

Submitted Electronically



April 14, 2023

Chiquita Brooks-LaSure, Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
7500 Security Boulevard
Baltimore, MD 21244-1850

Re: Disclosures of Ownership and Additional Disclosable Parties Information for Skilled Nursing Facilities and Nursing Facilities (CMS-6084-P)

Dear Administrator Brooks-LaSure:

On behalf of our over 5,000 members and partners including mission-driven organizations representing the entire field of aging services, LeadingAge appreciates the opportunity to submit comments relating to the Notice of Proposed Rulemaking for Disclosures of Ownership and Additional Disclosable Parties Information for Skilled Nursing Facilities and Nursing Facilities.

LeadingAge and our nonprofit, mission-driven nursing homes strongly support efforts to ensure that older adults and families receive quality care in America's nursing homes, including the goals of transparency and accountability with respect to ownership and operation.

LeadingAge members are transparent in their ownership structure and board governance and are held accountable to their local communities and government at all levels. Nonprofit providers have always disclosed ownership and management information as required by federal tax law on Internal Revenue Service Form 990s that are open to public inspection.

We value transparency and accountability because they promote nursing home excellence and because they strengthen our organizations and the communities that we serve. The corporate structures of LeadingAge members promote longevity of ownership through governance by community boards of directors and are financially sustained through public bond offerings and donations from philanthropists and foundations—though government support is often needed to cover the rising costs of caring for older adults. And we agree that ownership and financing of nursing homes should be transparent to help ensure that owners or associated businesses do not profit at the cost of quality care.

In this spirit, we support CMS's publication of the proposed rule, but offer the following comments and recommendations which we believe would support the goals of transparency and accountability, while providing needed clarifications for nursing home operators and reducing

certain compliance challenges and burdens that may arise.

BACKGROUND

Section 6101(a) of the Affordable Care Act (Pub. L. 111-148) (“ACA”) added a new section 1124(c) to the Social Security Act (the “Act”). This provision established requirements for the disclosure of information about the owners and operators of Medicare skilled nursing facilities (“SNFs”) and Medicaid nursing facilities (“NFs”). CMS previously proposed regulatory language to implement section 1124(c) as part of a 2011 proposed rule re: Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities; Disclosures of Ownership and Additional Disclosable Parties Information,¹ but did not finalize those proposed disclosure provisions in the subsequent final rule. With this notice of proposed rulemaking, CMS again proposes implementing language. For purposes of our comments below, we cite to subsections of the Social Security Act, rather than the ACA, when referring to the statutory language, and we use the term nursing homes to refer to SNFs and NFs collectively.

COMMENTS AND RECOMMENDATIONS

(1) We strongly urge CMS to include in the final rule the Social Security Act provision that specifically allows nonprofit nursing homes to submit IRS Form 990 to the extent that the information submitted meets the requirements of the Act.

Nonprofit providers (NFPs) already file an extensive report (Form 990) annually to the Internal Revenue Service (IRS) that discloses governance and operational leadership, related parties and affiliates, level of control and ownership, key employees and independent contractors, business dealings between reportable individuals and the NFP, and other detailed information. This filing is a requirement for maintaining tax-exempt status, and the IRS has revised the form periodically to address the nature and quality of the information collected. These filings are publicly available on the IRS website and other sites such as Guidestar (<http://www2.guidestar.org>).

Section 1124(c)(2)(B) of the Act establishes the following provision that applies where information is already reported or submitted: “To the extent that information reported by a facility to the Internal Revenue Service on Form 990, information submitted by a facility to the Securities and Exchange Commission, or information otherwise submitted to the Secretary or any other Federal agency contains the information described in clauses (i), (ii), or (iii) of subparagraph (A), the facility may provide such Form or such information submitted to meet the requirements of paragraph (1).”

Despite Congress’s inclusion of this provision in the underlying statute, this proposed rule does not

¹ 76 FR 26364

include implementing language for it. Instead, CMS states only that it may address this section in future rulemaking but needs additional time to examine the matter, given the potential operational complexities of incorporating the provisions of section 1124(c)(2)(B) into § 424.516(g) or 42 CFR part 455 when there already is vehicle (the Form CMS-855A) for collecting the data the Act requires to be disclosed.

We strongly urge CMS to include implementation of Section 1124(c)(2)(B) prior to finalizing a rule on these matters. While there may be organizational complexities for CMS to address in doing so, there will also be complexities for providers if CMS does not do so. LeadingAge believes it is very important for CMS to manage the burden of provider compliance, especially when doing so is consistent with the goals of the proposed regulations and underlying statute as it is here.

We ask CMS not to delay implementation and instead to develop a process by which nursing homes might file or link to the actual Form 990 or take some similar action, in lieu of reproducing applicable data using the standardized format created by CMS, as part of its planned work to revise Form 855A.

In this regard, since the Form 990 is filed annually and its content addresses the underlying policy goals of providing CMS with information on ownership and management of nursing homes, we would ask CMS to consider annual reporting to be sufficient with respect to the data elements required by the Act, in lieu of the proposed 90-day updates.

On a separate note, relating to nonprofit organizations, some of our member organizations have raised questions and concerns about an aspect of the current provider enrollment system that requires submission of social security numbers for volunteer board members, who serve in governance roles but – given the nature of nonprofit organizations – are not owners. We will share additional perspective on this issue with CMS through a separate communication.

(2) We ask CMS to define and clarify the proposed definition of “additional disclosable party.”

CMS proposes to define “additional disclosable party” as meaning any person or entity who:

- (1) exercises operational, financial, or managerial control over the facility or a part thereof, or provides policies or procedures for any of the operations of the facility, 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 or administrative services, management or clinical consulting services, or accounting or financial services to the facility.

CMS notes that this proposed definition duplicates the definition of the same term in section 1124(c)(5)(A) of the Act.

LeadingAge believes that, without additional definition or clarification of certain terms, the proposed rule may result in disclosures that are overly-broad, including certain facility employees, as well as consultants, advisors, and other service providers that nursing homes routinely engage, that do not own, control or manage the operations and activities of facilities in a manner that the rule is intended to address.

In its 2011 proposed rule referenced above, CMS noted the broad nature of the term “additional disclosable parties” and that it may be difficult for providers, under certain circumstances, to reasonably know without explicit guidance which parties and individuals associated with their facility are subject to the disclosure requirements. Therefore, CMS requested comment on how to narrow the scope of the term’s definition to ensure that the additional reporting requirements apply only to those parties and individuals that are capable of exercising actual operations, financial, or managerial control over a given facility.

CMS has not requested similar comments in the current proposed rule. However, we believe consideration of these issues remains very important, in order to provide clarity for providers and to ensure that the complexity of, and the burden associated with submitting, the required information is reasonable and supportive of the underlying policy goals.

As one alternative, CMS could deem submission of IRS Form 990 as sufficient for compliance with the requirements for submission of “additional disclosable parties,” or it could draw useful definitional concepts and content from this Form. While the 990 does not track the requirements of Section 1124 identically, it contains significant, detailed information relating to ownership and control, such as disclosure of key employees, highest compensated employees and highest compensated independent contractors. In addition, the form requires identification of business transactions with current or former trustees, officers, directors or key employees or their family members, or an entity of which a current or former trustee, officer, director or key employee is an officer, director, trustee or direct or indirect owner. The IRS also requires identification of related and controlling organizations, and partnerships, among other information.

If CMS believed it would be consistent with Congressional intent, another alternative would be for CMS to address operational, financial or managerial control with reference to day-to-day operations of the facility, or to routine or regular exercise of such control.

If CMS believes these approaches are not appropriate, we recommend that CMS otherwise provide general definitions to clarify the disclosure requirements, in order to provide guidance for identifying both individuals and entities that must be included in the additional party disclosures as well as individuals or entities that fall outside of the threshold for reporting.

We offer these brief examples to illustrate the possible interpretive, compliance challenges that may arise and the potential that disclosures will be broader than necessary:

- The definition requires disclosure of an individual that exercises operational or managerial control over “a part” of a facility. This could be read to include a member of the nursing staff that supervises one unit within a facility, for example.
- The definition includes all individuals and entities that provide management or administrative services, management or clinical consulting services, or accounting or financial services to the facility. Would this include all corporate office staff, for example, who support individual facilities within a multi-site organization? Would it include an external nurse consultant that offers brief assistance with preparing a plan of correction following an annual nursing home survey, but otherwise does not provide services to the facility? Would it include all staff who work in the billing department? Would it include unaffiliated, independent auditors?
- The definition includes individuals or entities that “provide policies or procedures”. Disclosing an independent, unaffiliated organization that provides template policies and procedures, for example, would seem unnecessary, since nursing home leadership must separately tailor, adopt and implement those policies, and the organization that created the template does exercise authority or managerial control.

Ensuring that disclosures are not broader than intended is also important considering that, with respect to SNFs, CMS is proposing that providers must report any change to the information disclosed within 30 days for changes in ownership or control and 90 days for all other changes. On this point: given the considerable amount of additional information that would be required to be reported under the proposed rule, we support a less frequent requirement for updating the additional information that would be required to be disclosed under the proposed rule, such as a semi-annual or annual reporting requirement, which would be significantly more frequent than reporting only upon revalidation, but somewhat longer than what CMS is proposing, to account for the time that will be needed to compile and report information, especially in larger organizations.

In summary, we urge CMS to provide clear guidance or definitions that support both the goal of increasing transparency concerning those that own and are responsible for operating nursing homes, and the goal of ensuring a reasonable compliance burden for affected providers.

(3) Nursing homes in some cases may be unable to provide all of the information required with respect to “additional disclosable parties.”

The definition of “additional disclosable party” is very important from another perspective, too, given that the rule would require nursing homes to disclose the following: (1) the organizational structure of each such party (essentially meaning ownership) and (2) a description of the relationship of each such additional disclosable party to the facility and to one another. Further, nursing homes submitting disclosures must attest that information is accurate and current.

As part of the current enrollment process for SNFs, for example, a facility is required to submit an

organizational diagram identifying all of the owning and managing entities listed on the Form CMS-855A and their relationships with the provider and with each other; and a diagram identifying the organizational structures of all of the SNF's owners. When a provider has created an organizational structure, including where there are vertical arrangements establishing ownership or control, the owning and managing entities and their relationships can reasonable be known and disclosed.

When these concepts are extended to include the organizational structure of all additional disclosable parties – as broadly defined – and the relationship among all such parties to the facility and to one another, we are concerned that in many circumstances a facility may not be able to provide complete information.

A nursing home may not know or be able to obtain the ownership/ organizational structure of all entities that fall into the definition of “additional disclosable party,” such as an independent, third-party consultant or professional services firm, as this information may be proprietary and confidential.

Also, it is not clear how a nursing home could realistically disclose all of the relationships one additional disclosable party has with all other additional disclosable parties, given the many independent business arrangements that may be in place. As a practical matter, given the breadth of the definition of “additional disclosable party,” there may be connections between and among the additional disclosable parties that are not known or knowable, and the state of these relationships likely changes frequently.

We request clarification from CMS about what efforts facilities would be expected to make to obtain information concerning additional disclosable parties, how such efforts would be demonstrated, and that CMS clarify that nursing homes will not be held accountable to disclosing information that they are not reasonably able to provide.

(5) Disclosure of Private Equity and Real Estate Investment Trust Status

CMS intends to add data elements to the Form CMS-855A through which owning and managing entities of SNFs would have to disclose whether they are either a private equity company or a REIT. To assist stakeholders in understanding the meaning of these terms for provider enrollment purposes, CMS also proposes to add definitions of these two terms.

LeadingAge supports the addition of these data elements, which we believe will facilitate further research and analysis how and to what extent ownership types affect and correlate with outcomes and the quality of care provided to nursing home residents.

(6) We recommend that CMS seek input from stakeholders when it develops plans for making disclosed information publicly available.

Section 1124 of the Act states that no later than one year after final regulations are published in the Federal Register, the Secretary of Health and Human Services shall make the information reported under such regulations available to the public.

Accordingly, CMS intends to make data reported in accordance with section 1124(c) of the Act publicly available within one year after this rule, if finalized, is published. CMS notes that it would consider making this data available on *data.cms.gov*, and that further information regarding the format and scope of the published information would be provided via future sub-regulatory guidance.

In keeping with our support for transparency, LeadingAge supports CMS's intention to make the data public. However, given the significant volume of information that will be disclosed if this rule is finalized – and given the complexity of the issues involved as expressed in our comments above – we recommend that CMS actively engage with stakeholders in the development of the sub-regulatory guidance. We believe there will be many questions on which stakeholder input will be very important, including the staging and prioritizing of making various data public (assuming it will not occur all at once), and presenting data in a way that ensures the information presented is most useful.

CONCLUSION

We appreciate the opportunity to submit these comments and respectfully request that CMS consider and address our concerns before publishing a final rule. Thank you for your consideration, and please contact me (jlips@leadingage.org) if we can answer any questions or provide additional information.

Sincerely,

Jonathan Lips

Jonathan Lips,
Vice President, Legal Affairs