

April 2023

Client Advisory

CMS Proposes to Expand Disclosure of Ownership Requirements for Skilled Nursing Facilities

On February 15, 2023, the U.S. Department of Health and Human Services issued a new proposed rule to implement portions of Section 6101 of the Patient Protection and Affordable Care Act (Affordable Care Act). This comes 12 years after initially proposing transformative changes to the disclosure of information requirements for nursing home facility ownership.

This proposed rulemaking significantly increases the required disclosure of certain ownership, managerial, and other information regarding Medicare skilled nursing facilities (SNFs) and Medicaid nursing facilities (NFs). This proposed rule also adds ownership disclosure requirements for specific categories of nursing facility owners, such as private equity companies, real estate investment trusts (REITs), management companies, and perhaps even financial and clinical consultants.

Concerns about insufficient data regarding the ownership of nursing facilities and the need to better monitor these facilities, especially as related to nursing facilities that are owned by private equity companies and real estate investment trusts, prompted the Centers for Medicare and Medicaid Services (CMS) to propose these new regulations. Specifically, in the rulemaking, CMS referred to the 2021 MEDPAC report and 2021 study assessing the impact of private equity on patient health. The MEDPAC report noted that as of 2021, approximately 70% of nursing homes in the United States were operated by for-profit entities. The 2021 study contained a conclusion, citing data over a 17-year period, that private equity ownership increased the short-term mortality of Medicare patients by 10%. CMS recently elevated skilled nursing facilities to a “high risk” category, effective January 1, 2023, now requiring criminal background checks for all new owners of nursing homes along with a site visit in order to complete CMS 855A change of ownership applications.

Proposed Changes

Under the proposed new regulations, CMS will require:

- Identities of each member of the “governing body” of the facility, including the name, title, and period of service.
- Disclosure of each individual or entity who is an officer, director, member, partner, trustee, or managing employee of the facility.

After the effective date of this rulemaking, CMS will require additional information be reported through the CMS 855A provider enrollment process, extending ownership disclosures to additional disclosable parties, which is a term that is newly defined in the proposed rulemaking. CMS is also requiring organizational structures of each additional disclosable party of the facility and a description of the relationship of each such additional disclosable party to the facility and to one another.

Of particular concern to providers is the breadth of the new definitions of an *additional disclosable party* and *managing employee*, who will now include **any** persons or entities that:

- Exercises operational, financial, or managerial control over the facility, or provides policies or procedures for any of the facility’s operations, or provides financial or cash management services to the facility.
- Leases or subleases real property to the facility, or owns a whole or part interest equal to or exceeding 5 percent of the total value of such real property.
- Provides management or administrative services, management or clinical consulting services, or accounting or financial services to the facility.
- Directly or indirectly manages, advises, or supervises any element of the practices, finances, or operations of the facility.

Implementation of Changes

Implementation and operationalization of this rulemaking is expected to occur through the use of CMS's Provider Enrollment, Chain, and Ownership System (PECOS), and through updated versions of the CMS 855A application form. Providers will be expected to report a change in ownership or control to CMS within 30 days, and within 90 days for any other changes. Medicaid providers do not have the same timeframe requirements for reporting. Of key importance is that any of the above or current regulations authorizes and encourages State Medicaid Agencies to establish similar reporting requirements. For multi-state providers, this may create multiple definitions of the above new ownership and control disclosure requirements.

Public Posting

CMS intends to make the ownership information that is provided under these new regulations available to the public within one year after the final regulations become effective. If this proposed rulemaking is adopted, the final rule will become effective 60 days after publication in the Federal Register. Medicare SNFs would not be required to disclose the data required under this rulemaking until its next revalidation is due or upon a change of ownership or information filing.

Comments to Proposed Rulemaking

The comment period of this rulemaking from the Centers for Medicare and Medicaid Services runs through April 14, 2023. If you would like assistance on filing a comment to the proposed rule, please contact Shloka Joshi at 267-817-9248 or sjoshi@archerlaw.com.

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