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New Important CMS Disclosure Requirements for SNFs Take Effect January, 2024

The Biden-Harris administration has implemented new regulations that will require entities that complete the CMS-855A form to disclose key information with respect to their ownership, management, and control structures. These changes seek to increase transparency in SNFs and identify private equity interests in the nursing home space.

Push for SNF Transparency

The Affordable Care Act (ACA) was signed into law in March of 2010 and significantly changed the healthcare landscape. However, one section of ACA largely has flown under the radar: Section 6101(a), which tasked the Secretary of the Department of Health and Human Services (HHS) to promulgate specific regulations requiring the disclosure of managerial, ownership, and control information for skilled nursing facilities (SNFs).ⁱ This had largely been left unimplemented since its passage.

That changed with the current administration. The Biden-Harris administration has long publicly intended to increase transparency in eldercare facilities, with a special focus on determining the effect of for-profit entities on the provision and quality of care.ⁱⁱ This was spurred on by their perception that eldercare facilities owned, operated, or otherwise affiliated with private equity companies (PECs) and/or real estate investment trusts (REITs) may have lower quality of care and performance metrics for residents and facility personnel than those without PEC or REIT involvement.ⁱⁱⁱ

In an attempt to address this perceived concern, the Biden-Harris administration specifically directed HHS to draft rules implementing ACA's transparency requirements and to collect and report disclosures of certain corporate ownership, management, and control data for SNFs.^{iv}

HHS's November 17, 2023 Final Rules

HHS heeded the call, and recently published their final rules for these disclosures (Final Rules).^v The Final Rules specifically cite the perceived issue of private equity's and REITs' influence on

the industry as an impetus for their promulgation,^{vi} and accordingly amend applicable regulations governing how disclosures must be made on the CMS-855A form.^{vii} These changes go into effect on January 16, 2024.^{viii}

The Final Rules' New CMS-855A Form Disclosure Requirements

Per the Final Rules, any SNF entity that completes a CMS-855A form must now disclose:

1. Each member of the facility's "**governing body**," including the name, title, and period of service of each member;
2. Each person or entity who is an officer, director, member, partner, trustee, or "**managing employee**" of the facility, including the name, title, and period of service of each such person or entity;
3. Each person or entity who is an "**additional disclosable party**" of the facility;
4. The "**organizational structure**" of each additional disclosable party, and a description of their relationship to the facility and to one another;^{ix} and
5. Whether any entity disclosed is a "**private equity company**" or "**real estate investment trust**," pursuant to the Final Rules' specific definitions of these terms.^{xxi}

Notably, to the extent that a Medicare SNF has already reported any of this data via the CMS-855A form, it need not report the same data more than once on the same application submission.^{xii}

What is Considered the "Governing Body?" of a SNF?

A SNF's "governing body" is already defined in the regulations as those "legally responsible for establishing and implementing policies regarding the management and operation of the facility," who "appoints the administrator," and is "responsible and accountable for the QAPI program[.]"^{xiii}

As such, the "governing body" disclosure on the CMS-855A form essentially designates the overseeing decision makers who are ultimately responsible for the facility's operations.

Who is Considered a "Managing Employee" of a SNF?

Per the Final Rules, a SNF's "managing employee" is defined as any individual who "exercises operational or managerial control over, or who directly or indirectly conducts, the day-to-day operation" of the facility.^{xiv} It is also defined as any individual who "directly or indirectly

manages, advises, or supervises any element of the practices, finances, or operations of the facility.”^{xv} This includes any general or business manager, administrator, director, and consultant on these matters.^{xvi} An individual does not need to be an employee or permanent staff member to qualify as a “managing employee.”^{xvii}

As such, the “managing employee” disclosure on the CMS–855A form essentially designates the appointee(s) tasked with actually running the facility’s finances and operations on the ground.

What is Considered an “Additional Disclosable Party” of a SNF?

Per the Final Rules, an Additional Disclosable Party (“ADP”) is any person or entity that:

1. Exercises operational, financial, or managerial control over the facility or a part thereof, provides policies or procedures for any of the facility's operations, or provides financial or cash management services to the facility;
2. 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; or
3. Provides management, administrative, clinical consulting, accounting, or financial services to the facility.^{xviii}

This definition facially casts a very broad net, and HHS has advised that forthcoming sub-regulatory guidance will provide clear examples and factual scenarios of what would fall within the scope of a particular term.^{xix} Nonetheless, any typical master tenant or sublandlord entity that leases the facility’s real property/brick and mortar building to the operating company very likely qualifies as an ADP. Also, HHS expressly advised that a typical back-office management or consulting company unequivocally would qualify as an ADP.^{xx}

What is Considered a “Private Equity Company” and a “REIT” for Disclosure?

Per the Final Rules, a private equity company is now specifically defined as “a company that collects capital investments from individuals or entities and purchases a direct or indirect ownership share of a provider.”^{xxi} This definition too facially casts a very broad net. That appears to be HHS’s intention though. Indeed, HHS has expressly stated that they wish to capture all PEC ownership interests related to the facility, not just if a PEC owns the facility directly. In fact, HHS added the term “indirect ownership shares” to the initial draft of the

regulations specifically to capture unambiguously those interests that are held by a PEC at the very top of a corporate ownership chain, with multiple ownership entities intervening between it and the facility.^{xxii} Per the Final Rules, any entity fitting the definition of a PEC must be disclosed in the CMS–855A form.

With respect to the definition a “REIT,” HHS took a different approach. HHS initially proposed an entirely new definition that would potentially capture nearly any entity that owns the real estate or the building wherein a provider operates (or that owns or operates the provider itself).^{xxiii} However, HHS ultimately determined that doing so would cast too wide a net, and actually would defeat the purpose of properly identifying true REITs.^{xxiv} Rather, HHS settled on using the IRS’s definition of a REIT, which likely does not apply to most SNF landlords.^{xxv}

Penalties

While the Final Rules promulgated no specific new penalties for failure to comply with the new disclosure requirements, it did expressly remind the public of CMS’s authority to deny or revoke enrollment if a provider certifies as true any misleading or false information on the application to enroll or maintain enrollment in Medicare.^{xxvi} A provider that is denied enrollment on this basis is subject to a reapplication bar of up to 3 years^{xxvii} and potentially a maximum 10-year reenrollment bar.^{xxviii} Fines and imprisonment penalties are also available.^{xxix} HHS was content with the deterrence already set by these penalty regimes.^{xxx}

Takeaway

Given the ever-increasing scrutiny in the healthcare industry, proactive compliance in all aspects of a healthcare enterprise is absolutely essential. With these Final Rules, the government now will have more transparency into each SNF’s ownership, management, control, and the extent to which private equity and REITs are involved. Legal counsel should be consulted as needed to ensure compliant and sensible disclosures are being made to CMS.^{xxxi}

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Endnotes

ⁱ 42 U.S.C. 1320a–3(c).

ⁱⁱ See, e.g., Press Release, Center for Medicare and Medicaid Services, Biden-Harris Administration Makes More Medicare Nursing Home Ownership Data Publicly Available, Improving Identification of Multiple Facilities Under Common Ownership (Sept. 26, 2022), <https://www.hhs.gov/about/news/2022/09/26/biden-harris-administration-makes-more-medicare-nursing-home-ownership-data-publicly-available-improving-identification-of-multiple-facilities-under-common-ownership.html>; Fact Sheet, The White House, Protecting Seniors by Improving Safety and Quality of Care in the Nation’s Nursing Homes (Feb. 28, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/>

ⁱⁱⁱ *Id.*

^{iv} *Id.*

^v 88 Fed. Reg. 80141 (Nov. 17, 2023).

^{vi} *Id.* at 80142.

^{vii} *Id.* at 80168 – 80169, amending 42 CFR §§ 424.502, 424.516, 455.101, and 455.104. Note that the CMS-855A form is utilized for enrollment and continued participation in the Medicare program. It is completed upon the initial application and every 5 years thereafter. 42 CFR § 424.515. CMS may, in its own discretion, require a facility to complete or update its form within the 5-year period. *Id.* Nearly every eldercare facility enrolls in Medicare and is thereby subject to the new regulations.

^{viii} *Id.* at 80142.

^{ix} *Id.* at 80168, amending 42 CFR § 424.516.

^x *Id.* at 80146, 80168, amending 42 CFR § 424.502.

^{xi} See also Fact Sheet, CMS and Medicare Learning Network, New Ownership Reporting Requirements for Providers Using the Form CMS-855A (Nov. 17, 2023), <https://www.cms.gov/files/document/mln9340578-new-ownership-reporting-requirements-providers-using-form-cms-855a.pdf>

^{xii} 88 Fed. Reg. 80142 (Nov. 17, 2023).

^{xiii} 42 CFR § 483.70(d)(3). As background, every facility is required to have a quality assurance and performance improvement (QAPI) program dedicated to reviewing and enhancing outcomes of care and quality of life. 42 CFR § 483.75(a).

^{xiv} 88 Fed. Reg. 80168 (Nov. 17, 2023), amending 42 CFR § 424.502.

^{xv} *Id.*

^{xvi} *Id.*

^{xvii} *Id.*

^{xviii} *Id.*

^{xix} *Id.* at 80152.

^{xx} *Id.*

^{xxi} *Id.* at 80168, amending 42 CFR § 424.502.

^{xxii} *Id.* at 80160. HHS noted that a PEC must be disclosed even in the following hypothetical: Nursing Home W is 75 percent owned by Entity X, which is 75 percent owned by Entity Y. Entity Z, a PEC, owns 90 percent of Entity Y.

^{xxiii} *Id.*

^{xxiv} *Id.*

^{xxv} *Id.* The IRS’ definition of a REIT is in 26 U.S.C. 856(a).

^{xxvi} See 42 CFR §§ 424.530(a)(4) and 424.535(a)(4).

^{xxvii} See 42 CFR § 424.530(f).

^{xxviii} 42 CFR § 424.535(c).

^{xxix} 42 CFR §§ 424.530(a)(4) and 424.535(a)(4).

^{xxx} 88 Fed. Reg. 80152.

^{xxxi} Notably, while the disclosures will become mandatory for Medicare beginning January 16, the regulations will not yet directly affect Medicaid forms, which will require states to publish its own version of the regulation. That said, some states, such as California, already require disclosure of some of the newly required information. See Medi-Cal Disclosure Statement, available at: <https://www.dhcs.ca.gov/formsandpubs/laws/reggs/Documents/dhs6207reference.pdf>.