



April 10, 2023

The Honorable Chiquita Brooks-LaSure  
Administrator  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Hubert H. Humphrey Building  
200 Independence Avenue, S.W.  
Washington, DC 20201

Submitted electronically to <http://www.regulations.gov>

Re: CMS-6084-P. Medicare and Medicaid Programs; Disclosures of Ownership and Additional Disclosable Parties Information for Skilled Nursing Facilities and Nursing Facilities

Dear Administrator Brooks-LaSure:

AARP, on behalf of our nearly 38 million members and all older Americans nationwide, appreciates the opportunity to comment on this important proposed rule to implement Section 6101 of the Patient Protection and Affordable Care Act (ACA) regarding disclosure of nursing home ownership and additional disclosable parties information.

In 2011, the Centers for Medicare & Medicaid Services (CMS) issued proposed regulations to implement Section 6101 of the ACA. AARP supported enactment of these and other nursing home transparency and improvement provisions and commented on the previous proposed rule. However, CMS did not issue a final rule. We appreciate that CMS has issued a new proposed rule to implement these provisions. AARP urges CMS to strengthen this proposed rule and issue a long overdue final rule to implement Section 6101 of the ACA. In general, references to nursing homes in this letter apply to skilled nursing facilities in Medicare and nursing facilities in Medicaid, unless otherwise noted.

Since 2011, the nursing home sector and how it is structured has continued to change. [Current research](#) supports expanded ownership transparency as imperative so that CMS can understand who actually owns and has ownership interests in a nursing home. This expanded transparency is critical so that CMS can evaluate whether the applicants or owners have the qualifications, performance history, and financial capacity to provide high quality care within their nursing home. CMS should also use this data to provide consumers and their families with important

user-friendly information on Nursing Home Care Compare to help them select a nursing home that best meets their needs.

Experience also shows that financial transparency is increasingly vital as lawmakers and regulators learn they do not have the information they need to determine how and whether any funds are being paid out to related parties, what if any profits are being diverted to the related parties, and whether Medicaid nursing home rates are, in fact, adequate to cover the actual costs of care, not including any concealed profits. Fully audited consolidated financial statements demonstrating how nursing homes direct funds will prove critical to meaningful transparency. Financial transparency is essential when implementing and administering any direct care resident payment ratios that require nursing homes to spend a certain percentage of funds on direct resident care. While these important topics are a focus of current discussions, they are not quite the subject of the proposed regulations.

The new proposed federal regulations are narrower than the identified need for transparency. While we are pleased that CMS is refocused on implementing Section 6101, we stress the need to also respond to the demands of the current landscape, including through this regulation. As a general principle, AARP urges CMS to require broad transparency and disclosure of information under the final rule (including broad definitions) given the increasingly complex ownership structures and additional disclosable parties. We offer the following comments on this proposed rule and urge CMS to address them in the final rule.

## **Definitions**

### Additional Disclosable Parties

AARP encourages CMS to broaden the definition of additional disclosable parties to capture all relevant parties. As written, the regulations would not require full disclosure of all parent and sister organizations and all their owners and related parties as the language in part (1) only requires disclosure of entities that exercise operational, financial, or managerial control. People or entities without controlling interests will not be disclosed unless they meet the criteria in parts (2) or (3) of the additional disclosable parties definition. CMS does not define operational, financial, or managerial control. AARP urges CMS to define these terms broadly to capture as many relevant additional disclosable parties as possible now and in the future. Nursing home ownership and organizational structures have grown increasingly complex. More information, transparency, and clarity is important to understand these structures and all their implications for resident care. Without defining the terms, CMS leaves it up to nursing homes and others to define these terms themselves. They may interpret the terms narrowly to avoid reporting information and there is greater likelihood of inconsistent reporting across nursing homes. AARP urges, to the extent possible, that the definition and substantive sections make clear that disclosure needs to extend to all related parties, including owners of parent organizations and sister organizations. We also encourage CMS to consider “related organizations” under 42 C.F.R. § 413.7 in the context of the additional disclosable parties definition.

### Private Equity Company

CMS asked for feedback on its proposed definition of a private equity company. While we do not have a position on the precise definition offered, we urge that the regulations, to the extent possible, encompass any individual and/or entity, regardless of how it is titled, with ownership interest in a nursing home. The final regulation should be flexible and adaptable enough to capture ownership even as specific terms evolve or change over time, including efforts to hide ownership.

### Organizational Structure

In our 2011 proposed rule comments, we noted that the definition of "organizational structure" did not include "the following from the statute: '(vii) any other person or entity, such information as the Secretary determines appropriate.' The omission of this phrase may indicate that the Secretary does not want to include any other person or entity in this definition. However, either way, we encourage CMS to include this phrase in the regulatory definition to be consistent with the statute..." These 2023 proposed regulations also do not include this phrase as included in the statute. AARP strongly urges CMS to add this language to the final regulations when promulgated. It gives important discretion and flexibility to CMS to adapt to changing circumstances in the future. We also note that in the definition of corporation, CMS should include language acknowledging that a corporation may be owned by another corporation.

Given the increasing complexity of nursing home organizational structures, AARP encourages CMS to add more depth and breadth to the examples to set a common expectation and make it more difficult to avoid compliance with the disclosure regulations.

Additionally, the minimum ownership percentages in the statute and these proposed regulations need to be interpreted more broadly. Now that it is clear how easy it is to organize one's ownership interests around such thresholds, we would like to see the regulations respond more aggressively. For example, one individual can own 4.9% of four distinct limited liability corporations (LLCs) that all have an ownership interest in a nursing home. That individual's identify can be shielded from disclosure because of this provision. At a minimum, we would like to see the regulations interpret Section 6101 to require aggregation of any individual's ownership interests.

### **Requiring Nursing Homes to Report Changes to States**

CMS states that "...we are not proposing that states require nursing homes to report changes to their existing section 1124(c) information within certain timeframes. However, we believe it is critical that states have accurate and updated information regarding nursing facilities' owners and operations. We therefore encourage states to establish reporting requirements regarding changes

in the data required under section 1124(c) of the Act, including when the provider changes its ownership. Likewise, we suggest (but are not proposing) that states collect data signifying whether a particular organization reported under section 1124(c) of the Act is a private equity company or REIT [real estate investment trust].” We do not support this approach. Nursing homes should be required to report this information to states (not just encouraged). The final regulations should require states to collect this information, outline a timeframe within which this must be reported, describe how states must consider this information in assessing a licensure applicant’s qualifications for a license, and require this information to be reported before a state approves a request for licensure or licensure renewal.

### **Accuracy and Accountability of Reported Data**

AARP supports the CMS decision described in the proposed regulation to require the ownership information to be true, correct, and complete. Nursing homes should be held to a standard of knowing along with reporting who their owners are and the information should be readily accessible to the public. Medicare and Medicaid providers have a duty to comply with the obligations outlined in statute and regulation (including conditions of participation) and know whether they are complying or not. To ensure accuracy of reporting, CMS should require reporting entities to provide supplemental documents with relevant information. Additionally, CMS has a duty to share accurate information.

AARP also recommends that the information provided be made public on the Nursing Home Care Compare website. This will help ensure that ownership information is easily accessible for residents, potential residents, their family caregivers, and the public. CMS should provide this information in an easy-to-understand, consumer-friendly manner. We encourage CMS to make information about current nursing homes available as soon as possible and consider providing some information retrospectively.

We also urge CMS to audit the self-reported data for accuracy and to outline in the final regulations what the audit process will consider. CMS could designate specific staff to conduct such audits or perform the audits during nursing home surveys. CMS should enforce these provisions using the array of enforcement tools that CMS has to ensure compliance. Reporters of inaccurate data should face appropriate enforcement action. We also note the importance of audits here to inform financial transparency and use of direct care resident payment ratios to ensure that payments to nursing homes are used for direct resident care.

### **Importance of CMS Action on Ownership Information Disclosed**

#### **Participation in Medicare and/or Medicaid**

It is important that the regulations clearly state that the goal of disclosure is to gather information that can be reviewed and analyzed in evaluating characteristics about the industry and also about the nursing homes that wish to participate in Medicare and/or Medicaid. As CMS states, “Section

1866(j)(1)(A) of the Act requires the Secretary to establish a process for the enrollment of providers and suppliers into the Medicare program. The overarching purpose of the enrollment process is to confirm that providers and suppliers seeking to bill Medicare for services and items furnished to Medicare beneficiaries meet all applicable Federal and State requirements to do so. The process is, to an extent, a ‘gatekeeper’ that prevents unqualified and potentially fraudulent individuals and entities from entering and inappropriately billing Medicare.”

We strongly support this objective but note that, as drafted, the regulations presume or imply some necessary steps between information gathering and preventing unqualified and potentially fraudulent entities from operating nursing homes generally without fully discussing or affirmatively requiring them (there is a mention of an FBI criminal background check in some cases). The proposed regulations do not fully connect the disclosure requirements to any activities that CMS or state survey agencies would or could undertake related to monitoring and oversight. In addition, the proposed regulations do not articulate anything about how disclosed information would or could be reviewed in determining whether an applicant should be allowed to participate in Medicare and/or Medicaid or to operate a nursing home, what research into past performance would or may be conducted, and what implications any findings of poor performance history might have.

While it may be a stated objective that requiring disclosures would improve quality, without the commensurate actions related to evaluating qualifications to operate a nursing home and deliver high quality care or how the information would be used in monitoring and oversight, the impact of the disclosure requirements is weaker than it could be. Those necessary interim steps should be described, as appropriate, with provisions that inform applicants that a history of poor performance by the applicant, owner, or an additional disclosable party, etc. would (where possible) or might disqualify them – unless remedied within a specified timeframe -- from obtaining or retaining (where possible) approval to participate in Medicare and/or Medicaid. Finally, CMS and the Department of Justice should take enforcement action against any facility that is not truthful about ownership interests of related parties. Providers must be held accountable if they make false statements about their ownership.

### Ensuring Ongoing Quality of Care

As noted in previous correspondence, a February 2021 [Health Affairs article](#) recommended that “HHS should immediately create an interagency (CMS, HHS OIG, Department of Justice (DOJ) and the Centers for Disease Control and Prevention) **‘Early Detection Task Force’** [emphasis added] to identify and monitor nursing homes that need more focused attention.” The article calls for such a task force to “analyze [Provider Enrollment and Chain Ownership System] PECOS data in addition to information about staffing and medical director administrative time from the Payroll-Based Journal (PBJ) database, data from the survey and certification inspection program, and spending patterns from Medicare cost reports. Robust monitoring would provide a new lens on how ownership and financial investment in the nursing home sector impact the quality of care and the stability of individual facilities and

chains.” AARP acknowledges and appreciates the Administration's efforts to release more ownership data.

AARP urges CMS to take a more proactive role in monitoring nursing homes to encourage positive change. Analyzing performance in a timely manner is an important part of improving quality. Ownership data, staffing data, Medicare cost report data, clinical quality metrics, and more could be used to understand and affect the ongoing performance of individual nursing homes and/or nursing home groups connected by common ownership.

The proposed regulations would be improved by an articulation of how the required disclosures contribute not just to transparency but also to ensuring the provision of high-quality care. Accordingly, we suggest the addition of language detailing how required disclosure would or may be used in examining or determining facility fitness, measuring their performance, and more.

### **Revisions to Section 424.516 to Ensure Compliance Shortly After Effective Date**

In 2011, AARP commented: “CMS is proposing to revise the reporting requirements that Medicare SNFs and Medicaid nursing facilities must disclose at the time of enrollment and when any change in ownership occurs. CMS should provide in the final regulations for the collection of information that has not been submitted when the new reporting requirements become effective, and not just at enrollment. Facilities should then report any changes and have opportunities to confirm the accuracy of their information.” The proposed regulations as currently drafted require that the disclosure requirements apply on initial enrollment, change of ownership, revalidation, reactivation, and change of information. While this does expand on what CMS proposed to require in 2011, it does not mandate all existing facilities to comply with the disclosure requirement upon effective date as AARP had recommended. AARP’s prior concern that revalidation only occurs every 5 years unless CMS chooses to do an off-cycle revalidation is not addressed in the proposed regulations and, as a result, the proposed regulations still do not require disclosure for existing facilities (with no change in ownership or change in information) until revalidation which could mean up to 5 years from the effective date for some facilities. We urge CMS to address this issue and understand CMS plans to update Form CMS-855A for facilities to disclose the information. Prompt updating of the form and collection of ownership information for all facilities is important to implementation.

### **Required Disclosure of Owners Within the Parent Company**

The draft regulations would be improved by more clearly requiring disclosures back to the parent company. This would help ensure that all owners and operators of nursing homes are disclosed. It is also important for the final regulations to reflect the complexity of ownership, which is often structured in multi-layered corporations, LLCs, trusts, and more, where a primary goal of the structuring is to make it more difficult to hold accountable the parent companies of a nursing home.

Section 424.516 requires disclosure of the *organizational structure* of any additional disclosable parties but does not require disclosure of the *ownership* of those additional disclosable parties. Knowing the CEO is not the same as knowing who owns 25 percent of that business. Again, the definition is too narrow as described in our comments in the above definitions section.

AARP appreciates your consideration of our comments and urges you to incorporate them into the final rule. We also urge CMS to issue a final rule in a timely manner to implement these long overdue nursing home ownership and disclosure provisions. AARP looks forward to continuing to work with CMS to establish minimum federal direct care staffing standards for nursing homes participating in Medicare and Medicaid, improve transparency and accountability, and improve the quality of care and quality of life for our nation's nursing home residents. If you have any questions, please contact me or Rhonda Richards on our Government Affairs staff at [r-richards@aarpp.org](mailto:r-richards@aarpp.org).

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner", with a stylized flourish at the end.

David Certner  
Legislative Counsel and Legislative Policy Director  
Government Affairs