

Insights

NEW FINAL RULE REQUIRES U.S. NURSING HOMES DISCLOSE OWNERSHIP STRUCTURE

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SUMMARY

On November 17, 2023, the Centers for Medicare and Medicaid (CMS) published a [final rule](#) implementing additional disclosure requirements for U.S.-located, Medicare skilled nursing facilities and Medicaid nursing facilities (nursing facilities). This additional information will be available to the public via a CMS website. According to CMS, the intent behind the new regulations is to (i) allow the public to be better informed about the ownership of the nursing facilities they use and (ii) allow CMS to better track quality and cost outcomes for facilities owned or operated by private for-profit companies, like private equity companies (PECs) and real estate investment trusts (REITs).

SELECTED REPORTING REQUIREMENTS

The final rule requires all Medicare and Medicaid enrolled U.S. nursing facilities to report to CMS (and/or the relevant state Medicaid agencies) additional information about their ownership and management structures. Of note, nursing facilities will now be required to report on their enrollment applications (i) each person or entity who is an additional disclosable party and (ii) the organizational structure of each additional disclosable party *and* a description of the relationship of each such additional disclosable party to the facility and to one another. Currently, only information about direct and indirect ownership and management relationships is required to be reported on the enrollment application. As outlined below, the categories of related parties that must be disclosed has been expanded significantly.

The definition of additional disclosable party encompasses a wide range of participants in the nursing facility industry. Specifically, “additional disclosable party” includes any person or entity who does any of the following:

1. Exercises operational, financial, or managerial control over the facility or a part thereof;
2. Provides policies or procedures for any of the operations of the facility;

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 five percent of the total value of such real property;
6. Provides management or administrative services;
7. Provides management or clinical consulting services; or
8. Provides accounting or financial services to the facility.

For each additional disclosable party, the nursing facilities must report the organizational structure of such entity. "Organizational structure" means, in relevant part, (1) for a corporation: the officers, directors, and shareholders of the corporation who have an ownership interest in the corporation which is equal to or exceeds five percent and (2) for a limited liability company: the members and managers of the limited liability company including, as applicable, what percentage each member and manager has of the ownership interest in the limited liability company.

REPORTING DEADLINE

While the final rule is effective January 16, 2024, the reporting requirements will only go into effect when CMS has made available an updated Form CMS - 855A (855A) to the public. Nursing facilities enrolling in Medicare after this date will be required to disclose this newly required information.

Publication of the updated 855A does not immediately trigger any reporting requirements for already enrolled nursing facilities. Rather, the information will need to be submitted upon revalidation. In the final rule, CMS has stated that it intends to conduct off-cycle revalidations, so nursing facilities should be prepared to submit the information upon request of CMS rather than on the typical revalidation cycle of five years.

For new Medicaid nursing facilities, the information will need to be submitted when the states have established a procedure for accepting such information. The final rule does not address whether state Medicaid agencies will conduct off-cycle revalidations.

PRACTICAL TAKEAWAYS

In short order and certainly before the New Year 2023, nursing facilities should review their leases, management agreements and other applicable corporate documentation to identify the relevant entities that qualify as additional disclosable parties and therefore will need to be reported upon revalidation.

Similarly, PECs, REITs and management entities should prepare to provide required information to the nursing facilities, including elucidating for the nursing facilities how their affiliates who are also additional disclosable parties in the enterprise are related to one another. PECs, REITs and management entities should consider developing standard organizational flow charts and short descriptions that can be distributed to requesting nursing facilities so that the information reported on the 855A is consistent across nursing facilities.

All reporting entities should conduct a review of relevant agreements to ensure that filing the 855-A does not result in a breach of confidentiality under any contracts. If reporting would cause a breach, parties should work to amend such agreements to allow for disclosure. Frequently, contracts will allow for amendment in the event of a change in law, so parties may be able to rely on these provisions to accomplish the relevant amendments in an efficient manner.

If you would like to discuss anything raised in this alert, please contact Jennifer Hutchens, Kelly Koeninger or any other member of BCLP's Healthcare & Life Sciences Industry Team on Strategic, Operations, and Compliance.

RELATED PRACTICE AREAS

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