



April 14, 2023

Chiquita Brooks-LaSure, Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-6084-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

Re: Medicare and Medicaid Programs; Disclosures of Ownership and Additional Disclosable Parties Information for Skilled Nursing Facilities and Nursing Facilities (File No. CMS-6084-P)

Dear Administrator Brooks-LaSure:

The American Investment Council (“AIC”) appreciates the opportunity to submit these comments to the Centers for Medicare & Medicaid Services (“CMS”) in response to the Proposed Rule implementing section 1124(c) of the Social Security Act (the “Proposed Rule”).

AIC is an advocacy, communications, and research organization established to advance access to capital, job creation, retirement security, innovation, and economic growth by promoting responsible long-term investment. In this effort, AIC develops, analyzes, and distributes information about the private equity and private credit industry and its contributions to the U.S. and global economy. Established in 2007 and formerly known as the Private Equity Growth Capital Council, AIC is based in Washington, D.C. AIC’s members are the world’s leading private equity and private credit firms, united by their commitment to growing and strengthening the businesses in which they invest.¹

As discussed further below, private equity has a long history of health care investing in the United States. Private equity investments play a critical role in supporting access to quality, affordable health care. These investments produce strong health outcomes demonstrated by the decades-long track record of innovations delivering more effective treatments, saving lives, lowering health care costs, and supporting access to quality, affordable health care. Furthermore, private equity-backed facilities are more likely to serve lower income and underserved populations in rural areas.² The Medicare Payment Advisory Commission (“MedPAC”) concluded that private equity investments play an important role providing a broad range of provider entities with capital and expertise to navigate an increasingly complex health care landscape.³

¹ For further information about AIC and its members, please visit our website at www.investmentcouncil.org.

² US Health Care: How PE Is Filling the Gaps, (March 2021), available [here](#).

³ June 2021 Report to the Congress: Medicare and the Health Care Delivery System (June 2021), available [here](#).

AIC supports CMS' efforts to ensure enhanced transparency through disclosure of nursing facility ownership and AIC acknowledges private equity's commitment to the wellbeing of nursing facility patients. We are concerned, however, that the Proposed Rule uses inaccurate definitions and standards that would impede CMS from achieving its policy objectives. More specifically, and as explained in greater detail below, AIC encourages CMS to: (i) modify the definition of "private equity company" to capture the broader universe of private owners of nursing facilities (rather than a narrow subset); (ii) tighten the definition of "REIT" to tie it to the policy goals sought by CMS; and (iii) modify aspects of the proposed ownership disclosure requirements to more appropriately capture entities capable of exerting control over the operation of nursing facilities. These changes would enable CMS to more accurately monitor those private owners that are in positions to operate nursing facilities without frustrating the intent of the Proposed Rule and inadvertently causing regulatory confusion for both government officials and consumers.

I. The Proposed Definition of "Private Equity Company" is Inaccurate and Should Be Modified

The definition of "private equity company" in the Proposed Rule is inaccurate and captures a swath of entities that are not even private companies. Accordingly, in order to satisfy CMS' stated objectives, including CMS' ability to conduct meaningful research about the owners of nursing facilities, the Proposed Rule should be modified to provide a clear definition that addresses the core functions of owning and operating a nursing facility.

A. To facilitate enhanced transparency, CMS should collect information on ownership of "private companies"

The Proposed Rule would adopt the following definition of "private equity company":

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.

As stated in the preamble to the Proposed Rule, CMS is evaluating whether private ownership of nursing facilities may have adverse effects on the operation of those facilities and the care patients receive. Although we disagree with the underlying premise, CMS acknowledges that its concerns "are not limited to private equity companies," and the White House fact sheet states that "corporate owners and operators have not been held to account for poor nursing home performance."⁴ Against this backdrop, and considering that private equity funds own less than 5 percent of all nursing facilities,⁵ limiting the definition to private equity, as the Proposed Rule does, would fail to accomplish CMS' stated goals. Instead, CMS should adopt an alternative and more general definition of "private company" to capture a broader set of private companies that own and operate nursing facilities.

At the same time, the definition included in the Proposed Rule is imprecise and inaccurate. It would, for example, capture *publicly-traded companies* that own nursing facilities, which would appear at best ancillary to CMS' intent. In addition, the proposed definition would exclude *operating*

⁴ White House fact sheet "Protecting Seniors and People with Disabilities By Improving Safety and Quality of Care in the Nations' Nursing Homes" (Feb. 2022), available [here](#).

⁵ Robert Tyler Braun, PhD; Hyunkyung Yun, MSW; Lawrence P. Casalino, MD, PhD; et, al., Comparative Performance of Private Equity-Owned US Nursing Homes During the COVID-19 Pandemic, JAMA Network Open. 2020;3(10):e2026702 (Oct. 28, 2020).

companies (whether public or private) that own nursing facilities. In both cases, the definition results in a significantly incomplete picture of the universe of private companies that own nursing facilities on a for-profit basis. Altogether, the Proposed Rule would lead to a deluge of vague and unreliable disclosures from a hodgepodge of unrelated categories of investors, undermining CMS’ goal of collecting clear and useful information regarding parties that exercise operational, financial or managerial control over a given nursing facility.

As a result, AIC recommends the definition of “private equity company” be modified as follows to more closely align with CMS’ stated intent in collecting information about private owners.

***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~~ purchased [a majority ownership share of]/[a controlling interest in] a provider.*

This definition will provide greater transparency of the majority of ownership of nursing facilities and ensure that, in accordance with the intent of the Proposed Rule, purely passive investments are not captured. The proposed modified definition also avoids inaccurately and confusingly labeling all private companies as “private equity companies,” and avoids the misleading suggestion that only the smaller universe of private equity companies and not private companies more broadly, are the focus of the Proposed Rule. A private equity company is a private fund that raises capital specifically to invest in and operate portfolio companies, whereas a private company is simply any non-publicly-traded company that may or may not have an interest in managing and operating a company it invests in to achieve a more positive outcome for that company. Our proposed definition avoids market confusion and inadvertent regulatory implications for private companies that are structured as private equity funds and are operated and regulated as such.

B. The proposed definition of “Private Equity Company” should be modified

If CMS’ intent in collecting and providing information about private, for-profit owners of nursing facilities is to capture only *private equity fund* ownership of such facilities, we strongly disagree that private equity fund ownership of nursing home facilities raises the types of concerns that CMS is attempting to address with the Proposed Rule. Moreover, the proposed definition should be modified to the extent CMS intends to capture this information.

As an initial matter, the Proposed Rule in addition to failing to recognize the nearly *de minimis* private equity ownership of nursing facilities (see above), does not seem to take into account a number of favorable studies addressing private equity healthcare investing. For example, in a 2018 Georgetown University study,⁶ researchers constructed a panel dataset of all for-profit nursing facilities in Ohio from 2005 to 2010 and linked it with detailed resident-level data. Comparing the quality of care provided to long-stay residents at private equity-owned facilities and other for-profit (non-private equity) facilities, the study concluded there was no statistical difference between aggregated patient outcomes.

Furthermore, an October 2020 study by the University of California and Duke University on private equity-owned nursing facilities has shown that they outperformed non-private equity-owned

⁶ Sean Shenghsiu Huang, John R Bowblis, Private equity ownership and nursing home quality: an instrumental variables approach, *Int. J. Health Econ. Manag.* 2019 Dec;19(3-4):273-299 (Oct. 24, 2018).

facilities during the Covid-19 crisis along several dimensions:⁷ private equity-owned facilities during the pandemic had lower rates of outbreak as measured by all six primary measures. Non-private equity facilities were twice as likely to report confirmed cases or deaths among residents as private equity-owned facilities. After controlling for facility characteristics, resident composition, and local factors including outbreak intensity, private equity facilities remain less likely to experience a COVID-19 outbreak—private equity ownership was associated with a mean decrease in the probability of confirmed resident cases by 7.1 percentage points. Additionally, relative to non-private equity facilities, private equity ownerships were associated with increased availability of personal protective equipment.⁸ Private equity-owned nursing facilities also mirror the general positive spillover effects we observe across other industries. According to a 2017 longitudinal case study of private equity-backed Golden Living, private equity ownership allowed Golden Living’s nursing facilities to execute “novel” strategies and helped to launch additional medical care for communities, such as pharmacy services improving the quality of patient care.⁹

The AIC and its membership remain supportive of efforts and initiatives to enhance health care delivery and improve patient outcomes for our nation’s senior citizens. Private sources of capital are needed to ensure continued improvements, particularly in the areas of technology, patient satisfaction, and regulatory compliance.¹⁰ As discussed above, private equity currently accounts for a nearly *de minimis* percentage of nursing facility ownership.¹¹ However, we note that, historically, private investment in the skilled nursing and long-term care sector was a critical factor in providing essential capital since 1940. As observed by the Florida Agency for Health Care Administration, “the quality of a nursing home depends on the adequacy of funding to provide care.”¹² And again, private equity provides such funding to the benefit of the patients.

Nonetheless, to the extent CMS determines that identification of *private equity funds* as owners of nursing facilities is consistent with Congressional intent behind the Proposed Rule, CMS should not create its own novel, overbroad, and inaccurate definition of “private equity company” but instead should use the existing definition of “private equity fund” utilized by other regulatory agencies, including the Securities and Exchange Commission (“SEC”) - the primary regulator of private equity fund sponsors:

Private equity fund means, for purposes of this subpart only, any “private fund” that purchased [a majority ownership share of]/[a controlling interest in] a provider and that is not a “hedge fund”, “liquidity fund”, “real estate fund”, “securitized asset fund” or “venture capital fund” and does not provide investors with redemption

⁷ Ashvin Gandhi, YoungJun Song & Prabhava Upadrashta, Have Private Equity Owned Nursing Homes Fared Worse Under Covid-19?, Social Science Research Network (Oct. 2020).

⁸ Additionally, in a Weill Cornell Medical College study titled “Comparative Performance of Private Equity–Owned US Nursing Homes During the COVID-19 Pandemic,” researchers performed a cross-sectional study of 11,470 US nursing facilities. They found no statistically significant differences in staffing levels, COVID-19 cases or deaths, or deaths from any cause, between private equity nursing facilities and non-private equity facilities. Robert Tyler Braun, PhD; Hyunkyung Yun, MSW; Lawrence P. Casalino, MD, PhD; et, al., Comparative Performance of Private Equity–Owned US Nursing Homes During the COVID-19 Pandemic, JAMA Network Open. 2020;3(10):e2026702 (Oct. 28, 2020).

⁹ Aline Bos & Charlene Harrington, *What Happens to a Nursing Chain When Private Equity Takes Over? A Longitudinal Case Study* (Nov. 2017).

¹⁰ A 2019 EY survey found that a majority of health care executives reported that private equity investment entailed increasing investments in improving regulatory compliance, tracking patient experience and satisfaction. A. Saenz, How private equity can improve the health of health care, EY: New Horizons 2019 Edition (Oct. 25, 2019).

¹¹ Howard Gleckman, *Are Critics Of Private Equity Nursing Home Ownership Living In The Past?* Forbes, (April 2022), available [here](#).

¹² Florida Agency for Health Care Administration, Long Term Care Review: Florida Nursing Homes Regulation, Quality, Ownership, and Reimbursement.

rights in the ordinary course, as such terms are defined in the Glossary of Terms for Form PF - Reporting Form for Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors for purposes of private fund reporting on Form PF as required by the Investment Advisers Act of 1940, as amended.

This definition of “private equity fund” eliminates certain other private funds (such as hedge funds, venture funds, and credit funds) and public funds (such as mutual funds) that do not necessarily operate privately to make controlling investments in their portfolio companies, including nursing facilities, and thus avoids the type of market and regulatory confusion that could persist with the “private equity company” definition that would include all such funds. As noted above, the Proposed Rule would lead to a deluge of vague and inaccurate disclosures from a hodgepodge of unrelated categories of investors, undermining CMS’ mission of collecting clear and useful information regarding parties that exercise operational, financial, or managerial control over a given nursing facility.

II. The Proposed Definition of “REIT” is Overbroad and Should Be Modified.

REITs are in the business of leasing property, not exerting influence or operational control over the lessees of that property. It is not clear why CMS believes that identification of REIT lessors of property to nursing facilities would address the concern expressed in the White House fact sheet and repeated in the Proposed Rule that “corporate owners and operators have not been held to account for poor nursing home performance.” Ideally, REITs would be eliminated from the reach of the Proposed Rule, because their role in ensuring the health and quality of nursing facilities is negligible.

Leases with nursing facilities may include provisions aimed at protecting a REIT’s interest in ensuring the lessee continues to operate the facilities in compliance with contractual and legal requirements. A lease, for example, may include provisions obligating the nursing facility to operate a minimum number of beds, make maintenance and growth capital expenditures, and comply with health care regulations. A REIT does not exert operational control over a nursing facility via inclusion of such provisions in a lease. Moreover, such provisions—to the extent they exist—do not raise the issues CMS is concerned about (i.e. such provisions could only support the quality of care and would not detract from it).

However, to the extent CMS determines that identification of REITs as lessors of real property to nursing facilities is consistent with Congressional intent behind the Proposed Rule, CMS should not create an overbroad definition of REIT. A REIT is a specific type of entity arising out of tax law. The current proposed definition of REIT would capture a panoply of other types of entities that may lease real estate to nursing homes but are not REITs. To avoid the type of market and regulatory confusion described above, CMS should consider defining the term REIT more narrowly, as follows:

***REIT** means, for purposes of this subpart only, a “real estate investment trust” as that term is defined in Section 856(a) of the Internal Revenue Code, that leases or subleases real property to a facility in the ordinary course of its business and that has the power, through the lease agreement or otherwise, to exert day-to-day operational, financial or managerial control over the facility or a part thereof.*

III. The Proposed Definition of “Organizational Structure” is Overbroad and Should Be Modified

The Proposed Rule adopts the definition of “organizational structure” from the ACA:¹³

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 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.*

The definition is inconsistent with CMS’ intent to better understand the organizational structure of a nursing facility to ensure that persons responsible for day-to-day operations of the facility are held responsible for any operational issues. For example, in limited partnerships, as a matter of law, only the general partner has authority to take actions or impact the operations of a business entity; limited partners have no ability to make decisions or affect the operations of a nursing facility, regardless of the level of their indirect ownership interest. Similar restrictions exist for non-managing members of limited liability companies. Moreover, the vast majority of private limited partnership and limited liability company arrangements contain strict confidentiality agreements under which the identities of the limited partners or members cannot be disclosed to the general public.

To ensure the Proposed Rule’s disclosure requirement does not unduly burden nursing facilities, AIC recommends that CMS appropriately narrow the term “organizational structure” as follows:

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:

- ...
- (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.~~*
- ...
- (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.~~*

To the extent CMS determines to maintain a requirement to disclose certain owners of a limited partnership or limited liability company, CMS should, consistent with our

¹³ *Id.*

discussion above, tailor this requirement to require disclosure only of owners of “ownership interests” of the vehicle of greater than 25%, as follows:

*(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 **that is greater than 25%.***

...

*(4) 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 **greater than 25%** ~~equal to or exceeds 10%.~~*

Alternatively, CMS should modify the definition of “ownership interests” to limit such interests to those that provide the holder of those interests with the ability to remove or replace a general partner or managing member without cause. The defined term would then reflect the types of interests that may provide the holder with a level of influence commensurate with the intended focus of the Proposed Rule. In this regard, CMS could consider the definition of “voting security” in the Investment Company Act of 1940, as amended:

***Ownership interest** means, for purposes of this subpart only, an interest in a Private Equity Fund or a REIT that meets the definition of “voting security” as defined in and interpreted for purposes of Section 2(a)(42) of the Investment Company Act of 1940, as amended.*

Conclusion

In sum, CMS should address the entire market of private owners of nursing facilities rather than the universe of owners that would be captured by the proposed definition of “private equity company,” or at a minimum narrow the subset of private owners to those structured and operated as actual private equity funds pursuant to the definition adopted by the SEC. CMS should also consider eliminating REITs from the reach of the Proposed Rule, and short of that, to narrow the definition so that it captures only REITs that could exert influence over the day-to-day operations of the facility. Further, CMS should modify the “look through” requirement to report on indirect owners of nursing facilities, since such owners, in the context of private companies, lack the ability to control and operate a nursing facility. These changes will enable CMS to more accurately monitor the private owners who are in position to operate affected nursing facilities without frustrating the intent of the Proposed Rules and inadvertently harming patients and causing regulatory confusion.

AIC appreciates the opportunity to comment on the Proposed Rule and would be pleased to answer any questions that you might have concerning our comments.

Respectfully submitted,

/S/ Rebekah Goshorn Jurata

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