



**Americans for
Financial Reform
Education Fund**

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-6084-P
P.O. Box 8010
Baltimore, MD 21244-1810

April 14, 2023

Re: Medicare and Medicaid Programs; Disclosures of Ownership and Additional Disclosable Parties Information for Skilled Nursing Facilities and Nursing Facilities [CMS-6084-P]

Americans for Financial Reform Education Fund (AFREF) is pleased to offer comments on the proposed rule by the Centers for Medicare and Medicaid Services (CMS), which would implement Section 1124(c) of the Social Security Act, requiring the disclosure of important information regarding the ownership and control of nursing facilities, including when an owning or managing entity is a private equity (PE) company or a Real Estate Investment Trust (REIT).

AFREF is a nonpartisan, nonprofit coalition of more than 200 civil rights, community-based, consumer, labor, small business, investor, faith-based, and civic groups, and individual experts. We fight for a fair and just financial system that contributes to shared prosperity for all families and communities. Transparency and accountability are key features of a just financial system, and therefore we support the proposed rule, which would bring more of both to nursing facilities that serve Medicare and Medicaid beneficiaries. We are particularly enthusiastic about shedding light on PE companies' role in nursing facilities (and eventually, we hope, across the health care system), which has been shown to bring disproportionate harm to residents of PE-owned facilities.

Private equity and health care are incompatible

Private equity funds are in the business of making money in a relatively short time from the companies they purchase through a variety of tactics, including reducing highly skilled staff, taking on extremely high levels of debt, and selling off real estate to benefit investors. When applied to health care businesses, these tactics frequently create conditions that degrade quality standards, compromise safety, and impose financial burdens on facilities that divert resources from patient care.

There is abundant evidence of the harmful effects of PE ownership of health care providers. As CMS notes in the proposed rule, the lives, health and safety of residents of PE-owned nursing

facilities are at greater risk than are residents of other facilities.¹ And while this rule applies only to nursing facilities, as the statute it implements requires, research evidence and actual experience of PE ownership's negative impacts on cost, quality, and access go well beyond nursing facilities.

The lack of transparency in ownership of facilities exacerbates the problem and shields owners and investors from accountability for the performance of the businesses they own. The opacity of ownership information can facilitate "stealth consolidation" of health care markets and obscure financial relationships among facilities and contractors such as management and staffing companies, which provide profits to their owners but can further drain resources from the facilities.

The proposed rule provides needed transparency and accountability

AFREF supports final adoption of the proposed rule as a long overdue implementation of requirements addressing an issue that attracted interest in Congress as early as 2007.² We appreciate and support that CMS defers to the broader definition of terms (for example, of disclosable party, managing employee, and organizational structure) when the statutory language conflicts with existing rules. The definitions in § 424.502 and § 455.101 of the proposed rule acknowledge that PE companies' influence over the finances and operations of nursing facilities go beyond the actions of regular employees and direct corporate owners, extending to management services companies and consultants outside the corporate hierarchy, for example. We would recommend that CMS update the definitions of these terms where they appear in other CMS rules, to the more inclusive definitions proposed for § 424.502 and § 455.101. Disclosure of these complex relationships promotes transparency and accountability.

Similarly, we support the decision to leave in place the "true, correct, and complete" accuracy standard that applies to the Medicare Enrollment Application (CMS-855A), without the "to the best of my knowledge" qualifier. Entities entrusted with the care of frail residents with complex needs, whose care is financed by public funds, should be expected to provide information that is unquestionably accurate and complete.

We also support CMS reserving its right to conduct validation of the information disclosed under this rule outside of the regular cycle of revalidation and when the facility reports a change, as permitted under § 424.515(d).

We offer these further comments:

- **Definition of Private Equity Company in § 424.502:** In order for CMS understand who the ultimate beneficial owners are, CMS should seek consistency in the definition of private equity with [other](#) transparency/beneficial ownership requirements.

¹ <https://www.federalregister.gov/d/2023-02993/p-63>

² Charlene Harrington et al., "These Administrative Actions Would Improve Nursing Home Ownership And Financial Transparency In The Post COVID-19 Period," *Health Affairs Forefront*, accessed December 2, 2022, <https://doi.org/10.1377/forefront.20210208.597573>.

CMS should adopt a broad definition of control and of ownership interest so that the use of a series of shell companies, affiliates, and financial instruments cannot be used to evade its reporting requirements. We suggest the following definitions:

Direct or indirect exercise of substantial control. An individual exercises substantial control over a reporting company if the individual has:

- (A) Board representation;
- (B) Ownership or control of a majority of the voting power or voting rights of the reporting company;
- (C) Rights associated with any financing arrangement or interest in a company;
- (D) Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company;
- (E) Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or
- (F) any other contract, arrangement, understanding, relationship, or otherwise.

Definition of ownership interest. The term “ownership interest” means:

- (A) Any equity, stock, or similar instrument; preorganization certificate or subscription; or transferable share of, or voting trust certificate or certificate of deposit for, an equity security, interest in a joint venture, or certificate of interest in a business trust; in each such case, without regard to whether any such instrument is transferable, is classified as stock or anything similar, or confers voting power or voting rights;
- (B) Any capital or profit interest in an entity;
- (C) Any instrument convertible, with or without consideration, into any share or instrument, any future on any such instrument, or any warrant or right to purchase, sell, or subscribe to a share or interest regardless of whether characterized as debt;
- (D) Any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.

- **Reasonable but definite timetable for revisions:** The preamble to the proposed rule clarifies that its effective date would be 60 days following publication of the final rule, but that nursing facilities would not be required to report the data required under the rule until the Medicare Enrollment Application form is revised. We strongly urge CMS to go beyond its pledge to undertake the revisions promptly and set a reasonable but definite timetable for the revisions. The rule is, in fact, not effective until this is done, and the required disclosures, having awaited implementation for more than a decade already, should not be subject to further unnecessary delay.
- **Public posting of data:** CMS notes that a primary purpose of transparency is “to allow consumers to select facilities with better knowledge of their owners and operators.”³

³ <https://www.federalregister.gov/d/2023-02993/p-76>

With this goal in mind, we request that CMS more explicitly indicate how and where the data will be publicly available within one year of the final rule. For example, in addition to making the data available on *data.cms.gov*, we suggest publishing the information on the Care Compare website, using plain language and organizing it to allow consumers to identify and examine quality ratings for multiple nursing facilities that may be owned or controlled by the same PE company, as the Government Accountability Office recommended in its recent report.⁴

- **Encourage Medicaid data availability:** Because Medicaid programs pay for more care in nursing facilities than Medicare, encourage states to make data from their Medicaid providers available in similar ways, and offer technical and financial support to states to develop this capability if needed.
- **Enforcement:** Transparency is but a means to the end of greater accountability for nursing facilities. Strong enforcement of the rule is essential. This information will be important to addressing the deficiencies associated with PE-owned nursing facilities, but only if compliance with the rule is closely monitored. CMS should consider dedicating staff to monitor compliance and investigate violations of the rule for the first several years it is in effect. Further, CMS should establish a protocol for checking the information facilities provide under the rule against the Office of the Inspector General’s List of Excluded Individuals/Entities (LEIE). People and companies on the Exclusions List have committed fraud and caused harm to patients in various settings and are not permitted to have any involvement in owning or managing a nursing facility. The promulgation of this rule is an excellent opportunity for CMS to make the Exclusions List an affirmative tool for improving care for Medicare and Medicaid beneficiaries.

Conclusion

With this proposed rule, CMS rightly prioritizes the need for more thorough reporting of the people and organizations responsible for nursing facilities – the care they deliver and the businesses they manage. The poorer performance of PE- and REIT-owned facilities cannot be ignored. Further, we hope that implementation of this requirement for nursing facilities is the first step of many to come and that CMS will soon act to make similar information available across the health care system, particularly in sectors (such as specialty physician practices, hospice, and hospitals) where PE ownership is common.

For more information, please contact Senior Policy Analyst Andrew Park at andrew@ourfinancialsecurity.org or Robert Seifert, Senior Fellow at robertwseifert@icloud.com.

Sincerely,
Americans for Financial Reform Education Fund

⁴ “Nursing Homes: CMS Should Make Ownership Information More Transparent for Consumers,” accessed February 16, 2023, <https://www.gao.gov/assets/gao-23-104813.pdf>.