

New CMS Rule Will Change Nursing Facility Disclosures

By **Janice Davis and Christopher Ronne** (February 8, 2024, 6:07 PM EST)

Effective Jan. 16, 2024, a new rule promulgated by the Centers for Medicare & Medicaid Services will significantly expand disclosure requirements for skilled nursing facilities participating in Medicare and nursing facilities participating in Medicaid.

The disclosures pertain to direct and indirect ownership, oversight, managerial and other information, and are intended to increase transparency and provide families with necessary data for evaluating such facilities.

The new rule[1] implements portions of Section 6101 of the Patient Protection and Affordable Care Act, which was signed into law in March 2010 under the Obama administration.

The final rule is part of the continued effort by the Biden administration to improve care and accountability at skilled nursing facilities and Medicaid nursing facilities,[2] which some believe to diminish under ownership by private equity companies and real estate investment trusts.[3]

CMS has noted that the transparency requirements aim to empower families and other stakeholders to closely examine the correlation between the ownership of a nursing facility and the quality of care at such facility in order to make better-informed decisions about nursing home care.



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Updated Disclosure Obligations

While nursing facilities have been historically required to disclose ownership structures and certain managing parties, the final rule enhances disclosure obligations to include several layers within the upward chain of ownership, the ownership of related parties with which a nursing facility has commercial or financial arrangements, and certain parties with administrative, management or policy-related functions.

Specifically, in addition to previous disclosure obligations, nursing facilities will now be required to disclose each of the following:

- Each member of the facility's governing body, including each member's name, title and period of service at the facility;

- Each person or entity that is an officer, director, member, partner, trustee or managing employee[4] of the facility, including such party's name, title and period of service;
- Each person or entity that is an additional disclosable party with respect to the facility; and
- Each additional disclosable party's organizational structure, including the relationship of each such party to the facility and to each other.

The final rule defines an "additional disclosable party" as any person or entity who does any of the following: (1) exercises operational, financial or managerial control over the facility; (2) provides policies or procedures for any of the facility's operations; (3) provides financial or cash management services to the facility; (4) leases or subleases real property to the facility; (5) owns a whole or part interest equal to or exceeding 5% of the total value of the facility's real property; (6) provides management or administrative services; (7) provides managerial or clinical consulting services; or (8) provides accounting or financial services to the facility.

Defining Private Equity Companies and REITs

Importantly, with respect to each disclosed party, nursing facilities will also have to identify whether they constitute private equity companies or real estate investment trusts.

For purposes of the final rule, CMS has eschewed standard definitions of private equity companies, such as that followed by the U.S. Securities and Exchange Commission, and instead elected to broadly define them as any "publicly traded or non-publicly traded company that collects capital investments from individuals or entities and purchases a direct or indirect ownership share of a provider."

CMS, however, incorporates the more widely accepted definition of a REIT as codified in the Internal Revenue Code at Title 26 of the U.S. Code, Section 856.[5]

CMS now requires such robust disclosure with the stated objective of providing "a more complete background on the organizations and individuals that own, oversee, and facilitate the operations of nursing homes," including that of parties that "merely furnish cash management services to a [Nursing Facility] that is enrolled in Medicare." [6]

Notably, the definitions for private equity companies and REITs under the final rule apply to all providers and suppliers that complete a Form CMS-855, not just nursing facilities.

Next Steps

The final rule became effective on Jan. 16. While CMS updated Form CMS-855A, the Medicare enrollment application, as of September 2023 to require the disclosure of owners that are private equity companies or REITs,[7] CMS must make further updates in the application to address the disclosure of additional data introduced by the final rule.

Based on guidance issued to date, skilled nursing facilities currently enrolled in Medicare do not need to immediately update their information, but will be required to update the information upon the next revalidation, change of information or change of ownership requiring the submission of a Form CMS-855A.

It is anticipated that once Form CMS-855A is revised, CMS will commence off-cycle revalidations of

skilled nursing facilities to obtain the requisite data that could not be provided during initial enrollment. Medicaid nursing facilities will not be required to disclose the ownership disclosure data until the relevant state Medicaid agency has established the means to collect the data, which must be established promptly.

The enhanced information that is required to be disclosed under the final rule is expected to become publicly available within one year of reporting. CMS will issue additional guidance on how collected data will be posted, further explain the new requirements and provide examples of the types of data that must be disclosed.

The final rule, which includes more extensive disclosure requirements, is designed to increase transparency and provide families with data to evaluate nursing facilities. The disclosed information will make public which nursing facilities are owned by private equity companies or REITs.

It is anticipated that CMS will use this information for increased oversight and accountability of such nursing facilities backed by private equity companies or REITs, which may include increased targeted audits.

It will be important for applicants subject to the final rule to submit accurate applications or risk denial or revocation of their enrollment in Medicare or Medicaid, or jeopardize payments from such agencies.

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[1] See 88 FR 80141, Centers for Medicare & Medicaid Services, Department of Health and Human Services (Nov. 17, 2023).

[2] Disclosures of Ownership and Additional Disclosable Parties Information for Skilled Nursing Facilities and Nursing Facilities — Proposed Rule, Centers for Medicare and Medicaid Services (Feb. 13, 2023).

[3] Refer to Section II.A.2 of the Final Rule.

[4] In determining the scope of the term "managing employee," CMS considered implementation of a narrower definition found in Section 1126(c) of the Social Security Act and a broader definition found in Section 1124(c) of the Social Security Act, which broader definition applied only to Nursing Facilities. For purposes of the Final Rule, CMS determined to adopt the broader definition located in Section 1124(c), such that "managing employee" shall mean "an individual (including a general manager, business manager, administrator, director, or consultant) who directly or indirectly manages, advises, or supervises any element of the practices, finances, or operations of the facility" (emphasis added).

[5] "Real Estate Investment Trust" means a corporation, trust, or association (1) which is managed by one or more trustees or directors; (2) the beneficial ownership of which is evidenced by transferable shares or by transferable certificates of beneficial interest; (3) which (but for the provisions of this part) would be taxable as a domestic corporation; (4) which is neither a financial institution referred to in section 582(c)(2) nor an insurance company to which subchapter L applies; (5) the beneficial ownership

of which is held by 100 or more persons; (6) subject to the provisions of subsection (k) of 26 USC § 856, which is not closely held (as determined under subsection (h) of 26 USC § 856); and (7) which meets the requirements of subsection (c) of 26 USC § 856.

[6] See n.2.

[7] Medicare Enrollment Application for Institutional Providers, CMS-855 (last updated September 2023).