



The National
CONSUMER VOICE
for Quality Long-Term Care

April 14, 2023

Centers for Medicare & Medicaid Services
Submitted electronically, <https://www.regulations.gov>

Re: Medicare and Medicaid Programs; Disclosures of
Ownership and Additional Disclosable Parties
Information for Skilled Nursing Facilities and Nursing
Facilities, 88 Fed. Reg. 9820 (February 15, 2023), CMS-
6084-P

Dear CMS Administrator Brooks LaSure and CMS Colleagues:

The National Consumer Voice for Quality Long-Term Care (Consumer Voice) and the undersigned offer the following comments and suggestions in support of the new ownership and disclosure requirements implementing 6101 of the Affordable Care Act (ACA). Consumer Voice is the leading national voice representing consumers in issues related to long-term care, helping to ensure that consumers are empowered to advocate for themselves. We are a primary source of information and tools for consumers, families, caregivers, advocates, and ombudsmen to help ensure quality care for the individual.

Consumer Voice strongly supports the creation of regulations requiring increased transparency of nursing home ownership. Ample evidence supports that different ownership types (non-profit/for-profit) often result in disparate health outcomes for nursing home residents. Further, within ownership types, there can be significant disparities in outcomes for residents. For instance, a recent study found that residing in nursing homes owned by a private equity investor (a form of for-profit nursing home) raised the mortality of Medicare residents by 10%ⁱ. In other words, knowing who owns and operates a nursing home can be a matter of life and death.

We strongly believe that transparency in who owns and operates nursing homes serves several purposes, but most importantly, it should:

- 1) Ensure sufficient information to empower consumers to make informed health choices.
- 2) Increase accountability for how nursing home owners spend Medicare and Medicaid dollars. Ensure accountability for the quality of care and services provided to residents.
- 3) Ensure accountability for the quality of care and services provided to residents.

Section 6101 of the Affordable Care Act sought to pull back the complicated veil masking the myriad entities some nursing home owners use to hide their ownership, avoid liability, and maximize profit from Medicare and Medicaid. As a result, Section 6101 focuses not only on who owns a nursing home but also who controls the operations, finances, and day-to-day management. If implemented correctly, the primary goals of transparency will be achieved.

While we thank the Centers for Medicaid Services (CMS) for promulgating regulations intended to increase transparency in nursing homes, we are concerned that CMS has not done enough to ensure the goals of transparency embodied in the law. Addressing who owns, operates, and controls nursing homes must be addressed with innovative and up-to-date regulations and policies that consider the extensive and extremely complex ownership structures that have been employed by this industry.

Below we offer general comments and concerns regarding the regulations along with in-depth analysis and suggestions to make these regulations stronger and capable of achieving the statutory promise of Section 6101 of the ACA.

In addition, we have provided, at the end of this document in Attachment A, with suggested changes incorporated into the language proposed by CMS.

Background

Much of the opacity in nursing home ownership can be traced back to the rise of related party transactions. In 2003, an article in the Journal of Health Law proposed “separating the ownership of the real estate [on which a nursing home is located] from the ownership of the operating entity that holds the license and Medicare and Medicaid provider agreements.”ⁱⁱ The goal of this practice was to limit the financial liability of the owners of the nursing home but also help avoid Medicare and Medicaid exclusions for program violations.ⁱⁱⁱ

Since the publication of that article, the use of these related organizations has increased, with nearly 70% of nursing homes using related parties, with billions of dollars funneled through them annually.^{iv} As owners began to separate themselves from the facility through the use of related parties, it became increasingly difficult to ascertain who owned or controlled a nursing home. Now it is not uncommon for a single nursing home to have over a dozen related party companies related to it, some who may own the real estate, others providing some kind of service.^v

In 2010, a U.S. Government Accountability Office (GAO) report found, regarding nursing homes, that “CMS’s ability to determine the accuracy and completeness of the reported ownership data [was] limited.”^{vi} While the GAO initially focused on the issue of private equity investment in nursing homes, it ended up identifying system-wide flaws. It made eleven recommendations, only six of which have been implemented by CMS.

In its report, the GAO repeatedly noted the complex ownership and organizational structures and found that “Nursing homes often have numerous owners listed, but not information provided in PECOS to indicate how they may be related.”^{vii} It noted how one company created:

- Separate limited liability companies for the operation of each individual home in the chain;
- Separate limited liability companies that owned the nursing home real estate;
- A separate company that leased all the properties from the real estate holding companies and then subleased them to the operating companies; and
- A holding company set up to own the entire chain.^{viii}

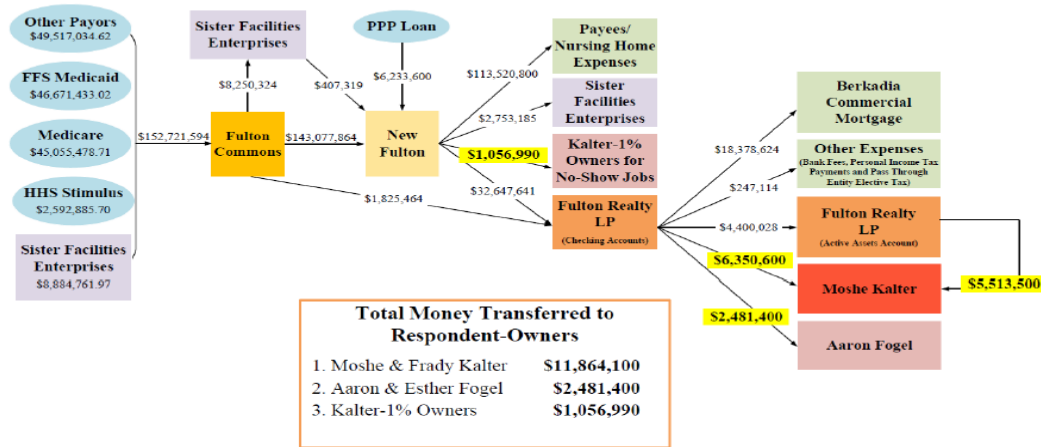
The GAO report called for the proper implementation of Section 6101 of the ACA. Its primary recommendation was that CMS require that facilities report:

- The organizational structure and the relationships to the facility and to one another of all persons or entities with direct or indirect ownership or control interests in the provider (as defined in the act), such that the hierarchy of all intermediate persons and entities from the provider level up to the chain and the ultimate owner is described.^{ix}

This recommendation is notable for its adoption of language used in Section 6101, which the GAO report cites significantly throughout the report as an essential step in achieving transparency in nursing home ownership. Notably, this recommendation requires exhaustive disclosure by nursing home owners and the numerous companies that often surround a facility's operation. Over thirteen years later, this recommendation has still not been implemented.

Things have not gotten better since the GAO's report. Recent litigation demonstrates how some nursing homes use related parties and other ownership structures to hide fraud and avoid liability for poor care that harms residents. A recent case filed by the New York Attorney General against Fulton Commons revealed a complex ownership and control structure designed to siphon Medicare and Medicaid dollars away from care.^x The complaint alleges that the defendants created a complex ownership structure with over twelve different owners. However, this was done to disguise the fact that one person exercised control over the whole operation.

**Fulton Commons Cash Flow Chart: Transfer of \$15,402,490
to Respondent-Owners from Fulton Commons from 2018–2021**



Notes:

*This sum is based on W-2 records, produced by Respondents Fulton Commons and New Fulton, reporting salaries paid to each of the eight Kalter-1% Owners by New Fulton.

1. Unless otherwise specified, all the chart totals other than those of the Sister Facilities Enterprises, as defined in ¶ 43 n.17 *infra*, are the net balances as determined from the analyses of the bank accounts.
2. This chart is not inclusive of every transaction in the accounts.
3. Some amounts are rounded down to the nearest dollar, which may affect the total balances.
4. The amounts transferred to Moshe Kalter and Aaron Fogel were transferred into joint bank accounts with their spouses, Frady Kalter and Esther Fogel, respectively.

The chart above, taken from the Attorney General’s complaint, illustrates the highly complicated efforts made by the defendants to hide their ownership interests while allegedly funneling millions into their profits. Unsurprisingly, the complaint details numerous horrors suffered by residents in this facility during the corresponding time.

Numerous Reports and Studies Support Increased Ownership Transparency

The National Imperative to Improve Nursing Home Quality: Honoring Our Commitment to Residents, Families, and Staff, the April 2022 report issued by the National Academies of Sciences, Engineering and Medicine (NASEM), identified the importance of ownership information to the public, when for-profit facilities generally provide poorer quality care than not-for-profit facilities. It found “Current data sources do not allow for an examination of performance across nursing homes by a common owner” and facilities use “related-party transactions or unrelated business entities to hide profits.” As summarized by the Government Accountability Office (GAO), the NASEM report called for the following:

- Enhanced collection, auditing, and transparency of information on finances, operations, and ownership of all nursing homes;
- Tracking and evaluating the quality of care across facilities under common ownership and management; and
- Strengthened oversight and enforcement across facilities with a common owner.

The Medicaid and CHIP Payment and Access Commission (MACPAC) addressed many of the transparency issues, recommending, in its March 2023 report, that:

- More transparency of related-party transactions would help shed light on practices that may inflate costs above what they would be if a facility were operated more economically and efficiently (Adelberg et al., 2022).^{xi}
- More transparency of real estate ownership models is also important for understanding related party transactions, especially arrangements in which the facility real estate is owned by one entity and then leased to another,” as required by §6101 of the Affordable Care Act. MACPAC expresses concern that the ownership data that facilities submit to the Provider Enrollment, Chain, and Ownership System (PECOS) “do not include information on the ultimate owners of some chains, and they do not separately identify specific types of arrangements that stakeholders have raised concerns about, such as real-estate investment trusts and private equity ownership (Braun et al. 2023, GAO 2023, Braun et al. 2021).

Critical to achieving the goals of transparency in nursing home finances is identifying the entities or individuals who own and operate not only nursing homes but the related parties that are connected to facilities. While CMS currently requires disclosure of related party transactions, it does not require the disclosure of the type of ownership information and organizational structures that Section 6101 of the ACA requires. Key to accountability in Medicare and Medicaid dollars is transparency in nursing home ownership and operations.

A report from Public Citizen in September 2022, noted the critical importance to consumers of knowing who owns a nursing home, particularly whether a facility is owned by a private equity company.^{xii} The report documented that ownership data made publicly available by CMS repeatedly failed to reveal who the actual owners of nursing homes were.^{xiii} The report called for the immediate implementation of Section 6101 of the ACA.

In *Nursing Homes: CMS Should Make Ownership Information More Transparent for Consumers*, a January 2023 report, the Government Accountability Office (GAO) found that specific and detailed nursing home ownership information is essential for consumers because for-profit and chain-owned facilities often have less staff and provide poorer care. Despite the importance of ownership information, the information reported on Care Compare “is not sufficiently transparent for consumers because it uses terminology that consumers may not understand and does not allow consumers to identify relationships and patterns across nursing homes, among other limitations.”^{xiv}

The GAO found that Care Compare fails in five of the six characteristics that the GAO considers relevant for the presentation of data. The federal website fails to highlight important patterns and relationships among facilities with common ownership and fails to identify chain owners.

In its report, the GAO stated,

“[T]he presentation of ownership information on Care Compare does not allow consumers to easily identify relationships and patterns related to quality across nursing homes under common ownership. For example, while owner names are listed, there is no way to easily identify what other nursing homes might have the same owner or to allow the consumer to examine quality or other patterns at nursing homes under common ownership.”^{xv}

An additional recommendation by the GAO was for CMS to provide “a user-friendly list of all nursing homes under common ownership, along with information on their quality ratings, [which] would allow consumers to observe patterns in quality across facilities with common ownership”^{xvi}

Implicit in the GAO’s critique of Care Compare is the necessity of accurate and exhaustive ownership information because this information is so critical to nursing home residents and families. Strong and innovative implementing regulations are essential to this goal.

Consumer Voice makes the following recommendations:

- **CMS should define important terms.**

Except for creating two new definitions for “private equity” and “real estate investment trusts” CMS has not taken the opportunity to define critical terms in the regulations. For instance, important definitions such as “additional disclosable party” lack any explanation. What does it mean to exercise “operational”, “financial”, or “managerial” control over a facility? The regulations do not specify. Without defining these terms, CMS will not be able to ensure that all parties subject to the regulation are reporting and disclosing information.

- **Additional language is needed to ensure the proposed regulations will capture all parties subject to the disclosure requirements of Section 6101 of the ACA.**

To assure the efficacy of these regulations, they must take into account the multi-layered nature of corporate and other ownership structures. For example, in 2020, Ensign, the second largest U.S. chain, reported owning 22 separate companies, including: Ensign Inc. (which owned 129 entities), Keystone Care limited liability corporation (LLC) (70 entities), Bandera Healthcare LLC (34 entities), Flagstone Healthcare South LLC (31 entities), Milestone Healthcare LLC (24 entities), Gateway Healthcare Inc. (23 entities), Pennant Healthcare LLC (21 entities), Endura Healthcare Inc. (19 entities), Flagstone Healthcare Central LLC (14 entities), Flagstone Healthcare North Inc. (7 entities), and other smaller companies. In all, 22 Ensign companies owned a total of 409 legal entities (mostly LLCs), which directly owned

and/or operated 198 separate NHs and other senior care communities, most with different corporate names.^{xvii}

We are concerned that the proposed regulations would very likely be unable to capture and untangle this complicated web of corporations, limited liability companies, and other organizations. Rather than addressing these common practices employed by owners and operators like Ensign, CMS has proposed to use a definition of organizational structure that only requires the bare minimum of disclosure. As defined, the regulation will bring us no closer to understanding who owns and operates nursing homes.

- **CMS should implement proper enforcement mechanisms, including intermediate sanctions, to ensure prompt and accurate disclosures.**

The proposed CMS regulations note that if the information is not accurate or complete, a facility may be prohibited from participating in Medicare and Medicaid. While this is an ultimate sanction, there are no intermediate sanctions for different levels of violations of the ownership regulations. The CMS regulations should establish intermediate sanctions and create different levels of penalties, including fines, holds on payments, and suspensions.

If reporting is not provided timely, we suggest that Medicare fiscal intermediaries routinely withhold payment to facilities for reports that are not submitted timely or that are materially incomplete or inaccurate – until the missing or incorrect information is provided and can be verified.

The regulations should state that CMS has the discretion to assess a civil penalty of \$10,000 for a material violation of the ownership regulatory provisions. If reports are found to be materially false, the provider will be immediately suspended in whole or in part until the complete reports are provided and determined by CMS to be acceptable. This would be consistent with the current 42 C.F.R. 405.371(d)(1), that states that: “If a provider has failed to timely file an acceptable cost report, payment to the provider is immediately suspended in whole or in part until a cost report is filed and determined by the Medicare contractor to be acceptable.”

Finally, to further improve accuracy, CMS could consider establishing a “reward system” for finding and reporting errors that is paid for from fines levied against the facilities for submitting inaccurate cost reports. If a suspected error or falsification is substantiated, a reporter (e.g., an auditor, attorney or other members of the general public) could be paid a modest fee. This system is not intended to supplant the currently existing federal or state whistleblower regulation.

- **CMS should make ownership information publicly available.**

CMS states that more information regarding the “vehicle” for publication of the ownership information will be provided after the final rule is published. We strongly urge CMS to establish how they plan to make the ownership information available as part of the final regulations.

The statute requires: “Not later than the date that is 1 year after the date on which the final regulations promulgated under section 1124(c)(3)(A) of the Social Security Act, as added by subsection (a), are published in the Federal Register, the Secretary of Health and Human Services shall make the information reported in accordance with such final regulations available to the public in accordance with procedures established by the Secretary.”

Moreover, as noted previously, the U.S. Government Accountability Office in its January 2023 Report, “CMS Should Make Ownership Information More Transparent for Consumers,” the GAO found that ownership information on Nursing Home Care Compare was not sufficiently transparent for consumers. Its recommendations include using plain language with clear graphics, organizing the information to highlight patterns related to quality across nursing homes with common ownership, obtaining consumer input to test ease of use and navigability, including explanations of how to use ownership information in the decision-making process and adding information on how the data are collected and assessed for accuracy.

We strongly urge that CMS make all the provider enrollment information publicly available on www.data.cms.gov. This should include the documentation data that verifies the accuracy of the implementation submitted. In addition, we strongly urge CMS to make the parent company data and related party data for each nursing home available on its Medicare Nursing Home Care Compare website.

- **The corresponding proposed Medicaid regulations differ from the Medicare regulations.**

There are significant differences in the Medicare and Medicaid proposed regulations, including the omission of the proposed definitions of “private equity company” and “real estate investment trust.” In the proposed rule, CMS states, “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.” We recommend that CMS provide these definitions to states. If CMS does not provide a definition, each state will adopt varying definitions, which will lead to confusion and inconsistencies.

Additionally, our proposed changes to the regulations explicitly incorporate the definitions “private equity company” and “real estate investment trust.” In order for the proposed regulations to be effective, they must be identical on both the Medicare and Medicaid side. Accordingly, we urge CMS to ensure the language in the final Medicaid regulations is identical to the final Medicare language.

Below you will find detailed comments and suggestions regarding the proposed regulations. Additional or changes to language are in bold and are accompanied by reasoning and support for why these changes should be made.

424.502 Definitions

Additional Disclosable Party

The term “additional disclosable party” (ADP) defines which persons or entities must disclose their organizational structure. The current proposed definition fails to define key

terms essential to making clear who must disclose information. The law defines ADPs as persons or entities that exercise “operational, financial, or managerial control over the facility,” but the proposed regulation fails to define the terms operational, financial, managerial, or control. In order to achieve the disclosure envisioned and required by § 6101 these terms must be defined in order to ensure all persons or entities are aware of their status as ADPs and their obligation to disclose information under the regulation

We propose the following additional definitions:

- **Operational Control means:**
 - a) **An individual or entity that influences or directs, directly or indirectly, the actions or policies of any part of either the skilled nursing facility; or**
 - b) **An individual or entity which, directly or indirectly, chooses, appoints, or terminates (i) any member of the Board of Directors or management committee, (ii) any manager or managing member, (iii) any member of senior management of the skilled nursing facility or its business, including its chain or parent company; or (iv) any other person or entity who participates in the operational oversight of the facility or its business.**

This definition captures persons or entities who guide the overall operations of a nursing home, including setting policies, budgets, or oversight of the facility. This is in contrast to managerial control, where those policies are affected at the facility level. The inclusion of definition (b) further distinguishes everyday management of a facility from the overall authority to influence and implement the policies and procedure of a facility.

- **Financial Control means:**
 - a) **An individual or entity that, directly or indirectly, influences, directs, or manages the finances of facility; or**
 - b) **Receives or is entitled to receive (directly or indirectly) 5 percent or more of any of the profits or revenues of the skilled nursing facility, its business, or its properties during any time period.**
 - c) **Directly or indirectly owns or controls an equity interest in the skilled nursing facility, its business, or its properties that is equal to or exceeds 5 percent of the total outstanding equity interest of all equity owners in the skilled nursing facility, its business, or its properties.**

A definition of financial control must take into account the complex ownership structures discussed previously in these comments and also acknowledged by CMS in the proposed rule.

Section (a) of the definition incorporates the definition of control. It is well known that the hierarchal structures of nursing homes often obscure the actual person or entity exerting financial control over a nursing home. This disclosure requirement ensures that the

disclosure requirements meant for ADPs occurs back to the parent company or corporation that may use intermediary persons or entities to exert financial control.

Sections (b) and (c) acknowledge the presence of private investment in nursing homes, particularly private equity, and how that business model influences the finances and care of a nursing home. The expectation and receipt of revenues present in the private equity structure affects the bottom line of nursing homes and how budgets are created. The very nature of private equity investment is to cut costs and divert Medicare and Medicaid dollars away from care and towards investor profits. However, as noted later in these comments, private equity is not easily defined. Accordingly, CMS should require broad disclosure of entities or individuals who receive profits or revenues from nursing homes. Section (c) assures that equity interests are included in the definition. The 5% referenced in this section should be an aggregate interest across nursing homes in which an individual or entity has a financial interest.

- **Managerial Control means:**

An individual or entity that, directly or indirectly, influences or directs day-to-day operation of an institution, organization, or agency, either under contract or through some other arrangement. This definition includes any individual or entity that is a related organization as defined by 42 C.F.R. § 413.17.

This definition of managerial control borrows significantly from the current language present in “managing employee,” but broadens it to include not only individuals but also entities.

As is well known, at least 70% of nursing homes employ related organizations as defined at 42 C.F.R. § 413.17 to manage the various day to day operations of facilities. We strongly suggest that CMS incorporate this definition into the definition of ADP to ensure broader disclosure of the organizational structures of the related organizations that often run and manage the day-to-day operations.

Important to the definition of “related organization” is that it captures instances where an ADP may not be directly owned by a provider, but nevertheless is controlled by the owner or operator for the provider’s sole benefit and is a related organization. CMS acknowledges this practice in the Medicare Provider Reimbursement Manual, refers to these types of entities as “special purpose organizations,” and requires them to be reported as “related organizations.”^{xviii}

From Chapter 1011.7 of the manual:

A provider may establish a separate, special purpose organization to conduct certain of the provider’s patient-care-related or nonpatient-care-related activities (e.g., a development foundation

assumes the provider's fund-raising activity). Often, the provider does not own the special purpose organization (e.g., a non-profit, nonstock-issuing corporation), and has no common governing body membership. However, such a special purpose organization is considered to be related to a provider...

This language is critical to understanding the complexities of how nursing home owners control the operations, finances, and management of a facility. It is essential that CMS take steps to understand these structures and how they affect resident care.

Organizational Structure

- **Strike the language “with respect to a skilled nursing facility defined at section 1819(a) of the Act,”.**

This language is not in the original law and as construed would appear to apply the definition of organizational structure only to skilled nursing facilities, and not to all ADPs, which would defeat the purpose of the regulation. This language is not needed and should be removed.

- **Inserting “direct or indirect” before ownership interest in (1) *A corporation*.**

Indirect ownership interest is defined at 42 C.F.R. § 420.201 as:

“Any ownership interest in an entity that has an ownership interest in the disclosing entity. The term includes an ownership interest in any entity that has an indirect ownership interest in the disclosing entity.”

In the instant case, CMS should adopt this definition and apply it to any person or entity required to disclose their organizational structure under this regulation. As adopted, this definition would require exhaustive disclosure of the organizational structure not only of the initial corporation subject to the disclosure requirement but to any entity or individual that has an ownership interest in that corporation, and so on. If the person or entity with the indirect ownership interest is not a corporation, then the information required to be disclosed under the other categories listed in organizational structure.

- **Insert, “including Real Estate Investment Trusts” after “A trust,” in (5).**

To ensure that Real Estate Investment Trusts are disclosed, CMS should explicitly include them in this definition.

- **Insert “and beneficiaries” after “The trustees” in (5)**

Who benefits from trust is as equally important as the trustees.

- **Add an additional category (7) “A financial investment entity, including private equity investment companies, any partner, limited partner, or investor that has an ownership or equity interest in the entity of 5% or more.”**

We strongly urge CMS to include language regarding investment firms. CMS has proposed requiring entities to disclose whether they are private equity firms. Because CMS will be requiring this information, it should require that entity to disclose its organizational structure.

- **Create an additional category (8) to read “(8) In any instance where an ADP does not meet any of the definitions contained in (1)-(8), the name and contact information of that person or entity, and any other information the Secretary determines appropriate.”**

CMS has not properly implemented 42 U.S.C. § 1320a-3(5)(D)(vii) which provided the Secretary the authority to require the disclosure from “any other person or entity”. The purpose of providing this “catch-all” was to ensure that ADPs who may not fit into the other enumerated categories were still required to disclose identifying information. As proposed, the current regulation limits the scope of the disclosure requirements and could result in ADPs not disclosing their organizational structure because they are not listed in the provided definitions.

- **Create an additional section (9) which states, “In any instance where the entities listed in sections (1) through (8) of this section are not the parent organization or parent corporation, as defined in this section, of the entity subject to the disclosure requirements under this section, then the corresponding organizational structure for all direct or indirect owners of the entity back to the parent corporation or parent organization of the initial disclosing entity.”**

As CMS is aware, nursing home owners and operators often create companies that meet the definition of an ADP, yet the owners and operators have no ownership interest in that company. As a result, learning the organizational structure of the ADP will not result in the disclosure of the person or entity using the ADP to exert control on the facility. Accordingly, it is essential that CMS take a broad view of organizational structure and require exhaustive disclosure.

The 2010 GAO report made this very recommendation to HHS when calling for the implementation of Section 6101 of the ACA. From the report:

“[Reporting of] the organizational structure and the relationships to the facility and to one another of all persons or entities with direct or indirect ownership or control interests in the provider (as defined in the act), **such that the hierarchy of all intermediate persons and**

entities from the provider level up to the chain and the ultimate owner is described.”^{xix} (Emphasis Added).

For the regulation to be effective, CMS must employ its current knowledge of actual organizational structures and use its regulatory authority to require exhaustive disclosure.

- **Revise the definition of Real Estate Investment Trust to: “A Real Estate Investment Trust is an entity that meets the definition of 26 U.S.C. § 856 or claims REIT status when filing taxes with the Internal Revenue Services. Real estate investment trusts are additional disclosable parties as defined in this section and subject to the organizational structure disclosures in 42 C.F.R. § 424.516(iv).”**

CMS has proposed to use a definition of real estate investment trust (REIT) that differs with the legal definition. The definition of (REIT) is a legal term, recognized by the Internal Revenue Service and defined in the Internal Revenue Code at 26 U.S.C § 856. REITs must file special tax forms (1120-REIT). CMS’s proposed definition makes no reference to the legal definition of REIT but uses language that would capture many companies that own the real estate or building in or on which a provider operates, and not just REITs.

In the proposed regulations, CMS notes that there are concerns about the quality of care in nursing homes where REITs own the building or property and cite the need to identify these homes. However, CMS has created a definition that is so broad that identifying actual REITs, as defined in the tax code, will be impossible. Under the proposed definition any company that owns the buildings or real estate could be considered a REIT.

We support the identification of entities or people who own the real estate or buildings on or in which a facility operates, but using the term REITs to identify these groups is misplaced. CMS is well within its regulatory authority to propose multiple definitions of companies that own the real estate or building on or in which a facility operates. But, to fulfill the goal of addressing care quality in REIT owned facilities, CMS should use the legal definition of REIT.

- **Revise the definition of private equity company to: “Private equity company means for purposes of this subpart only, a publicly-traded or non-publicly traded company that collects capital investments from individuals or entities and purchases an ownership share of a provider, the real estate or buildings in which a provider operates, a company with an ownership or control interest in a provider as defined in 42 U.S.C. 1320a-3(a) or (b) or an additional disclosable party subject to disclosure by the provider.”**

Similar to our comments on REITs, we are concerned that the proposed definition of “private equity company” lacks sufficient specificity to capture actual private equity

investment. This fact stems in part because there is no legal term for private equity. It is further complicated by the significant presence of private capital in the nursing home industry that may not fall into what is traditionally considered private equity. Nevertheless, we appreciate CMS's efforts to define private equity, because, as noted previously, there is significant evidence of how care outcomes are significantly worse for residents residing in homes owned by these types of investment firms.

The definition proposed by CMS is too narrow and focuses only on the provider. It does not take into account the complex ownership structures documented throughout these comments. As CMS is aware, private equity firms often do not directly own a provider but use various intermediary companies to mask their ownership. CMS must broaden its definition to assure that any type of private equity ownership in a nursing home must be disclosed, including not only the real estate and building, but any related party organizations or ADP. Additionally, CMS should tie this definition to ownership interests required to be disclosed in 42 U.S.C. 1320-3(a) or (b) and require disclosure when private equity owns any interest in a party or entity disclosed under that section.

Additional Definitions

- **CMS should add the following definition of “Chain organization.”**

A chain organization consists of two or more health care facilities, or at least one health care facility and any other business or entity owned, leased, or, through any other device, controlled by one organization. Chain organizations include, but are not limited to, chains operated by proprietary organizations and chains operated by various religious, charitable, and governmental organizations. A chain organization may also include business organizations engaged in other activities not directly related to health care.

This definition of “Chain organization” is drawn directly from the Medicare Provider Reimbursement Manual.^{xx} Later in our comments, we suggest an additional disclosure requirement at 42 C.F.R. § 424.516 (g)(1) that requires facilities that are part of a chain to disclose the identifying information for other facilities in that chain. Chain ownership is extremely common in the nursing home industry. The quality of care provided by facilities within the same chain is frequently similar, making it important for consumers to evaluate facilities when making decisions about care.

- **CMS should add a definition of “Parent Corporation or Parent Organization”. “Parent corporation” or “parent organization” means an organization that is the legal entity owning a controlling interest in a skilled nursing facility subject to the disclosure requirements in this section. The parent organization is the “ultimate” parent, or the top entity in a hierarchy (which may include other parent organizations) of subsidiary organizations that is not itself a subsidiary of any corporation. A legal entity may be its own parent organization if it is not a subsidiary of any other organization.”**

As noted throughout our comments, nursing home owners and operators separate themselves from the facility itself. This goal is reached through the creation of layered hierarchies that are intermediate between the ultimate owner of the facility and the person or entity that may be listed as the actual owner. To ensure that the goals of ownership transparency manifested in 6101 are met, CMS must take steps to trace ADPs and other entities subject to disclosure under this section to an ultimate source, the parent corporation or organization.

42 C.F.R. § 424.516

- **Revise the language of 42 C.F.R. § 424.516(iv) as follows:**
 - (iv) The organizational structure (as defined in § 424.502) of each additional disclosable party of the facility and:**
 - 1) A description of the relationship of each such additional disclosable party to the facility, to one another, and to entities subject to the disclosure requirements at 42 U.S.C. 1320a-3(a) and (b).**
 - 2) An organizational diagram identifying the relationship of each additional disclosable party with the facility, to one another, and to entities subject to the disclosure requirements at 42 U.S.C. § 1320a-3(a) and (b).**

We strongly urge CMS to require a description of how ADPs are related to the entities subject to ownership and control disclosure requirements at 42 U.S.C. § 1320a-3(a) and (b). Sections (a) and (b) require nursing homes to disclose certain parties with ownership and control interests in the nursing facility. Absent from the proposed regulation is how the information in (a) and (b) relates to the additional required information in this section, which is one of the primary goals of Section 6101 of the ACA. This additional requirement would help illustrate the connection between the ADPs and the disclosed owners.

CMS already requires that providers furnish “An organizational diagram identifying all of the entities in this section and their relations with the provider and each other.”^{xxi} Additionally, CMS requires, in the case of nursing homes, “A diagram identifying the organizational structures of all of its owners,” and this requirement applies to all owners, regardless of the size of the ownership interest.^{xxii} We urge CMS to incorporate this requirement into the regulations. Additionally, this information should be made public. While CMS is currently collecting this data, it is not available on its website.

- **Add a new provision, “(g)(v) If the facility is part of a chain, as defined in this section, the names and identifying information of all facilities within that chain, and the parent corporation or parent organization name of the chain.”**

Most nursing homes are parts of a chain. As stated in our recommendation regarding the addition of a definition for chain organizations, it is essential to consumers to have information regarding the performance of nursing homes across a chain. CMS currently

requires the disclosure of whether a facility is a part of a chain but does not appear to require the disclosure of all the facilities in this chain. Currently, there is no way for consumers to accurately ascertain care quality across chains. Nursing Home Care Compare does not provide this information.

- **Add a new section, “(g)(2)” as follows:**

(2) Copies of any documents that contribute to establishing

(i) The relationship between the facility and any person or entity specified in (1)(i) through (iii), or the relationship between any persons or entities specified in (1)(i) through (iii), including any documents establishing a financial obligation between the facility and any person or entity specified in (1)(i) through (iii), or between such persons and entities; or

(ii) The organizational structure and descriptions of relationships as set forth in (1)(iv).

CMS must require documentary evidence that establishes the relationships described in 42 C.F.R. § 424.516(g)(i) through (iii), this includes, contract, mortgages, employment agreements, articles of incorporation, etc. CMS must take steps to verify the accuracy of the information disclosed in this section.

- **Revise the language currently located at § 424.516(g) to read:**

4) The skilled nursing facility must report any changes to information described in paragraph (g)(1) of this section as follows:

i) 120 days prior to any change in a direct or indirect ownership interest of an additional disclosable party or a parent company or parent organization;

ii) within thirty days of any other change.

Over the years, CMS has excluded over 3,000 entities and 70,000 individuals from participating in the Medicare and Medicaid programs because of their criminal history.^{xxiii} 42 C.F.R. §420.204 requires that providers, agents, managing employees and others to disclose any criminal offense. CMS takes this action to determine the fitness and suitability of persons to participate in the Medicare and Medicaid program. Yet, CMS is proposing at 42 C.F.R. 424.516(g)(3) to allow changes in this section to be reported retroactively. CMS must take proactive steps make determinations about fitness and eligibility before ownership changes occur.

Importantly, CMS has broad legal authority to implement all of the changes suggested in these comments. Section 6101 of the Affordable Care Act, 42 U.S.C. §1124(c), itself provides broad

authority to CMS to require comprehensive disclosure of ownership information. Section 1124(c)(2)(A)(ii)(II), (III), requires the identification of “each person or entity” who is an officer, director, and so forth of the facility of an additional disclosable party, respectively.

In addition, the Nursing Home Reform Law, enacted in 1987, gives the Secretary full and broad authority to require meaningful disclosure of all individuals who own or manage a piece(s) of a nursing home business, regardless of the nursing facility’s official ownership structure. The Medicare provisions in the Reform Law states:

“It is the duty and responsibility of the Secretary to assure that requirements which govern the provision of care in skilled nursing facilities under this subchapter, and the enforcement of such requirements, are adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys.”

Knowing who owns, operates, or manages facilities is critical to protecting both resident care and the integrity of public reimbursement.

Again, we thank CMS for proposing regulations that seek to address the lack of transparency in nursing home ownership. We strongly urge you to implement the suggested changes in this letter to ensure the veil of secrecy surrounding nursing home ownership is removed. Transparency in nursing home ownership is essential to the safety and well-being of our country’s nursing home residents.

Sincerely,

National Consumer Voice for Quality Long-Term Care
Anne Montgomery, Independent Consultant
California Advocates for Nursing Home Reform (CANHR)
Center for Medicare Advocacy
Elder Justice Coalition
Michigan Elder Justice Initiative
National Association of Local Long-Term Care Ombudsmen
National Association of Social Workers (NASW)

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- ⁱ Gupta, A., et. al., *How Patients Fare When Private Equity Funds Acquire Nursing Homes*. National Bureau of Economic Research, April 4, 2021.
- ⁱⁱ Joseph E. Casson, Julia McMillen, “Protecting Nursing Home Companies: Limiting Liability Through Corporate Restructuring,” *Journal of Health Law*, Vol. 36, No. 4 (Fall 2003), <http://briuswatch.org/wpcontent/uploads/2016/06/Casson-J.-Protecting-Nursing-Home-Companies-2003.pdf>
- ⁱⁱⁱ Id.
- ^{iv} "These Administrative Actions Would Improve Nursing Home Ownership And Financial Transparency In The Post COVID-19 Period", Health Affairs Blog, February 11, 2021. DOI: 10.1377/hblog20210208.597573
- ^v Consumer Voice, *Where Do the Billions of Dollars Go? A Look at Nursing Home Related Party Transactions*, March 2021, <https://theconsumervoice.org/news/detail/latest/new-report-nursing-homes-funnel-dollars-through-related-party-companies>
- ^{vi} U.S. Government Accountability Office. (2010). *Nursing homes: Complexity of private investment purchases demonstrates need for CMS to improve the usability and completeness of ownership data* (GAO-10-710). <http://www.gao.gov/products/GAO-10-710> [Quotes from p. 22]
- ^{vii} Id.
- ^{viii} Id.
- ^{ix} Id.
- ^x https://ag.ny.gov/sites/default/files/fulton_commons_petition.pdf
- ^{xi} MACPAC Report to Congress on Medicaid and CHIP, March 2023, Chapter 2, Principles for Assessing Medicaid Nursing Facility Payment Policies , p. 49, <https://www.macpac.gov/wp-content/uploads/2023/03/Chapter-2-Principles-for-Assessing-Medicaid-Nursing-Facility-Payment-Policies.pdf>
- ^{xii} Public Citizen, *Is It Private Equity? We Can’t See*; Federal Database on Owners of Nursing Homes Is Incomplete and Out-of-Compliance with the Law (Sep. 1, 2022), <https://www.citizen.org/article/nursing-home-transparency/>
- ^{xiii} Id.
- ^{xiv} GAO, *Nursing Homes: CMS Should Make Ownership Information More Transparent for Consumers*, GAO-23-104813, p. 18 (Jan. 2023), <https://www.gao.gov/assets/gao-23-104813.pdf>
- ^{xv} Id.
- ^{xvi} GAO-23-104813 (Jan. 2023), <https://www.gao.gov/assets/gao-23-104813.pdf>
- ^{xvii} Kingsley, D. and Harrington, C. (2022). Financial and Quality Metrics of a Large, Publicly-Traded US Nursing Home Chain in the Age of COVID-19. *International J. of Health Services*. 52 (2):212-224. <https://doi.org/10.1177/00207314221077649>
- ^{xviii} Ctrs. For Medicare & Medicaid Servs., U.S. Dep’t of Health & Hum. Servs., Program Manuals § 1011.7
- ^{xix} Government Accountability Office (GAO). *Nursing homes: Complexity of private investment purchases demonstrates need for CMS to improve the usability and completeness of ownership data*. GAO-10-710. Washington, D.C, September 2010. <http://www.gao.gov/products/GAO-10-710>
- ^{xx} Ctrs. For Medicare & Medicaid Servs., U.S. Dep’t of Health & Hum. Servs., Program Manuals § 3900
- ^{xxi} CMS Form 855a, page 28.
- ^{xxii} Id.

Attachment A

Below you will find our suggested changes to the proposed regulatory language in red.

PART 424—CONDITIONS FOR MEDICARE PAYMENT

1. The authority for part 424 continues to read as follows:

Authority: [42 U.S.C. 1302](#) and [1395hh](#).

Subpart P—Requirements for Establishing and Maintaining Medicare Billing Privileges

2. Section 424.502 is amended by—

- a. Adding the definition of “Additional disclosable party” in alphabetical order;
- b. Revising the definition of “Managing employee”; and
- c. Adding the definitions of “Organizational structure”, “Private equity company”, and “Real estate investment trust” in alphabetical order.

The additions and revision read as follows:

[§ 424.502](#)

Definitions.

* * * * *

Additional disclosable party means, with respect to a skilled nursing facility defined at section 1819(a) of the Act, any person or entity who does any of the following:

- (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.

(3) Provides management or administrative services, management or clinical consulting services, or accounting or financial services to the facility.

* * * * *

Managing employee means—

(1) A general manager, business manager, administrator, director, or other individual that exercises operational or managerial control over, or who directly or indirectly conducts, the day-to-day operation of the provider or supplier, either under contract or through some other arrangement, whether the individual is a W-2 employee of the provider or supplier; or

(2) With respect to the additional requirements at § 424.516(g) for a skilled nursing facility defined at section 1819(a) of the Act, an individual, including a general manager, business manager, administrator, director, or consultant, who directly or indirectly manages, advises, or supervises any element of the practices, finances, or operations of the facility.

* * * * *

Chain organization: a chain organization consists of a group of two or more health care facilities or at least one health care facility and any other business or entity owned, leased, or, through any other device, controlled by one organization. Chain organizations include, but are not limited to, chains operated by proprietary organizations and chains operated by various religious, charitable, and governmental organizations. A chain organization may also include business organizations engaged in other activities not directly related to health care.

Operational Control means:

- a) An individual or entity that, directly or indirectly, influences or directs the actions or policies of any part of the skilled nursing facility; or
- b) An individual or entity that directly or indirectly, chooses, appoints, or terminates (i) any member of the Board of Directors or management committee, (ii) any manager or managing member, (iii) any member of senior management of the skilled nursing facility or its business, including its chain or parent company; or (iv) any other person or entity who participates in the operational oversight of the facility or its business.

Financial Control means:

-
- a) An individual or entity that, directly or indirectly, influences, directs, or manages the finances of the skilled nursing facility; or
 - b) Receives or is entitled to receive (directly or indirectly) 5 percent or more of any of the profits or revenues of the skilled nursing facility, its business, or its properties during any time period; or
 - c) Directly or indirectly owns or controls an equity interest in the skilled nursing facility, its business, or its properties that is equal to or exceeds 5 percent of the total outstanding equity interest of all equity owners in the skilled nursing facility, its business, or its properties.

Managerial Control means:

An individual or entity that, directly or indirectly, influences or directs day to-day operations of a skilled nursing facility. This definition includes any individual or entity that is a related organization as defined by 42 C.F.R. § 413.17.

Organizational structure means, ~~with respect to a skilled nursing facility defined at section 1819(a) of the Act,~~ in the case of any of the following:

(1) *A corporation.* The officers, directors, and shareholders of the corporation who have a **direct or indirect** ownership interest in the corporation which is equal to or exceeds 5 percent.

(2) *A limited liability company.* The members and managers of the limited liability company including, as applicable, what percentage each member and manager has of the ownership interest in the limited liability company.

(3) *A general partnership.* The partners of the general partnership.

(4) *A limited partnership.* The general partners and any limited partners of the limited partnership who have an ownership interest in the limited partnership which is equal to or exceeds 10 percent.

(5) *A trust, including Real Estate Investment Trusts.* The trustees **and beneficiaries** of the trust.

(6) *An individual.* Contact information for the individual.

(7) *A financial investment entity, including private equity investment companies, any partner, limited partner, or investor that has an ownership or equity interest in the entity of 5% or more.*

(8) In any instance where an additional disclosable party does not meet any of the definitions contained in (1)-(8) the name and contact information of that person or entity, and any other information the Secretary determines appropriate.

(9) In any instance where the entities listed in sections (1) through (8) of this section are not the parent organization or parent corporation, as defined in this section, of the entity subject to the disclosure requirements under this section, then the corresponding organizational structure for all direct or indirect owners of the entity back to the parent corporation or parent organization of the initial disclosing entity.

“*Parent corporation*” or “*parent organization*” means an organization that is the legal entity owning a controlling interest in a skilled nursing facility subject to the disclosure requirements in this section. The parent organization is the “ultimate” parent, or the top entity in a hierarchy (which may include other parent organizations) of subsidiary organizations that is not itself a subsidiary of any corporation. A legal entity may be its own parent organization if it is not a subsidiary of any other organization.

* * * * *

Private equity company means for purposes of this subpart, a publicly-traded or non-publicly traded company that collects capital investments from individuals or entities and purchases an ownership share of a provider, the real estate or buildings in which a provider operates, a company with an ownership or control interest in a provider as defined in 42 U.S.C. 1320a-3(a) or (b) or an additional disclosable party, as defined in this section, and subject to disclosure by a provider. Private equity companies are additional disclosable parties as defined in this section and subject to the organizational structure disclosures in 42 C.F.R. § 424.516(iv)

Real Estate Investment Trust is an entity that meets the definition of 26 U.S.C. § 856 or claims REIT status when filing taxes with the Internal Revenue Services. Real estate investment trusts are additional disclosable parties as defined in this section and subject to the organizational structure disclosures in 42 C.F.R. § 424.516(iv)

3. Section 424.516 is amended by adding paragraph (g) to read as follows:

§ 424.516

Additional provider and supplier requirements for enrolling and maintaining active enrollment status in the Medicare program.

* * * * *

(g) *Skilled nursing facilities.* (1) In addition to all other applicable reporting requirements in this subpart, a skilled nursing facility (as defined in section 1819(a) of the Act) must

disclose upon initial enrollment (which, for purposes of this paragraph (g), also includes a change of ownership under [42 CFR 489.18](#)) and revalidation the following information:

(i) Each member of the governing body of the facility, including the name, title, and period of service for each such member.

(ii) Each person or entity who is an officer, director, member, partner, trustee, or managing employee (as defined in § 424.502) of the facility, including the name, title, and period of service of each such person or entity.

(iii) Each person or entity who is an additional disclosable party of the facility (as defined in § 424.502).

(iv) The organizational structure (as defined in § 424.502) of each additional disclosable party of the facility and:

- 1) A description of the relationship of each such additional disclosable party to the facility, to one another, and to entities subject to the disclosure requirements at 42 U.S.C. 1320a-3(a) and (b); and
- 2) An organizational diagram identifying the relationship of each additional disclosable party with the facility, to one another, and to entities subject to the disclosure requirements at 42 U.S.C. § 1320a-3(a) and (b)

(v) If the facility is part of a chain, as defined in this section, the names and identifying information of all facilities within that chain, and the parent corporation or parent organization name of the chain.

(2) Copies of any documents that contribute to establishing:

- (i) The relationship between the facility and any person or entity specified in (1)(i) through (iii), or the relationship between any persons or entities specified in (1)(i) through (iii), including any documents establishing a financial obligation between the facility and any person or entity specified in (1)(i) through (iii), or between such persons and entities; or

(ii) The organizational structure and descriptions of relationships as set forth in (1)(iv).

(3) The skilled nursing facility need not disclose the same information described in paragraph (g)(1) of this section more than once on the same enrollment application submission.

(4) The skilled nursing facility must report any changes to information described in paragraph (g)(1) of this section as follows:

i) 120 days prior to any change in a direct or indirect ownership interest of an additional disclosable party or a parent company or parent organization.

ii) within thirty days of any other change.

As noted in our comments, the corresponding Medicaid regulations should be identical to the Medicare regulations.

PART 455—PROGRAM INTEGRITY: MEDICAID

4. The authority citation for part 455 continues to read as follows:

Authority: [42 U.S.C. 1302](#).

5. Section 455.101 is amended by:

- a. Adding the definition of “Additional disclosable party” in alphabetical order;
- b. Revising the definition of “Managing employee”; and
- c. Adding the definition of “Organizational structure” in alphabetical order.

The additions and revision read as follows:

[§ 455.101](#)

Definitions.

Additional disclosable party means, with respect to a nursing facility defined in section 1919(a) of the Act, 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.

* * * * *

Managing employee means—

(1) A general manager, business manager, administrator, director, or other individual who exercises operational or managerial control over, or who directly or indirectly conducts, the day-to-day operation of an institution, organization, or agency, either under contract or through some other arrangement, whether or not the individual is a W-2 employee of the institution, organization, or agency; or

(2) With respect to the additional requirements at § 455.104(e) for a nursing facility defined in section 1919(a) of the Act, an individual, including a general manager, business manager, administrator, director, or consultant, who directly or indirectly manages, advises, or supervises any element of the practices, finances, or operations of the facility.

Organizational structure means, with respect to a nursing facility defined in section 1919(a) of the Act, in the case of any of the following:

(1) *A corporation.* The officers, directors, and shareholders of the corporation who have an ownership interest in the corporation which is equal to or exceeds 5 percent.

(2) *A limited liability company.* The members and managers of the limited liability company including, as applicable, what percentage each member and manager has of the ownership interest in the limited liability company.

(3) *A general partnership.* The partners of the general partnership.

(4) *A limited partnership.* The general partners and any limited partners of the limited partnership who have an ownership interest in the limited partnership which is equal to or exceeds 10 percent.

(5) *A trust.* The trustees of the trust.

(6) *An individual.* Contact information for the individual.

* * * * *

6. Section 455.104 is amended by redesignating paragraph (e) as paragraph (f) and adding new paragraph (e) to read as follows:

[§ 455.104](#)

Disclosure by Medicaid providers and fiscal agents: Information on ownership and control.
* * * * *

(e) *Nursing facilities.* (1) In addition to all other applicable reporting requirements in this subpart, a nursing facility (as defined in section 1919(a) of the Act) must disclose upon initial enrollment and revalidation the following information:

(i) Each member of the governing body of the facility, including the name, title, and period of service for each such member.

(ii) Each person or entity who is an officer, director, member, partner, trustee, or managing employee (as defined in § 455.101) of the facility, including the name, title, and period of service of each such person or entity.

(iii) Each person or entity who is an additional disclosable party of the facility (as defined in § 455.101).

(iv) The organizational structure (as defined in § 455.101) of each additional disclosable party of the facility and a description of the relationship of each such additional disclosable party to the facility and to one another.

(2) The State need not require the facility to disclose the same information described in this paragraph (e) more than once on the same enrollment application submission.