

Recent Efforts to Improve Transparency

While the passage and lengthy implementation of the transparency provisions of the ACA provided an opportunity for CMS to promote transparency in nursing home ownership, financing, and expenditures, the devastation wrought by COVID in nursing homes has revealed that serious gaps still exist. A large influx of funds went into the coffers of nursing homes during the pandemic, yet little is known about how this was spent. Furthermore, state regulatory agencies were hampered by a severe lack of ownership data that could have improved their response to the crisis. Some state agencies³¹ discovered that complex ownership and management structures and opaque financial reports made it difficult to identify and hold accountable bad actors. A state and federal regulatory system that largely collected and focused on information at the individual nursing home and single-state level did not serve the oversight needs of regulators.

The push for greater transparency in nursing home ownership and financing information slowed tremendously during the Trump Administration, which focused on deregulation, relaxation of surveys, and reduction of financial penalties.³² In late 2019-early 2020, just as COVID-19 began to tear through nursing homes, the issue of ownership transparency and private equity investment again became a focus of scrutiny, with oversight hearings in the House, by the House Ways and Means Subcommittee on Oversight, and the introduction of several pieces of legislation on the subject.³³

Biden Administration 2022 Reform Proposals

On February 28, 2022, the Biden Administration released a package of nursing home reforms which were highlighted several days later in the President's State of the Union Address.³⁴ One major area of emphasis in that reform package is a *commitment to improving the public transparency of nursing home ownership and finances*. These transparency initiatives include:

- Implementing ACA transparency requirements regarding corporate ownership, including collecting and publicly reporting more robust corporate ownership and operating data, and improving the accessibility of this information on the Care Compare website.

³¹ See, for example, Brubaker, H., *Eagle Tribune*, "Pennsylvania nursing home buyers would face more scrutiny under state health proposal," (April 26, 2022). Available at https://www.eagletribune.com/region/pennsylvania-nursing-home-buyers-would-face-more-scrutiny-under-state-health-proposal/article_3546727a-133e-598b-9b0e-041b73f2bc18.html

³² Edelman, T., *Center for Medicare Advocacy*, "Long-Term Care Policy: Trump vs. Biden," (October 20, 2020). Available at <https://medicareadvocacy.org/long-term-care-policy-trump-vs-biden/>.

³³ See, for example, U.S. Congress. H.R. 5825. 116th Congress (2019-2020). Available at <https://www.congress.gov/bill/116th-congress/house-bill/5825/text>.

³⁴ *The White House*, "Fact Sheet: Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes," (February 28, 2022). Available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/>.

- Creating a new database to track and identify owners and operators across states. This registry will use information collected through provider enrollment and inspections to provide more information about prospective owners and operators to states.
- Enhancing Care Compare by improving the readability and usability of its information, ensuring that star ratings more closely reflect verifiable data, and holding nursing homes accountable for providing accurate information. The Administration will be asking Congress to provide CMS with additional authority to validate data submitted and to take enforcement action against facilities providing incorrect information. Once new minimum staffing standards are in place,³⁵ Care Compare will include the performance of each facility in meeting these standards.
- Examining the role of private equity, real estate investment trusts, and other types of ownership in the nursing home sector, and publicly reporting those findings.
- Using data submissions, which will be performed in addition to on-site inspections, to improve enforcement actions against poor performing facilities.

Closely related to the transparency efforts outlined in the Biden Administration package are the proposals to expand CMS's enforcement authority at the ownership level, with an emphasis on chain ownership. These efforts include:

- Increasing accountability for chain owners and seeking new CMS authority to require minimum corporate competency to participate in Medicare and Medicaid. With such authority, CMS could potentially restrict an individual or entity from participating in those programs based on the compliance history of other facilities they have owned or operated.
- Seeking expanded CMS authority to impose enforcement actions on owners and operators of facilities even after they close, or on owners and operators of facilities that provide persistent and substandard care in some of their facilities, while owning others.

Some of these proposals will require Congressional action, while others could be accomplished under CMS's existing authority.

State Transparency Reforms

Long before the White House released its recent reform package, a few states, including Connecticut³⁶ and California,³⁷ moved to pass legislation to improve ownership, management,

³⁵ One of the key goals outlined in the Biden Administration package is the establishment of a minimum nursing home staffing requirement. On April 11, CMS published a proposed rule seeking initial input on this.

³⁶ CT House Bill No. 5051, *An Act Improving Transparency of Nursing Home Operations* (2014). Available at <https://www.cga.ct.gov/2014/act/pa/pdf/2014PA-00055-R00HB-05051-PA.pdf>.

Connecticut law signed in 2014 requiring nursing homes to include in their annual reports a profit and loss statement from related parties receiving \$50,000 or more.

³⁷ For example, California AB 9297, introduced in 2015 but died in Committee, would have established additional oversight and transparency for nursing home ownership by strengthening suitability requirements of owners,

and financial transparency for nursing homes. However, the bulk of state legislative transparency efforts were a response to the pandemic's devastating impact on nursing homes and the massive amount of dollars that flowed to these facilities.

The following are summaries of some of these state legislative efforts.

New York

New York was one of the first states to pass a transparency law.³⁸ Signed in December 2019, it imposed significant reporting obligations on New York's nursing home operators and increased the state health department's (DOH) oversight authority. Nursing home operators are required to:

- Disclose to DOH any "common or familial ownership" between the operator or facility and any entity or individual that provides services to the operator or the facility;³⁹
- Attest to the accuracy of such disclosures on an annual basis;⁴⁰
- Obtain DOH approval before guaranteeing the debt or other obligation of any third party;⁴¹ and
- Provide DOH with 90 days' notice prior to executing a letter of intent or other contractual agreement relating to any sale, mortgage, or encumbrance of the real property of the facility.⁴²

New Jersey

Early in the pandemic, New Jersey enlisted the Manatt Health consulting group to study the state's initial response to the pandemic in its nursing homes. In its report,⁴³ released June 2, 2020, Manatt set forth the key elements of a high-functioning, resilient long-term care system, including "a high degree of transparency across [the] system" and a "[r]eal-time use of data to inform interventions, educate the public and hold [the] industry accountable." The report provided a series of concrete near, intermediate, and longer-term recommendations for state

clarifying state's duty to review and approve ownership changes, and make ownership information more transparent to the public.

California AB 1953 signed into law in 2018, required reporting (effective January 1, 2020), by nursing homes and operators of ownership interests of 5% or more in a related-party, and to make several significant disclosures including the profit and loss statements of related parties' if goods, fees, and services were collectively worth \$10,000 or more per year.

³⁸ NY Public Health Law, Section 2803-X, *Requirements related to nursing homes and related assets and operations* (2020). Available at <https://www.nysenate.gov/legislation/laws/PBH/2803-X>.

³⁹ Id. § 2803, ¶ 1.

⁴⁰ Id. § 2803, ¶ 2.

⁴¹ Id. § 2803, ¶ 3.

⁴² Id. § 2803, ¶ 4.

⁴³ *Manatt*, "Recommendations to Strengthen the Resilience of New Jersey's Nursing Homes in the Wake of COVID19," (June 2, 2020). Available at <https://manatt.com/Manatt/media/Documents/NJ-LTC-Report.pdf>.

action to improve nursing home transparency. Many of these recommendations, including new procedures to regulate and monitor nursing home ownership, were quickly adopted by legislative champions and passed into law.⁴⁴

About one month after the release of the Manatt report, a strong ownership transparency bill, A4477 (S2789),⁴⁵ was introduced and eventually signed into law in May 2021. This law requires nursing home operators to provide:

- The names, addresses and organizational chart of companies intending to buy a facility,
- Any lease or management agreements,
- A list of all facilities the buyer has owned in the last five years, and
- Financial audits from the three years preceding the submission.

The legislation also requires any application for change in ownership to be posted on the health department's website. The state is also required to review the quality and safety record of the parties to the sale.

In January 2022, New Jersey Governor Murphy signed into law another transparency law, A4478 (S2759),⁴⁶ that further strengthens reporting to require nursing homes to publish on their websites owner-certified financial statements (or IRS Form 990's for non-profit homes), as well as their most recent cost reports. The law also requires the state health department to develop a special focus survey program for chronically poor performing nursing homes and authorizes the development of a system of escalating fines for repeated violations by a particular offender. The legislation also requires the state DOH to evaluate staffing levels in nursing homes.

California

In early 2021, California Advocates for Nursing Home Reform (CANHR), a statewide nonprofit consumer advocacy organization, crafted a package of seven bills to "improve state oversight, financial transparency, accountability, and ultimately enhance care for all residents."⁴⁷ This suite of legislative reforms, known as the Prioritize Responsible Ownership, Treatment, Equity and Corporate Transparency (PROTECT) Plan was intended to respond to the large number of COVID-19 related deaths in that state's nursing homes and the need to address the underlying issues of complex ownership models and the lack of transparency in the expenditure of public

⁴⁴ The Manatt report made numerous other recommendations beyond transparency, which were eventually enacted into law, including establishing a Minimum direct spending law. For more information on Minimum Direct Spending Laws, which have been enacted in additional states, see LTCCC's Brief, available at <https://nursinghome411.org/minimum-spending-laws/>.

⁴⁵ NJ Assembly Bill No. 4477 (2021). Available at <https://www.njleg.state.nj.us/bill-search/2020/A4477>.

⁴⁶ NJ Assembly Bill No. 4478 (originally introduced in 2020, signed by Governor Murphy in 2022). Available at <https://www.njleg.state.nj.us/bill-search/2020/A4478>.

⁴⁷ *California Advocates for Nursing Home Reform*, "A Once-in-a-Century Pandemic Yields a Once-in-a-Generation Chance for Reform: Introducing the 2021 Nursing Home PROTECT Plan," (2021). Available at http://www.canhr.org/publications/newsletters/Advocate/PDFs/Advocate_2021Q1.pdf.

funds. In October 2021, Governor Newsom signed five⁴⁸ of those bills into law.⁴⁹ (See the [Appendix](#) for CANHR’s original proposal, which includes three transparency provisions.)

A key component of the legislative package is SB 650,⁵⁰ also known as the Corporate Transparency in Elder Care Act of 2021. While existing state law required any “organization that operates, conducts, owns, or maintains a health facility” and its officers to file “specified reports relating to the facilities finances, including a balance sheet, detailing the assets, liabilities and net worth,” SB 650 significantly expanded the reporting requirements for nursing homes alone. This new law requires nursing homes to file with the state “an annual consolidated financial report that includes data from all operating entities, license holders, and related parties.”⁵¹ The filing must include a visual representation of the organizational structure. The law also requires a “duly authorized official of the organization to certify the report” and attest to its completeness. Furthermore, the state is to post these submitted reports and documents, which are considered public records, to its website.

California Governor Gavin Newsom also signed into law AB 1042⁵² which establishes shared liability for entities that share ownership or control of a nursing home. Under this law, related parties will be liable for, and the state is expressly authorized to seek repayment of, any unpaid fines and other fees due from related parties.

AB 1502,⁵³ still under consideration as of this writing,⁵⁴ establishes ownership suitability standards for nursing homes. The bill, which has passed the Assembly, would authorize the state to deny an application for a nursing home license, and to ban new admissions or to fine entities that continued to operate without an approved license. The bill is intended to close a

⁴⁸ *California Advocates for Nursing Home Reform*, “Press Release: Governor Newsom Signs Five of Six Nursing Home PROTECT Plan Reform Bills,” (October 8, 2021). Available at <https://canhrlegislation.com/press-release-governor-newsom-signs-five-of-six-nursing-home-protect-plan-reform-bills/>.

⁴⁹ Governor Newsom vetoed AB 279 dealing with resident evictions. AB 1502 was turned into a two-year bill.

⁵⁰ CA Senate Bill No. 650, *The Corporate Transparency in Elder Care Act* (2021). Available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB650.

⁵¹ Related parties” is broadly defined to include home offices, management organizations, owners of real estate, entities that provide staffing, therapy, pharmaceutical, marketing, administrative management, consulting, and insurance services; providers of supplies and equipment; financial advisors and consultants; banking and financial entities; any and all parent companies, holding companies, and sister organizations; and any entity in which an immediate family member of an owner of those organizations has an ownership interest of 5 percent or more. “Immediate family member” includes spouse, natural parent, child, sibling, adopted child, adoptive parent stepparent, stepchild, stepsister, stepbrother, father-in law, mother-in-law, sister-in-law, brother-in-law, son-in-law, daughter-in-law, grandparent, and grandchild.

⁵² CA Assembly Bill No. 1042, *Related Party Accountability* (2021). Available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1042.

⁵³ CA Assembly Bill No. 1502, *Nursing Home Ownership and Management Reform* (2021). Available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1502.

⁵⁴ June 2022.

major loophole in California law that currently allows entire nursing home chains to be purchased without state approval.

Florida

In 2021, Florida enacted legislation (s. 408.061, F.S)⁵⁵ to require nursing homes and their home offices⁵⁶ to report their actual expenditures and revenues annually. The data are required to be certified as complete and accurate by the chief financial officer and must include the fiscal year-end balance sheet, income statement, statement of cash flow, and statement of retained earnings.

Legislation to require these reports to be audited (HB 539⁵⁷) was passed by the legislature and signed into law on April 6. These provisions take effect July 1, 2022.

⁵⁵ FL s. 408.061, F.S. (2021). Available at <https://www.flsenate.gov/laws/statutes/2021/408.061>.

⁵⁶ *Home office* generally refers to an entity owns, leases or controls multiple providers or suppliers of a chain organization.

⁵⁷ FL House Bill 539, *Nursing Home Financial Reporting* (2022). Available at <https://www.flsenate.gov/Session/Bill/2022/539>.