

Nursing Homes Must Prepare For Ownership Scrutiny

By **Mark Mattioli and Paula Sanders** (August 8, 2023)

Nursing home ownership is a current topic of interest in the health care enforcement community.

President Joe Biden targeted nursing homes in his second State of the Union address, and the Centers for Medicare & Medicaid Services promulgated regulations in February requiring additional disclosures of ownership in nursing home transactions.[1]

The new rules seek to implement Section 6101 of the Affordable Care Act, requiring disclosure of certain ownership, managerial and other information regarding Medicare and Medicaid skilled nursing facilities, or SNFs.

Further, CMS elevated SNFs undergoing changes of ownership and restructuring by including new partners to the high designated risk category. This increased scrutiny became effective on Jan. 1.

Finally, the Pennsylvania Department of Health's new SNF regulations require increased notices and transparency in SNF changes of ownership. While the DOH notice regulations went into effect on Feb. 1, the additional regulations regarding changes of ownership do not become effective until Oct. 31.



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New CMS Scrutiny of SNF Transactions

As of Jan. 1, all SNFs involved in any enrollment activity became subject to a heightened review process. CMS elevated SNFs to the high categorical risk designation for changes of ownership, restructuring — such as introduction of new partners or owners with 5% or more ownership interests — and new enrollment.

It also raised SNFs to the moderate screening level for revalidations.[2] The change ended the decadelong classification of SNFs as a low categorical risk to the Medicare program.

This change is a component of the Biden administration's emphasis on increasing enforcement and oversight of post-acute providers and applies to both profit and nonprofit entities.

Providers in the high-risk categorical level must successfully pass the three elements of the limited level screening and the on-site visit. In addition, these providers, which now will include all SNFs with enrollment changes other than revalidations, must:

- Submit a set of fingerprints for a national background check from all individuals with a 5% or greater direct or indirect ownership interest in the provider.

- Undergo a fingerprint-based criminal history record check of the Federal Bureau of Investigation's Integrated Automated Fingerprint Identification System on all persons with a 5% or greater direct or indirect ownership interest in the provider.

The high screening category applies to new SNFs as well as those submitting either: (1) a change of ownership application pursuant to Title 42 of the Code of Federal Regulations, Section 489.18; or (2) an application to report any new owner pursuant to a change of information or other enrollment transaction. Restructurings include:

- For partnerships: A new partner, general or limited, who owns any percentage — even 1% — of the provider/supplier; or
- Excluding partnerships: A new direct or indirect owner of at least 5% of the provider/supplier.

Proposed Amendments to Medicare Regulations

On Feb. 15, CMS published proposed amendments to the regulations to make ownership more transparent. In promulgating the regulations, CMS expressed concerns about the quality of care and operations of nursing facilities owned by private equity and other types of investment firms.[3]

Citing reports that facility quality has declined under private equity, the regulations seek to make ownership of these facilities more apparent. The proposed regulations require SNFs to identify the following upon any change of ownership or upon revalidation:

- "Each member of the governing body";
- "Each person who is an officer, director, member partner, trustee or managing partner";
- "Each person who is an additional disclosable"; and
- "The organizational structure of each disclosable party and a description of the relationship of each such additional disclosable party to the facility."

An additional disclosable party is defined as anyone who:

- "Exercises operational, financial or managerial control over the facility or a part thereof, or provides policies and procedures for any of the operations of the facility or provides financial or cash management services to the facility;"
- "Leases or subleases real property to the facility or owns a whole or part interest equal to or exceeding 5% of the total value of the facility;" or
- "Provides management or administrative services, management or clinical consulting services or accounting or financial services to the facility." [4]

"Manager" is defined very broadly to include not only those individuals who have direct hands-on responsibilities but also any person who manages, advises or supervises any element of the practices, finances or operations of the facility. [5]

Organizational structure is defined depending upon the nature of the organization. For example, a corporation includes the directors and shareholders who have an ownership interest that exceed 5%.

A limited liability company includes the members and managers, including the percentage of ownership in the LLC. Limited partners include the general partners and any limited partner that owns more than 10% of the partnership.

The provisions are applicable to Medicare and Medicaid. The comment period ended on April 14. [6]

New Pennsylvania Regulations

In addition to the proposed federal regulations, new DOH regulations require additional transparency in SNF ownership and licensure disclosures. Some of the changes took effect earlier in the year, while the bulk of the changes go into effect in October.

As of Feb. 1, the DOH requires that a facility contemplating a change of ownership provide notice to all residents of the facility and their representatives and employees of the facility being purchased and to the Office of the State Long-term Care Ombudsman. [7]

Along similar lines, effective Oct. 31, the DOH will post notice of the receipt of any application for licensure of a new facility or change of ownership and a copy of the application on its website and allow a 10-day period for public comments. [8]

Additionally, the DOH will examine past compliance history and financial and organizational capacity as well as comments submitted by interested parties including the following: [9]

- "The prospective licensee's past performance related to owning or operating a facility in this commonwealth or other jurisdictions;"

- "The prospective licensee's demonstrated financial and organizational capacity and capability to successfully perform the requirements of operating a facility based on the information provided under Section 201.12;"
- "The prospective licensee's demonstrated history and experience with regulatory compliance, including evidence of consistent performance in delivering quality care;" and
- "Comments submitted by the public."

Also effective Oct. 31, all SNFs will be required to send the DOH additional information, including audited financial statements, in conjunction with annual license renewals. This will include, among other things:

- "An updated annual financial report that includes an audited financial statement prepared in accordance with generally accepted accounting principles; a visual representation of the current ownership structure, including parent companies, shareholders and related parties; and a supplemental schedule of annual gross revenues, prepared in accordance with generally accepted accounting principles, broken out by payor type." [10]

SNFs will also be required to provide the DOH notice within 30 days of changes in any person who:

- "Has or will have a direct or indirect ownership interest of 5% or more in the facility;"
- "Holds or will hold the license or ownership interest in the land on which the facility is located or the building in which the facility is located;"
- "Owns or will own a whole or part interest in any mortgage, deed, trust, note or other long-term liability secured in whole or in part by the equipment used in the facility, the land on which the facility is located or the building in which the facility is located."

The new owners will also be required to provide information on the directors, partners, administrators and anyone who has an interest in the management of the facility. [11]

What To Expect

SNFs undergoing changes of ownership in Pennsylvania can anticipate a heightened level of review and delays. The new transparency may make it easier to determine connections between various facilities that share services and that share a common ownership structure. Accordingly, given the new requirements, entities contemplating changes of ownership should be mindful of the following:

- Deal teams should anticipate delays with obtaining regulatory approval.
- Additional time may be needed to gather the required information as changes of ownership submissions with incomplete information will be likely be rejected or denied.
- Given the requirement for public notice and comment, new deals may be subjected to additional publicity and potential opposition.
- Approval of licensure changes will likely take longer given the need for the DOH to analyze substantially more information, including audited financials, than before.
- Even once the change in licensure has been approved, operators should expect significant delays in receiving their Medicare tie-in notices because of CMS' change in risk categorization for SNFs that now require on-site verification visits.

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[1] 88 Fed. Reg. 9820 (February 15, 2023).

[2] See, 42 C.F.R. §424.518(b)(1)(xiv) and (c)(1)(v).

[3] 88 Fed. Reg. 9822.

[4] Id. at 9829 (proposed amendment to 42 C.F.R. § 424.502).

[5] Id. Interestingly, while the definition of additional disclosable person is limited to SNFs,

the definition of "managing employee" applies to all providers. Part 424 governs Medicare enrollment generally. In perhaps a drafting error or a signal of things to come, the proposed regulations also define the terms "Private Equity" and "Real estate investment trust." Both are applicable to all providers however, neither term appears anywhere else in the proposed regulations other than the definitions.

[6] CMS received 74 Comments to the proposed rule.

[7] 42 Pa Code §201.12a

[8] 42 Pa Code §201.12a(d).

[9] 42 Pa Code §201.12b.

[10] See § 201.13c (b).

[11] 28 Pa. Code Section 201.18(c) (referencing data in Sections 201.12(b)(1) through 201.12(b)(6)).