

**CANHR** *Long Term Care Justice and Advocacy*

CALIFORNIA ADVOCATES FOR NURSING HOME REFORM

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Submitted electronically to [CHCQRegulationsUnit@cdph.ca.gov](mailto:CHCQRegulationsUnit@cdph.ca.gov)

**RE: Comments on Establishing Change of Ownership (CHOW) Regulations**

Dear Ms. Steinecker and Ms. Driscoll:

California Advocates for Nursing Home Reform (CANHR) and each of the 18 undersigned organizations and individuals are writing to comment on the Department's plan to establish change of ownership (CHOW) regulations as announced in AFLs 19-35 and 18-42 and as discussed at the November 15, 2019 and October 30, 2018 stakeholder meetings.

The planned regulations are of profound importance to California nursing home residents. No factor has more impact on the quality of care in a nursing home than its owner.

California's screening system for nursing home owners is broken. The Department is allowing unscrupulous nursing home operators and management companies to acquire and operate nursing homes for years without ever obtaining a license or its approval. Most alarmingly, the Department is allowing operators to continue running nursing homes even after it has determined they are unfit. Virtually anyone or any company can acquire nursing homes in California, no matter how terrible their track record, incompetent, or financially unqualified they may be.

Consequently, there is a growing number of dangerous nursing homes in California and an epidemic of elder abuse occurring within them. The lives of thousands of nursing home residents are endangered by the Department's policies and practices on nursing home ownership.

By law, a license to operate a nursing home is a privilege, not a right. California's laws governing nursing home changes of ownership are intended to protect residents from unfit operators. Thus, the planned regulations must place the burden on licensee applicants to demonstrate that they have the qualifications, experience, character, track record and financial resources before they are allowed to acquire or operate a nursing home.

### **Bad Actors Are Causing Bad Care**

The Department's longstanding failure to screen out unfit operators is like a welcome sign to bad actors who see opportunities to exploit nursing home residents for profit. As a result, California nursing homes are dominated by for-profit chains that, at best, are known for putting profits over care and, at worst, for routinely exposing residents to neglect and abuse that is causing residents to suffer severe harm, misery and torturous deaths.

California nursing home residents are paying a heavy price in poor care and mistreatment from unfit operators. Consider the following findings made in just the last month alone:

- California nursing homes have nearly the highest rate of complaints in the nation, with complaints more than doubling since 2012.<sup>1</sup>
- The routine, cutthroat practice of operators abandoning California nursing home residents by dumping them into hospitals, homeless shelters, motels, the streets and other dangerous

<sup>1</sup> U.S. HHS Office of Inspector General, [Trends in Nursing Home Complaints \(2016-2018\)](#), November 2019.

- settings in order to replace them with more lucrative residents is a national scandal.<sup>2</sup>
- California nursing homes routinely violate emergency preparedness and life safety standards despite the growing dangers to residents from wildfires and other threats.<sup>3</sup>

These new findings are but the tip of the iceberg on warning signs that the quality of care in California nursing homes is very poor. The Department's investigation and inspection reports are among the best evidence that nursing homes are frequently subjecting residents to shockingly inhumane care and abuse.

The connection between poor care and the chaotic buying and selling of nursing homes by chains is well established. In 2016, a large-scale national study of nursing home transactions over two decades concluded that there is tremendous churn in chain ownership; the dominance in chain ownership is growing; chains targeted the worst-quality nursing homes for acquisition; poor quality of care persisted in these facilities after they were acquired; and nursing homes owned by chains had much worse records than other facilities.<sup>4</sup>

It is time for the Department to put an end to the era where chain operators with deplorable records have virtual carte blanche to acquire and run nursing homes in California.

## **Responses to Department's Questions on Standards for Change of Ownership**

We offer the following comments on the questions the Department posed at the November 15, 2019 stakeholder meeting.

### **1. What are the most important issues for the Department to consider in developing licensing application approval/CHOW regulations?**

The Department's planned regulations must establish an effective prior approval process, strong qualification criteria to ensure applicants are suitable, a comprehensive system to review ownership and management changes at every level of corporate ownership and meaningful opportunities for the public to have a voice in CHOW and licensure decisions.

#### **A. The Regulations Should Establish a Prior Approval Process that Ensures All Applicants are Carefully Vetted Before They Are Allowed to Acquire, Operate or Manage a Long-Term Health Care Facility.**

No person or entity should be allowed to operate or manage a long-term health care facility unless and until the Department reviews and approves their CHOW or management company

<sup>2</sup> See, for example, the November 26, 2019 NBC News newscast, [Dumped: Nursing Home Evictions a Reality for Some Poor Patients](#), and November 29, 2019 NBC article, [Some nursing homes are illegally evicting elderly and disabled residents who can't afford to pay.](#)

<sup>3</sup> U.S. Department of Health and Human Services Office of Inspector General, [California Should Improve Its Oversight of Selected Nursing Homes' Compliance With Federal Requirements for Life Safety and Emergency Preparedness](#), A-09-18-02009, November 2019.

<sup>4</sup> Grabowski, David et al, [Low-Quality Nursing Homes Were More Likely Than Other Nursing Homes To Be Bought Or Sold By Chains in 1993-2010](#), Health Affairs, Vol. 34, No. 5, May 2016.

application. Without a prior approval system, the Department's regulatory oversight of nursing homes will fail because corrupt operators will be able to acquire nursing homes, as they do now.

Time and time again, unscrupulous nursing home operators have taken over California nursing homes without any approval from the Department and proceeded to cut staffing and strip care from residents. Once an unvetted operator takes over a nursing home, it is nearly impossible to remove the operator without exposing residents to turmoil, harm or the possibility the nursing home will close or be sold to another unfit operator.

The solution to this intolerable situation is to carefully review the qualifications of applicants and make determinations on their fitness before they acquire or begin to manage nursing homes.

California law already requires this approach. It prohibits anyone from operating or managing a nursing home without first obtaining a license from the Department. California Health and Safety Code §1253 states: "No person, firm, partnership, association, corporation, or political subdivision of the state, or other governmental agency within the state shall operate, establish, manage, conduct, or maintain a health facility in this state, without first obtaining a license therefor as provided in this chapter."

Currently, the Department allows operators to circumvent the law by using interim management agreements to take over control of nursing homes while CHOW applications are pending. The planned CHOW regulations should prohibit this practice and give the Department the authority to ban admissions at any facility that is operated or managed by an entity that is not licensed or approved by the Department.

Prior approval is critically important. Anyone who wants to drive, practice medicine, cut hair, teach, administer a nursing home or engage in numerous other professions has to get a license before doing so. It should be no different for nursing home owners. Those who would have so many residents' lives in their hands must be carefully vetted before they take over facilities.

## **B. The Regulations Should Establish Strong Qualification Criteria to Ensure Applicants Are Suitable.**

It is equally important for the Department to require applicants have strong qualifications, experience, character, track record and financial resources. California's experience shows that allowing unsuitable and unqualified operators to acquire and operate long-term health care facilities is a recipe for abuse and neglect of residents.

Applicants should be required to demonstrate that they are well qualified in all respects to operate a nursing home in full compliance with federal, state and local laws.

The applicant's compliance history in operating other long-term care health and assisted living facilities is a central factor in determining suitability. The Department's review should require an applicant to fully disclose the compliance histories of all long-term health care facilities and assisted living facilities it owns or operates, or previously owned or operated, inside and outside

of California. Applicants that fail to fully disclose their compliance histories should be disqualified.

For applicants that are nursing home chains or subsidiaries of chains, the Department should review the performance histories of all of its facilities, inside and outside of California, including the compliance histories of any assisted living facilities it owns or owned in any state.

In assessing an applicant's compliance history, the Department should carefully review its own compliance records, the records of other regulatory agencies in California and elsewhere as applicable, the compliance records supplied by the applicant, and any available information to determine its history of substantial compliance with all relevant state and federal standards. Applicants should be considered unsuitable if they have demonstrated a pattern or practice of violations of state or federal laws or regulations. The Department should give special consideration to violations that are compromising or have compromised the applicant's ability to give safe care.

The Department's reviews should apply to all persons and entities that have a five percent or greater beneficial ownership interest in the applicant corporation or partnership and all other persons and entities described in HSC §1267.5, including, but not limited to, management companies, subsidiaries, related parties and parent companies associated with the applicant.

The planned regulations should require the Department to look back at least seven years from the date of application in reviewing compliance histories and give it unrestricted authority to look back further whenever warranted. Operators with histories of neglecting, mistreating, abusing or exploiting residents should not be given second chances no matter when the mistreatment occurred. We further address the look-back period on compliance histories in response to the Department's question number 3.

Another key factor in assessing suitability is whether the applicant has a reputable and responsible character. Applicants should be required to provide affirmative evidence that they are trustworthy, responsible and dedicated to providing high quality of care to every resident of the facility.

The Department should examine an applicant's compliance practicing under a professional license to determine if the applicant is in good standing with the licensing board. Professionals who have had licenses suspended or revoked are not of reputable and responsible character. This is especially true of nursing home and assisted living facility administrators who have had their administrator licenses revoked or suspended.

An applicant's criminal history should be thoroughly examined. The Department should establish a criminal background check system to screen out applicants with criminal histories. Certified nursing assistants (CNAs) and other employees are subject to criminal background checks, so should owners and operators. At a minimum, the Department should identify and deny any applicant who has a criminal history involving any health or care facility and anyone who has been convicted of a serious crime. It should also closely scrutinize operators who have been charged with crimes related to the operation of health or care facilities.

Applicants must also be required to demonstrate the financial capability to operate the facility or facilities under review. We recommend applicants be required to show they have the financial means to properly run each facility under consideration for at least a year, as is the case in Kansas and other states.

Financial fitness is of growing importance because it is increasingly common for chain operators to sell their facilities to entities that are certain to fail due to lack of financial resources. These transactions reflect a reckless disregard for the well-being of residents.

Nothing illustrates this better than the collapse of Skyline Healthcare last year, a small chain that acquired over 100 nursing homes in at least ten states seemingly overnight. Extraordinary chaos ensued after Skyline stopped paying its bills and abandoned many of the facilities. Thousands of desperate residents were neglected and many hundreds of them forced to move to distant facilities. Several states sought emergency receiverships over scores of facilities that Skyline abandoned.<sup>6</sup>

Earlier this year in California, multiple nursing homes owned by the Golden Living chain were placed in receivership after it leased them to Dycora Transitional Health & Living, a new chain that lacked the resources to operate them.<sup>7</sup>

Additionally, the planned regulations should require applicants to reveal whether any of its facilities have been subject to bankruptcies, foreclosures, judgment liens, or disruptions in staffing, services or supplies due to failure to meet payroll or pay bills, or other symptoms of financial distress.

We make additional recommendations on suitability criteria in response to the Department's following question.

**C. The Regulations Should Establish a Comprehensive System to Review Ownership and Management Changes at Every Level of Corporate Ownership.**

The planned regulations should apply to all transactions involving change in ownership or management at every level of a corporation when ownership, control or management of a facility would be transferred from one entity to another. Corporate mergers and consolidations should be included, as should changes in partnerships and other ownership holdings.

It is especially important that the Department review ownership changes up to and including the parent company. Nursing home chains and investors increasingly create complex layers of

<sup>5</sup> The Kansas City Star, [Kansas Cracks Down on Nursing Home Operators with Shaky Finances](#), April 23, 2019.

<sup>6</sup> NBC News Investigation: [Nursing home chain collapses amid allegations of unpaid bills, poor care](#), July 19, 2019; Laura Strickler, Stephanie Gosk and Shelby Hanssen, [A nursing home chain grows too fast and collapses, and elderly and disabled residents pay the price](#), NBC Nightly News, May 19, 2019.

<sup>7</sup> Skilled Nursing News, [3 More Dycora Skilled Nursing Facilities Placed in Receivership](#), April 21, 2019.

ownership structures to avoid scrutiny and responsibility.<sup>8</sup> In most instances, the crucial decisions about staffing, budgets and patient care are not made at the facility, but at the top of the pyramid. The individuals making these decisions are often removed from the licensee by many layers, but they actually call the shots and take the profits.<sup>9</sup>

Likewise, the regulations must require Department approval anytime a licensee plans to contract management duties to another entity, as required by HSC §1253. The Department's current practice of allowing management companies to take over and operate nursing homes without any advance review or approval is exposing residents to grave dangers.

Unless parent and management company transactions are included in the change of ownership process, providers will have a giant loophole to circumvent and subvert its purpose, as they are doing today.

#### **D. The Regulations Should Establish a System that Provides Meaningful Opportunities for Public Input in CHOW and Licensure Decisions.**

One of the most important steps the Department should take to assess an applicant's character is to engage the public in the CHOW process. Currently, the public has no opportunity to express concerns about an applicant's character or qualifications because the Department treats change of ownership as a private process between it and the applicant.

The Department should put an end to this secretive, insular process and replace it with a system where CHOW and licensure decisions are made with full transparency and meaningful opportunities for public participation. Involving the public will change the very nature of the process and help change the public perception that the Department is a private partner of California's nursing home industry. It would also result in more informed decisions.

In the planned regulations, the Department should require that CHOW applications be posted online as received and establish formal opportunities for public notification and input on its determinations. Nursing home residents, their families, workers and others deserve a strong voice in important decisions that affect their lives.

#### **2. As part of the application review process, the Department is considering criteria that may include: review of an applicant's background in ownership or management of health facilities; the criminal background of the applicant; financial information of the applicant; enforcement actions taken by state or federal authorities against the applicant regarding**

<sup>8</sup> Harrington C, Ross L, Kang T. (2015). Hidden Owners, Hidden Profits, and Poor Nursing Home Care: A Case Study. *International Journal of Health Services*. 45(4): 779-800.

<sup>9</sup> See, for example, Jordan Rau, Care Suffers as More Nursing Homes Feed Money Into Corporate Webs, *New York Times* (Jan. 2, 2018) at [https://www.nytimes.com/2018/01/02/business/nursing-homes-care-corporate.html?\\_r=0](https://www.nytimes.com/2018/01/02/business/nursing-homes-care-corporate.html?_r=0)

Marjorie Lundstrom, Unmasked: Who owns California's nursing homes? *Sacramento Bee* (Nov. 9, 2014) at [http://canhr.org/newsroom/newdev\\_archive/2014/Nursing\\_homes\\_unmasked\\_Part2.pdf](http://canhr.org/newsroom/newdev_archive/2014/Nursing_homes_unmasked_Part2.pdf)

Marjorie Lundstrom, California falls short in disclosing nursing home ownership, *Sacramento Bee*, (Nov. 10, 2014) at [http://canhr.org/newsroom/newdev\\_archive/2014/Nursing\\_homes\\_unmasked\\_Part3.pdf](http://canhr.org/newsroom/newdev_archive/2014/Nursing_homes_unmasked_Part3.pdf)

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

**the provision of health care. What other factors, if any should the Department consider in evaluating an initial or CHOW application?**

In addition to the suitability recommendations we made in response to the prior question, the regulations should give the Department the authority to reject applicants who have any type of pattern or practice of violating state or federal standards. In making this determination, the Department should examine and consider the following factors for facilities associated with any applicant:

- Do any of the facilities have an above average number of deficiencies or violations of state or federal standards?
- Has any facility been the subject of violations, deficiencies or citations that involved harm or immediate jeopardy to residents?
- Has CMS classified any facility as a special focus facility or a candidate to be a special focus facility?
- Has any facility been the subject of CMS's abuse icon on Nursing Home Compare due to a history of substantiated abuse?
- Has any facility been the subject of above-average number of complaints?
- Has any facility been cited for insufficient staffing, staffed at levels below resident needs or requirements, sought or received a waiver of minimum staffing requirements, violated labor laws or been the subject of labor actions or strikes due to unsafe staffing levels?
- Are facilities operated by the applicant staffed below statewide staffing averages?
- Has any facility or its personnel been subject to an injunction, corporate integrity agreement, damages or criminal charges in an action filed by the Attorney General, a district attorney or federal law enforcement agency?
- Has any facility been sued due to abuse or neglect of its residents?
- Has any facility reached a settlement agreement to resolve suspension or revocation actions or had a temporary manager appointed?
- Has any facility or its personnel been involved in conduct detrimental to the welfare of its residents;
- Has a facility aided or abetted the commission of any illegal act in a facility?
- Has any facility failed to comply with abuse and neglect reporting requirements?
- Has the applicant or administrator of any facility been denied an administrator's license or had an administrator's license suspended or revoked?
- Has any facility been financially unstable, as evidenced by bankruptcies, failure to pay staff or its bills, cutting care or services to residents, utility cutoffs or other signs of financial distress?

**3. In review of the criteria noted above, what results, should mandatorily eliminate an applicant from consideration to own, manage, or operate a health facility? Should the regulations include specific disqualifying criteria that would eliminate an applicant from further consideration?**

Yes. Applicants should be permanently disqualified if they have ever owned, operated or managed a nursing home or assisted living facility that was involuntarily terminated from Medicare or Medi-Cal due to non-compliance, had its license suspended or revoked, or was

subjected to receivership pursuant to HSC §1327 or other codes. Operators who have had these drastic and rare enforcement actions imposed should not be in the nursing home business and certainly should not be allowed to expand their operations in California.

Applicants who are part of a nursing home chain that has a pattern of Class AA or Class A citations or immediate jeopardy deficiencies should also be disqualified, as should those who fail criminal background checks or present false information in CHOW and/or licensure applications.

**4. What differences in the review criteria if any, should there be regarding a new health facility application versus a CHOW application?**

There should not be any differences in the review criteria. The Department should not set a lower bar on suitability for licensing a new facility as it is now doing.

**5. Should a CHOW applicant be able to operate a health facility through a management company agreement during the pendency of their appeal of an application denial? Why or why not?**

No. It would be the height of irresponsibility to allow disapproved operators to take control of a health facility. Permitting unfit operators to control a facility places every resident's health and welfare at significant risk.

When a licensee wishes to sell a facility, our recommendations give it a strong incentive to find a qualified buyer that meets suitability requirements and has a good performance record. That outcome is exactly as it should be.

**6. If an applicant operates a health facility pending their appeal, what requirements should be included in the regulations surrounding this practice?**

For the reasons stated in response to the prior question, this scenario should never be tolerated or allowed by the planned regulations.

The regulations should give the Department the authority to ban admissions at any facility that is operated or managed by an entity that is not licensed or approved by the Department.

**7. What practical safeguards can be included in regulations to protect residents if the licensee cannot or will not take back operational control after a CHOW application is denied?**

This question inappropriately assumes that the Department will continue to allow licensees to transfer operational control to individuals or entities that are not approved or licensed by the Department and do not meet suitability requirements. The regulations should prohibit this practice and provide strong penalties for those who do not comply.

Residents cannot be protected if the Department were to officially abandon its duty to determine the suitability of applicants before they take over nursing homes.

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The planned regulations present a vital opportunity to transform the quality of care in California nursing homes by ensuring that no person or entity can acquire a nursing home unless they demonstrate that they can and will provide first-class care.

Thank you for considering our recommendations.

Sincerely,



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