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August 2, 2024

Ms. Chiquita Brooks-LaSure
Administrator, Centers for Medicare & Medicaid Services (CMS)
Department of Health and Human Services
Room 445-G, Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, D.C. 20201

Re: AHCA Response to *Document Identifiers: CMS–855A, Agency Information Collection*
***Activities: Submission for OMB Review; Comment Request* [89 FR 55272]**

Dear Administrator Brooks-LaSure:

The American Health Care Association and National Center for Assisted Living (AHCA/NCAL) is the nation's largest association of long-term and post-acute care providers. AHCA/NCAL advocates for quality care and services for frail, elderly, and disabled Americans. Our members provide essential care to millions of individuals in more than 14,500 nursing homes, assisted living facilities, and centers for individuals with intellectual and developmental disabilities.

AHCA appreciates the opportunity to comment on the *Agency Information Collection Activities: Submission for OMB Review; Comment Request* notice[1] regarding updates to the Form CMS-855A (referred to as this *Notice*). This form update is intended to incorporate additional Skilled Nursing Facility (SNF) provider enrollment reporting requirements promulgated in the CMS-6084-F, November 17, 2023, Medicare and Medicaid Programs; Disclosures of Ownership and Additional Disclosable Parties Information for Skilled Nursing Facilities and Nursing Facilities final rule (Referred to as the *Final Rule*).

The provider enrollment *Final Rule* added requirement for SNFs to report certain Additional Disclosable Parties (ADP) not previously reported including any entity that:

- 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;
- 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
- Provides management or administrative services, management or clinical consulting services, or accounting or financial services to the facility.

Four principal types of CMS-855A transactions via which SNFs will report the new ADP data are:

- Applications to initially enroll in Medicare;
- CHOW applications;
- Applications to revalidate the SNF's current enrollment information, and;
- Reporting changes to any of the SNF's previously disclosed supplemental data.

AHCA supports reasonable transparency of skilled nursing facility and nursing facility (collectively, nursing facility) ownership, leadership, and operational decision-making. That publicly reported information must be tailored to ensure it provides consumers and stakeholders with meaningful information, however. We have grave concerns regarding the transparency and validity of the prior *Final Rule* in presenting accurate information of the vast scope of new reporting and of the true burden of the SNF Additional Disclosable Parties (ADP) requirements reflected in the expanded draft revision of the Form CMS-855A in this *Notice*.

- **This *Notice* projects an increased provider labor burden that is <u>484 percent higher</u> than presented in the *Final Rule*.**
- **This *Notice* projects an increased provider cost burden that is <u>392 percent higher</u> than finalized in CMS-6084-F**

Table A below reflects the dramatic increase in SNF provider reporting burden and associated unfunded costs by comparing the data from the four principal types of CMS-855A transactions via which SNFs will report new ADP data from Table 2 of the *Final Rule* and a comparable table we created using data from Tables 4-25 of the supporting statement of this *Notice*. Notably, for Revalidation Applications, the total annual hours burden increased 1,237 percent and the total cost burden increased 1,027 percent between the publication of the *Final Rule* and this *Notice* which far exceeds any non-policy-related incidental adjustments.

Table A. SNF ADP Reporting Burden and Cost Estimate Changes Between *Final Rule* and this *Notice*

Principal types of CMS-855A transaction	Total Annual Burden (hours)		Total Cost ($)		Total Annual Burden (hours)	Total Cost ($)	Total Annual Burden (hours)	Total Cost ($)
	Final Rule	This Notice	Final Rule	This Notice	Net Burden Increase in this Notice		Percent Burden Increase in This Notice	
Initial Form CMS- 855A Applications	2,374	10,276	236,189	861,643	7,902	625,454	333%	265%
Revalidation Applications	3,762	50,308	374,281	4,218,325	46,546	3,844,044	1237%	1027%
Change of Ownership Applications	2,140	9,260	212,909	776,453	7,120	563,544	333%	265%
Change of Information Applications	4,500	4,751	447,705	398,374	251	-49,331	6%	-11%
Total	12,776	74,595	1,271,084	6,254,795	61,819	4,983,711	484%	392%

- **We believe the new information presented in the supporting statement and related forms[1] associated with this *Notice* is not an accurate representation of the ADP requirements finalized in the *Final Rule*, but instead reflects new policy that has not been subject to proper notice and comment and should be withdrawn until our concerns are resolved.**

[1] https://www.cms.gov/regulations-and-guidance/legislation/paperworkreductionactof1995/pra-listing/cms-855a

We note that we presented multiple concerns about the apparent inadequacy of the defined scope of ADP collection burden and costs in our April 13, 2023, comments[2] in response to the proposed rule, CMS-6084-P, Collection of Information Requirements section (88 FR 9826). However, the November 17 *Final Rule* failed to acknowledge our comments with the following statement *"We did not receive comments on our regulatory impact analysis…"* (88 FR 80167). CMS reiterated this inaccurate statement on page 4 of the supporting statement associated with this *Notice*.

As we stated in our April 13, 2023 comment letter in response to CMS-6084-P, we believe it is important for CMS to directly engage with SNF providers directly impacted by the ADP requirements regarding the *"… the realistic impact on facilities for compiling this information and keeping the information current."* We believe that it is necessary for CMS to revisit the scope expansion of the CMS-855A form SNF data requirements as detailed in the draft revision of the form presented in this *Notice*. CMS should significantly limit the scope and level of detail proposed to be collected from ADPs who are not organizationally related to the SNF but are instead contracted with to substantially fulfill specific SNF functions (see later discussion regarding suggested minimum FTE thresholds). This will mitigate some of the increased burden and costs described, and also provide information regarding ADPs that is reasonably compiled to provide meaningful data to consumers and other stakeholders.

In this *Notice*, CMS stated that *"Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including:*

- *The necessity and utility of the proposed information collection for the proper performance of the agency's functions,*
- *The accuracy of the estimated burden,*
- *Ways to enhance the quality, utility, and clarity of the information to be collected, and*
- *The use of automated collection techniques or other forms of information technology to minimize the information collection burden."*

Below are specific comments in response to the supporting statement and related forms associated with this Notice.

1. The Definition of ADPs is Inadequate and Unacceptable

The definitions of ADPs described on pages 54 and 64 of the proposed revisions to Form CMS-855A of this Notice do not provide sufficient detail for providers to be able to identify who the parties "that perform administrative, financial, or clinical consulting services" are that need to be reported or included in the required organizational chart for the ADP. Although we requested such detailed guidance be provided in our comments in response to the CMS-6084-P *Proposed Rule,* we do not see any additional clarification in this *Notice* beyond limited new job role items in the proposed Form CMS-855A items in Section D of the Organizations disclosure section of the Attachment and Section B of the Individuals disclosures. Additionally, when reviewing the proposed revisions to Form CMS-855A, CMS provides a link, pages 54 and 65 containing the following statement and link for more information:

> *"For examples of individuals to report, visit CMS.gov/medicare/enrollment-renewal/providers-suppliers."*

There is no information related to ADPs on the linked webpage. Without such information we are unable to evaluate whether the CMS burden increase estimates are correct. Turnover rates may be high for certain occupations that may be considered within a broad and vague definition of an ADP.

[2] https://www.regulations.gov/comment/CMS-2023-0031-0043

For example, a nurse or therapy consultant hired to help update clinical policies for 2 months, a temporary manager under contract or brought in from a sister facility in an organization to cover maternity leave, or other temporary or intermittent personnel engaged in organizational and clinical policies would appear to need to be reported in item 13 on page 68 of the proposed Form CMS-855A changes at both the onset of the short-term or periodic activity and after their work is completed. **We believe the intent of this policy is that it should focus on individuals/organizations that have a constant and permanent daily presence in the development, implementation, and ongoing refinement of policies, not those that are involved in periodic contributions to components of the policies**.

- **We recommend that the individual's contractual agreement or employee job role work hours performing activities specifically meeting ADP reporting requirements must be the equivalent of a minimum of 0.5 FTEs annualized to be reportable under the ADP reporting policy.**

Establishing minimum FTE thresholds for ADP reporting would eliminate the burdensome adding on and removing of ADPs via change of information CMS-855A reporting for part-time or temporary performance of some but not a substantial portion of ADP related functions.

Additionally, it is unclear what activities could be considered *"indirect"* services that would require ADP reporting of an individual, particularly related to policies and procedures and clinical consulting services. For example, if a SNF obtains boilerplate template policies from companies or national organizations, such as ours, does AHCA need to be reported as an indirect ADP? Or if the SNF is part of a statewide provider network (some states have networks of over 100 SNFs), or are participating in an Accountable Care Organization (ACO), or have agreements with End State Renal Disease (ESRD), Hospice, or other providers/suppliers with shared policies related to services furnished by the SNF, are all of the network, ACO, other providers/suppliers to be reported as ADPs? As another example, are attorneys hired or on retainer to review legal documents that may contain organizational policies but are not involved in developing or implementing the policies reportable as ADPs? Would the reporting of an attorney as an ADP potentially compromise attorney-client privilege?

In addition to the initial burden of reporting ADPs on the Initial Enrollment, CHOW, or during Revalidations, if a Change of Information, including revised organizational charts for the ADP, must be reported on each ADP personnel change or the signing of new time limited or sporadic clinical consulting agreements including a broad swath of *"indirect"* services, the volume of Change of Information submissions could skyrocket significantly above the CMS annual estimate of 4,751.

- **We request a clear definition of the term *"indirect"* services as it would apply to the ADP reporting policy.**

We also do not understand how the estimated volume of Initial Enrollments, CHOWs, and Revalidations increased significantly in this Notice but the estimated volume increase for Change of Information submissions only nominally increased. We believe that without a clear and limited definition of ADPs, most if not all 15,000+ SNFs would be required to submit at least one Change of Information per year. Additionally, given the high turnover rates of some positions, and the fact that changes must be reported within 90 days of the occurrence, many SNFs will be required to perform Change of Information submissions at least on a quarterly basis. **In other words, we estimate that Change of Information Form CMS-855A submissions would be likely to be more than four times the volume of 4,751 that CMS estimates.**

- **We request that CMS provide sufficient detail, and include occupational titles, for SNF providers to be able to identify who the parties *"that perform administrative, financial, or clinical consulting services"* are that need to be reported or included in the required organizational chart for the ADP in any Form CMS-855A transaction.**

Without additional clarity, such as a list of occupational titles that the ADP policy applies to, facilities will need to develop their own interpretation, which could result in an overwhelming number of individuals identified resulting in confusing and meaningless information available to consumers and stakeholders.

2. CMS inexplicably adopts and uses different and lower value wage estimates in this *Notice* compared to the *Final Rule*.

On page 8 of the supporting statement associated with this *Notice*, CMS states without explanation that the Agency will ignore the median U.S. Bureau of Labor Statistics' (BLS) May 2022 National Occupational Employment and Wage Estimates wage estimates that were used and finalized in the *Final Rule.* Instead, the Agency is proposing use of the lower mean wage values in this *Notice*. Additionally, Table 2 of the supporting statement does not reflect the Lawyers wage rates that are described in the document on page 8.

We created Table B below to reflect the differences between the BLS mean wage estimates used in the *Final Rule*, and the median wages proposed in this *Notice*. The wage estimates in this *Notice* are 10.7 percent lower for the Office and Administrative Support Workers, compared to the Final Rule and are 17.1 percent lower for Lawyers. This means that the provider cost burden estimates listed in Table 25 of this *Notice* are not comparable to the *Final Rule* estimates because CMS has changed the wage cost basis assumptions.

Table B. SNF ADP Reporting BLS Wage Index Estimate Changes Between *Final Rule* and this *Notice.*

BLS Wage Estimate Adjusted Hourly Wage/hr.	43-9199 Office and Administrative Support Workers, All Other (Wage/Wage+Benefits)	23-1011 Lawyers (Wage/Wage+Benefits)
May 2022 (Mean – *Final Rule*)	$20.75/$41.5	$78.74/$157.48
May 2022 (Median – *Notice*)	$18.59/$37.18	$65.26/$130.52
Reduction from *Final Rule* ($)	-$2.16/-$4.32	-$13.48/-$26.96
Reduction from *Final Rule* (%)	-10.4%	-17.1%

- **We request that CMS provide a rationale consistent with other policies for the unexpected change in the wage rate basis for the cost estimates between the *Final Rule* and this *Notice*.**
- **We request that CMS provide a clear and direct comparison of the increased reporting cost burden being introduced in this *Notice*.**

It is extremely difficult to compare burden impact changes with this *Notice* when the wage basis between the *Final Rule* and this *Notice* are not the same. Even with these deflated estimated being used in this *Notice*, the additional burden costs of the proposed Form CMS-855A changes in this *Notice* will be 392 percent higher than those described in the *Final Rule*. The cost burden increase estimate in this *Notice* would have been much higher had both estimates been based on the same hourly rate basis.

3. CMS proposed changes to Form CMS-855A and Data Elements in this *Notice* to accommodate the new SNF ADP reporting requirements appear to incorporate much

more extensive burden on providers than described and promulgated in the *Final Rule*.

We understand the need for CMS to revise the CMS-855A provider enrollment form to accommodate new data elements for SNFs to report on certain persons or entities that perform administrative, financial, or clinical consulting services but do not otherwise qualify a person or entity that must otherwise be reported on the application such as an owner or managing organization. In this *Notice*, CMS refers to this new data to be reported as *"supplemental data"* that requires additional data fields to the provider enrollment form.

Because the proposed Form CMS-855A revisions to collect this new ADP *supplemental data* are in addition to data currently reported in the 14-pages of Sections 5 and 6 of the form that is used by all institutional providers, and the addition of *supplemental data* fields to these sections may create confusion for other provider types, CMS is proposing to remove SNF data reporting from Sections 5 and 6 and instead would require SNFs to report the necessary data (current and new ADP *supplemental data*) in a new 20-page attachment.

- **In general, we support the proposed approach to create a unique SNF Provider Enrollment Attachment to replace reporting in Sections 5 and 6 of the form but have questions about the transition.**

Specifically, we request that CMS clarify whether the data elements in existing Sections 5 and 6 will be automatically transitioned to the corresponding data field in the new SNF attachment so there is no additional reporting burden during a subsequent CHOW, revalidation, or change of information submission. Additionally, it would be extremely helpful if CMS would provide a user-friendly side-by-side data mapping diagram for such information for SNF providers to reference when updating information for the abovementioned purposes.

- **We appreciate that in this *Notice*, that CMS clarified that the Agency had changed its assumptions and approach to estimate the burden associated with the ADP additional *elements* proposed to be added to Form CMS-855A to better reflect the true reporting burden increase. However, we believe the more detailed changes to estimating burden impacts of ADP reporting by SMS in this *Notice* reveal substantive policy changes from the *Final Rule* that impose significant additional administrative burden.**

Below we discuss additional specific concerns we have that are particularly challenging in the CMS Revalidation Applications and Change of Information reporting burden estimates.

Revalidation Applications. Provider enrollment revalidation applications are required once every 5 years. We note that CMS states on Page 10 of the supporting statement that, instead of implementing the revalidation policy as promulgated in the *Final Rule*, in which the Agency estimated only 1,672 providers would be impacted per year, this *Notice* appears to create new policy that would require off-cycle revalidations for nearly all current SNF providers in an extremely compressed timeframe. The Agency states:

> *"This is because we plan to conduct off-cycle revalidations under § 424.515(d) of each Medicare-enrolled SNF once the CMS-855A is revised to collect the section 1124(c) data. We expect to complete these revalidations within the first 3 years following CMS-6084-F's publication, most likely all in the first year. Since there are roughly 15,500 enrolled SNFs, this results in 5,167 annual revalidations over the 3-year OMB approval period (or 15,500/3).*

We find this troublesome for a number of reasons. First, in this *Notice*, CMS is proposing they are *"most likely"* to compress the revalidation cycle for over 15,000 SNFs from 5 years to as little as one year from their most recent initial enrolment, CHOW, or revalidation under "off-cycle revalidation" authorities. This level of volume or granularity was not part of the *Final Rule* or the associated burden estimates. Second, CMS states the clock for completing these off-cycle revalidations started following the November 17, 2023 *Final Rule "publication"* date. Given any revisions to Form CMS-855A will not be published and available until, at the earliest, later this fall, one year after the publication date, we do not see this as a reasonable expectation. Finally, despite the stated intent in this *Notice* to complete the new off-cycle revalidation within one year, CMS provides a burden estimate of 5,167 respondents per year spread across three years. It is highly dubious whether CMS and the Medicare Administrative Contractors (MACs) have the capacity to meet such an aggressive one or up to 3-year off-cycle revalidation schedule given current provider enrollment revalidation delays. **Even if CMS were to spread out these off-cycle revalidations across three years, the additional provider burden remains much higher than the 1,672 providers projected in the *Final Rule*. As reflected in Table A above, for *Revalidation Applications*, the total annual labor hours burden increased 1,237 percent and the total cost burden increased 1,027 percent between the publication of the *Final Rule* and this *Notice*.**

- **We request that CMS maintain the revalidation cycle frequency policies to be consistent with the annual estimate of 1,672 providers as estimated and promulgated in the *Final Rule*.**

Changes of Information. On page 6 of this *Notice*, CMS discusses that the new ADP reporting requirements are intended to collect *"certain information not collected via the existing CMS-855A process. This includes (but is not limited to) parties that perform administrative, financial, or clinical consulting services but do not otherwise qualify a person or entity that must otherwise be reported on the application."* This represents a significant expansion of potential organizations and individuals that would need to be reported for any changes occur from previously reported on an initial enrolment, CHOW, or revalidation within 30 or 90 days of the occurrence, including an updated organizational chart of the SNF or external entity performing a function requiring as an ADP.

In our in our April 13, 2023 comments we requested specific responses to questions such as these:

- *What does it mean to indirectly manage, advise, or supervise any element of the practices, finances, or operations of the facility? including parties that perform administrative, financial, or clinical consulting services but do not otherwise qualify a person or entity that must otherwise be reported on the application?*
- *Does this include consultant pharmacists or consultant dietitians?*
- *Does it also include the companies for which these consultants work, if the consultants do not own their own business?*
- *Per historical cost report data, most facilities obtain rehabilitation (physical and occupational therapy and speech-language pathology) services under arrangement with individual practitioners and private companies. Does this rule apply to these individuals and central office and regional staff of rehabilitation companies that may contribute to direct care, generate facility policies and procedures, and provide education and other administrative support services?*
- *If an external accounting/auditing firm is used by the facility to produce cost reports and perform other financial and reimbursement services and if the firm is large and the auditor has several layers of individuals to whom he/she reports, must all those individuals also be reported to CMS?*

- *Must attorneys who advise a facility on operations, finances, and practices be reported to CMS? If the attorney is not independently employed, how much information must be reported about the attorney's law firm? And if the firm has offices nationwide or internationally, do all locations need to be identified along with any additional information required by CMS?*
- *Does it require disclosure of relationships with banks with which lines of credit or letters of credit are secured (unsure if this is a "financial" service).*

In all of these examples, the number of individuals who might be reported, at a minimum on an organizational chart of the ADP, is extensive and turnover of personnel in positions performing ADP-related functions could require frequent updates to all the information that must be gathered about these individuals. **This is going to be extremely time-intensive for the provider and will require at least one full-time employee devoted to this process.**

4. The use of automated collection techniques or other forms of information technology to minimize the information collection burden.

We believe that a SNF provider should not have to report detailed information about a reportable party that has existing information in the Provider, Enrollment, Chain, and Ownership System (PECOS). To minimize the burden of submitting redundant information, SNF providers should be able to submit just the respective Tax Identification Number (TIN), National Provider Identifier (NPI), or a Medicare provider number/Provider Transaction Access Number (PTAN) of the reportable organization or individual into the Provider, Enrollment, Chain, and Ownership System (PECOS) and the application should be able to auto-populate all the fields of Form CMS-855A where existing administrative data already exists. Additionally, we do not believe it is necessary for SNF providers to submit organizational information, including organizational charts, about another type of Medicare enrolled provider beyond what that provider is required to submit to PECOS.

- **We request that the PECOS and the Form CMS-855A be configured in a manner that would permit the SNF to enter the Medicare provider number of a Medicare-enrolled disclosable party or a TIN of a disclosable party already reported in PECOS which would auto-populate all the fields of the proposed SNF Attachment to Form CMS-855A where existing administrative data already exists for that disclosable party.**

Conclusion

We appreciate the opportunity to comment on the *Agency Information Collection Activities: Submission for OMB Review; Comment Request* notice regarding updates to the Form CMS-855A. We hope that our discussion regarding our concerns about the quality, utility, and clarity of the information to be collected and of the significant increased burden estimates between the *Final Rule* and this *Notice* provide sufficient justification for CMS to withdraw this proposal until these concerns are addressed. If you have questions about these comments, please contact Dan Ciolek at dciolek@ahca.org. Thank you.

Sincerely,

Mark Parkinson
President & CEO