

Insights

CMS Reporting Requirements for Nursing Facilities: Fast Tracking the Start Line

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As we previously reported, CMS issued a Final Rule implementing certain requirements in the Affordable Care Act regarding the disclosure of ownership, managerial and other information for Medicare and Medicaid participating nursing facilities. Most notable and complicated of these new requirements is the obligation to report *additional disclosable parties* (“ADP”) and the *organizational structure* of each ADP.

While the Final Rule went into effect on January 16, 2024, it allowed some breathing room for facilities, stating that Medicare skilled nursing facilities would not have to disclose this newly required data until the Form CMS-855A (i.e., the Medicare enrollment form) had been revised, and only upon initial enrollment, a change of ownership, or a revalidation. The time has now come for nursing facilities to gear up for the disclosures. On September 19th, CMS issued an MLN Connects Newsletter stating that CMS will revalidate enrolled SNFs from October to December 2024 to collect the newly required information, with one-third of the SNFs getting notices in October and two-thirds of the SNFs getting notices in November and December. CMS also published a new CMS-855A which includes an 18-page Attachment 1 dedicated solely to SNF disclosures, and then shortly thereafter published a 15-page Guidance document related to this SNF Attachment.

With pages and pages of instructions and guidance to sort through, and then pages and pages of disclosures to develop, SNFs will be certain to have a busy year end. Indeed, based on the breadth of the definition of ADP—as it is defined in the Final Rule and further elaborated on in the Guidance—and the expansiveness of the organizational structure required to be disclosed for each ADP, it is quite likely that SNFs will be submitting 200+ pages (or the electronic equivalent in PECOS) of information about its employees, contractors, and volunteers¹, as Attachment 1 will be duplicated numerous times over to reflect information for each and every individual or entity that falls within the laundry list of disclosable parties. Even if there is a reasonable question as to whether a party constitutes a disclosable party (for instance, whether the individual is an ADP), CMS has instructed in both the Rule and in the Guidance that the Rule should be construed towards disclosure. And that is just for Medicare – we have yet to see these requirements being applied in Medicaid.

Some interesting tidbits from the Guidance are as follows:

- If the SNF is a governmental organization, then the governing body members of the governmental organization need not be reported unless the member falls within another disclosure category (e.g., exercises operational control or is a managing employee), in which case such member will still need to be disclosed for such category. However, the offset of this non-reporting of the governing body members of the governmental organization seems to be that the SNF provider must nonetheless still submit a letter on the

letterhead of the responsible government (like a government agency) attesting that the government or tribal organization will be legally and financially responsible if there is any outstanding debt owed to CMS, and the letter must be signed by an authorized official of the governmental organization. See page 54 of the new CMS-855A.

- CMS expects SNFs to disclose ADPs and managing employees regardless of tenure, stating, “[t]here is no minimum threshold for disclosure in terms of: (1) the length of time the party must have furnished the services, served on an ADP’s governing board, etc.; (2) the degree and extent of involvement with the SNF’s day-to-day operations; and (3) the volume of the furnished services, functions, etc. As an illustration, it is unnecessary for a person’s dealings with the SNF to be equivalent to at least 0.33 full-time employees (FTEs) to qualify for disclosure. Even if certain services were furnished for only a very brief period, by a temporary employee, and only one time (rather than, for example, for three-month periods every 18 months), disclosure is required.”
- CMS carves out legal services from ADP disclosures unless the attorney is providing services or exercising control that are/is not legal in nature and which otherwise fall(s) within one of the disclosure categories, thus placing pressure on the question of whether the services are legal services subject to attorney/client privilege or merely just government affairs or consulting services.
- SNFs will have to submit multiple charts reflecting various relationships between the reported organizations, the owners, and the owners of the ADPs.
- The regulations require changes of information to be reported within 90 days of the change, and changes of ownership or control to be reported within 30 days (42 CFR 424.516(e)(1) and (2)). However, CMS appears to be interpreting “change of ownership or control” broadly, requiring more changes to be reported within that 30-day period as opposed to the 90-day period that may have previously applied. For instance, CMS is requiring changes in managing employees and changes in information related to leases, subleases and ownership of real property to be made within 30 days.
- The Final Rule suggests, and the Guidance further verifies, that SNFs will also have to report changes in the *ownership* of ADPs (42 CFR 424.516(g)(3)). In other words, if an accounting firm that the SNF utilizes for audit services undergoes an acquisition or merger, the SNF is responsible for reporting that ownership change to CMS within the required timeframe.

The Guidance appears to go beyond the Final Rule and the Final Rule appears to go beyond the underlying statutory authority at Soc. Sec. Act 1124(c). Given the recent decision in *Loper Bright Enterprises v. Raimondo*., raising questions about agency interpretation and commentary, it is a wonder if CMS’ Final Rule and Interpretative Guidance will be challenged, as we are seeing in many other industries and agency actions. For questions about SNF disclosures under this new Rule and Guidance, please contact Meghan M. Linvill McNab or Andrew Warner.

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¹CMS noted in the guidance that it doesn't matter whether the disclosable party is an employee, an independent contractor, *or even a volunteer*. Moreover, an individual's specific occupational title is not solely determinative as to whether he/she must be reported. It is the nature of the service, function, ownership, oversight, etc., that is pertinent, not the party's employment/contractual status.