June 3, 2024

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

The U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: Request for Information on Consolidation in Health Care Markets (RFI)
Federal eRulemaking Portal - Docket No. ATR 102

To Whom It May Concern:

Thank you for the opportunity to submit comments regarding the consolidation in health care markets as part of your agencies' request for information (RFI). As the largest association representing America's long term and post-acute care facilities, the American Health Care Association/National Center for Assisted Living (AHCA/NCAL)'s mission is to improve lives by delivering solutions for quality care, and we stand ready to work with the Administration and Congress on productive policies that support our unique population. Our members provide essential care to millions of individuals in America's nursing homes, assisted living communities, and centers for individuals with intellectual and developmental disabilities (ID/DD).

It is no secret that how America finances long term care is broken. It's too expensive for most people, so many seniors and individuals with disabilities must spend down their assets to qualify for Medicaid. However, Medicaid is notoriously underfunded and not always available to individuals unless they require skilled nursing-level care. It is really challenging because long term care combines housing, health care, and social services, and the vast majority of Americans can't afford to plan for this expense.

This vital sector of the health care industry and senior living needs significant investments to expand access and support our workforce, services, and infrastructure. There is a critical need for

access to adequate capital in the U.S. health care system, and specifically long term care, for it to function efficiently and effectively. With a rapidly growing elderly population, now is the time for federal policymakers to incentivize investment in long term care and advance public-private partnerships.

We support financial transparency, ensuring federal and state dollars are being used appropriately, and proper accountability if they are not. However, neither ownership nor line items on a financial statement prove whether a health care provider is committed to its patients. To truly transform long term care, we must focus on supportive solutions that help address the growing caregiver shortage and chronic government underfunding. Meanwhile, we believe accountability can be achieved by incentivizing providers and investors across the health care spectrum to focus on the metrics that matter for their patients and residents' quality of life.

The RFI seeks comment on the effect of transactions involving health care providers, facilities, and ancillary products or services, conducted by private equity and other capital providers. It seeks comments on the effects on the health care market including patients, communities, payers, employers, providers, and other health care workers and businesses.

We would like to take this opportunity to address some misconceptions policymakers and stakeholders may have about various financial matters and business structures within the long term and post-acute care sector in hopes that it will help inform the RFI and this important national discussion about the role of private capital in health care.

Private Equity

Private Equity (PE) is defined as publicly or non-publicly traded companies that collect capital from large investors, purchase an ownership share of a provider, and collect capital from their investments.[1] In the nursing home sector, the role of PE firms has diminished over the years to a minuscule level today (less than 5 percent).[2] PE investments largely happened a decade or more ago but were unsuccessful, and many of the larger PE firms have since left the nursing home sector. Since 2015, nursing homes make up an extremely small proportion of PE capital and deals (less than 10 percent) in the entire health care system. More recently, PE investors have moved into non-hospital-based physician specialties: dermatology, dental practice management, case management, ophthalmology, and orthopedics – as well as behavioral health.[3]

Owners of long term care facilities are extremely diverse and are often run by Main Street, not Wall Street. Nearly half of nursing homes are owned by independent operators with 10 or less facilities, of which, more than one-third (34 percent) are standalone, single property operators. Even the ten largest nursing home operators account for only 10.7 percent of the nation's nursing

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[1] Centers For Medicare & Medicaid Services. (2023). Medicare and Medicaid Programs; Disclosures of Ownership and Additional Disclosable Parties Information for Skilled Nursing Facilities and Nursing Facilities. Proposed Rule. HT Digital Streams Limited.

[2] JAMA (2020). Comparative Performance of Private Equity–Owned US Nursing Homes During the COVID-19 Pandemic.

[3] Center for Economic and Policy Research (2020). "Private Equity Buyouts in Healthcare: Who Wins, Who Loses?"

home beds.[4] Meanwhile, nearly 40 percent of residential care facilities, also considered assisted living communities, are single property operators.[5] Now is the time for federal policymakers to focus on supporting this profession, many of whom are small businesses, by finding ways to increase their access to capital.

Real Estate Investment Trusts

Real Estate Investment Trusts (REITs) are publicly or non-publicly traded companies that invest in or fully own the real estate of income producing properties. REITs are one source of long-term property financing for nursing homes and assisted living communities. Similar to PE firms, REITs have a relatively small footprint in the long term care sector. REITs hold investments in a 12 percent of U.S. nursing homes and 9 percent of senior housing/assisted living communities.[6]

There are two types of REIT relationships with long term care facilities: 1) a triple net lease structure (NNN) and 2) a joint venture structure. The triple net lease structure is the most common of the two and represents a majority of relationships with long term care facilities. A REIT purchases the land and building(s), and the provider becomes a tenant. The tenant then pays rent to the REIT while still running the day-to-day operations of the long term care facility. The REIT does not have any direct control or influence on the daily operations of the long term care facility. The less common joint venture structure provides exposure for REITs to the financial performance and healthcare operations of the properties they acquire.

Similar to other private investors, REITs can create efficiencies for operators, invest in building improvements, expand the role of technology, and allow providers to focus on customer experience and clinical care, rather than real estate. They can assist their operators with group purchasing capabilities, including personal protective equipment (PPE) and testing/medical equipment, which was lifesaving during the pandemic. Additionally, REITs can be a source of financing for new owners, including young professionals, with little capital to get into the long term care field. This is crucial as we aim to recruit the next generation of care professionals and leaders who may not have the resources to purchase a facility.

REITs can also assist long term care providers in serving more vulnerable individuals in underserved communities as well as support quality improvement efforts. An AHCA/NCAL internal analysis found that REIT-owned skilled nursing facilities (SNFs) tend to have a higher proportion of residents on Medicaid (64 percent) compared to other ownership types. These REIT-owned SNFs also have the highest average Five-Star Quality ratings. We also have assisted living members that predominantly serve residents who rely on Medicaid—a unique model given that Medicaid does not guarantee assisted living services—thanks in part due to their relationship with REITs.

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[4] ASPE Office of Health Policy (2022). Ownership of Skilled Nursing Facilities: An Analysis of Newly-Released Federal Data.
[5] National Center for Health Statistics (2020). Biennial Overview of Post-acute and Long-term Care in the United States.
[6] JAMA (2022). Trends in Real Estate Investment Trust Ownership of US Health Care Properties.

In recent times during the pandemic, REITS demonstrated a record of supporting the communities in which they invest. It was common to hear of reduced/abated rent and a reduction in interest collections; and helping communities source PPE. Others provided resources for full-time employees (as an unreimbursed cost to the REIT) to assist providers during the most intensive months of staff and resource need. They helped their partners access information about COVID and provided regulatory updates. These constructive relationships continue today.

Long term care is on the precipice of a crisis where demand for long term care will exceed supply. We believe a strong public-private partnership is part of the solution, one where the federal government encourages investments, including from REITs, to ensure access to care.

Related Parties

Related parties are common across a variety of industries, including health care. Related parties are entities commonly owned that are subject to control or shared control. Related parties may be individuals, parent companies, subsidiaries, joint ventures, or other companies organized, and created under multiple forms of legal entities.

In long term and post-acute care, related parties can create efficiencies and streamline services for residents. When providers diversify their portfolio, we often see them offering ancillary services, such as therapy, pharmacy, and home health. It is because these providers have a unique perspective and on-the-ground experience on how best to serve our long term care population. Additionally, creating efficiencies does not mean cutting corners—it could mean using a management company to do the accounting rather than hiring a full-time accountant, or hiring a regional nurse to help support multiple buildings. Furthermore, the federal government *requires* long term care providers to create related party entities if the provider has financing through the U.S. Department of Housing and Urban Development, in order to separate the bricks and mortar from the operations.

We are concerned that many are misconstruing these transactions without a real understanding of basic business principles or how to interpret cost reports. At a rudimentary level, revenues earned by related and third parties for providing services will exceed costs. We don't expect doctors, dentists, hospitals, and other health care providers to offer their services at cost. That would mean that these services were breaking even, and it would be difficult to remain viable or make critical improvements. Additionally, there is no evidence that nationwide, related parties are charging significantly more than other non-related third-party services. It is highly plausible that these are the going market rates for these services. Moreover, the amount of nursing homes that have related party relationships may be inflated. Nursing homes must report any related parties where they have at least a five percent ownership stake—a very low threshold.

The sad truth is that because long term care is chronically underfunded and a difficult business to operate, ancillary services sometimes help keep these facilities afloat. For years, the average nursing home has been operating with a negative or barely break-even margin, including in 2020 and 2021 when the sector received pandemic relief funding from the federal government.

Table 1. Freestanding SNFs' all-payer total margins 2018-2022

	2018	2019	2020	2021	2022
All-payer margin	-0.3%	0.6%	3.1%	3.4%	-1.4%
Non-Medicare margin	-3.2%	-2.2%	-0.8%	0.1	-6.5%

Source: MedPAC March 2024 Report to the Congress: Medicare Payment Policy

This is largely due to the fact that in many states, Medicaid is chronically underfunded. In 2019, Medicaid failed to cover actual, allowable costs for 80 percent of the nation's nursing homes, and the median facility only had 86 percent of their actual costs reimbursed by the program.[7] More than 6 in 10 nursing home residents rely on Medicaid, so this lack of funding makes it difficult for many providers to keep their doors open, let alone make investments in their operations.[8]

Since the pandemic, nearly 600 nursing homes have closed, and more than 45,000 beds have come offline. The pace of decline in the total number of nursing homes and beds is four times faster than pre-pandemic.[9]

Related parties can be a lifeline for many long term care providers who are committed to serving our nation's seniors and individuals with disabilities, but need other, more viable opportunities to remain in operation. However, as stated earlier, not all long term care providers are equipped to offer these ancillary services—many are small, mom and pop organizations. It is critical that federal policymakers avoid policies that make blanket assumptions or impose blanket requirements when it comes to this standard business practice.

Changes in Ownership

Given that your federal agencies are requesting information about the consolidation in health care markets, change of ownership (CHOW) is another critical topic.

A recent report from HHS concluded that between 2016-2021, CHOW was much more common in nursing homes than hospitals. Researchers found that more than 3,000 SNFs experienced a CHOW.[10] What policymakers failed to recognize is that these alarming trends are not indicative of a quest to consolidate the SNF profession, but of the pervasive challenge of running these buildings. Federal policymakers examined these nursing facilities' overall quality star ratings, but not their overall margins, like they did for hospitals. SNF margins are affected by reductions in reimbursement levels from government programs and Health Plans, and cost changes which cannot be controlled.

Federal researchers also found that the majority (62.3%) of SNFs that were purchased had a single organizational owner. This should come as little surprise, as independent owners and

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[7] MACPAC Estimates of Medicaid Nursing Facility Payments Relative to Costs (January 2023).
[8] Kaiser Family Foundation Distribution of Certified Nursing Facility Residents by Primary Payer Source (2023).
[9] AHCA/NCAL Access to Care Report (August 2023).
[10] ASPE, Changes of Ownership of Hospital and Skilled Nursing Facilities: An Analysis of Newly-Released CMS Data, April 2022

operators have fewer resources to manage market instability, compared to regional and larger-sized companies and those with diversified, ancillary services.
The reality is that it is really challenging to run a long term care facility, especially in the wake of the pandemic. High labor costs, soaring inflation, slow-to-rebound occupancy rates, unclear interest rates, regulatory uncertainty, and low Medicaid reimbursement are being felt across the sector. Healthcare bankruptcies were their highest in five years in 2023, and senior living and pharmaceuticals accounted for half of the industry's Chapter 11 filings.[11]

We encourage federal policymakers to avoid jumping to conclusions about the long term care and senior living industry when it comes to mergers and acquisitions. These dealings are more indicative of the lack of government support, and the need for more stable and sustainable reimbursement systems as well as private capital to prevent this volatility in the sector. We support encouraging competition and fostering a market where providers who are passionate about serving seniors—no matter their profile—have a more viable path to live out their mission.

Ownership Reporting

We support financial transparency, and nursing homes report ownership and financing through a vast array of current requirements. In November 2023, the Biden Administration finalized a rule to increase transparency of nursing home ownership, which went into effect in January 2024.[12] We appreciate the Administration's efforts to assist families in making more informed decisions. Given that these new financial reporting requirements only went into effect earlier this year and are still being implemented, we would encourage Congress to evaluate the effects of this final rule before proposing additional reporting requirements. We must ensure that adequate reporting does not turn into burdensome paperwork. This will not drive quality care in America's long term care facilities, nor the larger health care system.

We also want to reiterate that ownership status does not prove whether a long-term care facility, senior living community, or any health care provider is committed to its residents or patients. AHCA/NCAL is proud to represent both not-for-profit and for-profit long term care providers, and our focus is on improving the quality of care in all facilities, no matter their business structure. This is why we developed our National Quality Awards Program, based on the Baldrige Criteria for Performance Excellence. And over the decades, we've found that strong organizations tend to have supportive and trusted leadership as well as a staff culture that empowers frontline caregivers to think critically and solve problems. These characteristics are not unique to a specific type or size of provider.

Again, we urge federal policymakers to remain focused on incentivizing providers and investors to improve on the metrics that drive quality outcomes for their patients and residents.

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[11] McKnight's Senior Living, "Senior living and care among leaders in healthcare bankruptcies in 2023," January 26, 2024.
[12] Centers for Medicare and Medicaid Services (2023). Fact Sheet: Disclosures of Ownership and Additional Disclosable Parties Information for Skilled Nursing Facilities and Nursing Facilities.

Final Thoughts

The federal government plays a pivotal role in investing in our long term care system. Millions of seniors and individuals with disabilities rely on Medicare and Medicaid to receive this life-affirming care. Ensuring reasonable transparency and accountability of those resources is also a key duty of the federal and state governments. Yet, private capital can also support our long term care, senior living, and other health care providers, especially when government resources are limited or lacking. In assisted living specifically, where there is little government funding available, private capital is crucial to developing high-quality services and communities to our residents, and they and their families enjoy a high level of satisfaction thanks in part to those investments.

We encourage the Administration and Congress to find a proper balance of oversight while still encouraging more investments in our health care system. With the proper incentivizes, we can ensure investors are coming into the health care space for the right reasons, producing great outcomes for residents and patients, modernizing our services and buildings, and expanding access to a growing elderly and individuals with ID/DD population.

We look forward to working with you and other policymakers to develop these solutions and make our health care system the best in the world. Please do not hesitate to contact me at MAllen@AHCA.org if you have any questions or would like to meet to further discuss our comments.

Sincerely,

Martin Allen
Senior Vice President of Reimbursement Policy
AHCA/NCAL