Center for Medicare Advocacy
Advancing Access to Medicare and Health Care

May 17, 2024

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Secretary
U.S. Department of Health and Human Services
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Submitted via: www.regulations.gov, Docket No. ATR102

Dear Assistant Attorney General Kanter, Chair Khan, and Secretary Becerra:

The Center for Medicare Advocacy (Center) is a national, private, non-profit law organization, founded in 1986, that provides education, analysis, advocacy, and legal assistance to assist people nationwide, primarily the elderly and people with disabilities, to obtain necessary health care, therapy, and Medicare. The Center focuses on the needs of Medicare beneficiaries, people with chronic conditions, and those in need of long-term care and provides training regarding Medicare and health care rights throughout the country. It advocates on behalf of beneficiaries in administrative and legislative forums and serves as legal counsel in litigation of importance to Medicare beneficiaries and others seeking health coverage. These comments are based on the Center's experiences talking with and representing Medicare beneficiaries and their families and advocates.

The Federal Trade Commission and the Departments of Justice and Health and Human Services have "launched a cross-government public inquiry into private-equity and other corporations' increasing control over health care." The Center submits the following comments.

First, the Center supports the positions taken in the letter submitted by Americans for Financial Reform, Private Equity Stakeholder Project, and Community Catalyst, on behalf of many organizations. The Center focuses in this letter on two points – first, providing information on the devastating effects on nursing home residents of private equity takeovers of their facilities that have been documented for many years, and second, emphasizing our support for additional direct action by government against private equity and other private for-profit nursing home operators under their existing statutory authority, and calling for additional federal legislation to directly address and curb the harmful behavior of predatory owners.

Nursing facilities taken over by private equity harm residents and workers.

The public record is filled with academic studies and articles in the popular press detailing the detrimental effects on nursing home residents and workers of private equity's takeover of their facilities. A small sample is described here:

> Charles Duhigg, "At many privately owned U.S. nursing homes, more profit and less care," *The New York Times* (Sep. 24, 2007), describes the cost-cutting by private equity firms when they take over nursing homes – reducing the numbers of nursing staff, practices to hide ownership behind multiple companies, and enormous profits.
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> GAO, *Nursing Homes: Complexity of Private Investment Purchases Demonstrates Need for CMS to Improve the Usability and Completeness of Ownership Data*, GAO-10-710 (Sep. 2010), (private equity was called private investment in 2010) recommends the submission of more comprehensive ownership information and more useable and accurate public reporting of ownership information.
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> Rohit Pradhan, Robert Weech-Maldonado, Jeffrey S. Harman, Mona Al-Amin, Kathryn Hyer, "Private Equity Ownership of Nursing Homes: Implications for Quality," *Journal of Health Care Finance* page 10 (June/July 2014), includes link to full article.
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> > A longitudinal study of nursing facilities in Florida, 2000-2007, finds that nursing facilities acquired by private equity firms between 2002 and 2003 "have lower RN staffing and higher LPN staffing and CNA [certified nurse aides] staffing compared to other FP [for-profit] nursing homes. The change in nurse staffing pattern is reflected in the sharply lower skill mix of private equity nursing homes." The researchers "report a decline in RN staffing with every progressive year of private equity ownership." They recognize the importance of nurse staffing to the quality of care that facilities are able to provide to their residents and see nurse staffing as "a primary target for cost-savings." Consequently, they suggest, "Imposition of federal minimum staffing levels may be helpful and should be seriously considered by CMS."

> The researchers compared an experimental group – all 97 nursing homes acquired by private equity firms in Florida in 2002 and 2003 – with a control group – approximately 250 Medicare- and Medicaid-certified for-profit, chain affiliated, non-hospital-based nursing homes. *Id*. 5. Of the 97 facilities in the experimental group, Formation acquired 49 facilities from Beverly, 10 facilities from Genesis, and 20 facilities from Mariner; Senior Health Management LLC acquired 18 facilities from Kindred Healthcare. *Id*. 5, Table 1.
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> Researchers found that facilities controlled by private equity had lower registered nursing hours, provided lower quality of care (e.g., more pressure ulcers among residents), had more deficiencies cited by survey agencies, and "deliberately complex organizational structures [that] not only hinder the ability of regulators to monitor quality but also limit legal remedies available to aggrieved residents." *Id.* 11.

Atul Gupta, Sabrina T. Howell, Constantine Yannelis, and Abhinav Gupta, "Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes." (Feb. 2020; updated Nov. 2020) with link to full report.

> The researchers estimate that between 2000 and 2017, about 21,000 residents died because of private equity takeover of their nursing facilities. The researchers attribute the deaths to "declines in patient-level health measures, such as worsening mobility and elevated use of anti-psychotic medications; declines in nurse availability per patient; and declines in compliance with federal and state standards of care."

Eleanor Laise, "Private-equity takeover of nursing homes has reduced quality of care at critical moment, research suggests; for-profit ownership and private-equity backing of nursing homes, academic studies show, may weaken facilities' staffing levels and compliance with federal standards," *MarketWatch* (Mar. 14, 2020).

> Laise cites academic studies showing for-profit and private equity ownership of nursing facilities weakens staffing levels and is correlated with less compliance with federal standards of care.

Eleanor Laise, "As the Pandemic Struck, a Private-Equity Firm Went on a Nursing –Home Buying Spree," *Barron's* (Aug. 6, 2020),

> Laise discusses The Portopiccolo Group that was founded in 2016 and, by 2020, operated more than 100 facilities under various names, such as Accordius, Pelican Health, and Orchid Cove. At least 10% of Portopiccolo-affiliated facilities had been cited with infection control deficiencies during targeted infection control surveys since March 2020, more than three times the rate of nursing homes nationwide. Laise eports that among the 75 facilities listing Portopiccolo's CEO as an owner in federal regulatory data, 43% had one star, the lowest rating, compared to 17% of

facilities nationwide. Only three of the 75 facilities "exceed the national average total nurse staffing of 3.86 hours per resident day."

Americans for Financial Reform Education Fund, "The Deadly Combination of Private Equity and Nursing Homes During a Pandemic; New Jersey Case Study of Coronavirus at Private Equity Nursing Homes" (Aug. 2020).

> An analysis of COVID-19 in New Jersey nursing facilities by the Americans for Financial Reform Education Fund finds that while facilities operated by private equity firms account for 15% of the state's nursing facilities, they accounted for 20% of the coronavirus cases and deaths. 58.8% of residents in facilities owned by private equity firms contracted COVID-19, 24.5% higher than the statewide average. Private equity facilities in New Jersey provided 20% fewer hours of nursing care per resident per day and were cited with more deficiencies than nonprofit and public facilities.

Americans for Financial Reform Education Fund, Anti-Corruption Data Collective, Public Citizen, "Public Money for Private Equity; Pandemic Relief Went to Companies Backed by Private Equity Titans" (2022).

> The report finds that companies backed by private equity received 16,000 CARES Act loans or grants worth more than $5 billion. Report 39.

Eileen O'Grady (Private Equity Stakeholder Project), *Pulling Back the Veil on Today's Private Equity Ownership of Nursing Homes* (Jul. 21, 2021).

> "Private equity investors' outsized return expectations over short time horizons may lead to profit-seeking tactics that hurt patient care. High levels of debt left over from leveraged buyouts can leave nursing homes with less capital available for operations as more money is diverted to interest payments. Sale-leaseback transactions, where a company is made to sell its real estate to a third party and lease it back, can leave nursing homes with fewer assets and increased liabilities in the form of rent payments. Management fees and shareholder dividends can further bleed nursing home companies of money that could be invested into patient care." [Report, page 3.]
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> "The complex business structures used by many nursing home companies can obfuscate ownership and make it difficult to track quality and compliance across nursing homes with the same owner. These structures also allow owners to reap excessive profits while limiting financial transparency, primarily through use of related party services." [Report, page 4.]
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> "Nursing home companies often contract with third party entities that have the same owner to provide services and goods, such as management services, staffing, supplies, and lease agreements. These structures legally allow nursing home owners

to siphon money out of nursing facilities and hide profits. Nursing home owners can further boost profits by overpaying related parties." [Report, page 4.]

The Report concludes:

"Decades-worth of stories and data have revealed the devastating impacts of private equity ownership of nursing homes. Investors' outsized return expectations over short time horizons can lead to cost-cutting and risk-taking that endanger patients. The firms profiting off of the elderly are often secretive and escape liability for their activities." [Report, page 14.]

"In an industry that provides care to some of the most vulnerable communities and receives hundreds of billions of dollars of government money each year, it is critical that private equity cannot be allowed to continue to siphon money out of nursing homes at the expense of patients and health care workers." [Report, page 14.]

Stronger direct action by governmental authorities is needed.

The Center for Medicare Advocacy fully supports this statement in the letter by Americans for Financial Reform, Private Equity Stakeholder Project, and Community Catalyst:

> **I. Needed government action**
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> PE and health care are incompatible. Current trends of PE acquisition in many health care sectors point to spiraling prices, diminished access, and declining quality, including unnecessary illness, injury, and death. Further, the essence of health care — an ethical commitment by autonomous, highly trained professionals to the improvement and well-being of their patients and clients — is undermined by PE's financialization strategies that emphasize maximizing profits above all. The United States already trails peer nations in the quality and outcomes produced by its health care system, while simultaneously leading the world in the cost of its care. Further consolidation, exemplified by PE firms' activities, will make this worse. The three agencies must use the full extent of their regulatory and enforcement authority to meet this challenge by changing the incentives that attract PE to health care and making a grim future less likely.

The Center also supports the demands for increased transparency and meaningful public reporting and for the FTC and the Departments of Justice and Health and Human Services to use their authority fully to hold private equity firms accountable.

The Center's additional comments follow:

1. **CMS should deny federal certification to nursing facility operators with a history of providing poor care.**

The Centers for Medicare & Medicaid Services (CMS) should use its existing statutory authority to prevent all nursing facility operators with records of poor quality of care from being certified

for Medicare and Medicaid to operate additional facilities. The Nursing Home Reform Law (42 U.S.C. §§1395i-3(f)(1), 1396r(f)(1), Medicare and Medicaid, respectively) defines as the Secretary's "duty and responsibility . . . to assure that the requirements governing skilled nursing facilities . . . , and the enforcement of such requirements, are adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys." Setting appropriate standards of care, enforcing them, and spending public money appropriately are three distinct, but complementary, responsibilities that give the Secretary broad and comprehensive authority to set federal standards for certification. At present, however, CMS essentially takes the position that state licensure is a sufficient basis for certification and imposes only two minimal conditions for certification (disclosing ownership interests and having a quality assessment and assurance committee).

Law Professor Nina Kohn demonstrates in "Using What We Have: How Existing Legal Authorities Can Help Fix American's Nursing Home Crisis," 65 *Wm. &Mary L. Rev*. 127 (2023) (full article available through link) that CMS should use the longstanding statutory authority at 42 U.S.C. §§1395i-3(d)(1)(A), 1396r(d)(1)(A), 1395i-3(f)(5), 1396r(f)(5) and the provisions quoted above "to steer public funds away from nursing homes owned or operated by entities with a history of abuse and neglect" and "to deny certification to facilities that are governed or managed by entities that have shown they are unlikely to administer them in a way that will provide residents with the required quality of care." Article pages 143, 145. She concludes:

> Denying certification to facilities owned or operated by entities with a history of endangering residents is therefore consistent with the Secretary's statutory mandate to refrain from certifying facilities that are not administered in a way that enables them to provide residents with high-quality care.

Id. 146.

2. **CMS should require nursing facilities to submit audited Medicare cost reports and should conduct audits of a sample of them.**

Medicare cost reports receive little if any scrutiny by federal regulators, resulting in the submission of cost reports that are blank, incomplete, or inaccurate. The National Consumer Voice for Quality Long-Term Care, *Where Do the Billions of Dollars Go? A Look at Nursing Home Related Party Transactions* (2023). Requiring facilities to have (and submit for federal review and audit) cost reports that have been audited by a certified accounting firm would improve the facilities' accountability for their reports' accuracy. The government should also audit a sample of cost reports (both a random sample and cost reports that appear most problematic) and enforce existing requirements that identify costs that can be charged to the Medicare program. Charlene Harrington and Toby S. Edelman, "Private Equity and Nursing Home Care: What Policies Can Be Adopted to Address the Growing Problems?" *Public Policy & Aging Report*, 2023, 33, 44-48 (Apr. 2023).

Additional statutory authority

In addition, the Center proposes that the Administration and its agencies and Departments seek additional statutory authority to address private equity and other predatory operators.

1. **Congress should give CMS authority to conduct enforcement on a corporate-wide basis.**

CMS currently imposes remedies against facilities that are cited with deficiencies one facility at a time. It does not take enforcement action against facilities based on common ownership, even though it now compiles and publicly reports consolidated information about nursing homes that have common ownership ("affiliated entities").

Policies affecting spending and quality of care are often made at the highest corporate levels, not by individual facilities or their administrators. As a result, the poor care seen in one facility often reflects corporate policies that affect all facilities under common ownership. Using information about common ownership both to determine when to conduct surveys of facilities and to impose penalties is feasible. Although CMS and state survey agencies already have authority under the 1987 Nursing Home Reform Law to determine the timing of surveys based on facility performance (the law requires that standard (annual) surveys be conducted on a nine to 15-month cycle, averaging 12 months), they need new statutory authority for corporate-wide enforcement.

There is a model for corporate-wide enforcement in Florida law, Chapter 408, Part II. Florida Statutes 408.815 authorizes the state to revoke the licenses from multiple facilities under common ownership if one of the facilities is subject to significant regulatory enforcement.

Florida invoked this statutory authority in 2018 when it threatened to close all 53 of Consulate Health Care's Florida nursing facilities. In settlement, the state put eight of the 53 facilities under close state review, but included in the settlement, a provision, as described in Christopher Guinn, "55 nursing home licenses spared by agreement," *The Ledger* (Apr. 20, 2018), stating that "if any nursing home on the list experiences a problem that leads to the death of a resident, or injury or harm that requires admittance to a hospital, the company will be obligated to sell the facility to a new owner." Strong and meaningful enforcement on a corporate-wide basis can be effective, remove the poorest performing operators, and make a difference.

2. **Congress should enact legislation for nursing facilities to require direct care ratios.**

One way to discourage predatory operators from operating nursing facilities is to require, by law, and to fully and effectively enforce, requirements that facilities spend designated portions of their public reimbursement on care for residents and limit profits to designated percentages ("direct care ratios"). Several states have enacted direct care ratio laws to ensure that public reimbursement is more directly focused on resident care.

In 2021, New York enacted a state budget law requiring nursing facilities to spend 70% of their revenue on resident care, including 40% of resident-facing care, and limiting profits to 5%.

The nursing home industry filed two lawsuits challenging the law, asserting virtually identical legal claims, including violation of the Fifth and Fourteenth Amendments and the Supremacy Clause, federal preemption, and excessive fines, in violation of the Eighth Amendment. LeadingAge New York, the association representing 180 not-for-profit and government facilities, filed its case in state court, *LeadingAge New York Inc. v. Kathy Hochul*, Index No.: 903920-22 (State of New York

Supreme Court, Albany Court). Two hundred fifty individually-named facilities and three trade associations filed their challenge in federal court, *Home for the Aged of the Little Sisters of the Poor v. McDonald*, No. 1:21-cv-1384 (BKS/CFH) (N.D.N.Y. Jan. 9, 2024). In decisions issued two weeks apart, both courts rejected nursing homes' claims and dismissed the complaints – the state Decision and Order on December 28, 2023, and the federal Memorandum-Decision and Order, on January 9, 2024.

Direct care ratio laws fulfilling the Secretary's statutory duties under the 1987 Nursing Home Reform Law can withstand constitutional challenge.

3. **Congress should give federal officials explicit authority to approve or disapprove purchases by private equity.**

A.B. 3129, a bill in California, would require the State Attorney General to review and give (or deny) approval to private equity firms seeking to buy health care facilities. Federal legislation could give comparable authority to the U.S. Attorney General or a federal agency.

As amended on April 24, 2024, https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202320240AB3129&showamends=false, A.B. 3129 requires a private equity group or hedge fund to give

> written notice to, and obtain the written consent of, the Attorney General prior to a change of control or acquisition between the private equity group or hedge fund and a health care facility or provider group]with revenues of $4,000,000]. The notice shall be submitted at the same time that any other state or federal agency is notified pursuant to state or federal law, and otherwise shall be provided at least 90 days before the change in control or acquisition, and shall contain information sufficient to evaluate the nature of the acquisition or change of control and information sufficient for the Attorney General to determine that the criteria set forth in subdivisions (a) and (b) of Section 1190.20 have been met or that a waiver may be granted pursuant to subdivision (f).

A.B. 3129 gives the Attorney General the authority to grant, deny, or impose conditions on the transaction. The bill is discussed in Andrew Oxford, "California Eyes Oversight of Private Equity Health Care Deals," *Bloomberg Law* (Feb. 29, 2024).

4. **Congress must prohibit/regulate the financial incentives that private equity currently enjoys.**

Congressional hearings investigating private equity's role in nursing homes (and other health care providers) create a clear record of the dangers of private equity ownership. Comprehensive federal legislation could eliminate, or at least reduce, the financial incentives, including federal tax incentives, that private equity firms currently enjoy. Americans for Financial Reform, "The Stop Wall Street Looting Act: End Private Equity's Predatory Practices" (Aug. 2021).

The Stop Wall Street Looting Act, H.R. 5648, 117th Congress,

https://www.congress.gov/bill/117th-congress/senate-bill/3022/all-info, proposed closing various loopholes that currently insulate private equity firms from risk while enabling them to make large profits, making private equity firms responsible for company liabilities, and protecting workers and investors. "Baldwin, Warren, Brown, Colleagues Reintroduce Bold Legislation to Fundamentally Reform the Private Equity Industry" (Press Release, Oct. 20, 2021).

Conclusion

The ownership of nursing homes (and other health care providers) by private equity firms and other predatory for-profit privately-held owners endangers those who receive care from their facilities, their workers, and all taxpayers. The Federal Government needs to use all existing authority more effectively and to seek additional statutory authority to protect the public interest. We need to do more than study the issues. We need strong action as quickly as possible to protect the public.

Thank you for the opportunity to submit comments.

Sincerely,

Toby S. Edelman
Senior Policy Attorney