Act Funds to Address COVID-19

The COVID-19 pandemic took a devastating toll on nursing home residents, particularly prior to the rollout of vaccines. The pandemic, its seismic effect on the Nation’s health care system, and rapid policy changes made in response to its onset, also significantly affected the way that States did their jobs surveying nursing homes. In response to the challenges COVID-19 presented for CMS and survey agencies, Chairman Casey secured \$100 million in the Coronavirus Aid, Relief, and Economic Security (CARES) Act to buttress oversight of nursing homes during the pandemic.³⁶⁷

This section reviews how States used CARES Act survey and certification (S&C) funds. It also demonstrates how nearly two-third of States registered specific concern about the approaching sunset of CARES Act funds, which expire September 30, 2023; broad concern about Federal funding levels for S&C activities; or both.³⁶⁸

A. The Pandemic’s Toll in Nursing Homes and the Pandemic’s Early Days

Since the onset of the pandemic in 2020, at least 1.6 million nursing home residents contracted COVID-19, and at least 166,000 residents have died of the disease.³⁶⁹ From the pandemic’s early days, it was clear that nursing home residents were particularly susceptible to COVID-19.

One of the earliest identified outbreaks of COVID-19 in the U.S. occurred in a nursing home, Life Care Center in Kirkland, Washington, where 81 of the 120 residents were infected by the disease and 35 died.³⁷⁰ In a March 2020 epidemiological report, the Centers for Disease Control and Prevention (CDC) attributed the spread of the disease to “limitations in effective infection control and prevention and staff members working in multiple facilities contributed to intra- and interfacility spread.”³⁷¹ The Kirkland facility would subsequently be cited for a series of violations, including insufficient infection control, carrying civil monetary penalties of over \$421,000.³⁷²

³⁶⁷ P.L. 116-136.

³⁶⁸ P.L. No: 116-136.

³⁶⁹ “COVID-19 Nursing Home Data,” CMS, <https://data.cms.gov/covid-19/covid-19-nursing-homedata>, last visited May 14, 2023. CMS reported 166,113 deaths among nursing home residents attributable to COVID-19, and 3,099 deaths among nursing home staff attributable to COVID-19 through April 30, 2023, <https://data.cms.gov/covid-19/covid-19-nursing-home-data>.

³⁷⁰ Asia Fields and Mary Hudetz, “Coronavirus spread at Life Care Center of Kirkland for weeks, while response stalled,” *Seattle Times*, March 18, 2020, <https://www.seattletimes.com/seattle-news/times-watchdog/coronavirus-spread-in-a-kirkland-nursing-home-for-weeks-while-response-stalled/>; Jack Healy and Serge F. Kovalski, “The Coronavirus’s Rampage Through a Suburban Nursing Home,” *New York Times*, March 21, 2020, <https://www.nytimes.com/2020/03/21/us/coronavirus-nursing-home-kirkland-life-care.html>.

³⁷¹ Temet McMichael, Shauna Clark, Sargis Pogojans, et al., “COVID-19 in a Long-Term Care Facility — King County, Washington, February 27–March 9, 2020,” *Centers for Disease Control (CDC), Morbidity Mortality Weekly Report* (March 18, 2020), available at <https://web.archive.org/web/20200319105144/https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e1.htm>.

³⁷² *Life Care Center of Kirkland v. Centers for Medicare & Medicaid Services*, ALJ Ruling No. CR5975 (November 9, 2021), available at <https://www.hhs.gov/about/agencies/dab/decisions/alj-decisions/2021/alj-cr5975/index.html>. The company remains in litigation over the outbreak, see Kimberly Marselas, “Life Care must face trial in 2 of nation’s earliest COVID deaths,” *McKnights Long-Term Care News*, January 31, 2023, <https://www.mcknights.com/news/life-care-must-face-trial-in-2-of-nations-earliest-covid-deaths/#:~:text=The%20plaintiffs%2C%20survivors%20of%20two,began%20circulating%20in%20the%20US.>

While the full scale of COVID’s toll in nursing homes may never be known, the impact was certainly substantial. Reported COVID-19 deaths in nursing homes accounted for roughly 15 percent of the 1.1 million COVID-19 deaths in the Nation through April 2023,³⁷³ even though nursing home residents make up less than one percent of the U.S. population.³⁷⁴

B. Select Federal Policy and Guidance Changes in Response to COVID-19

Nursing home residents’ vulnerability to COVID-19 prompted CMS to issue a series of new policies and guidance to nursing homes and State survey agencies beginning in March 2020.

One of CMS’ earliest actions in response to COVID-19 was the decision on March 4, 2020, to suspend non-emergency S&C activities.³⁷⁵ CMS subsequently limited surveys to immediate jeopardy complaints on March 23, 2020, and required survey agencies to conduct focused infection control (FIC) surveys at all nursing homes by the end of July 2020.³⁷⁶ In June 2020, CMS expanded survey activities, allowing States to return to some onsite surveys as long as local case rates of COVID-19 were low.³⁷⁷ CMS also revised the criteria for FIC surveys: States were required to perform onsite FIC surveys of nursing homes with previous COVID-19 outbreaks and to complete onsite FIC surveys within three to five days of nursing homes reporting new COVID-19 cases.³⁷⁸ Beginning on October 1, 2020, survey agencies were also required to perform annual FIC surveys of 20 percent of nursing homes.³⁷⁹ On August 17, 2020, CMS announced that States could resume all routine inspections, continuing FIC surveys under the above criteria.³⁸⁰ On November 12, 2021, CMS released new guidance that required States to perform annual FIC surveys of 20 percent of nursing homes in addition to routine inspections.³⁸¹

In September 2022, CMS reiterated the requirement that States perform annual FIC surveys at 20 percent of a State’s nursing homes as part of standard recertification surveys.³⁸² On May 1, 2023, CMS announced that the requirement for States to perform annual FIC surveys of 20 percent of nursing homes would sunset September 30, 2023.³⁸³ However, CMS would continue to make the FIC survey tool available for States to use at their discretion.³⁸⁴

³⁷³ “COVID Data Tracker,” CDC, accessed May 14, 2023, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home>.

³⁷⁴ “State Health Facts: Total Number of Residents in Certified Nursing Facilities (2022),” KFF, accessed May 14, 2023, <https://www.kff.org/other/state-indicator/number-of-nursing-facility-residents/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>. KFF reported 1,157,714 nursing home residents, based on an analysis of Care Compare.

³⁷⁵ CMS, “Suspension of Survey Activities,” QSO-20-12-All (March 4, 2020), available at <https://www.cms.gov/files/document/qso-20-12-all.pdf>.

³⁷⁶ David G. Stevenson and Audrey K. Cheng AK, “Nursing home oversight during the COVID-19 pandemic,” *Journal of the American Geriatrics Society* 69 no. 4 (April 2021):850-860, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8014759/> [hereinafter Stevenson-Cheng].

³⁷⁷ *Supra*, note 43, COVID-19 Survey Activities Memo.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ CMS, “Enforcement Cases Held during the Prioritization Period and Revised Survey Prioritization,” QSO-20-35-ALL (August 17, 2020), available at <https://www.cms.gov/files/document/qso-20-35-all.pdf>.

³⁸¹ *Supra*, note 43, COVID-19 Oversight Changes Memo.

³⁸² CMS, “Fiscal Year (FY) 2023 Mission & Priorities document (MPD) – Action,” 22-10-All (September 28, 2022), available at <https://www.cms.gov/files/document/fy-2023-mpd-admin-info-22-10-all.pdf>.

³⁸³ *Supra*, note 45, PHE Expiration Memo.

³⁸⁴ *Id.*

The introduction of FIC surveys added significantly to the workload of survey agencies. According to CMS data, survey agencies conducted more than 115,000 FIC surveys from 2020 through 2022 (see Table 4 below, and Table 8 in Appendix A for a State-by-State breakdown). State officials reported that infection control surveys often required one to two days at a nursing home, in addition to any post-survey paperwork, reducing the capacity to respond to complaints and conduct annual recertification surveys in a timely manner.³⁸⁵ In a December 2020 audit, OIG raised questions about the effectiveness of infection control surveys conducted from March to May 2020, noting that they “resulted in few deficiencies, in part because of their limited scope and less surveyor time onsite,” and the concern of State officials that the infection control surveys were contributing to a survey backlog that persists to this day.³⁸⁶ OIG recommended CMS assess the results of the infection control surveys and revise them accordingly; the agency did not concur with OIG’s recommendation.³⁸⁷

Table 4: Focused Infection Control Surveys Conducted by Calendar Year

Calendar Year	Focused Infection Control Surveys
2020	61,162
2021	31,575
2022	22,560

Source: Quality, Certification and Oversight Reports (CMS). Data are derived from survey activity reports, based on FIC surveys conducted at dually certified SNF/NFs; distinct part SNF/NFs; Skilled Nursing Facilities (Medicare only); and Nursing Facilities (Medicaid only).

C. Background on CARES Act Survey and Certification Funding

In March 2020, President Trump signed the CARES Act, a \$2.2 trillion measure aimed at addressing challenges posed by the COVID-19 pandemic.³⁸⁸ As noted above, the CARES Act included \$100 million in funding for the S&C program, secured by Chairman Casey, “to be available for necessary costs associated with COVID-19 related survey and certification activities.”³⁸⁹ On April 30, 2020, CMS released guidance to State Survey Agency Directors regarding requirements for accessing funds, reporting, and allowable uses of the funds.³⁹⁰ Forty-one States reported using the CARES Act S&C funding for survey activities (see Map 6).

³⁸⁵ Nebraska Department of Health and Human Services, phone conversation with Aging Committee Majority staff, March 30, 2023. See also discussion of focused infection control surveys in Section IV of this report.

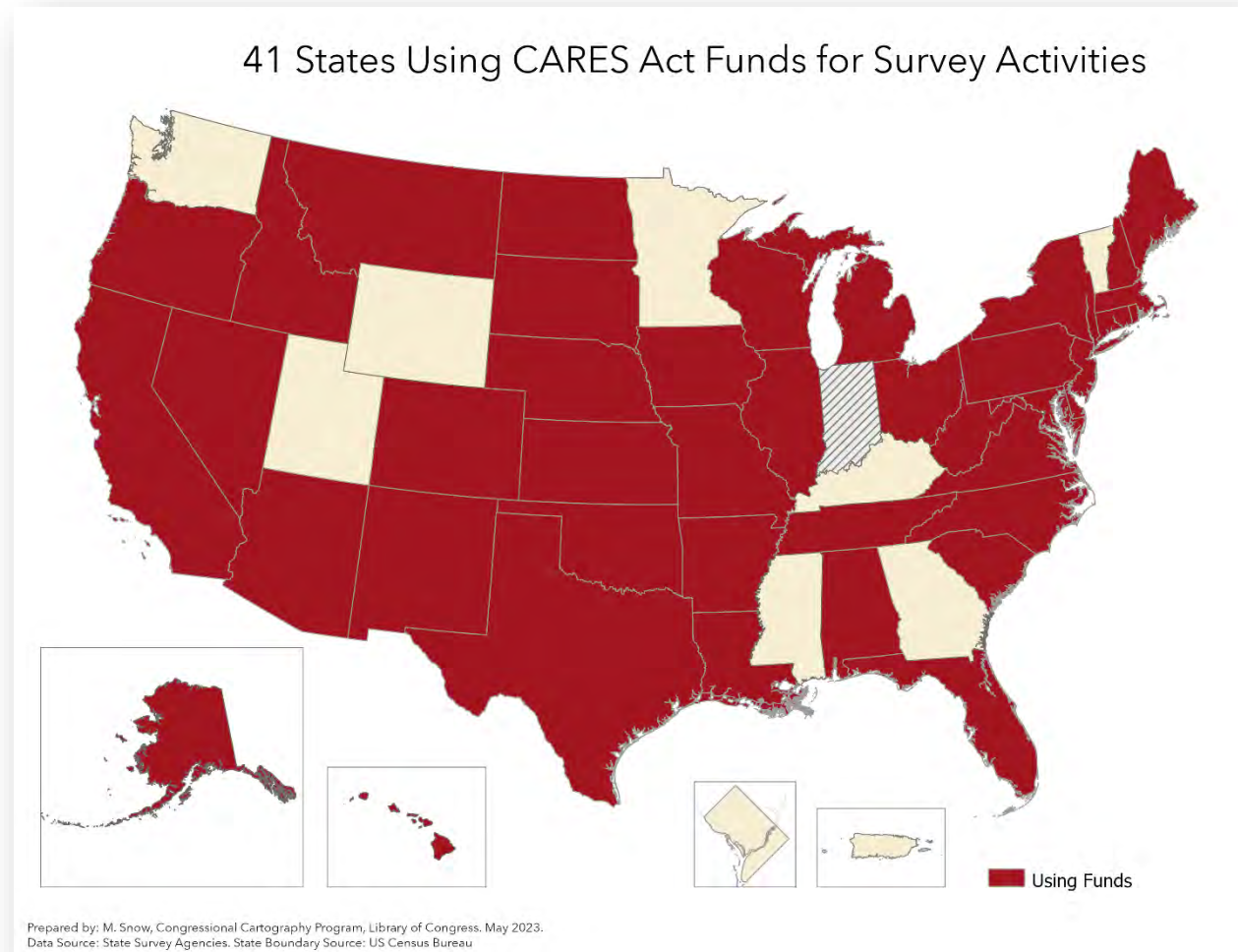
³⁸⁶ HHSOIG, “Onsite Surveys of Nursing Homes During the COVID-19 Pandemic: March 23–May 30, 2020,” OEI-01-20-00430 (December 2020), available at <https://oig.hhs.gov/oei/reports/OEI-01-20-00430.pdf> [hereinafter *OIG COVID-19 Surveys Evaluation*], see Report in Brief. OIG updated its original audit on survey backlogs in July 2021, see HHSOIG, “States’ Backlogs of Standard Surveys of Nursing Homes Grew Substantially During the COVID-19 Pandemic,” OEI-01-20-00431 (July 27, 2021), available at <https://oig.hhs.gov/oei/reports/OEI-01-20-00431.asp>.

³⁸⁷ *Id.*

³⁸⁸ P.L. 116-136.

³⁸⁹ CMS, “Fiscal Year 2020 CARES Act Information,” 20-07-ALL (April 30, 2020, revised June 19, 2020), available at <https://www.cms.gov/files/document/admin-info-20-07-all-revised.pdf> [hereinafter *CARES Act Funding Memo*], at 1.

³⁹⁰ *Id.*

Map 6: 41 States Using CARES Act Funds for Survey Activities

CMS' April 2020 guidance instructed survey agencies that they would be able to request CARES Act funding up to their FY2020 proportional allocation cap, a calculation that determines the amount of funding each State will receive during a given fiscal year.³⁹¹ States that had completed 100 percent of their focused infection control surveys by July 31, 2020, were able to request the entire FY2020 to FY2023 funding allocation.³⁹² States that completed the focused infection control surveys would also be able to apply for redistributed funding from States that did not meet the infection control survey requirement and returned money to CMS.³⁹³ States that did not complete their focused infection control surveys had to submit a corrective action plan to CMS by July 31, 2020.³⁹⁴ An analysis in the *Journal of the American Geriatrics Society* found that

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.*

States were generally successful in conducting the infection control surveys by mid-2020, as required by CMS:

As of June 26th, 83% of facilities nationwide had received an onsite infection control survey, and only six states (Alabama, Alaska, Georgia, Maryland, Pennsylvania, and West Virginia) had visited fewer than 50% of all facilities for these directed surveys. Of note, by the July 31, 2020 deadline, all states had conducted infection control surveys at 97% or more of its facilities, except for Maryland (76%) and Alaska (85%).³⁹⁵

States were able to use this funding for more than one purpose. CMS provided a list of allowable uses of funding, emphasizing that States should prioritize immediate jeopardy surveys, FIC surveys, and survey backlogs.³⁹⁶ In June 2020, CMS released the funding allocations by percent and by dollar amount to each State and Territory, which totaled \$81 million.³⁹⁷ Notably, each State did receive its full allocation, proportional to the number of nursing homes in each State, though it is unclear when those funds were distributed and which States were required to complete a corrective action plan. As noted previously, the CARES Act funding for S&C activities will sunset September 30, 2023.³⁹⁸

D. States Reported Benefitting from CARES Act Funds

States reported that supplemental funding provided under the CARES Act expanded their ability to address COVID-19-related issues, primarily conducting FIC surveys. Twenty-eight States reported using CARES Act funding for targeted infection control surveys. Five States wrote that they used the funds to complete standard surveys. Wisconsin shared that the survey agency “is using this money to complete over 2,000 nursing home and non-long term care recertification surveys and complaint investigations, and to address the gap between state survey costs and funding provided by the federal government for these functions.”³⁹⁹

State survey agencies were not immune to difficulties acquiring personal protective equipment (PPE) during 2020, an issue OIG reported hampered their ability to conduct surveys.⁴⁰⁰ Several States used CARES Act funding to purchase PPE or other equipment in order to safely conduct onsite surveys. Oklahoma used CARES Act funding to help facilities obtain access to PPE, as well as COVID-19 testing supplies, respirator fit testing, adaptive devices for safe visitation, and facility and infection prevention training.⁴⁰¹

States also used CARES Act funding to address staffing shortages through the hiring of temporary and permanent staff. Eleven States used CARES Act funding to hire contractors, with some variation between activities for those contractors. Iowa was one of four States that contracted with third parties to assist with their survey backlog, noting that “contractors mostly

³⁹⁵ *Supra*, note 376, Stevenson-Cheng.

³⁹⁶ *Supra*, note 389, CARES Act Funding Memo, at 4.

³⁹⁷ *Supra*, note 43, COVID-19 Survey Activities Memo.

³⁹⁸ Public Law No: 116-136.

³⁹⁹ Appendix C, Wisconsin, at AGING-00653.

⁴⁰⁰ *Supra*, note 386, OIG COVID-19 Surveys Evaluation, at 16-17.

⁴⁰¹ Appendix C, Oklahoma, at AGING-00419.

conduct recertification surveys with any outstanding complaints that facility may have.”⁴⁰² Several States also used the CARES Act funding to hire additional personnel.

E. States’ Concerns about Federal Funding and Sunsetting CARES Act Funds

There is widespread concern among survey agencies about Federal funding levels and the impact it has on States carrying out their responsibilities overseeing nursing homes and Federally certified health facilities. Thirty-two States and Puerto Rico reported concern about sunsetting CARES Act funding, Federal S&C funding more broadly, or both (see Map 7). As discussed in Section V and detailed further in Appendix B of this report, multiple States have brought Federal funding concerns to the attention of CMS, many in the form of supplemental budget requests. Wyoming was among the 27 States that raised general concerns about Federal funding levels for S&C activities:

In order to address recruitment and retention challenges, the Wyoming State Legislature increased State employee salaries effective July 1, 2022. However, due to the CMS flat lined budget, we do not have the permanent federal funds to fill two (2) of our health surveyor positions. We are concerned about surveyor burnout, having adequate time for training, and potential increased staff turnover. It would be extremely beneficial if CMS would increase the Survey and Certification budget to assist states to keep up with increased salaries, travel, and other costs. This is particularly critical in light of the increased CMS workload.⁴⁰³

Montana wrote that an “[a]dditional federal budget award would help to maintain the existing survey staff at professional salaries, aid in drawing others to this unique work, and aid in moving closer to completing the workload,” noting the agencies past struggles to recruit staff.⁴⁰⁴ Rhode Island likewise pointed to the importance of increasing Federal funding to help the State conduct timely surveys.⁴⁰⁵ Washington made clear that Federal funding shortfalls were an issue that preceded the COVID-19 pandemic and has worsened as time goes on:

The money provided by CMS to complete required work has remained stagnant for many years. At the same time, the need for staff has increased exponentially, investigations into facilities have become more complex and the cost of living has increased—all increasing the cost to perform the [survey agency’s] important work. Even prior to the [Public Health Emergency], CMS did not fully fund the proposed budget submitted by state agencies that was based on the required work and cost to complete the work. This has not changed and the gap between the amount requested, and the amount received has continued to grow, leaving the cost burden for the work on the state.⁴⁰⁶

Twenty States highlighted that the sunsetting of CARES Act funds in September 2023 will have a negative impact on their ability to complete the same level of work. Many States pointed out

⁴⁰² Appendix C, Iowa, at AGING-00216.

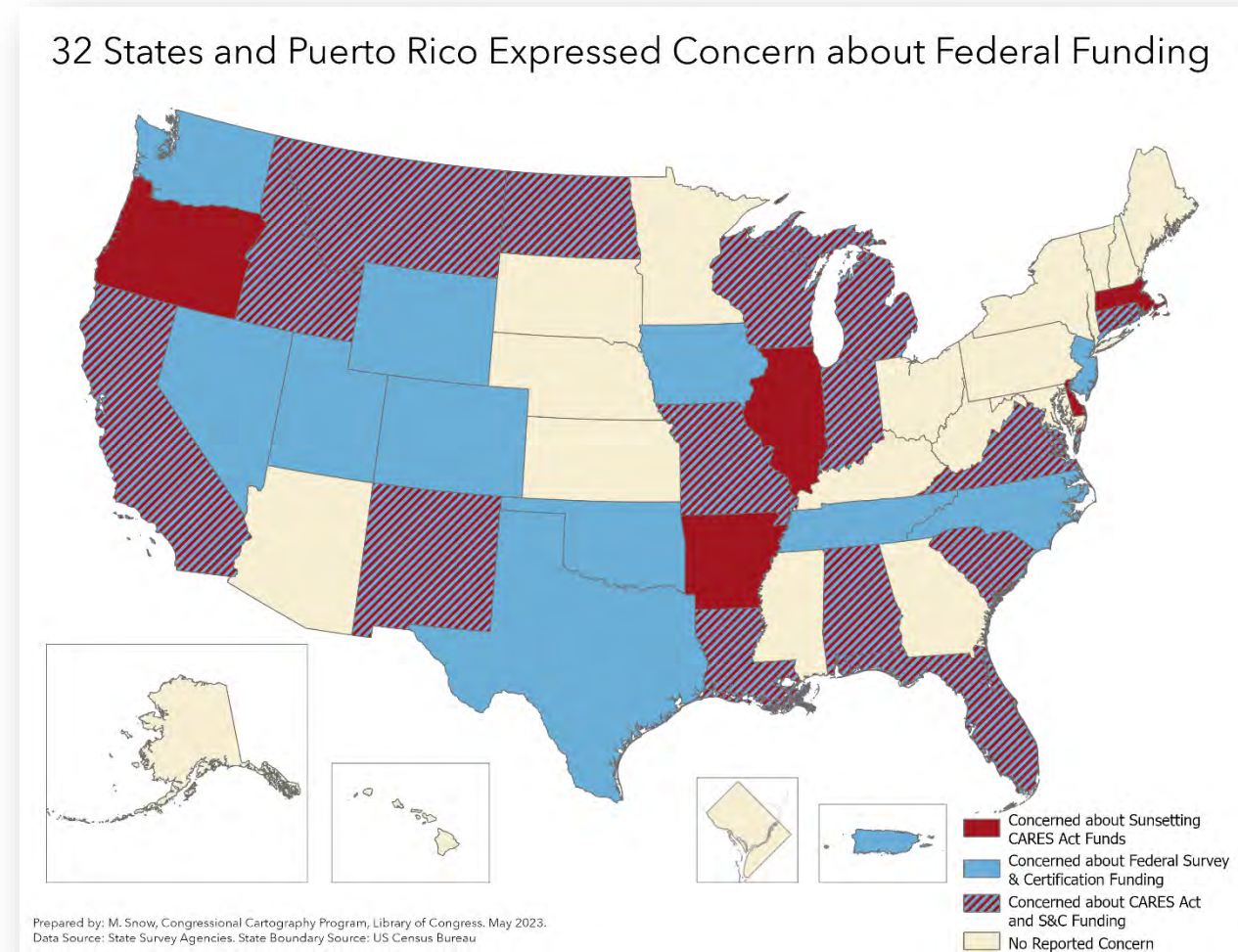
⁴⁰³ Appendix C, Wyoming, at AGING-00660.

⁴⁰⁴ Appendix C, Montana, at AGING-00335.

⁴⁰⁵ Appendix C, Rhode Island, at AGING-00453.

⁴⁰⁶ Appendix C, Washington, at AGING-00634.

Map 7: 32 States and Puerto Rico Expressed Concern about Federal Funding



that the supplemental funding was critical to conducting their responsibilities or that the State would need to absorb these activities into annual budgets that have remained largely flat-lined. Alabama expressed concern over the State’s ability to retain enough staff to complete its S&C activities:

The additional supplemental support for hiring and retaining staff will not be available to adequately implement steps for recruitment and retention of qualified, well trained survey staff in the absence of CARES funding. Overall staffing costs have risen, therefore funding must be provided at a level that allows the [survey agency] to acquire, in most cases, and maintain enough staff to accomplish the required survey workload as it currently exists.⁴⁰⁷

⁴⁰⁷ Appendix C, Alabama, at AGING-0007.

Connecticut, which utilized school nurses as a temporary workforce to complete infection control surveys during the pandemic, expressed concern over the loss of funding for temporary personnel.⁴⁰⁸ Specifically, Connecticut “is working towards hiring temporary workers to help alleviate the backlog of pending complaint investigations and plans to utilize CARES Act funding to support these workers.”⁴⁰⁹ Connecticut warned, “as these funds sunset, the Department will be unable to support the temporary workers who augment the workforce by addressing the backlog, providing training, and filling vacant positions while jobs are under recruitment.”⁴¹⁰ In addition to its concerns about Federal funding, Rhode Island said it was worried that the sunset of the CARES Act funding would affect its ability to maintain additional personnel:

CARES Act funding expanded the capacity of the agency to provide oversight to nursing homes. In part, the funding allowed the [survey agency] to support an additional full time equivalent. Sunsetting CARES Act funding will jeopardize the ability to maintain a higher level of staffing.⁴¹¹

California exhausted its CARES Act allocation in FY2022 and now must fund the additional FIC surveys through its normal allocation from CMS. The State said that “this decreases California’s ability to perform other workload that would usually be funded by [CMS].”⁴¹² Louisiana made a similar point, noting:

...the supplemental funding has had a great impact on the costs associated with increased survey workload and other related activities due to COVID-19. It would be difficult to complete the increased COVID-19 survey workload and other related cost with the [CMS] base budget allocated for Louisiana without the additional funding boost provided by the CARES Act.⁴¹³

In its response, Illinois pointed out that even beyond COVID-19, survey agencies must be vigilant at identifying gaps in infection control policies in nursing homes. Illinois observed that “given the recent CMS initiatives aimed at improving infection prevention practices, the emergence of even more multi-drug resistant infections in nursing home residents, and persistent non-compliance with infection control regulations future[,] funding is critical to the state survey agency.”⁴¹⁴ Future funding concerns are also present in States that used CARES Act funding to pay contractors for survey work, a point underscored by South Carolina’s survey agency, which shared bluntly that “no longer getting the CARES Act funding will affect our ability to complete surveys in required timeframes.”⁴¹⁵

⁴⁰⁸ Appendix C, Connecticut, at AGING-0073.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ Appendix C, Rhode Island, at AGING-00453.

⁴¹² Appendix C, California, at AGING-00048.

⁴¹³ Appendix C, Louisiana, at AGING-00237.

⁴¹⁴ Appendix C, Illinois, at AGING-00207.

⁴¹⁵ Appendix C, South Carolina, at AGING-00458.

VII: Recommendations

Based on the findings of this report, the Aging Committee's Majority staff issue the following 10 recommendations:

- 1. Congress and States should invest in robust nursing home oversight.** Flat Federal funding over much of the last decade contributed to widespread workforce shortages at State survey agencies, resulting in nursing home inspection delays that posed risks to resident health and safety. More than 80 percent of survey agencies cited non-competitive salaries leading to problems recruiting and retaining surveyors, while 32 States and Puerto Rico raised concerns about the sufficiency of Federal funding. Survey agencies are jointly funded by CMS and States. Therefore, Congress should increase funding for survey and certification activities and consider making the spending mandatory to provide States more predictable funding streams. States, in turn, should provide adequate matching funds and ensure civil service salary rules provide survey agencies flexibility to offer competitive salaries.
- 2. CMS should regularly collect and report staffing information from State survey agencies.** The investigation found that 32 survey agencies have vacancy rates of 20 percent or more among nursing home surveyors. Likewise, in 2022, the Office of Inspector General for the Department of Health and Human Services identified staff shortages as a "root cause" of States' problems overseeing nursing homes. Given the key role staffing plays in nursing home oversight, CMS should regularly track and publicly report survey agencies' capacity to conduct oversight of nursing homes and other Federally certified health care providers. Data collection should include, but 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.
- 3. CMS, HHS OIG, and States should increase oversight of contract surveyors.** More than half of the States reported contracting with private companies to conduct nursing home surveys. Three contractors alone reported conducting more than 600 recertification surveys in 2022 and generated revenue of nearly \$20 million from State survey business. The growing use of contract surveyors, their high costs, questions about quality, and potential conflicts of interest demand additional attention from regulators and watchdogs at the Federal and State levels. Federal and State watchdogs should consider including survey agencies' use of contractors in their future audit plans. CMS should closely track survey agencies' use of contractors; collect and report data on their use; and consider additional oversight of contract surveys to ensure quality. CMS should also consider providing States additional guidance and technical assistance regarding the use of contractors to conduct survey activities, in order to ensure efficiency and quality.
- 4. States should consider more flexible hiring requirements for surveyors.** Given the substantial market competition for Registered Nurses (RNs), survey agencies should evaluate the number of nurses they need on staff in order to meet the requirements of the State Operations Manual. States that rely exclusively or heavily on RNs to conduct survey work should consider utilization of interdisciplinary teams that include an RN for clinical elements

of the survey. Increased use of allied health professions or other professions may help reduce the pressure on States currently hiring only—or largely—RNs for survey work.

5. **CMS should consider strategies to reduce burden on States for non-survey tasks.** States expressed concern about tasks outside the survey process that CMS requires but does not fund. CMS should work with survey agencies to identify non-survey-related tasks that could be reduced in scope, eliminated, or taken on by the Federal government. Such time savings may help States address current survey backlogs and keep up with future survey workload.
6. **Congress, States, and institutions of higher education should collaborate to expand opportunities to enter into and remain in the health care workforce.** Survey agencies have struggled to recruit and retain workforce, particularly nurses, due to stiff competition within the health care marketplace. Such staffing concerns are common across the Nation’s health care system today. Congress and States, in partnership with institutions of higher education, should increase funding for nursing educational programs and improve scholarship and loan repayment programs to expand access to nursing education, including for those working in the long-term care industry. Given the interconnectedness of the health care workforce, they should explore increasing similar educational opportunities for allied health professionals, as well.
7. **Congress, States, and health care facilities should improve mental health resources for the health care workforce.** Numerous states expressed concern about the stress of surveying and associated burnout, largely driven by the long hours and difficulty of the work, large number of backlogged surveys, long distance travel and days away from home, frequent turnover of staff, and COVID-19 related stresses. In recent years, Congress and States have dedicated some resources and funding to address mental health challenges for the health care workforce. More must be done to prevent burnout and provide support for surveyors to remain on the job.
8. **Congress should increase funding for the State long-term care ombudsman program.** Utilization of long-term care is expected to continue increasing, particularly as the number of people over the age of 65 is expected to reach 80 million by 2040—twice as many as in 2000. State Long-Term Care Ombudsmen are important advocates for residents of nursing homes and other long-term care settings, oftentimes providing voice to the voiceless in instances of abuse and neglect. Congress should increase funding to the Long-Term Care Ombudsman program.
9. **CMS should strengthen the accuracy of Care Compare.** The OIG’s April 2023 audit of Care Compare found that health, life safety, and emergency preparedness deficiencies were underreported at an estimated two-thirds of nursing homes. Consumers rely on Care Compare as a tool when selecting nursing homes for themselves or their loved ones. CMS should strengthen the process for reviewing inspection results reported on Care Compare by requiring survey agencies to verify deficiencies reported. CMS should also provide training and technical assistance to survey agencies.

10. **Congress should increase funding to the Office of Inspector General for the Department of Health and Human Services.** The OIG has provided critical insight into the issues facing nursing home residents in recent years, including during the COVID-19 pandemic, and the Office of Inspector General has indicated that nursing homes are a top priority for oversight. OIG has completed 27 audits and evaluations about nursing homes since 2020 and currently has 24 reviews underway, in addition to ongoing law enforcement activities.⁴¹⁶ Congress should invest in the OIG’s oversight of nursing homes and other health programs to ensure taxpayer dollars are being wisely spent and beneficiaries of Medicare and Medicaid receive quality care.

⁴¹⁶ HHSOIG, “Fiscal Year 2024 Justification of Estimates for Congress,” n.d., <https://oig.hhs.gov/documents/budget/1105/FY-2024-HHS-OIG-CJ.pdf>, at 67.

Appendix A

To better understand the severity of surveyor staffing shortages at State survey agencies and their impact on nursing home oversight, Chairman Casey requested letters and data from all 50 States, the District of Columbia, and Puerto Rico.⁴¹⁷

States were asked to provide narrative responses on the following subjects:

- Challenges individual survey agencies experience carrying out their responsibilities;
- Effects of surveyor staff turnover on survey activities;
- Impacts of market competition for nursing staff on survey agency staffing and efforts to recruit and retain surveyors;
- Utilization of third-party contractors for survey activities;
- Steps CMS could take to better support States in light of staffing shortages; and
- Uses of CARES Act funding for survey activities.

States also were asked to provide quantitative data on the following subjects:

- The number of Medicare and Medicaid certified nursing homes and beds;
- The amount of State and Federal funding for survey and certification activities in each of the last five fiscal years;
- The number of nursing home surveyor positions;
- The number of current surveyor position vacancies;
- The number of surveyor hires and departures in each of the last five fiscal years;
- The average years of surveying experience by current surveyor staff;
- Current surveyor staff salary ranges;
- Spending on contracted services in each of the last five fiscal years; and
- Immediate jeopardy complaints received, and proportion addressed within statutorily mandated time frames in each of the last five fiscal years.

Additionally, States were asked to provide documentation on correspondence with CMS and contracts with survey contracting firms.

All of the survey agencies that received letters provided responses, and the vast majority of States substantially responded to all of Chairman Casey's information and data requests. Majority staff sent follow-up questions and requests in an attempt to clarify and reconcile information and data, as needed. The staff interrogatories are on file with the Aging Committee.

What follows are descriptions of the data compiled by Aging Committee staff from States:

Narrative Data from States

States were asked to address six categories of narrative questions posed by Chairman Casey in his September 2022 letter. All 52 survey agencies provided written responses. Majority staff

⁴¹⁷ *Supra*, note 23, Casey Survey Agency Letter.

analyzed the responses to derive themes and observations from the States' responses, which informed maps, figures, and tables throughout this report.

Quantitative Data from States

States were asked to provide quantitative data in response to a number of requests. All 52 survey agencies provided responses, though data were missing for some States for individual items. Data compiled for tables include: (1) the number of nursing home facilities and nursing home beds by State and the ratio of facilities and beds to surveyor positions, and (2) surveyor vacancy rates and proportion of surveyors with fewer than two years' surveying experience. The latter table includes data obtained from a July 2003 GAO report on surveyor vacancies and surveying experience in 42 State survey agencies in 2002.⁴¹⁸ Data presented in maps from quantitative responses includes: (1) surveyor position vacancy rates and (2) proportion of surveyor staff with two years or less surveying experience.

Quantitative Data Derived from Narrative Responses

Aging Committee staff analyzed each State's response to the six narrative questions and identified themes commonly expressed by the respondents. Majority staff summed the number of States reporting individual themes that were used to inform the report's findings. Majority staff identified the number of States that reported using CARES Act funding for surveying, including States that used the funding to (1) conduct standard and focused infection control surveys, (2) hire new surveyors, (3) contract surveyors with individual surveyors or firms, and (4) purchase equipment for surveyors such as personal protective equipment. Majority staff also identified States that expressed concern about the sunset of CARES Act funding. Staff considered States to have expressed concern if their replies discussed any adverse effects of sunset of funds on survey activities. Majority staff also quantified the following data: (1) reports by States of challenges they face meeting Federally mandated survey regulations; (2) reasons for survey staff turnover; (3) specific uses of CARES Act funding; (4) States that attributed survey backlogs to staff shortages; and (5) States indicating that current Federal funding is insufficient for Federally mandated surveying activities.

Data on Contracted Survey Services

States provided data and documents, including contracts, regarding their use of third-party contractors. Majority staff analyzed this information to determine States' use of contractors for standard surveys, infection control surveys, life safety code surveys, and independent dispute resolution (IDR). Majority staff also compiled data provided by three companies that conduct surveys in multiple States, which are included in Section IV and in the below tables.

⁴¹⁸ *Supra*, note 82, GAO 2003 Nursing Home Oversight Report, at 78, Table 9: State Survey Agency Responses to Questions about Surveyor Experience, Vacancies, Hiring Freezes, Competitiveness of Salaries, and Minimum Required Experience.

Table 1. Nursing Homes, Certified Beds, and Surveyor Positions, by State, FY2022

This table provides data States reported regarding the number of nursing homes, number of certified nursing home beds, and budgeted surveyor positions. Majority staff calculated ratios of nursing homes per budgeted surveyor, and nursing home beds per budgeted surveyor position.

State	Number of Nursing Homes	Number of Nursing Home Beds	Budgeted Surveyor Positions	Nursing Homes per Surveyor Position	Nursing Home Beds per Surveyor Position
Alabama	231	48,851	51	4.5	958
Alaska	20	830	14	1.4	59
Arizona	143	16,145	35	4.1	461
Arkansas	221	25,700	62	3.6	415
California	1,175	117,148	654	1.8	179
Colorado	218	19,980	52	4.2	384
Connecticut	205	23,790	66	3.1	361
Delaware	44	4,858	21	2.1	231
District of Columbia	17	2,448	6	2.8	408
Florida	698	84,336	229	3.0	368
Georgia	360	39,659	55	6.5	721
Hawai'i	45	4,323	12	3.8	360
Idaho	80	6,031	17	4.7	355
Illinois	704	88,597	315	2.2	281
Indiana	524	50,821	100	5.2	508
Iowa	414	28,314	46	9.0	616
Kansas	323	14,925	57	5.7	262
Kentucky	279	26,329	95	2.9	277
Louisiana	276	34,598	43	6.4	805
Maine	90	6,472	15	6.0	432
Maryland	225	27,718	59	3.8	470
Massachusetts	363	41,299	82	4.4	504
Michigan	433	45,030	93	4.7	484
Minnesota	349	24,920	78	4.5	320
Mississippi	206	17,382	35	5.9	497
Missouri	515	53,506	190	2.7	282
Montana	62	5,248	22	2.8	239
Nebraska	189	14,251	33	5.7	432
Nevada	65	6,758	19	3.4	356
New Hampshire	73	7,282	17	4.3	428
New Jersey	351	51,189	68	5.2	752
New Mexico	68	6,832	27	2.5	253
New York	613	114,134	115	5.3	993
North Carolina	424	44,206	96	4.4	461

UNINSPECTED AND NEGLECTED

North Dakota	77	5,215	25	3.1	209
Ohio	950	84,624	118	8.0	717
Oklahoma	402	31,547	60	6.7	526
Oregon	129	10,541	52	2.5	203
Pennsylvania	678	86,624	120	5.7	722
Puerto Rico	6	192	2	3.0	96
Rhode Island	75	8,351	30	2.5	278
South Carolina	188	20,640	16	11.8	1,290
South Dakota	98	7,361	23	4.3	320
Tennessee	313	35,395	110	2.8	322
Texas	1,204	136,261	350	3.4	389
Utah	98	8,472	16	6.1	530
Vermont	35	2,954	16	2.2	185
Virginia	288	32,505	45	6.4	722
Washington	200	19,296	107	1.9	180
West Virginia	123	10,653	24	5.1	444
Wisconsin	346	26,562	64	5.4	415
Wyoming	35	2,605	11	3.2	237

Table 2: Percent of Vacant Surveyor Positions, by State, 2002 and 2022

This table compares the survey vacancy rates States reported in 2002 and 2022. The data for 2002 was derived from a contemporaneous GAO report, which measured vacancy rates in 42 States.⁴¹⁹ Majority staff calculated the 2022 vacancy rates by dividing data States reported for the number of vacant positions by the number of budgeted positions.

State	2002	2022
Alabama	10%	80%
Alaska	22%	36%
Arizona	24%	40%
Arkansas	20%	47%
California	6%	14%
Colorado	17%	27%
Connecticut	1%	32%
Delaware*	--	38%
District of Columbia	9%	33%
Florida	8%	25%
Georgia	14%	45%
Hawai'i	17%	50%
Idaho	0%	71%
Illinois	5%	22%
Indiana	18%	1%
Iowa	0%	9%
Kansas	4%	51%
Kentucky	17%	83%
Louisiana	6%	4%
Maine	9%	20%
Maryland	9%	14%
Massachusetts	14%	4%
Michigan	5%	12%
Minnesota	17%	22%
Mississippi*	--	54%
Missouri	11%	12%
Montana*	--	23%
Nebraska	6%	24%
Nevada*	--	42%
New Hampshire	12%	16%
New Jersey	23%	53%
New Mexico	34%	19%
New York	4%	59%
North Carolina	18%	20%

⁴¹⁹ *Id.*

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North Dakota*	--	0%
Ohio	5%	25%
Oklahoma	4%	45%
Oregon	12%	23%
Pennsylvania	7%	13%
Puerto Rico**	--	--
Rhode Island	13%	7%
South Carolina*	--	58%
South Dakota	0%	17%
Tennessee	18%	19%
Texas	20%	13%
Utah	8%	25%
Vermont*	--	6%
Virginia	5%	31%
Washington	0%	8%
West Virginia*	--	42%
Wisconsin	15%	14%
Wyoming*	--	22%

Notes

* - GAO did not report vacancy rate.

** - GAO did not report vacancy rate, and Majority staff was unable to reconcile 2022 data.

Table 3: Surveyors with Two Years or Less Experience, by State, 2002 and 2022

This table compares the percentage of surveyors in States that have two years or less of experience in 2002 and 2022. These data are a measure of survey agency capacity, since survey agencies reported that surveyors with two years or less experience have limited ability to conduct their jobs independently. The data for 2002 was derived from a contemporaneous GAO report, which measured surveyor experience in 42 States.⁴²⁰ The 2022 data is derived from State responses to Chairman Casey’s questions.

State	2002	2022
Alabama	48%	31%
Alaska	29%	13%
Arizona	20%	40%
Arkansas	33%	32%
California	52%	35%
Colorado	24%	46%
Connecticut	29%	30%
Delaware*	--	55%
District of Columbia	50%	42%
Florida	55%	35%
Georgia	51%	36%
Hawai’i	40%	17%
Idaho	54%	80%
Illinois	5%	12%
Indiana	20%	34%
Iowa	4%	42%
Kansas	17%	11%
Kentucky	51%	76%
Louisiana	48%	37%
Maine	42%	33%
Maryland	70%	24%
Massachusetts	16%	48%
Michigan	17%	20%
Minnesota	0%	36%
Mississippi*	--	41%
Missouri	36%	36%
Montana*	--	5%
Nebraska	29%	2%
Nevada*	--	16%
New Hampshire	60%	50%
New Jersey	30%	25%
New Mexico	30%	33%

⁴²⁰ *Id.*

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New York	40%	25%
North Carolina	33%	19%
North Dakota*	--	26%
Ohio	17%	24%
Oklahoma	67%	40%
Oregon	34%	23%
Pennsylvania	15%	34%
Puerto Rico*	--	0%
Rhode Island	9%	48%
South Carolina*	--	6%
South Dakota	18%	52%
Tennessee	45%	22%
Texas	32%	42%
Utah	50%	60%
Vermont*	--	40%
Virginia	21%	3%
Washington	54%	65%
West Virginia*	--	29%
Wisconsin	25%	20%
Wyoming*	--	14%

Notes

* - GAO did not report tenure data.

Table 4. Staff Employed by Three Multistate Contract Survey Firms

This table summarizes data from the third-party contractors' responses to Chairman Casey's questions about the number of people they employ. The data herein is taken exclusively from the responses provided by the contractors.

	Ascellon	CertiSurv	HMS
Surveyors	35	71	74
Quality Assurance Staff	3	13	9
Office Support Staff/Other functions	<i>N/A</i>	6	19
Management	5	3	5

Source: Company data (see Appendix D). Note: CertiSurv was incorporated in 2019.

Table 5. Focused Infection Control Surveys Completed by Three Multistate Contract Survey Firms

This table summarizes data from the third-party contractors' responses to Chairman Casey's questions about the number of focused infection control surveys they completed in the last three calendar years. The data herein is taken exclusively from the responses provided by the contractors.

	Ascellon	CertiSurv	HMS	Totals
2020	151	309	531	991
2021	122	18	97	237
2022	10	73	1	84
Totals	283	400	629	1,312

Source: Company data (see Appendix D). Note: CertiSurv was incorporated in 2019.

Table 6. Complaint Surveys Completed by Three Multistate Contract Survey Firms

This table summarizes data from the third-party contractors' responses to Chairman Casey's questions about the number of complaint surveys they completed in the last three calendar years. The data herein is taken exclusively from the responses provided by the contractors. Of note, complaint surveys can be included in recertification surveys, but the above numbers report standalone complaint surveys.

	Ascellon	CertiSurv	HMS	Totals
2018	0	N/A	63	63
2019	16	5	15	36
2020	18	194	24	236
2021	26	264	4	294
2022	11	149	25	185
Totals	71	612	131	814

Source: Company data (see Appendix D). Note: CertiSurv was incorporated in 2019.

Table 7. States with Recent and Current Contracts with Three Multistate Contract Survey Firms

This table summarizes data from the third-party contractors’ responses to Chairman Casey’s questions about States where contractors have active contracts as well as copies of contracts provided by individual States.

Third-Party Contractors	States
Ascellon	Alabama, Georgia, Missouri, South Carolina
CertiSurv	Alabama, Arkansas, Colorado, Georgia, Hawai’i, Iowa, Kentucky, Missouri, Nebraska, New Jersey, South Carolina, Texas, Wisconsin
HMS	Alabama, California, Georgia, Hawai’i, Idaho, Iowa, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, South Carolina, Virginia, Washington, Wisconsin

Source: Company data (see Appendix D). Note: CertiSurv was incorporated in 2019.

Table 8: Focused Infection Control Surveys, by State (2020-2022)

This table summarizes the number of focused infection control (FIC) surveys States conducted from 2020 to 2022. As detailed in Section VI(B), CMS introduced FIC surveys in March 2020 in response to the COVID-19 pandemic. States were required to conduct FIC surveys in all nursing homes by July 2020. CMS subsequently scaled back FIC survey requirements in 2021, and will sunset them on September 30, 2023. States have reported these surveys, which typically take one or two days to complete, have added substantially to their workloads.

State	2020	2021	2022	Total
Alabama	704	217	175	1,096
Alaska	45	26	30	101
Arizona	416	192	151	759
Arkansas	1,118	803	242	2,163
California	5,823	2,786	2,330	10,939
Colorado	702	360	411	1,473
Connecticut	2,503	270	244	3,017
Delaware	130	71	36	237
District Of Columbia	51	18	22	91
Florida	3,473	2,159	938	6,570
Georgia	960	617	461	2,038
Guam	1	2	1	4
Hawai'i	85	38	35	158
Idaho	180	91	101	372
Illinois	2,270	1,016	811	4,097
Indiana	3,296	1,654	957	5,907
Iowa	1,285	539	573	2,397
Kansas	974	407	371	1,752
Kentucky	1,138	605	223	1,966
Louisiana	1,212	695	311	2,218
Maine	144	98	54	296
Maryland	465	239	257	961
Massachusetts	1,647	796	397	2,840
Michigan	1,147	436	391	1,974
Minnesota	1,158	390	271	1,819
Mississippi	643	168	165	976
Missouri	2,228	1,155	985	4,368
Montana	206	130	127	463
Nebraska	492	146	171	809
Nevada	294	183	114	591
New Hampshire	159	92	50	301
New Jersey	882	788	558	2,228
New Mexico	235	155	102	492
New York	2,231	1,330	661	4,222
North Carolina	1,551	481	351	2,383

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North Dakota	281	34	48	363
Ohio	3,774	2,509	1,299	7,582
Oklahoma	1,236	740	529	2,505
Oregon	613	206	146	965
Pennsylvania	2,242	1,187	818	4,247
Puerto Rico	35	28	38	101
Rhode Island	278	200	146	624
South Carolina	754	324	166	1,244
South Dakota	331	158	58	547
Tennessee	1,101	474	278	1,853
Texas	7,263	4,857	4,647	16,767
Utah	283	213	118	614
Vermont	58	35	29	122
Virginia	893	336	238	1,467
Washington	729	563	530	1,822
West Virginia	341	141	57	539
Wisconsin	986	322	284	1,592
Wyoming	113	93	31	237
National Total	61,159	31,573	22,537	115,269

Source: CMS, Quality, Certification and Oversight Reports

Appendix B

In response to the Chairman Casey’s request, States provided correspondence with CMS, including budget justifications in which they sought additional funds for a given fiscal year. Committee staff analyzed the communications of three States—South Carolina, Connecticut, and Idaho—which follow.

B-1: South Carolina: “Never Recovered” from Budget Cuts in the Early 2010s

Over the course of five years, South Carolina repeatedly raised concerns about inadequate funding and its associated effect on the survey agency’s staffing in a series of letters to CMS requesting supplemental Federal funding. In a 2019 letter, the State noted that the survey agency’s budget was reduced 16 percent between FY2011 and FY2012 and that it “never recovered from that cut,”⁴²¹ adding:

For the past three fiscal years, the [South Carolina Survey Agency] has requested a budget increase. The [South Carolina Survey Agency] will continue to request increases with the hopes that at one point, CMS will be able to adjust our budget. We understand that CMS’s Survey and Certification budget is contingent on congressional decisions, however, the [South Carolina Survey Agency] has been and will continue to communicate our budgetary needs to CMS for budget increases via this annual budget narrative.⁴²²

South Carolina’s letter went on to describe to CMS how there were five surveyor positions it was “unable to post or recruit due to lack of funding,” and that the State required an additional \$390,500 to fund the positions.⁴²³ However, the additional five staff were just a stopgap measure. South Carolina wrote that “in order to meet and sustain the CMS Survey and Complaint workload and ... to truly build a structured system” that could achieve CMS’ performance standards, the survey agency needed 15 additional staff, requiring \$1.2 million in Federal funding.⁴²⁴ In the years that followed, South Carolina’s letters to CMS repeatedly requested additional funding to address the staffing shortages (see Table B-1).

South Carolina sent similar letters to CMS in 2020,⁴²⁵ 2021,⁴²⁶ and 2022, when the State warned that it was “currently facing an extreme staffing shortage” in its long-term care division and “experiencing extreme difficulty in attracting all genres of surveyors.”⁴²⁷ In October 2022, the State reported that in the face of staffing shortages, it had spent \$3.6 million on contractors in an attempt to meet survey performance goals set by CMS, using funds drawn from regular annual allocations, as well as CARES Act allocations.⁴²⁸ Even with the contractors in place, the State only expected to complete 55 percent of its “Tier 1 workload,” the inspections CMS considers to be the highest priority, in FY2023.⁴²⁹ Despite the Social Security Act’s requirement that nursing

⁴²¹ Appendix C, South Carolina, at AGING-00477.

⁴²² *Id.*, at AGING-00477.

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*, at AGING-00486.

⁴²⁶ *Id.*, at AGING-00495.

⁴²⁷ *Id.*, at AGING-00501.

⁴²⁸ *Id.*, at AGING-00510.

⁴²⁹ *Id.*, at AGING-00511.

homes receive an annual recertification survey every 15.9 months, South Carolina’s average was 19.7 months at the time of the October 2022 letter.⁴³⁰

Table B-1: South Carolina’s Supplemental Budget Requests to CMS, FY2017-2021

Fiscal Year	CMS’ Original Budget Allocation	State’s Supplemental Request	Difference (\$)	Difference (%)
2017	\$2,688,816	\$3,788,033	\$1,099,217	41%
2018	\$2,672,713	\$3,680,092	\$1,007,379	38%
2019	\$2,738,694	\$4,328,785	\$1,590,091	58%
2020	\$2,726,194	\$4,408,520	\$1,682,326	62%
2021	\$2,726,467	\$5,474,502	\$2,748,035	101%

Source: South Carolina survey agency correspondence with CMS

B-2: Connecticut: Flood of Surveyor Retirements Led to Severe Staffing Shortages

Connecticut detailed years of difficulty conducting work amidst staffing shortages, flat-lined Federal funding, mass retirements, and State hiring freezes in a series of increasingly blunt budget justifications to CMS. The State’s FY2018 budget justification detailed how vacant surveyor and management positions dating back to 2011 had stretched the agency’s workforce thin.⁴³¹ Even when Connecticut’s survey agency succeeded in obtaining a supplemental budget allocation from CMS in FY2015, an unanticipated State hiring freeze prevented the survey agency from bringing on “seven desperately needed and vital” staff.⁴³² As a result, Connecticut’s survey agency was forced to return \$1.5 million to CMS; similar circumstances required the State to return \$1.2 million to CMS in FY2016.⁴³³

Connecticut’s FY2019 budget request to CMS listed challenges including “resource constraints/limitations as a result of more than 20% of staff vacancies, increases in personnel costs as a result of employee bargaining contractual obligations, significant increases in fringe benefit costs,” and additional responsibilities CMS expected States to fulfill.⁴³⁴ The State added “it was critical to note” that changes in the State’s retirement system would likely result in the retirement of 30 percent of the Facility Licensing and Investigations Division, a large proportion of whom were expected to be nurses “integral to survey and certification activities.”⁴³⁵ The pending departures prompted the State to consider hiring contractors to “conduct activities that will ensure safe and quality healthcare for all beneficiaries,” which the State expected to exceed the capacity of directly employed surveyors.⁴³⁶

⁴³⁰ *Id.*

⁴³¹ Appendix C, Connecticut, at AGING-00077.

⁴³² *Id.*, at AGING-00077.

⁴³³ *Id.*

⁴³⁴ *Id.*, at AGING-00109.

⁴³⁵ *Id.*

⁴³⁶ *Id.*

Exhibit B-1: Connecticut Highlights Severe Staffing Shortage in CMS Budget Justification

the pandemic. Currently, the Facility Licensing and Investigations Section (FLIS) has a roster of 98 Full Time Equivalents (FTE) which includes administrative and supportive staff. Of those 98 FTE's, 66 are allocated to conduct certification surveys. Most notable, of the 66 FTE's allocated for certification activities, 26 of those 66 are currently vacant positions which represents an unprecedented vacancy rate of 39% in the FLIS. Included in the vacancy rate are the 2 key leadership positions in the section, Branch and Section Chief. While the FLIS is in varying degrees

By the time it submitted its FY2023 budget justification, Connecticut was facing “significant challenges” as it sought to recover from the pandemic. Chief among Connecticut’s challenges was an “unprecedented” vacancy rate in the State’s licensing and investigations section. The State went so far as to bold, highlight and underline the fact that 26 of its 66 certification positions were vacant, including the positions of Branch and Section Chief (see B-1).

B-3: Idaho: Staffing Posed Greatest Challenge to Timely Nursing Home Oversight

Idaho characterized staff recruitment, hiring, and training in its long-term care unit as the greatest challenge to achieving timely completion of the highest priority inspections, according to a memo the State sent to CMS in 2018.⁴³⁷ Idaho noted that it had six open surveyor positions at the time (three for long-term care, three for certification of other Medicare facilities) and was relying on contract surveyors to address staffing shortfalls and improve timeliness, despite concerns about their expense.⁴³⁸ (Idaho reported that it pays contract surveyors more than twice the hourly rate it pays State employees, while noting “we would have no chance of meeting expectations without them.”)⁴³⁹ Despite the State’s efforts, staffing shortages were forcing the survey agency to pass up surveys in certain circumstances:

We recognize complaints as a priority and make every attempt to meet the timing requirements. However, there are times, due to staffing or other planned survey activity, travel distance, and weather that decisions are made to delay a non-immediate jeopardy investigation to use resources more effectively.⁴⁴⁰

Idaho further noted that a lack of oversight of non-long-term care facilities was also affecting the quality of care being delivered:

The cumulative effect of not surveying non-long term care providers at more than the minimum requirements has resulted in an increased number of [Conditions of Participation] and [Conditions for Coverage] found out of compliance and the increasing number of substantiated complaints affecting workload.⁴⁴¹

⁴³⁷ Appendix C, Idaho, at AGING-00193.

⁴³⁸ *Id.*

⁴³⁹ *Id.*, at AGING-00184-AGING-00185.

⁴⁴⁰ *Id.*, at AGING-00194. Idaho raised similar concerns in its FY2018 budget justification, *see id.*, AGING-00197.

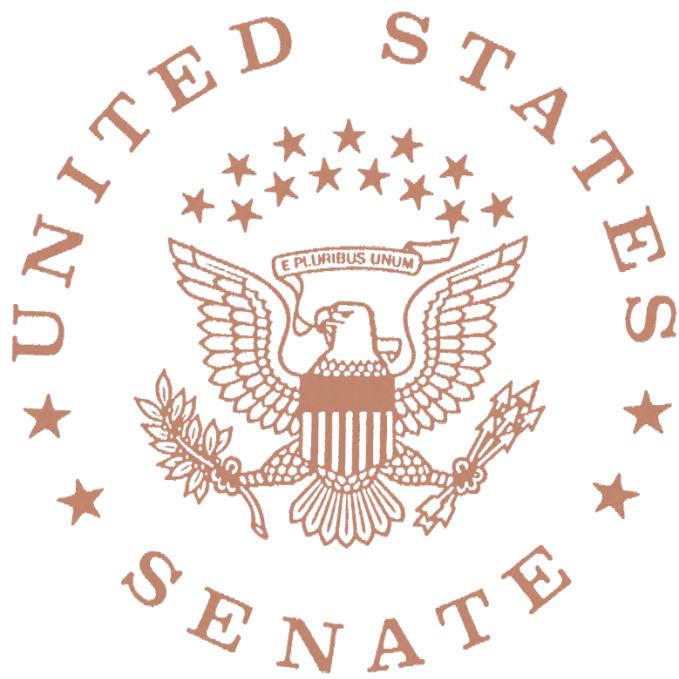
⁴⁴¹ *Id.*

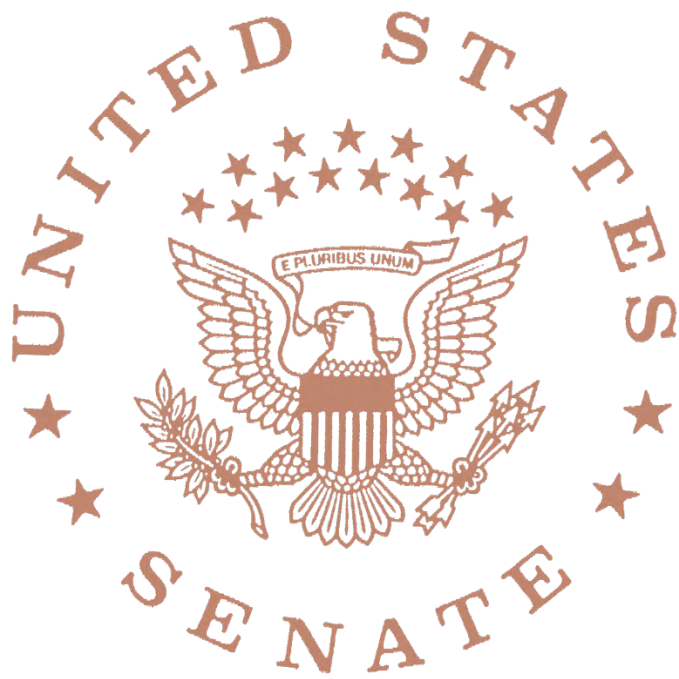
By FY2021, the number of vacant surveyor positions in Idaho had grown to nine—seven in long-term care and two for other Medicare facilities. In addition to the continued use of contract surveyors, Idaho was training staff from other programs to help conduct long-term care surveys and had hired retired survey staff on a part-time basis to handle some tasks, including abuse investigations.⁴⁴² The State noted that the COVID-19 public health emergency had resulted in annual recertification and complaint investigations “not meeting CMS expectations for timeliness across all provider types;” however the long-term care program was “affected the most.”⁴⁴³ Looking ahead, Idaho bluntly wrote that it would not meet the statutory timelines for annual recertification surveys at long-term care facilities in FY2021: “we anticipate at least 3-4 years to meet expectations.”⁴⁴⁴

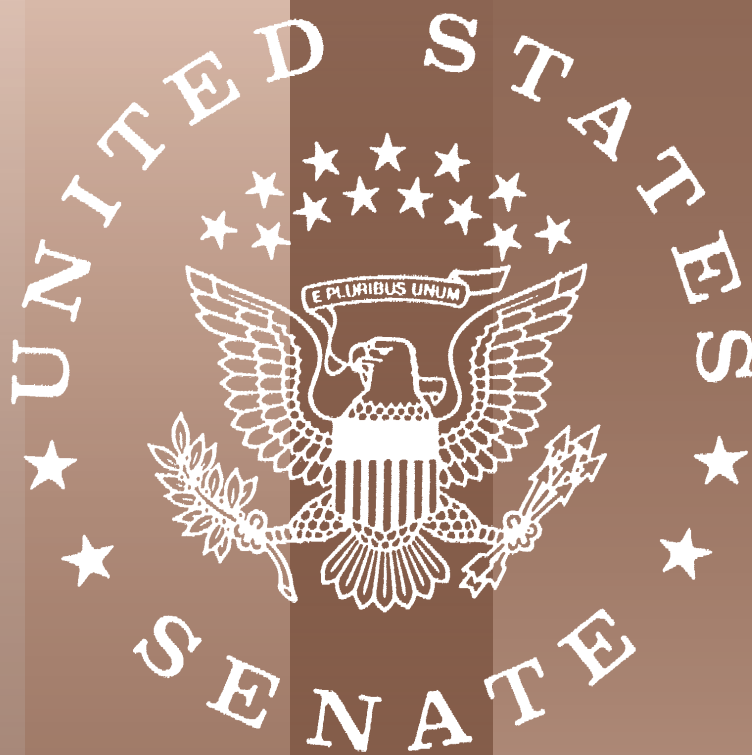
⁴⁴² *Id.*, at AGING-00188.

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*







**A REPORT BY THE
MAJORITY STAFF OF THE
U.S. SENATE SPECIAL
COMMITTEE ON AGING**