The National CONSUMER VOICE for Quality Long-Term Care formerly NCCNHR

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Senate Committee on Finance
Attn: Editorial and Document Section
Rm. SD-219
Dirksen Senate Office Bldg.
Washington, DC 20510-6200

RE: Statement for the Record
A National Tragedy: COVID-19 in the Nation's Nursing Homes
Hearing before the U.S. Senate Committee on Finance
March 17, 2021

Dear Chairman Wyden, Ranking Member Crapo, and Members of the Committee:

The National Consumer Voice for Quality Long-Term Care, Community Legal Services of Philadelphia, and the Michigan Elder Justice Initiative would like to thank Chairman Wyden and Ranking Member Crapo for holding this hearing on the devastating impact of the COVID-19 pandemic on nursing home residents

Our organizations advocate for quality care, quality of life, and the rights of nursing home residents and other long-term care consumers. We appreciate the opportunity to share our input on this critical issue with the Committee.

No group of Americans has suffered from COVID-19 more than nursing home residents. Over 130,000[1] residents have died from COVID-19, while over 1.1 million residents and staff have been infected.[2] At the same time, countless others have suffered from isolation and neglect. An Associated Press article[3] from November 2020 estimated that there had been over 40,000 excess deaths in 2020 compared to 2019 that were not attributable to COVID-19. That number is likely much higher now. Adding to the suffering, one year after nursing homes were locked down, tens of thousands of nursing home residents continue to have extremely limited, if any, in-person contact with their families and loved ones.

These numbers are even more tragic because much of this suffering and death could have been prevented. Years of insufficient staffing and the nursing home industry's focus on profits over residents, combined with the slow and inadequate federal response to the pandemic in long-term care facilities created a perfect storm resulting in tragedy. COVID-19 has also exposed the failures of nursing homes to care for and protect residents adequately. Without significant policy changes, long-standing problems will continue, future pandemics will be equally devastating, and residents will be the ones who suffer and die.

We urge Congress to:

- Initiate an investigation into the devastating impact of COVID-19 on nursing home residents.

[1] https://data.cms.gov/stories/s/COVID-19-Nursing-Home-Data/bkwz-xpvg/
[2] Both numbers are an undercount. CMS did not require nursing homes to start reporting data regarding COVID-19 cases and deaths until May 8, 2020 and did not require facilities to report COVID-19 data back to the beginning of the pandemic. Other totals, such as the New York Times, are much higher. However, the Times total includes all long-term care facilities, for instance, assisted living facilities, and not just nursing homes.
[3] https://apnews.com/article/nursing-homes-neglect-death-surge-3b74a2202140c5a6b5cf05cdf0ea4f32

- Support nursing home staff by requiring minimum staffing standards, training, and increased wages and benefits.
- Require the rescission of all waivers of nursing home regulations established during the Public Health Emergency.
- Ensure access to COVID-19 vaccines for all residents and staff who choose to be vaccinated.
- Ensure protection from COVID-19 for residents and staff by ensuring ongoing access to PPE and testing.
- Fully restore visitation in nursing homes.
- Reinstate standard and complaint surveys and strengthen regulations and enforcement.
- Require transparency and accountability around nursing home ownership and finances.
- Address disparities in care for racial and ethnic minorities.
- Expand choice through the expansion of Medicaid Home and Community Based Services.

Many of these recommendations will have the immediate effect of preventing further harm from COVID-19 while also having the long-term benefit of increasing the overall quality of care and preventing a recurrence of the devastation wrought by COVID-19 in the future.

I. Investigate the Full Impact of the COVID-19 Pandemic on Residents of Long-Term Care Facilities, Including the Disproportionate Impact on People of Color

Before the pandemic, 82% of nursing homes in the United States had been cited for an infection control violation, with 50% of those homes having repeated problems[4]. The deadly impact on nursing home residents from infections has long been known. Infections have been a leading cause of morbidity and mortality among nursing home residents, with 1.6 million to 3.8 million infections per year before the pandemic.[5] Yet, many nursing homes were utterly unprepared to prevent the spread of infectious disease among residents. In August 2020, five months into the pandemic, former CMS Administrator Seema Verma noted that nursing home inspections continued to find widespread failures in basic infection control procedures, such as handwashing.[6]

From the outset, the industry has asserted that since COVID-19 rates in the community heightened the risk of spread in the facility, there was little it could do to protect residents. This claim has been proven inaccurate by numerous studies that show that similarly situated nursing homes that invested in staffing and care quality did better than homes that did not.[7] Recently, the New York Attorney General released a report[8] finding that a facility's prior history of inadequate staffing was more predictive of outcomes than other factors, including its geographic location.

COVID-19 has had a disparate impact on nursing home residents of color. Data shows that homes with large populations of Black and Latinx residents were disproportionately affected compared to other homes.[9] Congress must ensure that the causes of these disparities are investigated and addressed.

CMS was slow to require transparency of conditions in nursing homes as a result of the pandemic. It was not until May 2020 that CMS required all facilities to report data to the CDC about COVID infections, deaths, etc., and it failed to require the reporting retroactively. As a result, there is little data from the months before May, when tens of thousands of residents contracted COVID-19 and died. At the same time, CMS waived facility reporting of staffing

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[4] https://www.gao.gov/products/gao-20-576r

[5] Richards, C. Infections in residents of long-term care facilities: An agenda for research. Report of an Expert Panel. 50 *JAGS*. 570–576 (2002).

[6] https://skillednursingnews.com/2020/08/cms-targets-infection-control-in-new-nursing-home-training-program/

[7] Figueroa, J.F., Wadhere, R.K., Papanicolas, I., Riley, K., Zheng, J., Orav, E.J. and Jha, A.K.. Association of nursing home ratings on health inspections, quality of care, and nurse staffing with COVID-19 Cases. *JAMA:* (2020): August 10, E1-E2; He, M., Li, Y., and Fang, F. Is there a link between nursing home reported quality and COVID-19 cases? Evidence from California skilled nursing facilities. *JAMDA*. 2020: 905-908; Li, Y., Tempkin-Greener, H., Shan, G. and Cai, X. COVID-19 infections and deaths among Connecticut nursing home residents: facility correlates. *JAGS:* June 18, 2020.

[8] https://ag.ny.gov/sites/default/files/2021-nursinghomesreport.pdf

[9] Li, Y., et, al, Racial and Ethnic Disparities in COVID-19 Infections and Deaths Across U.S. Nursing Homes, *Journal of American Geriatric Society*, 2020 Nov., 68(11):2454-2461; NY Times, https://www.nytimes.com/article/coronavirus-nursing-homes-racial-disparity.html?action=click&module=Well&pgtype=Homepage&section=US%20News

data to the Payroll-Based Journal and delayed reporting assessment data. Complete reporting is essential to establish an accurate and complete picture of what occurred during this time. It is vital to have this information to learn from early failures and help ensure they do not recur. We urge Congress to investigate the effect of COVID-19 on nursing home residents thoroughly. Any investigation should include recommendations to improve care quality and prevent a recurrence of the nursing homes crisis.

II. Support the Long-Term Care Workforce Through Minimum Staffing Standards, Training, and Increased Wages and Benefits.

Staffing

Since CMS began releasing weekly data in May 2020, on average, 19% of nursing homes have reported a shortage of nurse aides, while 16% reported a shortage in nurses.[10] Over 554,000 nursing home staff have been infected with COVID-19, and at least 1,625 have died.[11] Many workers have resigned due to fear of contracting COVID, family and caregiving responsibilities that have increased during the pandemic, or frustration due to untenable working conditions. These factors exacerbated insufficient staffing levels that pre-dated the pandemic and placed workers in impossible situations and residents at risk of harm.

The federal government does not require minimum staffing levels, and as a result, inadequate staffing has long been a problem in nursing facilities. Numerous studies have linked higher staffing levels to better care.[12] CMS's own study on appropriate staffing found a clear association between nurse staffing levels and quality care.[13] Insufficient staffing proved deadly during the pandemic, with studies showing that facilities with higher staffing levels and ratings fared better on controlling COVID-19 spread and resident outcomes than poorly staffed homes.[14]

Before the pandemic, RN presence was directly related to quality care and better outcomes for residents.[15] It also proved to be predictive of outcomes during the pandemic, as homes with total RN staffing levels under the recommended minimum standard (.75 hours per resident day) had a two times greater probability of having COVID-19 infections.[16] Yet, nursing homes are only required to have an RN present 8 hours daily.

Training

Early in the pandemic, the previous administration waived the requirement that nurse aides meet training and certification requirements[17] during the Public Health Emergency. CMS claimed that the waiver was necessary to address staff shortages. In reality, the waiver resulted in Temporary Nurse Aides (TNAs) who were ill-equipped to provide necessary care and services to residents and put the workers and residents at increased risk of injury. TNAs who had not been trained in proper infection control entered a medical setting where protecting residents from infectious disease was paramount.

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[10] https://data.cms.gov/stories/s/bkwz-xpvg

[11] Id.

[12] Castle. N.G., Wagner, L.M., Ferguson, J.C., & Handler, S.M. Nursing home deficiency citations for safety. *J. Aging and Social Policy,* 2011; 23 (1):34-57.Castle, N.G. & Anderson, R.A. Caregiver staffing in nursing homes and their influence on quality of care. *Medical Care.* 2011:49(6):545-552; Schnelle, J.F., Simmons, S.F., Harrington, C., Cadogan, M., Garcia, E., & Bates-Jensen, B. Relationship of nursing home staffing to quality of care? *Health Serv Res.* 2004: 39 (2):225-250. Spector, W.D., Limcangco, R., Williams, C., Rhodes, W. & Hurd, D. Potentially avoidable hospitalizations for elderly long-stay residents in nursing homes. *Med Care.* 2013: 51 (8):673-81.

[13] Centers for Medicare and Medicaid Services, Abt Associates Inc. Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes. Report to Congress: Phase II Final. Volumes I-III. Baltimore, MD.

[14] Li, et. al, 2020, *COVID-19 Infections and Deaths Among Connecticut Nursing Home Resident: Facility Correlates*; Journal of the American Geriatrics Society, Vol. 68, Issue 10, 2153-2162.

[15] Dellefield, M.E., Castle, N.G., McGilton, K.S., & Spilsbury, K. The relationship between registered nurses and nursing home quality: An integrative review (2008-2014). *Nurs Econ.* 2015; 33(2):95-108, 116.b

[16] Harrington, et. al., 2020, Nursing Staffing and Coronavirus Infections in California Nursing Homes; *Policy Politics & Nursing Practice*, 2020, Vol. 21(3) 174-86.

[17] https://www.cms.gov/files/document/summary-covid-19-emergency-declaration-waivers.pdf

To date, this waiver is still in place, and proposals exist at the state and federal levels for waving the training and certification requirements for these workers permanently. If the pandemic has taught us anything, it is that more training is needed, not less.

It is also unclear how many untrained and uncertified workers have fallen under this waiver and how much training and supervision they have had. In fact, it is doubtful whether CMS will be able to determine the total number. It would be highly irresponsible to waive these requirements without knowing how many staff, and in turn, residents will be affected.

The current training requirements for CNAs are inadequate as well. CNAs have more contact with residents than any other staff members. However, federal training requirements for CNA certification are only 75 hours. Increasing acuity and complexity of residents' needs, including higher incidences of dementia, warrant a need for increased training standards. In its report on the adequacy of the healthcare workforce for older Americans (*Retooling for an Aging America*, 2008), the National Academy of Medicine (formerly the Institute of Medicine) recommends that "federal requirements for the minimum training of certified nursing assistants (CNAs) and home health aides should be raised to at least 120 hours and should include demonstration of competence in the care of older adults as a criterion for certification" (Recommendation 5-1).

Increased Wages and Benefits

A report[18] released by Leading Age, an organization representing non-profit nursing homes, documented that almost half of nursing home care workers earned less than a living wage, with nearly 57% relying on public assistance. One study[19] documented that nursing homes' nursing staff turnover rate was roughly 100% annually, even before the pandemic. The Leading Age report states that increasing wages for nursing home workers would reduce this turnover and significantly improve residents' health outcomes. Increased wages are necessary to attract and retain highly experienced and well-trained workers. On the one hand, we cannot call our nursing home workers heroes, while on the other, paying them wages that require them to rely on government assistance.

Further contributing to unsafe conditions for staff and residents, too many facilities do not have a qualified infection preventionist to support and implement infection prevention and control protocols necessary to sufficiently address the spread of COVID-19.

Lastly, understaffing is made worse by the failures of CMS to enforce adequate staffing levels. A recent report[20] by the Office of Inspector General found that CMS should do more to strengthen oversight of nursing home staffing.

To better support the facility's staff and attract and retain experienced and qualified workers that can increase positive health outcomes, Congress should urge CMS to:

- End the Trump Administration's waiver of training requirements for nurse aides and feeding assistants enacted in March 2020. Require temporary nurse aides hired under this waiver to complete full training and certification within a designated timeframe to continue working and require nursing homes to identify and publicly report numbers of Temporary Nurse Aides currently employed.
- Increase initial nurse aide certification training requirements from the current 75 hours to adequately prepare frontline aides for the complex needs of the people they are hired to assist. Require facilities to cover the cost of training.

[18] https://leadingage.org/sites/default/files/Making%20Care%20Work%20Pay%20Report.pdf
[19] Gandhi, A., Yu, G., Grabowski, D. High Nursing Staff Turnover in Nursing Homes Offers Important Quality Information, *Health Affairs* 2021, Vol. 40, No, 3.
[20] https://oig.hhs.gov/oei/reports/OEI-04-18-00451.pdf

In addition, Congress should pass legislation that:

- Strengthens the direct care workforce by (a) increasing compensation, including hazard pay (b) improving access to affordable health insurance, paid family and medical leave, paid sick leave, and affordable childcare.
- Requires a minimum staffing standard of at least 4.1 hours per resident day.
- Requires 24-hour RN presence in all nursing homes.
- Establishes a robust enforcement mechanism to ensure adequate staffing levels.

III. Require the Rescission of all Waivers of Nursing Home Regulations Established Under the Public Health Emergency

In addition to the training and certification waiver, the previous administration issued multiple waivers of standards and requirements for healthcare providers, including nursing homes, through the use of 1135 waivers[21]. These waivers included waiving notice of transfer or discharge and facility reporting requirements, including resident assessment information and staffing information.

The waiver allowing facilities not to report resident assessment information and staffing information has been rescinded. However, CMS has publicly stated that it will not require facilities to provide the staffing information for the period that reporting was waived, even though it is readily accessible to nursing homes. When CMS made this decision, the period for which the reporting waiver applied had been the deadliest for nursing home residents. If we are to understand what happened during the pandemic, facilities must provide this information.

Waivers must not continue indefinitely without evaluation to assess whether they continue to be needed or effective. Many of the waivers referred to in this document remove essential resident rights articulated in law and regulation.

Congress should urge CMS to:

- Rescind the waivers of nursing facility requirements that permit waivers of notice for transfer or discharge due to cohorting and nurse aide training.
- Require facilities to report data on staffing from January 1 – May 2020. All of this data is already in the possession of nursing homes and is critical for analyzing what happened during that time and what we can do to prevent it in the future.

IV. Ensure Access to COVID-19 Vaccines for All Residents and Staff Who Choose to be Vaccinated.

The discovery and release of highly effective and safe COVID-19 vaccines has offered promise to residents and staff. Since residents and staff began receiving vaccinations, COVID-19 case numbers and deaths have plummeted. Yet not all residents have equal access to the vaccine in nursing homes.

In all states but West Virginia, the CDC partnered with outside pharmacies to conduct clinics at nursing homes to have residents and staff vaccinated. These pharmacies have adopted a policy of only visiting nursing homes three times to vaccinate residents. As a result, residents who entered the facility after the second clinic have just received one dose of the vaccination. Others who were admitted after the third clinic have not received a vaccine at all. In some states, plans have not yet been established to ensure continued access to vaccines, and in some cases, facilities are requiring residents to obtain the vaccination themselves. This policy creates an unacceptable burden on residents and families to ensure they become fully vaccinated. For many residents, this task will be impossible and will result in them going without the protection of a vaccine.

New residents and staff continue entering nursing homes and should be offered the vaccine. Currently, there is no policy from the federal government setting forth a plan for ensuring these residents can become fully vaccinated.

[21] https://www.cms.gov/files/document/summary-covid-19-emergency-declaration-waivers.pdf

Early reports[22] stated nursing home staff were refusing vaccination at a rate as high as 60%. This high refusal rate has been attributed mainly to distrust of the vaccine and a lack of information accessible to staff.[23] CMS and CDC must continue efforts to provide staff with information on vaccines that address staff concerns and help increase vaccination rates among staff.

It is also vitally important for current and future residents and their families to have access to information that shows how many residents and staff have been vaccinated in each facility. This information will be essential for residents to make informed decisions on their care and where they want to reside. Although the CDC is releasing total numbers of staff and residents who have been vaccinated, it is not at the facility level.

To ensure all residents and staff have access to the COVID-19 vaccination, Congress should:

- Require federal, state, and local coordination for ensuring ongoing access to vaccines for all residents and staff of long-term care facilities.
- Require nursing homes to report the number and percentage of their residents and workers who have been vaccinated and disclose that information to residents, families, staff, the LTCOP, the State Survey Agency, CMS and CDC. Vaccination rates in nursing homes should be reported to the CDC and shared publicly on Nursing Home Compare (Care Compare).

V. Ensure Protection from COVID-19 for Residents and Staff by Ensuring Ongoing Access to PPE and Testing.

As with many health facilities, nursing homes have struggled to obtain and maintain adequate supplies of high-quality personal protective equipment (PPE). Many nursing homes continue to report less than one-week supplies of masks, gowns, and gloves.[24] Additionally, ensuring facilities have sufficient access to accurate COVID-19 testing will be essential in helping prevent outbreaks. To ensure all facilities have adequate PPE and testing, Congress should:

- Establish an effective supply chain for the distribution of PPE to long-term care facilities, and ensure funding for sufficient, usable PPE to supply nursing home staff, visitors, surveyors, and LTC ombudsmen.
- Require all facilities to have a 30-day supply of PPE on hand.
- Provide funding and hold facilities accountable for paying for accurate point-of-care testing with rapid turnaround of results for staff, residents, and their families who visit.

VI. Fully Restore Visitation in Nursing Homes

On March 13, 2020, CMS issued an order[25] prohibiting anyone other than essential health care workers from entering nursing homes. As a result, residents were isolated from their families and subject to neglect and harm due to inadequate staffing. As time passed, the harm from isolation and neglect began to take a toll on residents' health and well-being.[26] These problems mainly went unseen, as facility surveyors, families, and long-term care ombudsmen were restricted from entering facilities. Residents could no longer rely on their loved ones to draw attention to health declines or inadequate care. As some facilities re-opened their doors to visitation, many family members discovered their loved ones had experienced a devastating decline, including significant weight loss, cognitive decline, emotional distress, and extremely poor hygiene.[27]

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[22] https://www.cnbc.com/2021/02/09/covid-vaccine-60percent-of-nursing-home-staff-refused-shots-walgreens-exec-says.html
[23] https://www.health.harvard.edu/blog/why-wont-some-health-care-workers-get-vaccinated-2021021721967

[24] For instance, for the week ending February 14, 2001, 5% of nursing homes reported they had less than a one week supply of N-95 masks. https://data.cms.gov/stories/s/bkwz-xpvg
[25] CMS, QSO-20-14-NH, updated by QSO-20-39-NH (Sept 17, 2020)
[26] https://apnews.com/article/nursing-homes-neglect-death-surge-3b74a2202140c5a6b5cf05cdf0ea4f32
[27] https://theconsumervoice.org/uploads/files/issues/Devasting_Effect_of_Lockdowns_on_Residents_of_LTC_Facilities.pdf

On March 10, 2021, CMS issued new visitation guidance[28] that relaxed some of the visitation restrictions. While a step in the right direction, the guidance does not go far enough, however, to protect residents from the effects of isolation and neglect. The guidance language allows facilities significant discretion when determining the length and frequency of visits, including for compassionate care. CMS must require facilities to permit visits based on the needs of each resident and enforce those requirements.

Further, residents continue to need access to telecommunications devices and internet services in order to communicate with family and friends who are unable to visit in person. Such access is necessary for supporting many residents who suffer from isolation. Despite efforts to increase access during the pandemic, many facilities do not have devices that can be used by residents who do not have their own, and there are facilities that refuse to allow a resident to connect their personal device to the facility's internet connection.

To help protect residents, Congress should:

- Allow every resident to designate an essential support person (ESP). The ESP must be allowed unrestricted access to residents to provide physical and emotional support and assistance in meeting residents' needs. ESPs should be treated as employees of the facility for infection control purposes, including routine COVID-19 testing and the wearing of PPE (cost to be borne by the facility).
- Urge CMS to modify its visitation guidance to require facilities to permit visits based on the needs of each resident and, until full visitation rights are restored, ensure that visits are no less than one hour weekly.
- Require CMS to enforce visitation guidance.
- Pass legislation that provides access to telecommunications devices and the internet for all residents.

VII. Reinstate Annual Recertification and Complaint Surveys and Strengthen Regulations and Enforcement

Recertification and Complaint Surveys

At the same time visitation bans were instituted, the previous administration suspended surveys and enforcement except in very limited situations. CMS directed State Survey Agencies to prioritize the most egregious complaints (triaged as immediate jeopardy) and implemented a new type of survey focused on infection prevention and control requirements[29], to the exclusion of all other issues. As a result, state survey agencies did not conduct complaint investigations (except for immediate jeopardy) or annual surveys for months. Complaints of rights violations, neglect, eviction, and similar serious issues were ignored to the residents' great detriment.

While CMS issued guidance in September 2020 to reinstate survey activities, not all states have. As of the date of this hearing, California, Ohio, and Tennessee, for example, still have not begun completing annual recertification surveys. California is still only investigating IJ-level complaints.

Congress should urge CMS to ensure that all states are conducting annual recertification surveys and investigating all complaints.

Regulations

In 2017 CMS issued final federal rules for nursing homes that rolled back the ban on pre-dispute arbitration and in 2019 issued proposed rules to further rollback the revised nursing home rules published in 2016. These proposed rules would provide fewer protections for residents and less accountability for nursing facilities by, among other things, weakening standards relating to infection prevention, use of antipsychotic medications, and responding to resident and family grievances.

[28] CMS, QSO=20-39-NH
[29] CMS, QSO-20-20-All

Congress should:

- Urge CMS to rescind its 2019 proposed rules to ensure that nursing home residents are not stripped of these necessary protections.
- Pass legislation banning forced arbitration agreements in nursing homes.
- Urge CMS to reinstate the regulation banning nursing home arbitration agreements.

Enforcement

Prior to the pandemic, insufficient enforcement of regulations long plagued nursing home care. Deficiencies were under-cited and often did not[30] identify serious problems. Enforcement actions are also not sufficiently meaningful to bring about lasting change, as evidenced by a 2019[31] OIG that found that 31 percent of nursing homes had a deficiency (violation) cited at least five times during 2013-2017, and [32] a study which determined that 42 percent of deficiencies were given for chronic or repeated deficiencies in a three-year period.

Enforcement was further weakened by actions taken under the previous administration. In 2017, CMS revised its enforcement policy to change the default method of assessing civil money penalties for past non-compliance from the imposition of "per-day" fines to "per-instance" fines. This change removes any incentive for facilities to identify and correct non-compliance as early as possible, resulting in residents subjected to potentially harmful non-compliance for an extended period. We believe this revision was made in violation of proper administrative procedures.

These failures of enforcement certainly contributed to the crisis in nursing homes during the pandemic. Repeated and long-standing violations are the result of facilities facing little pecuniary punishment. As noted above, 8 out of 10 facilities had infection control violations before the pandemic, with half of those having repeated problems. Until CMS adopts a rigorous and consistent enforcement strategy, the issues that led to the devastation in nursing homes will continue.

Congress should:

- Require CMS to ensure that comprehensive and complaint surveys have been fully restarted in all states.
- Direct CMS to withdraw the proposed rules on nursing facility Requirements of Participation published Federal Register, Vol. 84, No. 138, July 18, 2019, 34737.
- Strengthen federal and state enforcement by requiring pre-established per-day penalties and utilizing denials of payment for resident admissions for non-compliance with specific requirements, such as staffing, transfer/discharge, life safety, emergency preparedness, and infection control.
- Instruct CMS to rescind the Trump Administration directive, "Revision of Civil Money Penalty (CMP) Policies and CMP Analytic Tool" (S&C 17-37-NH), which instructed State Survey Agency Directors and CMS Regional Offices that "per-instance" CMPs would be imposed for past non-compliance, conflicting with the enforcement provisions in the Social Security Act that provide for the imposition of CMPS for "each day of non-compliance."

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[30] Office of the Inspector General (OIG*). States continued to fall short in meeting required timeframes for investigating nursing home complaints: 2016-2018. Data Brief*. Washington, DC: OIG OEI-01-19-00421. September 2020.

[31] Office of the Inspector General (OIG). *Trends in deficiencies at nursing homes show that improvements are needed to ensure the health and safety of residents. HHS Data Brief*. April 2019. 09-18-02010.

[32] A Long Term Care Community Coalition. Issue Alert. Chronic deficiencies in care: the persistence of recurring failures to meet minimum safety and dignity standards in U.S. nursing homes. *LTCCC*, February 2017. www.nursinghome411.org/nursing-homes-with-chronic-deficiencies/.

VIII. Require Transparency and Accountability Around Nursing Home Ownership and Finances.

For years, the nursing home industry has been plagued by poor care brought on by the purchase of homes by corporations and Private Equity Investment (PE) firms with little or no experience in healthcare or with a long history of providing substandard care. A study released in February 2021 estimated that PE ownership of a nursing home increases the mortality of Medicare residents by 10%, results in declines in many measures of well-being for residents and increases taxpayer spending per resident by 11%.[33] A recent report in the *Washington Post* revealed that even during the pandemic, investment groups with a long track record of owning homes that provide poor quality care were allowed to buy over 20 homes and that care suffered. [34]

Corporate and PE firms have slashed resources, including cutting staff and supplies.[35] It is common practice for them to pay related third parties, such as vendors, management companies, and others, for services as a means of funneling money to themselves.[36] Yet, there is no system to audit the use of federal funds and determine whether they go to profits or resident care.

To improve the quality of care in nursing homes and to ensure the appropriate use of taxpayer money, Congress should pass legislation:

- Mandating audits to determine how facilities spend taxpayer money.
- Setting limits on administrative costs and profits for all payors.
- Requiring CMS to establish federal regulations to specify the minimum criteria for purchasing or managing any nursing home.

IX. Address disparities in care for racial and ethnic minorities.

All residents are entitled to quality care and services, access to justice, and protection from discrimination. Black and Latinx nursing home residents have been disproportionately affected by COVID-19[37]. Research has shown the disparities in care experienced by individuals based on race, ethnicity, and socioeconomic status have become pronounced during the COVID pandemic.[38] This research points to long-standing racial inequities that pre-date COVID-19. Due to discriminatory lending policies, housing segregation, greater reliance on Medicaid, and inequitable healthcare access, marginalized populations are more likely to reside in racially and ethnically identifiable nursing homes that provide poorer care. Data gathering practices and targeted interventions must be developed to ensure that residents' care needs are met.

CMS policies make addressing disparities in care difficult. Although CMS collects data on race and ethnicity, it does not release this data to the public, which has created a gap in knowledge regarding how minority groups are treated in nursing homes. However, COVID-19 has laid bare that residents of color receive inferior quality of care when compared with others.

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[33] https://www.nber.org/system/files/working_papers/w28474/w28474.pdf
[34] https://www.washingtonpost.com/local/portopiccolo-nursing-homes-maryland/2020/12/21/a1ffb2a6-292b-11eb-9b14-ad872157ebc9_story.html
[35] Harrington, C., Olney, B., Carrillo, H., Kang, T. Nurse staffing and deficiencies in the largest for-profit chains and chains owned by private equity companies. *Health Serv Res*. 2012; 47(1 pt. I):106–128.
[36] Harrington, C., Ross, L., Kang, T. Hidden ownership, hidden profits, and poor quality of nursing home care: A case study. *International Journal of Health Services*. 2015;45 (4): 779-800.
[37] Li, Y., Cen, X., Cai, X., and Temkin-Greener, H. Racial and ethnic disparities in COVID-19 infections and deaths across U.S. Nursing Homes. *JAGS*. 2020:1-8 DPO:10:1111/jgs.16847.
[38] Gebeloff, R., Ivory, D., Richtel, M., Smith M, Yourish K., Dance, S., Fortiér, J. and Yu, E., Parker, M. (2020). Striking racial divide: How COVID-19 has hit nursing homes. *The New York Times*, May 21, https://www.nytimes.com/article/coronavirus-nursing-homes-racialdisparity.html?action=click&module=Well&pgtype=Homepage&section=US%20News

We urge Congress to:

- Require CMS to collect and report nursing home resident demographic data specific to race and ethnicity, source of payment, and ownership.
- Require CMS to require facilities to report racial demographic data as part of the weekly data facilities report to the CDC.
- Make CMS race and ethnicity data publicly available dating back to the beginning of the pandemic. Policymakers, government agencies, advocates, providers, and researchers need this information to identify disparities in care and to develop enforceable public policies to ensure equitable care for all residents.
- Investigate and address the disparities in care and access to services for racial and ethnic minorities, including disparate care and outcomes in nursing homes under common ownership and operation, Medicare and Medicaid policies that allow or promote discrimination based source of payment, and other factors that result in disparate placement in poor-performing, racially identifiable nursing homes, such as hospital discharges.

X. Expand Choice Through Expansion of Medicaid Home and Community Based Services

For many older adults with limited income and resources, needing assistance with activities of daily living means going to a nursing home. However, during the pandemic, many older adults chose to remain home without sufficient supports to avoid the risk of being infected with COVID-19 in a nursing home. While the implementation of Medicaid waivers has improved access to home and community-based services (HCBS) for these individuals, HCBS is not a required benefit under Medicaid, and for those states where waivers exist, there often are limits on coverage, limited availability of service providers and affordable housing, and long waiting lists. The devastating effect of COVID-19 on people living in congregate settings has only highlighted the need to make HCBS a required benefit. Increased access to HCBS would likely have saved lives during the pandemic.

To allow individuals who could successfully remain in or transition back to their homes or community-based settings instead of entering or staying in a nursing home, we urge Congress to:

- Make HCBS a required benefit under Medicaid and allow coverage of housing-related services and retroactive coverage for HCBS services.
- Permanently reauthorize the Money Follows the Person program, which has helped older adults and persons with disabilities transition from institutions into the community.
- Direct resources for more low-income housing and residential care.

The pandemic's tragic impact on residents and staff of nursing home residents was years in the making. Many of the recommendations in this statement have been made by advocates for years, in part because it was foreseeable that a virus like COVID-19 would devastate nursing homes. We call on Congress to act now and take decisive steps to not only prevent the next crisis, but to increases the quality of care in nursing homes for current and future generations.

Sincerely,

The National Consumer Voice for Quality Long-Term Care
Community Legal Services of Philadelphia
Michigan Elder Justice Initiative