

Transparency as a Solution for the Hospital Capacity Problem

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I. OVERVIEW OF THE CAPACITY PROBLEM

COVID dramatically clarified a shortcoming in our healthcare system. We have a very good system, but like everything in the world, it has its shortcomings. What we see through the apex of COVID is that many hospitals in hotspot areas cannot provide an adequate supply of beds.¹ Although the United States spends much more than other countries on health care,² we have only 2.8 beds per thousand whereas other Organisation for Economic Co-

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¹ Reed Abelson, *Covid Overload: U.S. Hospitals Are Running Out of Beds for Patients*, N.Y. TIMES (Nov. 27, 2020), <https://www.nytimes.com/2020/11/27/health/covid-hospitals-overload.html> [<https://perma.cc/GF6F-KNAZ>]; Melanie Evans & Julie Wernau, *Covid-19 Patients Overwhelm Busy Hospitals as Delta Variant Spreads*, WALL ST. J. (Aug. 4, 2021), <https://www.wsj.com/articles/covid-19-patients-overwhelm-busy-hospitals-as-delta-variant-spreads-11628069401> (on file with the *Ohio State Law Journal*).

² ORG. FOR ECON. COOP. & DEV., HEALTH AT A GLANCE 2019: OECD INDICATORS 11 (2019), <https://www.oecd-ilibrary.org/docserver/4dd50c09-en.pdf?expires=1628458059&id=id&accname=guest&checksum=5C6D123FD77F98B4798996747EB4845E> [<https://perma.cc/LN8W-2X5P>].

Operation and Development nations have many more.³ Germany, for example, has eight beds per thousand.⁴

But even when we tried to make up for the shortage of these beds, the culture of the hospital system was such that many were not used to sharing.⁵ New York City, for example, erected a pop-up hospital for COVID patients, but many of the beds remained empty because these emergency hospitals were not connected to the traditional broader health system, and all too many hospitals failed to send their patients to available beds and integrate them into a chain of referrals and ongoing care.⁶

II. TRANSPARENCY AS A SOLUTION FOR THE HOSPITAL CAPACITY PROBLEM

Louis Brandeis, the great Supreme Court Justice, is famously, and usually incorrectly, quoted about transparency. He said, “Sunlight is said to be the best of disinfectants.”⁷

What can sunshine or transparency about standby capacity accomplish? It will identify and help to remedy capacity problems. It would reveal, should a pandemic occur, whether a hospital is less likely, more likely, or not likely to have some measure of capacity problems. By creating this transparency about capacity problems or surpluses, it could help to create individual and community hospital networks that help to solve the problem.⁸

A. Needed Elements for Transparency Measures of Hospital Capacity

Transparency is often lauded as a solution for various issues, but the solution lacks details about how to make it happen.

Unlike many admirable but politically difficult health care remedies, transparency about hospital capacity is actually doable. It is not easy to implement, but unlike solutions that require major, unlikely political action, it needs no new legislation or executive orders.

Transparency relies on four essential elements to be useful.

³ *Hospital Beds*, ORG. FOR ECON. COOP. & DEV., <https://data.oecd.org/healthqt/hospital-beds.htm> [<https://perma.cc/7HGA-SPRZ>].

⁴ *Id.*

⁵ The Daily, *The Mistakes New York Made*, N.Y. TIMES, at 12:42 (July 27, 2020), <https://www.nytimes.com/2020/07/27/podcasts/the-daily/new-york-hospitals-covid.html?showTranscript=1> (on file with the *Ohio State Law Journal*).

⁶ *Id.* at 20:08.

⁷ LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

⁸ Thomas P. Miller, *Will New Macromedical Regulation Be Prudential?*, 81 OHIO ST. L.J. 803, 811 (2021).

For one, transparency requires a uniform standard of disclosure so that the capacity status of hospitals can be readily compared.⁹ Then two, these standards should be trustworthy. The most frequent path to assure trustworthiness is with auditing through independent experts.¹⁰ Three, the transparency data should be readily accessible, unlike most health care data that are not only not readily accessible but rather difficult to find.¹¹ Four, there should be an influential outside audience that is interested in analyzing those data and framing them in a way that makes them broadly understandable.¹²

The U.S. Securities and Exchange Commission (SEC) can create these elements. It has almost all the ingredients needed.

1. Its Financial Accounting Standards Board (FASB) creates standards of disclosure.¹³ The SEC has delegated to the FASB, which is an independent nonprofit with a budget of less than a hundred million,¹⁴ to create standards of disclosure for the massive financial community.¹⁵ The FASB can readily take on the task of creating standards for measuring hospital capacity.

2. The Big Four accounting firms can ensure the trustworthiness of the capacity data by auditing the hospitals' compliance with FASB standards.¹⁶

3. The Electronic Data Gathering, Analysis, and Retrieval system (EDGAR), the SEC's readily accessible, huge database,¹⁷ can be accessed by anyone at any time.¹⁸ This reform would have it contain these standardized trustworthy data about the capacity of individual hospitals as measured by FASB standards.

4. The vast army of hospital financial analysts are very interested in information like this.¹⁹

⁹ See Regina E. Herzlinger, *Why American Health Care Needs Its Own SEC*, HARV. BUS. SCH.: WORKING KNOWLEDGE. (Sept. 3, 2020), <https://hbswk.hbs.edu/item/why-american-health-care-needs-its-own-sec> [<https://perma.cc/2347-4TTU>].

¹⁰ *Id.*

¹¹ *HHS Protect: Frequently Asked Questions*, HHS (July 20, 2020), <https://www.hhs.gov/about/news/2020/07/20/hhs-protect-frequently-asked-questions.html> [<https://perma.cc/4ZVK-YBVE>].

¹² Herzlinger, *supra* note 9.

¹³ *About the FASB*, FIN. ACCT. STANDARDS BD., <https://www.fasb.org/jsp/FASB/Page/SectionPage&cid=1176154526495> [<https://perma.cc/9VRT-3GBS>].

¹⁴ *FAF, FASB, GASB: How We're Funded*, FIN. ACCT. FOUND., <https://www.accountingfoundation.org/jsp/Foundation/Page/FAFSectionPage&cid=1351027545591> [<https://perma.cc/83T2-AZ7P>].

¹⁵ *About the FASB*, *supra* note 13.

¹⁶ See Carlos Ramirez, *How Big Four Audit Firms Control Standard-Setting in Accounting and Auditing*, in *FINANCE: THE DISCREET REGULATOR* 40, 40–41 (Isabelle Huault & Chrystelle Richard eds., 2012) (stating that the Big Four conduct compliance audits).

¹⁷ *About EDGAR*, SEC, <https://www.sec.gov/edgar/about> [<https://perma.cc/HYJ4-HN8G>].

¹⁸ *Id.*

¹⁹ *Patient Data Is a Hot Commodity. Here's How Third Parties (Legitimately) Get Ahold of It.*, ADVISORY BD. (Apr. 10, 2018), <https://www.advisory.com/daily-briefing/2018/04/10/patient-data> [<https://perma.cc/6EYV-QEPH>].

The SEC was created by President Franklin D. Roosevelt. He believed that it would act as a transparency agent²⁰ and called it the “‘truth’ agency.”²¹ These four steps ensure that it gets as close to “truth” as is possible when it comes to economic measurement. I will review them below in more detail.

1. *Uniformity*

The FASB is an independent nonprofit that establishes standards for public and private companies and not-for-profits²² (most hospitals are, at least in name, not-for-profits that follow generally accepted accounting principles).²³ The SEC recognizes the FASB as setting the accounting standards for public companies and for nonprofits.²⁴

One of the characteristics I personally admire about the FASB is that it is not governed by industry stakeholders.²⁵ FASB governors are not industry stakeholders who are primarily concerned with how disclosure will help or hurt a particular industry.²⁶ Instead, those who govern the FASB and who determine its standards are much more concerned with measurement and with perfecting the measurement instruments.²⁷ And unlike other agencies of disclosure in the government, such as the Centers for Medicare and Medicaid Services (CMS) or other parts of the U.S. Department of Health and Human Services,²⁸ their transparency instruments are not dominated by stakeholders’ involvement and they have not been captured by any industry.²⁹

I also admire the accountability created by the FASB’s clear role. It is difficult to hold CMS, for example, accountable for transparency shortcomings because of its many other missions. But FASB, which has only one mission, can easily be blamed for promulgating faulty measurement standards.³⁰

²⁰ Herzlinger, *supra* note 9.

²¹ *See id.*

²² *About the FASB*, *supra* note 13.

²³ Julia James, *Nonprofit Hospitals’ Community Benefit Requirements*, HEALTH AFFS. (Feb. 25, 2016), https://www.healthaffairs.org/doi/10.1377/hpb20160225.954803/full/healthpolicybrief_153.pdf [<https://perma.cc/KT88-AQMP>].

²⁴ *About the FASB*, *supra* note 13.

²⁵ *Id.* (“The seven members of the FASB serve full time and, to foster their independence, are required to sever connections with the firms or institutions they served before joining the Board.”).

²⁶ *See id.* (“While [the FASB board members] individually have diverse backgrounds, each has a concern for investors, other users, and the public interest . . .”).

²⁷ *See id.* (“The FASB and the GASB are charged with setting the highest-quality standards through a process that is robust, comprehensive, and inclusive.”).

²⁸ *Introduction: About HHS*, HHS, <https://www.hhs.gov/about/strategic-plan/introduction/index.html> [<https://perma.cc/KY2R-8VW6>].

²⁹ *About the FASB*, *supra* note 13.

³⁰ *See id.* (“The collective mission of the FASB, the GASB, and the FAF is to establish and improve financial accounting and reporting standards . . .”).

I value FASB's standards. I do not always agree with them, but I applaud the inclusive process, the clear accountability, and that the people involved are generally primarily concerned with perfecting, to the extent possible, the measurement process.³¹

2. *Trustworthiness*

The trustworthiness of the reported data is audited by Big Four accounting firms, the four largest services firms in the world.³² They audit the equity or debt of firms for compliance with FASB standards.³³ If their audits conclude that they do not comply with FASB standards, the debt or equity instruments (or both) of those firms cannot be traded on public markets.³⁴ The firms are Deloitte, Ernst and Young, KPMG, and PricewaterhouseCoopers.³⁵

3. *Accessibility*

How accessible are these data? EDGAR contains all these data.³⁶ It has vast loads of free, publicly available company and individual filings, most of which are audited for compliance with FASB standards.³⁷

4. *Extensive analysis*

A host of influential, widely followed analysts track these data for their assessment of nonprofit hospitals' debt and for-profit hospitals' debt and equity instruments. They include Moody's, Standard and Poor's, Fitch, Morningstar, Bloomberg, and the investment banks and private venture capital and private

³¹ FIN. ACCT. FOUND., FIN. ACCT. STANDARDS BD. & GOVERNMENTAL ACCT. STANDARDS BD., STRATEGIC PLAN 1 (Apr. 2015).

³² *Big Four Accounting Firms*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/careers/companies/big-four-accounting-firms-services-overview/> [<https://perma.cc/2BML-ECUA>].

³³ Ramirez, *supra* note 16, at 41.

³⁴ *Investor Bulletin: Trading Suspensions*, INVESTOR.GOV (Dec. 3, 2018), <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/investor-5> [<https://perma.cc/JG4P-BMZG>].

³⁵ *Big Four Accounting Firms*, *supra* note 32.

³⁶ *About EDGAR*, *supra* note 17.

³⁷ *See id.*

equity analysts in firms that make markets in related securities.³⁸ Virtually all of them are familiar with the data that are already produced about hospitals.³⁹

B. Substantial Impact?

So does all of this work?

The host of literature about whether transparency affects the financial market overwhelmingly concludes that the answer is yes.⁴⁰ This symposium is not an appropriate forum for a review of that literature. The SEC deals with real life, not fantasy, and as SEC Chairman Arthur Levitt once said, “The truth is, high standards lower the cost of capital. And that’s a goal we all share.”⁴¹

What is the likely equivalent impact of standards for hospital capacity? Firms that have poor capacity would likely pay more or have less value for their capital because COVID treatment is not well compensated.⁴² Hospitals that lack sufficient capacity (in ways whose measurement the FASB will enumerate) and that are likely to be hard hit during the next inevitable pandemic are clearly far riskier than hospitals that have sufficient capacity and may be able to deliver other, better compensated care or that have made arrangements to obtain the capacity that they need.⁴³ Their cost of equity and borrowing will increase relatively.⁴⁴ Conversely, the hospitals that have arranged to have appropriate capacity will have very strong incentive to disclose data that show that they have arranged to deal with the next pandemic as best they can.⁴⁵

³⁸ See, e.g., *Data Solutions for Biotech Corporations*, BLOOMBERG PRO. SERVS., https://www.bloomberg.com/professional/solution/health-care/?utm_medium=adwords&utm_campaign=sales&utm_source=pdsrch&utm_content=biotech&tactic=429429&gclid=cjwkcajwzrugbhbaeiwauqmr8anaeedg-neock-esc6qvr9-xt7dhcwa7wbhq79zpk04plwzoydxtxocniaqavd_bwe [https://perma.cc/3APH-4TUD] (explaining their health care analytics services).

³⁹ *Id.*; see *Fitch Ratings*, HEALTHCARE FIN. NEWS, <https://www.healthcarefinance.com/directory/fitch-ratings> [https://perma.cc/BV3J-ASSZ].

⁴⁰ See, e.g., Joshua Cohen, *U.S. Healthcare Markets Lack Transparency; Stakeholders Want to Keep It that Way*, FORBES (Dec. 7, 2020), <https://www.forbes.com/sites/joshuacohen/2020/12/07/us-healthcare-markets-lack-transparency-stakeholders-want-to-keep-it-that-way/?sh=2d4357db62b2> [https://perma.cc/X9N9-L75P].

⁴¹ Arthur Levitt, Chairman, SEC, *The Importance of High Quality Accounting Standards* (Sept. 29, 1997) (transcript available at <https://www.sec.gov/news/speech/speecharchive/1997/spch176.txt> [https://perma.cc/3R35-2C6H]).

⁴² See *Capacity Utilization*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/economics/capacity-utilization/> [https://perma.cc/H2WC-8BM7].

⁴³ See Thomas C. Tsai, Benjamin H. Jacobson & Ashish K. Jha, *American Hospital Capacity and Projected Need for COVID-19 Patient Care*, HEALTH AFFS. (Mar. 17, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200317.457910/full/> [https://perma.cc/8EPD-DUGA].

⁴⁴ KAUFMAN, HALL & ASSOCS., INC., *A GUIDE TO FINANCING STRATEGIES FOR HOSPITALS WITH SPECIAL CONSIDERATION FOR SMALLER HOSPITALS 3* (Dec. 2010).

⁴⁵ See Aleszu Bajak, *The Number of Hospitals Reporting Full ICUs Has Fallen by Nearly 50% Since Early January*, USA TODAY (Mar. 1, 2021), <https://www.usatoday.com>

How does transparency affect nonprofits? Research shows that nonprofits benefit from disclosure even if their performance is poor.⁴⁶ Good performance on their IRS Form 990, which is the tax form that should reveal whether they comply with the requirements that they be prudent, charitable organizations, is strongly correlated to donations and not correlated with other variables such as fundraising expenditures.⁴⁷ Hospitals that have poor performance also benefit from this disclosure, first, by being forced to confront their poor performance and, second through the generosity of the community that would help them.⁴⁸

III. REVIEW OF ACTION STEPS

These action steps show how transparency, a relatively simple solution, can help solve our hospital capacity problem and assure that we have enough standby capacity for the next pandemic, in one way or another.

The first step is that FASB requires disclosure.⁴⁹

Second is that FASB defines how to measure the readiness of hospital capacity for a pandemic.⁵⁰ This year-round process is broadly inclusive of all the stakeholders.⁵¹

Third, the auditors then study hospital compliance with FASB's standards.⁵² If they demur, those financial instruments will not be traded on public markets.⁵³ That is a velvet glove in an iron fist—the removal from access to capital in the public markets. Currently, although the government has required hospital transparency on prices, a relatively small fraction of hospitals have complied with that requirement.⁵⁴ In contrast, if they do not comply with the hospital standard promulgated by FASB on capacity, and if that disclosure is not audited

/story/news/2020/12/30/covid-19-hospitals-over-capacity-searchable-database/4066765001/
[https://perma.cc/28ZK-UYJ8].

⁴⁶ Marie C. Blouin, Roderick L. Lee & G. Scott Erickson, *The Impact of Online Financial Disclosure and Donations in Nonprofits*, 30 J. NONPROFIT & PUB. SECTOR MKTG. 251, 252–53, 261–63 (2018).

⁴⁷ *Id.* at 251–252, 263.

⁴⁸ *Id.* at 263–64.

⁴⁹ See *About the FASB*, *supra* note 13.

⁵⁰ See *Adopting the New FASB Standards in Healthcare*, ACCRUENT (Nov. 10, 2017), <https://www.accruent.com/resources/blog-posts/adopting-new-fasb-standards-healthcare> [https://perma.cc/F3QV-SFYF].

⁵¹ See *About the FASB*, *supra* note 13.

⁵² Joelle Pulver & Kate Jackson, *New Revenue Recognition Standard for Hospitals*, MOSS ADAMS (Feb. 21, 2017), <https://www.mossadams.com/articles/2017/february/new-revenue-recognition-standard-for-hospitals> [https://perma.cc/VFB9-WJ4T].

⁵³ *Investor Bulletin: Trading Suspensions*, *supra* note 34.

⁵⁴ Suhas Gondi, Adam L. Beckman, Avery A. Ofoje, Philip Hinkes & J. Michael McWilliams, *Early Hospital Compliance with Federal Requirements for Price Transparency*, 181 JAMA INTERNAL MED. 1396, 1396–97 (2021).

as “clean,” they can be hit with the heavy penalty of losing access to the public capital markets.⁵⁵

Fourth, the data then enter EDGAR, and an army of analysts reads them.⁵⁶ The analysts are very knowledgeable about the industry and finance but, to me, they are essentially journalists whose purpose is to communicate with investors. So their communications are freed from the jargon that all too often characterizes disclosure of health care financial events because the analysts’ purpose and the way they earn their living is to use their skills in communication to inform the investor, including small investors, who may not understand the full depth of the jargon that characterizes any FASB standards.

All in all, these doable but time-consuming steps will likely cause substantial improvements in hospital standby capacity.

⁵⁵ *Id.* at 1397.

⁵⁶ *About EDGAR*, *supra* note 17.