

HEALTH LAW UPDATE

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

855 Fun, Part II: SNFs and NFs Face Additional Ownership Disclosures

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In an earlier edition of *Health Law Update*,¹ we reported the issuance of CMS' new 855 enrollment forms, focusing specifically on the substantial changes to Form 855A (Institutional Providers) and the new Form 855O for physicians and non-physician practitioners enrolling in Medicare solely to order or refer items and services for Medicare beneficiaries. In this issue of *Health Law Update*, we will summarize a proposed rule, published as part of the proposed skilled nursing facility prospective payment system (PPS) update for fiscal year 2012² (the "Proposed Rule"), which would add even more ownership disclosure requirements to the 855A for Medicare skilled nursing facilities (SNFs) and Medicaid nursing facilities (NFs).

The Proposed Rule implements Section 6101 of the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act (collectively, PPACA). Section 6101 requires SNFs and NFs, on request by the Secretary of the Department of Health & Human Services and other federal and state agencies, to make available information on ownership, including a description of each facility's governing body and organizational structure and information regarding certain "additional disclosable parties" (to be discussed below).

Background

In 2007, the *New York Times* published an article analyzing trends in care at nursing homes owned by private investment groups.³ Alleging that investment activity in nursing homes resulted in severe cuts in staffing and supply levels, this article prompted the Federal government to take a closer look at the transparency of private investment in the nursing home sector and the impact of such private investment on the quality of care received by Medicare and Medicaid beneficiaries in those facilities.

Later that year, Congress conducted hearings seeking information on investor-owned nursing homes. Congress determined that complex ownership structures resulted in a lack of transparency as to who is ultimately responsible for resident care and operation of a nursing home. Congress expressed specific concern that the complex corporate structures insulate investors from liability for poor care and denies residents and their families legal remedies

¹ See ["855 Fun, Part I: CMS' New Medicare Enrollment Forms."](#) July 26, 2011.

² 76 Fed. Reg. 26364 (May 6, 2011).

³ Charles Duhigg, ["At Many Homes, More Profit and Less Nursing."](#) the *New York Times* (Sept. 23, 2007).

against the nursing home. The General Accounting Office (GAO) conducted its own investigation and presented its finding to Congress in September 2010⁴ (PPACA was enacted six months prior to this presentation). The GAO's investigation resulted in findings similar to those reported by the *New York Times*. In addition, the GAO determined that while certain ownership information is available to the public upon request, such information did not allow the public or government agencies to evaluate the relationship of each owner, direct or indirect, to the nursing home, or of nursing homes to each other.

The Proposed Rule's Disclosure Expansions

Additional reporting requirements under the Proposed Rule include the disclosure of (1) the "organizational structure" of each reporting SNF and NF, (2) an array of "managing employees" of the SNF or NF that is broader than current 855A requirements, and (3) each "additional disclosable party," as defined below, as well as the "organizational structure" of that additional disclosable party. Each SNF and NF must certify that the disclosed information is, to the best of such facility's knowledge, accurate and correct. If it does not, the reporting facility will not meet Medicare conditions of participation or of payment.

"Organizational Structure"

CMS proposes a definition of "organizational structure" that would mirror the statutory definition in PPACA. "Organizational structure" means: (1) in the case of 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) in the case of 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) in the case of a general partnership, the partners of the general partnership; (4) in the case of 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 (5) in the case of a trust, the trustees of the trust; and (6) in the case of an individual, contact information for the individual.

"Managing Employees"

CMS is also modifying the definition of "managing employee" for SNFs and NFs (but not for other types of Part A institutional providers) to mean "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." With this change, a managing employee is no longer limited to those controlling day-to-day operations, but also encompasses consultants and others who "manage, advise or supervise" any element of finances or operations of a SNF or NF.⁶ Like the "additional disclosable parties" to be discussed next, this proposed change makes the required disclosures ambiguously broad.

⁴ ["Nursing Homes: Complexity of Private Investment Purchases Demonstrates Need for CMS to Improve the Usability and Completeness of Ownership Data,"](#) GAO-10-710 (Sept. 30, 2010).

⁵ Interestingly, this percentage threshold, which now applies to all 855As (not just those for SNFs and NFs) arguably represents a liberalization of the former standard, which was often interpreted to require the disclosure of *every* limited partner, irrespective of percentage of ownership interest.

⁶ 76 Fed. Reg. 26398 & 26406.

"Additional Disclosable Parties"

CMS proposes to define "additional disclosable party" as "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."⁷ Given the potentially broad nature of this definition, CMS acknowledges that explicit guidance is needed in order for SNFs and NFs to identify which parties and individuals would be subject to the proposed disclosure requirements. CMS has solicited comments specifically as to how it might narrow the scope of the definition so that the requirements apply only to those who actually exercise operational, financial or managerial control over a given facility.⁸ This proposed definition could very well take a different form when the final rule is published.

Process and Implementation

The Proposed Rule requires that these disclosures be made at the time that a facility enrolls in Medicare and within 30 days of any changes of the disclosed information. Currently, changes of information that do not rise to the level of "changes of ownership" must be reported within 90 days. Alternatively, CMS is considering, but did not propose, to collect this ownership information only upon revalidation, which generally occurs every five years for SNFs but could also occur "off-cycle." Hopefully, CMS will provide additional guidance in the final rule as to the breadth of the required disclosures and how SNFs and NFs will identify all parties that must be disclosed. CMS is expected to publish the final rule in August 2011.

If you have any questions regarding this issue of *Health Law Update*, please contact any of the attorneys listed in our Healthcare Practice Group below.

⁷ 76 Fed. Reg. 26406.

⁸ 76 Fed. Reg. 26398.

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