



Charles N. Kahn III
President and CEO

June 5, 2023

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW Room 445-G
Washington, DC 20201

***RE: CMS–855A; CMS–246 and CMS–10823; Agency Information Collection Activities:
Submission for OMB Review; Comment Request; May 4, 2023***

Dear Administrator Brooks-LaSure:

The Federation of American Hospitals (FAH) is the national representative of more than 1,000 investor-owned or managed community hospitals and health systems throughout the United States. Our members include teaching and non-teaching hospitals in urban and rural parts of America, as well as inpatient rehabilitation, psychiatric, long-term acute care, and cancer hospitals. The FAH appreciates the opportunity to provide comments to the Centers for Medicare & Medicaid Services (CMS) regarding proposed revisions to the Medicare Enrollment Application – Institutional Providers (Form 855A) following CMS’s *Notice of Agency Information Collection Activities: Submission for OMB Review* published in the Federal Register on May 4, 2023 (88 Fed. Reg. 28,554).

The FAH previously commented to CMS, on February 12, 2023, on proposed changes to Form 855A in response to CMS’ *Agency Information Collection Activities: Proposed Collection; Comment Request*; December 15, 2022 (87 Fed. Reg. 76,626), and we have a further comment regarding an additional change on Form 855A related to disregarded entities, i.e., an entity that is treated as not separate from its single owner for income tax purposes. We also continue to be concerned with the addition to Section 5 regarding private equity companies (PECs) and real estate investment trusts (REITs).

Disregarded Entities (Sections 2 and 5)

Section 17 of current Form 855A “lists the documents that, if applicable, must be submitted with this completed enrollment application.” (Emphasis added.) This list includes “[w]ritten confirmation from the IRS confirming your Limited Liability Company (LLC) is

automatically classified as a Disregarded Entity. (e.g., Form 8832).” Clearly, based on this list, current Form 855A requires Form 8832 to be filed only if applicable, which is consistent with IRS requirements for disregarded entities.

Specifically, 26 CFR 301.7701-3 provides that a business entity can elect its classification for federal tax purposes and can designate such election on Form 8832. However, under 26 CFR 301.7701-3(a) and (b) there is a “default classification” available for an eligible entity, including a single member limited liability company (LLC) that is by default treated as a disregarded entity, and thus does not make an election and is not required to file Form 8832. Section 301.7701-3(a) affirms that “[e]lections are necessary only when an eligible entity chooses to be classified initially as other than the default classification [under Section 301.7701-3(b)] or when an eligible entity chooses to change its classification.” Under the default classification set forth in Section 301.7701-3(b), unless an entity elects otherwise, a domestic eligible entity is a partnership if it has two or more members; or is disregarded as an entity separate from its owner if it has a single owner. Thus, under this section, an entity (e.g., hospital) with a single owner will by default be classified for federal tax purposes as a disregarded entity. Under this “default classification,” the disregarded entity does not file Form 8832. A single member LLC that is a disregarded entity would file Form 8832 only if it is electing out of its default disregarded entity treatment and is electing instead to be treated as a separate C-corporation for tax purposes.

Moreover, it is unclear how an existing disregarded entity that is automatically classified by the IRS as such could even complete Form 8832: The first question on Form 8832 only permits the form to be filed for an “initial classification by a newly-formed entity” or a “change in current classification.” Neither of these responses would be applicable for an existing disregarded entity. Consistent with the language of the form, the instructions to Form 8832 do not contemplate its submission by an entity automatically designated for federal tax purposes as a disregarded entity. In the “Who Must File” section of the Form 8832 instructions, the IRS specifies that the form is to be filed by a domestic entity electing to be classified as an association taxable as a corporation, a domestic entity electing to change its current classification, or one of four types of foreign entities.

Under the foregoing IRS regulations and instructions, Form 8832 would not be applicable to disregarded entities and thus would not be required to be submitted to CMS for purposes of Form 855A. However, newly proposed Form 855A appears to take a different approach than the current form. Sections 2 and 5 require entities to confirm their “IRS Business Designation.” Specifically, Section 2 requires entities to designate whether they are:

- Proprietary
- Non-Profit (Submit IRS Form 501(c)(3))
- Disregarded Entity (Submit IRS Form 8832).

It is unclear whether Sections 2 and 5 would require disregarded entities to submit Form 8832, which for disregarded entities is not possible since these entities do not file Form 8832 with the IRS. However, Section 17 of newly proposed Form 855A contains similar language to the current form in that it lists the documents that, if applicable, must be submitted with the enrollment application – including “[w]ritten confirmation from the IRS confirming your Limited Liability Company (LLC) is automatically classified as a Disregarded Entity (e.g., Form

8832). This Section appears to confirm that Form 8832 must be provided only if applicable, which would not be the case for disregarded entities.

Accordingly, we urge CMS to add language in Sections 2 and 5 clarifying that Form 8832 must be provided “only if applicable.”

PEC and REIT Ownership Reporting (Section 5)

The FAH continues to be concerned by changes to Section 5 requiring providers to designate entities with reportable ownership interests as PECs or REITs because such collection is unnecessary and inappropriate and the definitions proposed are ambiguous such that reporting would be inherently unreliable. First, provider ownership by PECs and REITs, unlike hospital ownership by physicians, is not inherently problematic or subject to heightened scrutiny as a matter of law. Congress built off years of research regarding the risks associated with POHs when adopting section 6001 of the ACA. In contrast, PEC and REIT hospital ownership is not the object of statutory scrutiny, and the Supporting Statement does not identify any research suggesting a need to monitor PEC-owned and REIT-owned hospitals. Against this backdrop, it is unnecessary and inappropriate for providers to designate entities with reportable ownership interests as PECs or REITs on Form 855A or otherwise.

Moreover, the definitions of PEC and REIT set forth in the proposed Form 855A are vague such that a hospital’s designation (or non-designation) of an entity as a PEC or a REIT will not provide usable data regarding these types of entities. With respect to PECs, the proposed definition (a “non-publicly traded company that collects capital investments from individuals and/or entities (i.e., investors) and purchases an ownership share of a provider (e.g., skilled nursing facility, home health agency, etc.)”) could be read expansively as referring to virtually any privately held company with a reportable ownership interest in a hospital. Some hospitals might thus broadly designate entities as PECs, but others might designate PECs more narrowly, excluding entities that do not engage in typical private equity activities.

It would be premature and inappropriate to gather data on hospital ownership by PECs where there is no established definition of a PEC and the proposed definition is vague with uncertain boundaries. Notably, the literature cited in the February 15, 2023, proposed rule titled “Disclosures of Ownership and Additional Disclosable Parties Information for Skilled Nursing Facilities and Nursing Facilities,” does not include a clear and consistent definition of PEC, often times focusing on particular private equity *activities* rather than distinctive entities that qualify as PECs. For example, MedPAC’s 2021 report on the role that private equity plays in the Medicare program “focused primarily on buyouts . . . and [used] the term *private equity* to refer to them specifically unless noted otherwise.”¹ Similarly, the 2021 National Bureau of Economic Research (NBER) report on private equity investment in healthcare described private equity firms as “conduct[ing] leveraged buyouts (LBOs), in which a target firm is acquired primarily with debt financing – which is placed on the target firm’s balance sheet – and a small portion of

¹ Medicare Payment Advisory Commission, “Congressional Request: Private Equity and Medicare,” June 2021. jun21_ch3_medpac_report_to_congress_sec.pdf.

equity.”² This focus on particular activities or business models complicates or precludes the consistent identification of PECs.

With respect to reporting on ownership by a REIT, the FAH is concerned that the proposed definition of a REIT on Form 855A is overly broad and would encompass entities that are not REITs. A REIT is a defined entity under established and longstanding Treasury Regulations, 26 C.F.R. § 1.856-1, but the changes to Form 855A would, without explanation, appear to require that non-REITs be designated as REITs for Medicare purposes. Under the proposed definition, the touchstone of a Medicare REIT would be partial or full ownership of a hospital’s buildings or real estate by a company with a reportable ownership interest in the hospital. This would include entities that do not meet the status conditions or gross income and asset diversification requirements for REITs. This proposed definition of a REIT is not “modestly different” from the definition of REIT in other settings—rather, it includes entities that simply are not REITs and without any supporting rationale. Finalizing this definition would work against CMS’ objectives in gathering data regarding REIT ownership of hospitals because (1) the overinclusive definition would preclude CMS from making any conclusion with respect to the actual impacts of REIT ownership of providers and (2) the non-standard definition would result in inconsistent designations by hospitals of similar entities on the Form CMS—855A enrollment application.

In light of the foregoing, at this time, the FAH urges CMS to decline to finalize the addition of PEC and REIT designations to Section 5 of Form 855A. At a minimum, CMS should ensure that the definition of a REIT for Medicare purposes does not include any entity that is not a REIT under Treasury Regulations and should limit reporting on PEC and REIT ownership to skilled nursing facilities. Focusing initially on skilled nursing facilities would enable CMS to develop experience with the PEC and REIT definitions and refine them to ensure reporting is meaningful and consistent before considering extending reporting of PEC and REIT ownership interests to all providers and suppliers completing the Form 855A enrollment application.

* * * * *

Thank you for the opportunity to comment on the proposed revisions to the Medicare Enrollment Application. If you have any questions, please contact me or a member of my staff at 202-624-1534.

Sincerely,



² Atul Gupta, Sabrina T. Howell, Constantine Yannelis, and Abhinav Gupta, *Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes*, No. W28474, National Bureau of Economic Research, 2021, p. 8.