

Background

Efforts to Improve Transparency Prior to the Affordable Care Act

Institute of Medicine Study

Poor quality in nursing homes has been studied and documented for years. In 1986, Congress tasked the Institute of Medicine (IOM) with studying government regulation of nursing homes and recommending “changes in regulatory policies and procedures to enhance the ability of the regulatory system to assure that nursing home residents receive satisfactory care.” The IOM report identified an urgent need for a study to assess how to obtain more information about nursing homes and their operations to “facilitate regulation and policy development” and that such a “study should recommend specific ways to collect, analyze, and publish or otherwise make such data publicly available.”⁵

“The quality problems of this industry simply do not go away; they just seem to rise to public consciousness periodically.”

- John A. Nyman, Journal of Policy Analysis and Management, 1986

Around the same time, the IOM began studying the impact of for-profit and chain ownership on nursing home quality, cost, and access. A 1986 IOM report on the corporatization of nursing homes, *For Profit Enterprise in Health Care*, found that for-profit and chain-operated nursing homes provided poorer care than not-for-profit facilities⁶ and identified the need to better understand ownership, management, and financing models.

“Finally, researchers must use richer models of ownership. Lumping government-owned facilities with church-related homes and private nonprofits (that may be nonprofit in name only) into the same ownership category, may obscure significant differences in performance. The same is true of the for-profits. A multibillion dollar multistate chain of 800 nursing homes, whose stock is publicly traded, is hardly the same organization as a 40-bed facility owned and operated by a practical nurse and her family. Yet, both are for-profits. Finally, there may be significant differences among various multifacility nursing home systems and understanding the performance of chains may require analyses that distinguish among them.”⁷

Over the years, extensive research by the U.S. Government Accountability Office (GAO), U.S. H.H.S. Office of the Inspector General (OIG), and dozens of researchers have replicated and expanded on those findings.

⁵ *Institute of Medicine (US) Committee on Nursing Home Regulation*, “Improving the Quality of Care in Nursing Homes,” (1986) p. 43. Available at <https://www.ncbi.nlm.nih.gov/books/NBK217556/>.

⁶ See, for example, Hawes, C. and Phillips, C., *Institute of Medicine (US) Committee on Implications of For-Profit Enterprise in Health Care*, “The Changing Structure of the Nursing Home Industry and the Impact of Ownership on Quality, Cost, and Access” (1986). Available at <https://www.ncbi.nlm.nih.gov/books/NBK217907/>.

⁷ Id. at p546.

Nursing Home Reform Law

Many of the IOM's recommendations became law in 1987 with the passage of the Nursing Home Reform Act, as part of the Omnibus Budget Reconciliation Act of 1987 (OBRA-87).⁸ The resulting Nursing Home Reform Law (Reform Law), which remains in effect, set forth the most extensive set of changes to occur in federal nursing home regulation since the passage of Medicaid and Medicare more than two decades earlier. It established the minimum health and safety standards that nursing homes must meet to participate in Medicare and Medicaid.⁹ Among the Reform Law's many significant provisions was the public disclosure of information related to surveys, such as statements of deficiencies and plans of correction, as well as annual facility cost reports, and statements of ownership and control interest.¹⁰

Despite the positive steps taken in the Reform Law to improve transparency, detailed information about a nursing home's ownership and finances was for the most part considered confidential and unavailable to regulators or to the public. For example, someone suing a nursing home for abuse or neglect would have to convince the court why such information was needed and was not assured of receiving it.

In the early 2000s, growing investment in the nursing home industry by real estate investment trusts (REITs), private equity, and other increasingly complex ownership and financial structures further underscored the realization that more nursing home data – especially relating to ownership, management, and use of public funds – was sorely needed. In 2003, CMS began collecting nursing home ownership information in the Medicare Provider Enrollment, Chain, and Ownership System, or PECOS, an electronic system of records used to enroll and maintain information on Medicare providers.¹¹ As conceived, the primary function of PECOS was to gather information from a provider or supplier that tells CMS who it is, by whom it is owned, whether it meets state licensure and federal quality of care and safety requirements to participate in Medicare, where it is located or provides services, and information necessary to pay the claim. To this day, PECOS is considered a primary source for establishing ownership linkages across health care organizations because all Medicare providers are registered and those who report PECOS information must attest to its accuracy.

Yet, almost from its inception, questions about the accuracy, completeness, and usability of PECOS have been raised. Among those concerns were the inability to determine hierarchy or relationships among owners, the difficulty in linking all facilities in a chain or by private

⁸ U.S. Congress. *Omnibus Budget Reconciliation Act of 1987*. H.R. 3545. 110th Congress (1987-1988). Available at <https://www.congress.gov/bill/100th-congress/house-bill/3545>.

⁹ 42 C.F.R. Part 483, Subpart B. Available at <https://www.ecfr.gov/current/title-42/chapter-IV/subchapter-G/part-483/subpart-B>.

¹⁰ 42 U.S.C. § 1320a–5. Available at https://www.govinfo.gov/app/details/USCODE-1995-title42/USCODE-1995-title42-chap6-subchapXI_2-partA-sec1320a-5/summary.

¹¹ The vast majority of health care providers, including nursing homes, participate in Medicare.

investment ownership, as well as CMS's limited ability to determine accuracy and completeness.¹²

The Affordable Care Act's Transparency Provisions and Their Implementation

In 2007, a *New York Times* investigative report exposed the serious negative impact private equity and complex nursing home structures were having on nursing home quality.¹³ This was a major impetus for numerous GAO and HHS inspector General reports and hearings in both chambers of Congress, resulting in the Nursing Home Transparency and Improvement Acts of 2008¹⁴ and 2009,¹⁵ parts of which were ultimately passed as part of the 2010 Patient Protection and Affordable Care Act (ACA).¹⁶

Signed into law on March 23, 2010, the ACA's transparency provisions on ownership, management, and financing (Section 6101)¹⁷ are designed to make nursing home information more accessible and usable for consumers, advocates, and policymakers. This was seen as a critical tool for holding nursing homes accountable for the quality of care they provide, most of which was (and still is) funded by taxpayers.

Section 6101 of the ACA requires nursing homes to report information on each member of their governing body, persons or entities who are officers, directors, members, partners, trustees or managing employees, and other disclosable parties.¹⁸ Furthermore, nursing homes are required to report the organizational structure of each disclosable party and describe the relationship of that party to the facility and to other disclosable parties. The law authorizes regulators to obtain this information immediately, upon request. CMS was required to establish procedures to make this information available to the public by March 2013. Unfortunately (as of June 2022) the Section 6101 requirements have yet to be fully implemented.

¹² Government Accountability Office (GAO), "Complexity of Private Investment Purchases Demonstrates Need for CMS to Improve the Usability and Completeness of Ownership Data," (2010). Available at <https://www.gao.gov/products/gao-10-710>.

¹³ Duhigg, Charles, *The New York Times*, "At Many Nursing Homes, More Profit and Less Nursing," (September 23, 2007). Available at <https://www.nytimes.com/2007/09/23/business/23nursing.html>.

¹⁴ U.S. Congress. *Nursing Home Transparency and Improvement Act of 2008*. H.R. 5799. 110th Congress (2008). Available at <https://www.congress.gov/bill/110th-congress/house-bill/5799>.

¹⁵ U.S. Congress. *Nursing Home Transparency and Improvement Act of 2009*. S. 647. 111th Congress (2009-2010). Available at <https://www.congress.gov/bill/111th-congress/senate-bill/647>.

¹⁶ U.S. Congress. *Patient Protection and Affordable Care Act of 2010*. H.R. 3590. 111th Congress (2009-2010). Available at <https://www.congress.gov/111/plaws/publ148/PLAW-111publ148.pdf>.

¹⁷ Id at p581.

¹⁸ Disclosable parties were defined as "any person or entity who (i) exercises operational, financial, or managerial control over the facility or a part thereof, or provides policies or procedures for any of the operations of the facility, or provides financial or cash management services to the facility; (ii) leases or subleases real property to the facility, or owns a whole or part interest equal to or exceeding 5 percent of the total value of such real property; or (iii) provides management or administrative services, management or clinical consulting services, or accounting or financial services to the facility."

With respect to financing, while nursing homes had been required to submit annual cost reports prior to the ACA, ACA Section 6104¹⁹ requires them to report their spending across separate categories including direct care, indirect care, administrative expenses, and capital assets. In addition, CMS is required to redesign cost reports to capture this information and develop a way to make this information easily available upon request.

The ACA includes several other transparency and accountability provisions. Among these is the requirement for nursing homes to report staffing data, including hours of care per resident per day, turnover information, and wages, all based on auditable information such as payroll data. In addition, to increase public awareness and usability, CMS was required to add new information to its Nursing Home Compare²⁰ website including staffing data, inspections, penalties, and consumer complaints.

While many of the ACA's nursing home transparency requirements, particularly those related to strengthening consumer information, have been implemented (albeit some of them years after their required implementation date), others have not been implemented at all, or only partially.

Ownership Information

While CMS revised its Medicare enrollment and PECOS reporting form in 2011 to substantially expand its information on owners, managers, investors, and others, it has not yet published final regulations delineating all parties that are disclosable under the law and timeframes for reporting and updating information. In addition, as of this writing, CMS has still not established a mechanism to audit the accuracy and completeness of the PECOS data and has not enforced requirements to accurately report the names of all parent companies of the licensee and their related owners and corporations.²¹

Other concerns remain with respect to ownership information. To this day, many nursing home researchers consider PECOS to be an inaccessible and "relatively unreliable data source, particularly as ownership changes..."²² In addition, PECOS data is only available to researchers upon request because there are no PECOS public use files. Only one of its datasets, the Medicare Fee-For-Service Public Provider Enrollment Files (PPEF) is available to the public (since 2016), and those data are updated only on a quarterly basis.²³

¹⁹ *Patient Protection and Affordable Care Act of 2010*, Section 6104. Available at <https://www.congress.gov/111/plaws/publ148/PLAW-111publ148.pdf> at p593.

²⁰ The Medicare.gov Nursing Home Compare website is now known as Care Compare.

²¹ Harrington, C., Montgomery, A., King, T., Grabowski, D., and Wasserman, M., *Health Affairs Forefront*, "These Administrative Actions Would Improve Nursing Home Ownership and Financial Transparency in the Post COVID-19 Period," (February 11, 2021). Available at <https://www.healthaffairs.org/doi/10.1377/forefront.20210208.597573/full>.

²² Adelberg, M.S., Dobosenski, A.T., and Prendergast, E. M., *Faegre Drinker*, "The Need for Data Transparency in Skilled Nursing Facilities," (2022) <https://www.faegredrinker.com/-/media/files/linked-articles/the-need-for-data-transparency-in-skilled-nursing-facilities.pdf>

²³ Id.

Endeavoring to promote transparency, CMS announced in April 2022 it will release data publicly on mergers, acquisitions, consolidations, and ownership changes for 2016-2022 for nursing homes enrolled in Medicare.²⁴

Financing Information

Also in 2011, CMS implemented new Medicare cost reporting requirements for skilled nursing homes to collect detailed data on direct care expenditures by category. However, CMS has not yet developed a plan to report these data in a user-friendly format to policymakers and the public, as required by ACA's Section 6104. Furthermore, cost report data are seldom audited, and penalties are not issued for failure to report.²⁵ Though expenditure data in the cost reports are available to the public, experts describe them as "difficult to interpret and known to be inaccurate and incomplete."²⁶

Staffing Information

Although Section 6106 of the ACA required nursing homes to electronically submit staffing data based on payroll and other auditable data (instead of self-reported, unaudited data) within two years of the statute's enactment, the first reporting did not occur until 2016. Data has been available to the public since 2017.²⁷ Nursing homes are now required to use the PBJ (payroll-based journal) system to submit the number of hours nursing and other staff are paid each day, and these data form the basis for the staffing measures included on the Medicare.gov Nursing Home Care Compare website (formerly Nursing Home Compare).^{28,29}

In early 2022, CMS began posting information on staff turnover and weekend staffing levels on Care Compare.³⁰

²⁴ Centers for Medicare & Medicaid Services, "HHS Releases New Data and Report on Hospital and Nursing Home Ownership," (April 20, 2022). Available at <https://www.cms.gov/newsroom/press-releases/hhs-releases-new-data-and-report-hospital-and-nursing-home-ownership>.

²⁵ Harrington, C., Montgomery, A., King, T., Grabowski, D., and Wasserman, M., *Health Affairs Forefront*, "These Administrative Actions Would Improve Nursing Home Ownership and Financial Transparency in the Post COVID-19 Period," (February 11, 2021). Available at <https://www.healthaffairs.org/doi/10.1377/forefront.20210208.597573/full>.

²⁶ Adelberg, *supra* note 22.

²⁷ For more information on the PBJ System, see <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/NursingHomeQualityInits/Staffing-Data-Submission-PBJ>.

²⁸ The daily rates for a range of nursing and non-nursing staff are collected by CMS and reported to the public on a quarterly basis at <https://data.cms.gov/quality-of-care/payroll-based-journal-daily-nurse-staffing>. Every quarter, LTCCC provides average staffing rates, including nursing ratios, for every nursing home in the country in easy-to-use state files <https://nursinghome411.org/data/staffing/>.

²⁹ Effective December 1, 2020, *Care Compare* replaced eight CMS health care-specific websites, including Nursing Home Compare.

³⁰ Centers for Medicare & Medicaid Services, "To Advance Information on Quality of Care, CMS Makes Nursing Home Staffing Data Available," (January 26, 2022). Available at <https://www.cms.gov/newsroom/press-releases/advance-information-quality-care-cms-makes-nursing-home-staffing-data-available>.

Consumer Information

In addition to information on staffing, Care Compare provides a range of information on individual nursing homes, including ratings under CMS's Five-Star Quality Rating System, the results of health care inspection reports and complaint investigations, quality measure data, and basic ownership information (reflecting a partial implementation of Section 6101 of the ACA). States are required to provide a website with information on all nursing homes in the state, including survey reports, complaint investigation reports, and plans of correction (which, unfortunately, are not provided on Care Compare as of this writing). A standardized complaint form is available on Care Compare and on state nursing home consumer websites, as well as information on how to submit complaints and contact the state survey agency and the Long-Term Care Ombudsman Program.