

LONG TERM CARE & SENIOR LIVING BLOG

New CMS Proposed Rule Presents New Disclosure Requirements for Nursing Home Ownership

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On Monday, February 13, 2023, the Centers for Medicare & Medicaid Services (CMS), a part of the Department of Health and Human Services (HHS), submitted a proposed rule that goes beyond current data collections requirements by requiring nursing facilities to disclose additional information regarding ownership. The proposed rule implements Section 6101 of the Affordable Care Act, which requires disclosure of certain ownership, managerial, and other information regarding Medicare skilled nursing facilities and Medicaid nursing facilities.

Specifically, the proposed rule requires nursing facilities disclose the following additional information to CMS:

1. Each member of the governing body of the facility, 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 of the facility and a description of the relationship of each such additional disclosable party to the facility and to one another.

“Additional disclosable party” is an overbroad term raising significant concerns and future problems for nursing facilities.

In support of the proposed rule, CMS argues that concerns about the quality of care and operations of nursing facilities have increased since 2011. CMS further references reports indicating that nursing facility quality is declining under private equity and similar owners. According to the Medicare Payment Advisory Commission's June 2021 Report to Congress, "private equity refers broadly to any activity where investors buy an ownership, or equity, stake in companies or other financial assets that are not traded on public stock or bond exchanges." In the proposed rule, CMS specifically targets real estate investment trusts (REITs) as also generating declining quality concerns. REITs are companies that own or operate income-generating real estate.

The proposed rule is presented as an effort to increase transparency about the complex and confusing ownership structures of nursing homes, which could help families make more informed choices and better understand the relationships between the companies and firms that care for their loved ones. In opposition, others have expressed that focusing on ownership and private equity is misleading since such a small number of nursing homes are owned by private equity firms and REITs. Further, those ownership interests typically do not have any influence on the daily operations of the nursing facility. The same can be said for entities leasing or subleasing property to a nursing home, which also must be disclosed under the proposed rule.

The proposed rule projects "a total annual information collection burden on Medicare and Medicaid nursing facilities in reporting this data of 18,912 hours at a cost of \$1,733,096." The amount was determined to be "not economically significant." From a nursing home litigation standpoint, disclosure of the requested information will provide plaintiff attorneys with an easy (but irrelevant) list of additional entities to name as defendants, only further complicating the legal issues of litigation.

The commenting period for the proposed rule ends on April 14, 2023. We will be monitoring these events as they develop.