# TEMPLATE LETTER FROM FACILITY

VIA EMAIL ([regsqna@health.ny.gov](mailto:regsqna@health.ny.gov)) AND FIRST-CLASS MAIL

Members of the New York State Public Health and Health Planning Council (PHHPC)

c/o Katherine Ceroalo

New York State Department of Health

Bureau of Program Counsel

Regulatory Affairs Unit

Room 2438

Erastus Corning Tower

Nelson A. Rockefeller Empire State Plaza

Albany NY 12237

Re: Proposed Nursing Home Spending Mandate (HLT-46-21-00005-RP) and Proposed Nursing Home Staffing Mandate (HLT-46-21-00007-RP)

Dear Members of the Public Health and Health Planning Council:

We, the undersigned are respectively the Administrator, Chief Financial Officer, and Director of Nursing of ***[INSERT name of facility]***, located at ***[insert mailing address]***, a \_\_\_\_\_\_\_\_\_ ***[INSERT number of beds]*** facility located in ***[INSERT name of county]***. We respectfully submit these comments on behalf of the aforementioned facility to express our concern about the impact of the above-captioned proposed regulations published in the August 10, 2022 edition of the New York State Register. If implemented, these proposed regulations will have a devastating impact on this facility.

# STAFFING MANDATE

We have undertaken an analysis of the staffing mandate and determined that, if implemented, this Facility may be unable, despite its best efforts, to comply with the mandate given the well-documented shortage of healthcare staff that affects not just this facility, but indeed the entire state.

***[In this paragraph, state what efforts the facility has implemented to retain and recruit staff].***

As we are sure the Council appreciates, the COVID pandemic has created profound problems in recruiting and retaining staff. If we are unable to comply with this mandate, the facility will have to pay fines as much as $2,000 per day. This could result in fines as high as $730,000 a year, which will only exacerbate rather than resolve the current crisis, making it even more difficult to achieve quality when revenues are being diverted from the need to care for our residents in order to pay fines to the Department of Health.

***[INSERT this paragraph if your facility has a 5-star rating of 3 or above, and a quality pool quintile rating of either 1, 2 or 3].*** We note that our facility already has a 5-star quality rating of \_\_\_\_\_ and is in the ***[INSERT appropriate (first, second or third)]*** quintile of the quality pool. It is difficult to comprehend why a facility would be further penalized, despite the fact that it is providing quality care.

# THE SPENDING MANDATE

Compounding the problem is the spending mandate, which requires facilities to spend 70% of their revenues on direct resident care, 40% of which must be on resident-facing staff, and requires facilities to disgorge and pay back to the state any revenues in excess of 5% of total cost.

Under the regulations, revenue that must be spent on patient care includes revenues received from the state Medicaid program, a significant component of which is to be for reimbursement of capital expenses, including mortgage interest and amortization, and depreciation on capital equipment.

This makes no sense since that reimbursement is intended to be spent on capital expenses rather than direct patient care. It is noteworthy that the capital component of the Medicaid reimbursement rate contains no factor for a return on equity or residual reimbursement for buildings over 40 years old. Accordingly, capital expenses are pass-through expenses meant to directly reimburse facilities for the capital expenses it incurs to provide care, yet under the law and regulations, unless the facility is either a 4- or 5-star facility, it must include that revenue which must be diverted to direct resident care. This facility, however, will still have to maintain and upgrade its physical plant and meet its financial obligations to its lenders.

This facility is also required under existing covenants with its mortgage lender to maintain certain debt-service coverage notices which it may be unable to meet if it is required to comply with the spending mandate. This could result in foreclosure or additional financial penalties imposed by the lender that will only make our financial situation worse.

Moreover, another portion of the revenue as defined by the regulations includes reimbursement received from the federal Medicare program, which facilities receive directly from the federal government for services already provided to Medicare patients. The proposed regulations require that a portion of those funds be diverted to the quality pool in order to cross-subsidize the state's Medicaid program which is illegal under federal law.

# RETROACTIVITY

The regulations purport to be retroactive to January 1, 2022, despite the fact that they have yet to be formally adopted. That means facilities will be held responsible for complying with regulations, and subject to severe penalties for non-compliance, despite the fact that for at least the first nine months of 2022, those regulations were not in effect. The manifest unfairness of demanding retroactive compliance is compounded by the fact that there is really no excuse for the prolonged delay. The legislation on which the regulations are based was passed in April 2021, and now, almost a year and a half later, there has still been no formal adoption of these regulations that are necessary to provide guidance to providers. Whatever happens, we respectfully request that any regulations that are adopted, if any, be prospective only, commencing no sooner than January 1, 2023.

# CONCLUSION

The spending and staffing mandates are fatally flawed, and for all the foregoing reasons, we respectfully request that the Council reject the DOH proposed spending and staffing regulations as they will only exacerbate rather than ameliorate the current health care crisis facing the long-term care delivery system throughout New York State.

Respectfully submitted.

NAME OF FACILITY

By:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Administrator

By:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Chief Financial Officer

By:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Director of Nursing