



Client Alert



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Nursing Home Ownership Disclosures to Expand Under Health Care Reform

The headlines are centered on the insurance reform provisions of The Patient Protection and Affordable Care Act (the Act), which became law on March 23, 2010. However, a lesser known provision of the Act will specifically impact the owners and operators of nursing homes. Subtitle B of Title VI of the Act, entitled "Nursing Home Transparency and Improvement," includes broad changes to the federal ownership disclosures that must be made by nursing homes participating in the Medicare and/or Medicaid programs. While some states already have broad ownership disclosure protocols, the Act marks the first time that certain of these disclosures will be made at the federal level. Further, the federal disclosures will be made publicly available.

The Individuals and Entities That Must Be Disclosed

Section 6101 of the Act significantly increases the number and types of "disclosable parties" that must be identified by nursing homes. At the federal level, nursing homes will now be required to disclose:

- Each member of the governing body of the facility, including the name, title, and period of service of each such member
- Each person or entity who is an officer, director, member, partner, trustee, of the facility, including the name, title, and period of service of each such person or entity
- Each managing employee of the facility, 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
- Each person or entity who is an "additional disclosable party" of the facility, including the organizational structure of each additional disclosable party and a description of the relationship of each such additional disclosable party to the facility and to one another.

"Additional disclosable party" is a new term of art, and is defined to include the following individuals and entities:

- An individual or entity that exercises operational, financial, or managerial control over the facility or a part thereof

- An individual or entity that provides policies or procedures for any of the operations of the facility
- An individual or entity that provides financial or cash management services to the facility
- An individual or entity that leases or subleases real property to the facility, or owns a whole or part interest equal to or exceeding five percent of the total value of such real property
- An individual or entity that provides management or administrative services, management or clinical consulting services, or accounting or financial services to the facility.

The “organizational structure” of each additional disclosable party must include the following based on the ownership structure of the additional disclosable party:

- For a corporation, the officers, directors, and shareholders of the corporation who have an ownership interest in the corporation that is equal to or exceeds five percent
- For 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)
- For a general partnership, the partners of the general partnership
- For a limited partnership, the general partners and any limited partners of the limited partnership who have an ownership interest in the limited partnership that is equal to or exceeds 10 percent
- For a trust, the trustees of the trust
- For an individual, contact information for the individual.

All ownership disclosures must include direct or indirect interests, including interests in intermediate entities.

The Screening Process

Section 6401 of the Act requires the Department of Health and Human Services (HHS) to establish procedures to conduct a screening of all providers. The level of screening applied to a particular provider will be based on the risk of fraud, waste and abuse presented by the category of provider. Thus, all nursing facilities will be subject to the same level of screening. Providers will be required to pay a fee of at least \$500 if selected for screening.

The screening will include a licensure check, criminal background checks, fingerprinting, unannounced site visits and federal and state database checks. Although not directly specified in the Act, it is reasonable to assume that the expanded ownership disclosures made by a nursing home will be included in the screening process.

When Must the Disclosures Be Made?

The Act requires that HHS promulgate regulations within two years that establish procedures for submitting

the information to HHS, the Office of Inspector General of HHS (OIG), and the State in which the facility is located (including the State's long-term care ombudsman). The regulations must also create a methodology for making the information available to the public.

Pending the promulgation of the regulations, facilities are immediately required to have the information "available" upon request of HHS, OIG or the State in which the facility is located. As such, nursing facilities must now begin the process of collecting this information and maintaining it in a readily-accessible format.

Expected Impact of the Increased Reporting

In addition to the increased administrative burden of making these broad disclosures, facilities could see a number of impacts from Section 6101 of the Act.

First, the implementing regulations must "ensure that the facility certifies, as a condition of participation and payment" under Medicare and Medicaid, that the information reported by the facility in accordance with such final regulations is, to the best of the facility's knowledge, accurate and current. Accordingly, a facility could find itself the target of a False Claims Act suit if it fails to include a required individual or entity in its disclosures.

Second, facilities may find that certain individuals and entities may balk at the prospect of being included in an ownership disclosure, which may impact their desire to maintain an arrangement with the facility. Likewise, if a facility is concerned that a particular disclosable party may not pass the new screening process, the facility may need to terminate its relationship with that party.

Third, the expanded list of disclosable parties could lengthen the time required to gather the necessary information for enrollment in the Medicare and Medicaid programs. This requirement would pertain to initial enrollments as well as filings required during a change of ownership (CHOW). Previously, the completion and of Form CMS-855 was fairly quick, as it did not require information greater than that required by state licensing agencies; Section 6101 expands the required disclosures to a level beyond that required by many state licensing agencies.

Finally, the availability of the disclosures to the public likely will result in plaintiffs' attorneys increasing the list of defendants in a malpractice suit, especially in states that do not currently require extensive disclosures. In essence, the federally required disclosures will provide a road map to every individual and entity (including the entity's ownership structure) that has an arrangement with a facility. For the first time this will include certain information such as real estate investors, clinical consultants, and entities that provide financial or cash management services. Facilities should expect to receive requests for this information immediately (whether as part of discovery or otherwise) based on the requirement that the facility have the information "available" pending the promulgation of regulations.



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Not only does the Act expand the current the law on nursing home disclosures as described above, but it also makes significant changes that will impact the operations of nursing homes. For example, the Act mandates compliance and ethics programs for nursing homes, quality assurance initiatives, staffing accountability, revisions to the *Nursing Home Compare* website, specific protocols for closing nursing homes and background check requirements.

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