

## AHCA Policy Memo on Section 6101 of PPACA

### PPACA Requires Disclosure of Ownership and Additional Disclosable Parties Information

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (PPACA). Title VI, Subtitle B of the law, entitled **Nursing Home Transparency and Improvement** includes two parts. The first section of **Part I – Improving Transparency of Information** is section 6101 – Required Disclosure of Ownership and Additional Disclosure Information.

This sections states that, beginning immediately, a facility must make certain information available for the State in which the facility is located, the State Long-Term Care Ombudsman, the Secretary of the Department of Health and Human Services (HHS) and the Office of Inspector General of HHS *should one of these entities request the information*. The information that must be provided, if requested, is bulleted on the attached document “**Guidance on the Nursing Home Transparency Provisions of the Patient Protection and Affordable Care Act**” (**Guidance**).<sup>1</sup>

By March 2012, HHS must issue final regulations that create a standardized format for reporting the disclosure information specified in PPACA section 6101. By July 2012, a nursing facility must report the information, on the standardized form, to HHS. At that time, a nursing facility also will have to certify, as a condition of program participation, that the information provided is, to the best of its knowledge, accurate and current. By March 2013, HHS will make the ownership and additional disclosable party information submitted on the standardized form available to the public.

It is important to note that if a nursing facility already reports any of this information to the Internal Revenue Service (e.g., on Form 990), the Securities and Exchange Commission, or HHS (e.g., on Form 855A) and, in some states, on the CMS Ownership and Control Interest Statement, the nursing facility can submit any of those forms/documents to satisfy the current requirement.

### Impact

A nursing facility will be responsible for obtaining and reporting the required ownership and other disclosable party information and certifying that this information is, to the best of the facility’s knowledge, accurate and current. The **Guidance** document identifies and defines specific individuals for which the facility must obtain and report the information.

Until the standardized format is developed and issued in final regulations (March 2012), a nursing facility may use the attached “**Provider Ownership and Disclosure Form**”<sup>2</sup> (**Form**) as a guide for compiling the required information. It is important to understand that this **Form** was designed by Reed Smith, LLP, AHCA General Counsel, to provide

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<sup>1</sup> Prepared by AHCA’s General Counsel, Reed Smith, LLP

<sup>2</sup> Ibid.

AHCA members with assistance in gathering the information required by PPACA until CMS develops the standardized format. Neither the **Guidance** nor the **Form** is to be considered legal advice. We recommend that each nursing facility review the information it gathers with its own legal counsel to assure that they have met the legal requirements of the PPACA/.

### Concerns

- In §1126(b) of the Social Security Act, the term “managing employee” means, with respect to an entity, an individual, including a general manager, business manager, administrator, and director, who exercises operational or managerial control over the entity, or who directly or indirectly conducts the day-to-day operations of the entity.”

The PPACA defines the term “managing employee” as 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.

Clarification must be provided by HHS.

- The PPACA definition of the term “managing employee” states that a consultant who advises or supervises any element of the practices or operations of the nursing facility requires additional clarification. AHCA believes that a “consultant,” for purposes of this requirement, should include only those consultants who actually have decision-making responsibilities related to day-to-day implementation of policies and procedures.
- It is important that HHS provide adequate time for a nursing facility to obtain this level of information, particularly during the immediate period following adoption of this law.
- HHS must clarify when and in what format the disclosure of ownership and additional disclosure information must be updated.
- HHS must designate a coordinating organization in every state for receiving and disseminating this information. That coordinating organization should also be required to advise a facility if this disclosure information has been requested.

## **Guidance on the Nursing Home Transparency Provisions of the Patient Protection and Affordable Care Act**

### **Current Requirement for SNFs and NEs**

The following information must be available to the Secretary of the Department of Health and Human Services (“HHS”), the Inspector General of HHS, the State in which the facility is located, and the State long-term care ombudsman, if any of them ask for it:

- Name of any person/entity that has an ownership interest of 5% or more in the facility
  - Includes direct or indirect interests, such as intermediate entities
  - “Intermediate entity” is not defined, but would likely include any and all persons or entities in between the ultimate parent (at the top of the ownership chain) and the actual Provider (facility), as long as there is an ownership link at each level down the chain.
- Name of any person/entity owning a mortgage, deed of trust, note, or obligation secured by the facility or property of the facility, if the interest is 5% or more of the total property
- Each member of the governing body of the facility
  - Name, title, period of service must be disclosed
- Each officer, director, member, partner, trustee, or managing employee of the facility
  - Name, title, period of service must be disclosed
  - **Managing employee** means 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
    - Note that this definition is different from the definition of “managing employee” for purposes of other ownership and disclosure provisions of the already-existing law. See Section 1126(b) of the Social Security Act.
- Each additional disclosable party of the facility
  - Name, organizational structure, and a description of the relationship of each additional disclosable party to the facility and to one another must be disclosed
  - **Additional disclosable party** means any person or entity who:
    - Exercises operational, financial, or managerial control over the facility or a part of the facility;

- Provides policies or procedures for any of the operations of the facility;
- Provides financial or cash management services to the facility;
- Leases or subleases real property to the facility, or owns a whole or part interest equal to or exceeding 5% of the total value of the real property; or
- Provides management or administrative services, management or clinical consulting services, or accounting or financial services to the facility.
- Examples include parent-subsidiary relationships, management companies, real estate holding companies, and administrative service companies
- **Organizational structure** means:
  - For a corporation → officers, directors, and shareholders who have an ownership interest equal to or exceeding 5% must be disclosed
  - For an LLC → members and managers must be disclosed, including, as applicable, what percentage each member and manager has of the ownership interest in the LLC
  - For a general partnership → partners must be disclosed
  - For a limited partnership → general partners and any limited partners who have an ownership interest equal to or exceeding 10% must be disclosed
  - For a trust → the trustees must be disclosed
  - For an individual → his or her contact information must be disclosed

*Note: If a facility already reports any of the above information to a federal agency, such as the IRS, SEC, or HHS, the facility can submit those forms to satisfy the current requirement. For example, facilities already must disclose certain ownership/investment information on CMS Form 855A and, in some states, on the CMS Ownership and Control Interest Statement.*

### **Future Requirements and Rulemakings**

- By March 2012, HHS must issue final regulations that include a standardized format for reporting the above information.
- By July 2012, facilities will begin reporting the above information to HHS.
  - A facility will have to certify that the information provided is, to the best of its knowledge, accurate and current.
- By March 2013, HHS will make the above information available to the public.

### **Undefined Terms/Concepts**

- There are many items that will need to be explained in future regulations. For example:
  - “Governing body” is not specifically defined; CMS may refer to existing regulatory definition in 42 C.F.R. § 483.75(d).
  - Many aspects of the “additional disclosable party” definition need further clarification. E.g., what is a clinical consultant? What if another party, such as a law firm, creates a Provider’s policies and procedures?
  - It is not clear how the new disclosure requirements apply to a Provider with a chain of ownership. E.g., does a Provider have to report additional disclosable parties for an indirect owner?

## Provider Ownership and Disclosure Form

Provider Name: \_\_\_\_\_

Provider Number: \_\_\_\_\_

For all questions, if the answer is a person's name, please list the full legal name (first, middle, last, Jr., Sr., etc.). If the answer is an entity name, please list the legal business name as reported to the Internal Revenue Service and the "Doing Business As" name, if applicable.

- A. Name any person or entity who has a direct or indirect ownership interest of 5% or more in the Provider. **Include direct or indirect ownership interests in intermediate entities.** Attach a chart showing the chain of ownership, if applicable. *[This information is likely already collected for CMS Form 855A.]*


- B. Name any person or entity who is an owner of a whole or part interest in any mortgage, deed of trust, note, or other obligation secured, in whole or in part, by the Provider or any of its property or assets, if the interest equals 5% or more of the total property or assets of the Provider.


- C. For each member of the governing body of the Provider, please list the individual's name, title, and dates of service.

Name	Title	DOS

D. For each officer, director, member, partner, trustee, or managing employee of the Provider, please list the individual's name, title, and dates of service. *[Managing employees include general managers, business managers, administrators, and consultants.]*

Name	Title	DOS
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

E. Name each "additional disclosable party" of the Provider. *[“Additional disclosable parties” exercise operational, financial, or managerial control over the Provider; provide policies and procedures for any operations of the Provider; provide accounting, financial, or cash management services to the Provider; lease or sublease real property to the Provider; or provide management, administrative, or clinical consulting services.]*

- Does the Provider have a parent company that has not already been disclosed?
- Does the Provider use another party as a management company?
- Does another party create policies/procedures for any of the Provider's operations?
- Does another party provide financial, cash management, or accounting services to the Provider?
- Does the Provider lease its property from another party?
- Does another party own any part of the Provider's property?
- Does the Provider use another party for administrative services?
- Does the Provider use another party for clinical consulting services?

If you have checked any of the boxes above, please list the party names below:

_____	_____
_____	_____
_____	_____

- F. For each “additional disclosable party” listed above, please provide:
1. The Organizational Structure (see “Definitions”).
  2. A description of its relationship to the Provider.
  3. A description of the disclosable party’s relationship to every other additional disclosable party.

***[Note: If the Provider already reports any of the above information to a federal agency, such as the IRS, SEC, or HHS, the Provider can substitute those forms in lieu of answering the applicable questions.]***

## Definitions

For purposes of this form, the terms “managing employee,” “additional disclosable party,” and “organizational structure” are defined as follows:

**Managing employee** means 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 Provider.

**Additional disclosable party** means any person or entity who:

- Exercises operational, financial, or managerial control over the Provider or a part of the Provider, or provides policies or procedures for any of the operations of the Provider, or provides financial or cash management services to the Provider;
- Leases or subleases real property to the Provider, or owns a whole or part interest equal to or exceeding 5% of the total value of such real property; or
- Provides management or administrative services, management or clinical consulting services, or accounting or financial services to the Provider.

**Organizational Structure** means, in the case of:

- A corporation – the officers, directors, and shareholders who have an ownership interest in the corporation which is equal to or exceeds 5%;
- A limited liability company – the members and managers, including, as applicable, what percentage each has of the ownership interest in the limited liability company;
- A general partnership – the partners;
- A limited partnership – the general partners and any limited partners who have an ownership interest which is equal to or exceeds 10%;
- A trust – the trustees of the trust;
- An individual – the contact information for the individual; and
- Any other person or entity that the Secretary of the Department of Health and Human Services determines appropriate.