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Washington, DC 20548

B-336355

May 28, 2024

The Honorable Ron Wyden  
Chairman  
The Honorable Mike Crapo  
Ranking Member  
Committee on Finance  
United States Senate

The Honorable Cathy McMorris Rodgers  
Chair  
The Honorable Frank Pallone, Jr.  
Ranking Member  
Committee on Energy and Commerce  
House of Representatives

The Honorable Jason Smith  
Chairman  
The Honorable Richard Neal  
Ranking Member  
Committee on Ways and Means  
House of Representatives

Subject: *Department of Health and Human Services, Centers for Medicare & Medicaid Services: Medicare and Medicaid Programs; Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS) entitled “Medicare and Medicaid Programs; Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting” (RIN: 0938-AV25). We received the rule on April 15, 2024. It was published in the *Federal Register* as a final rule on May 10, 2024. 89 Fed. Reg. 40876. The stated effective date of the rule is June 21, 2024.

This final rule, according to CMS, establishes minimum staffing standards for long-term care facilities, as part of the Biden-Harris Administration’s nursing home reform initiative to ensure safe and quality care in long-term care facilities. In addition, the rule requires states to report the percent of Medicaid payments for certain Medicaid-covered institutional services that are spent on compensation for direct care workers and support staff.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). As indicated above, the rule was published in the

*Federal Register* on May 10, 2024. 89 Fed. Reg. 40876. The *Congressional Record* reflects receipt of the rule by the House of Representatives on April 15, 2024, and the Senate on April 17, 2024. See 170 Cong. Rec. S2998 (Apr. 23, 2024); 170 Cong. Rec. H2500 (Apr. 17, 2024). The rule has a stated effective date of June 21, 2024. Therefore, the stated effective date of the rule is less than 60 days from the publication date.

Enclosed is our assessment of CMS's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Charlie McKiver, Assistant General Counsel, at (202) 512-5992.

A handwritten signature in cursive script that reads "Shirley A. Jones".

Shirley A. Jones  
Managing Associate General Counsel

Enclosure

cc: Wilma Robinson  
Deputy Executive Secretary  
Executive Secretariat  
Department of Health and Human Services

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE  
ISSUED BY THE  
DEPARTMENT OF HEALTH AND HUMAN SERVICES,  
CENTERS FOR MEDICARE & MEDICAID SERVICES  
ENTITLED  
“MEDICARE AND MEDICAID PROGRAMS;  
MINIMUM STAFFING STANDARDS FOR LONG-TERM CARE FACILITIES  
AND MEDICAID INSTITUTIONAL PAYMENT TRANSPARENCY REPORTING”  
(RIN: 0938-AV25)

(i) Cost-benefit analysis

The Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS) prepared a Regulatory Impact Analysis that presents the costs and benefits of CMS’s rulemaking. For this final rule, CMS calculated the annual cost of the minimum staffing requirements in the rule based on hours per resident day (HPRD) in calendar year (CY) 2021 dollars, assuming the implementation and enforcement of these HPRD requirements as being applied independent of a facility’s case-mix. CMS estimated that the aggregate impact of the staffing-related provisions in the rule, which includes a phased-in implementation of the requirement for 24 hours per day, 7 days per week registered nurse (RN) onsite coverage, the 0.55 RN and 2.45 nurse aide (NA) minimum HPRD requirements, and the 3.48 HPRD total nurse staff requirement, will result in an estimated cost of approximately \$53 million in Year 1, \$1.43 billion in Year 2, \$4.38 billion in Year 3, with costs increasing to \$5.76 billion by Year 10. CMS estimated the total cost over 10 years will be \$43.0 billion with an average annual cost of \$4.30 billion.

CMS addressed two main concerns with the rule: finding sufficient staff and the cost for hiring staff. CMS noted that the rule would require the hiring of approximately 16,000 RNs, which is approximately 0.5 percent of all non-self-employed RNs in the labor force. It also noted that the hiring necessary for facilities to meet the NA HPRD requirement will represent a larger portion of NAs available nationwide. The rule utilizes three steps to minimize the impact on access to care and to prevent the closure of facilities due to inadequate staff availability: (1) facilities located in areas with nurse staff shortages may apply for an exemption from the staffing requirements; (2) CMS will provide over \$75 million in financial incentives to make it easier for nurses to enter careers in nursing homes; and (3) the rule will be phased-in over three to five years to help ensure that an adequate workforce is available and to reduce the cost.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

The Secretary of HHS certified that this final rule will not have a significant economic impact on a substantial number of small entities; further, the Secretary determined that the rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

CMS determined that the rule will not have an effect on state, local, or tribal governments, in the aggregate, of \$100 million, adjusted annually for inflation, in any one year. For the private sector, CMS calculated the annual cost of the minimum staffing requirements based on HPRD in CY 2021 dollars, assuming the implementation and enforcement of these HPRD requirements as being applied independent of a facility’s case-mix. CMS estimated that the aggregate impact of the staffing-related provisions in the rule, which includes a phased-in implementation of the requirement for 24 hours per day, 7 days per week RN onsite coverage, the 0.55 RN and 2.45 NA minimum HPRD requirements, and the 3.48 HPRD total nurse staff requirement will result in an estimated cost of approximately \$53 million in Year 1, \$1.43 billion in Year 2, \$4.38 billion in Year 3, with costs increasing to \$5.76 billion by Year 10. CMS estimated the total cost over 10 years will be \$43.0 billion with an average annual cost of \$4.30 billion.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act’s exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act’s requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act” in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

CMS stated that the Act does not apply to this final rule because it does not increase direct spending.

(v) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On September 6, 2023, CMS published a proposed rule. 88 Fed. Reg. 61352. CMS received 46,520 comments. Commenters included long-term care consumers, advocacy groups for long-term care consumers, organizations representing providers of long-term care and senior service, long-term care ombudsmen, state survey agencies, various health care associations, legal organizations, labor unions, residents, families, and many individual health care professionals (such as nursing organizations) and administrative staff. CMS held two listening sessions on June 27, 2022, and August 29, 2022, to allow all stakeholders, including state

agencies and other organizations to voice their concerns about the impact that a staffing standard, and took into consideration comments provided by state agencies.

CMS provided a summary of each proposed provision, a summary of the public comments received and CMS's responses to them, and an explanation for changes to the proposed rule in the final rule. The rule's provisions are based on evidence CMS collected using a multifaceted approach, informed by multiple sources of information, including the 2022 Nursing Home Staffing Study; more than 3,000 public comment submissions from the Fiscal Year 2023 Skilled Nursing Facility Prospective Payment System proposed rule (FY2023 SNF PPS) request for information (RFI); academic and other literature; Payroll Based Journal (PBJ) System data; detailed listening sessions with residents and their families, workers, health care providers, and advocacy groups; and analyzing the 46,520 comments received on the proposed rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

CMS determined that this final rule contains information collection requirements (ICRs) under the Act. Under PRA, CMS was required to provide 60-day notice in the *Federal Register* and solicit public comments before a collection of information requirement was submitted to OMB for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of PRA requires that CMS solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of the agency.
- The accuracy of the estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

CMS solicited public comments on each of these issues for various sections of the rule that contain ICRs. Based upon CMS's analysis of comments received, CMS revised its burden estimates and added a burden estimate for long-term care facilities to solicit and consider any input received by residents, resident representatives, and family members.

CMS will make the reporting methodology and reporting template for the requirements finalized at section 442.43 available for public comment through the PRA notice and comment process, which will give the public the opportunity to provide specific feedback and help CMS align the methodology and reporting process with existing state practices to the greatest extent possible. However, CMS acknowledges that, because state processes, timelines, and definitions vary, it may not be possible to align all details of the reporting process with existing practices in multiple states. CMS, therefore, plans to provide technical assistance, as needed, to facilitate further alignment with states' current reporting practices, to the greatest extent possible.

Statutory authorization for the rule

CMS promulgated this final rule pursuant to sections 1302, 1320a-7, 1395i, 1395hh, and 1396r of title 42, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

CMS determined that this final rule is economically significant under the Order, and it was reviewed by OMB.

Executive Order No. 13132 (Federalism)

CMS determined that, with regard to the updates to the requirements for participation for long-term care facilities, the provisions in this final rule will not preempt the applicability of any state or local law providing a higher standard and that, to the extent federal standards exceed state and local law minimum staffing standards, no federal preemption is implicated. While CMS is not aware of any state or local law providing for a maximum staffing level, the rule will preempt the applicability of any state or local law providing for a maximum staffing level, to the extent that such a state or local maximum staffing level would prohibit a Medicare, Medicaid, or dually certified long-term care facility from meeting the minimum HPRD requirements and RN coverage levels finalized in the rule or from meeting higher staffing levels required based on the facility assessment provisions finalized in the rule.