



Charles N. Kahn III
President and CEO

February 13, 2022

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–10527, CMS–10260, CMS–10836 and CMS–855A. Agency Information
Collection Activities: Proposed Collection; Comment Request; December 15, 2022***

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 comment to the Centers for Medicare & Medicaid Services (CMS) on proposed revisions to the Medicare Enrollment Application - Institutional Providers (Form CMS 855A) following CMS's Notice of Agency Information Collection Activities: Proposed Collection, published in the Federal Register on December 17, 2022 (87 Fed. Reg. 76,626).

The FAH supports many of the changes proposed, including the revisions designed to correct errors, create a uniform standard across the enrollment applications, improve instructions, and minimize burden. The FAH, however, believes that three of the proposed changes are inappropriate and should not be finalized: (1) the removal of reporting on physician ownership from Section 2A(4), (2) the addition of new outpatient provider-based department information in Section 4A, and (3) the collection of new ownership information focused on private equity and real estate investment trusts (REITs) in Sections 5 and 6.

Section 2A(4)—Removal of Physician-Owned Hospital Information. The FAH strongly opposes the proposed removal of section 2A(4), which currently collects minimal information on physician-owned hospitals (POHs). Instead, the FAH urges CMS to (1) retain this question on Form CMS 855A, taking the necessary steps to include responses as a data point in the Provider Enrollment, Chain, and Ownership System (PECOS) ownership dataset, and (2) finally require that POHs submit the annual reports mandated by Congress by completing Form CMS 855POH. Congress recognized the critical risks associated with POHs with the adoption of the Affordable Care Act (ACA), which, *inter alia*, prohibits the enrollment of new POHs, limits the expansion of existing POHs, and imposes certain POH transparency requirements. Transparency, in particular, is critical to ensure that regulators and potential patients are aware of physician ownership, which carries unique risks with respect to physician conflicts of interest and high-cost, low-value care.¹

The cited justification for eliminating the POH “Yes/No” question from Section 2A is that “Physician owned hospital reporting is no longer required via the CMS-855 applications.” But no supporting rationale for eliminating POH reporting via Form CMS 855A is provided. This unexplained erosion of transparency measures for POHs should not be finalized. Rather, the FAH urges CMS to retain this question, include responses in the ownership dataset, and expand information collection for POHs. With respect to the ownership dataset, at present, responses in section 2A(4) do not appear in the PECOS ownership dataset. This dataset, which is updated monthly, provides valuable information and transparency around ownership, but it is not populated with information from Section 2A of the Form CMS 855A. Therefore, we urge CMS to either move the POH “Yes/No” question from Section 2A to Sections 5 and 6 or to revise the data sources for the ownership dataset to include responses to the POH question in section 2A(4).

Beyond adding POH data to the ownership dataset, the FAH believes that further delays in POHs’ annual reporting on ownership and investment interests are unwarranted. At present, it appears that despite the statutory requirement that POHs submit to the Secretary an annual report reporting on ownership and investment interests (42 U.S.C. § 1395nn(i)(C)(i)) and the adoption of an implementing regulation (42 C.F.R. § 411.362(b)(3)(i)), POHs have not been submitting this information. Rather, POHs have been instructed that they are not required to submit a completed Form CMS-855POH or a completed Attachment 1 of the Form CMS-855A since March 12, 2015.² Thus, the FAH strongly urges CMS to not only retain the POH question in Section 2A but also provide final instructions commencing annual reporting of POH ownership and investment in accordance with express requirements of 42 U.S.C. § 1395nn(i)(C)(i).

¹ These issues were given prominence in Atul Gawande’s seminal article highlighting the extraordinary cost of care at Doctors Hospital at Renaissance (DHR). *The Cost Conundrum—What a Texas Town Can Teach Us about Health Care*, NEW YORKER (June 1, 2009), available at <https://www.newyorker.com/magazine/2009/06/01/the-cost-conundrum>. CMS recently granted DHR’s request to add a total of 551 operating rooms, procedure rooms, and beds at a new facility more than 50 miles away from the main hospital and in another county. 87 Fed. Reg. 77,844 (Dec. 20, 2022).

² *Physician-Owned Hospitals*, CMS (Dec. 16, 2022, 4:22 PM), https://www.cms.gov/medicare/fraud-and-abuse/physiciansselfreferral/physician_owned_hospitals; Medicare Program Integrity Manual, Chapter 10, section 10.2.1.8.B.4.

Section 4A—Additional reporting requirements in Section 4. The FAH opposes the proposed revisions to Form CMS 855A because they are unnecessary and inappropriate. The proposed revisions would compel the provider to attest that the facility “satisfies applicable requirements at 42 CFR 413.65,” but provider attestations of compliance with the requirements of 42 C.F.R. § 413.65 have been voluntary since the 2003 Inpatient Prospective Payment System Final Rule.³ Under long-standing CMS policy and regulations, only a provider “seek[ing] a determination of provider-based status” would submit an attestation stating that the facility meets the applicable provider-based criteria.⁴ The justification for this change does not provide any rationale from deviating from this practice, and at a minimum, the language indicating that the provider “satisfies applicable requirements at 42 CFR 413.65” should be stricken.

The FAH is also concerned that the eight categories of provider-based departments are unclear and contradictory. By way of example, it is unclear whether the “remote location” checkbox should be used for the inpatient facility that is the remote location because this checkbox is within the category of “Outpatient Provider-Based Department (PBD) Site” and the remote location is not an outpatient provider-based department. Likewise, it is unclear which boxes should be checked for an off-campus dedicated emergency department (ED). Such a facility would be a “dedicated emergency department (ED)” (the third checkbox for outpatient PBD sites), but it would also be an outpatient PBD that is “off-campus” of the main provider (the fourth checkbox) and an outpatient PBD that is “excepted off-campus” pursuant to 42 C.F.R. § 419.48(b). Far from reducing provider burden, this proposed revisions to section 4A would create confusion. Moreover, this language is unnecessary to the implementation of Section 603 of the Bipartisan Budget Act of 2015 (Pub. L. 114-74) as CMS has required providers to use the “PO” and “PN” modifiers on claim forms to report excepted and non-excepted off-campus PBDs since January 1, 2017.

Section 4C(2)—Additional Reporting Requirements for Disclosure of Electronic Record Storage. The FAH has significant concerns with the proposed addition to question 4C(2) regarding electronic storage sites as public disclosure of the requested information could create significant cybersecurity risks for providers, and urges CMS to eliminate or modify this addition. As proposed, providers that store patient medical records electronically would be required to “identify where/how these records are stored.” The instructions for this proposed question further specify: “This can be website, URL, in-house software program, online service, vendor, etc. This must be an electronic storage site that can be accessed by CMS or its designees if necessary.” To the extent that this question is seeking disclosure of a link that can be accessed by CMS or its designees directly, such a disclosure would be inconsistent with security standards. If that is not what is being requested, the wording of the question should be appropriately revised to reference a site “to which CMS or its designees can be provided access if necessary.”

Hospitals and health systems have been the targets of significantly disruptive cybersecurity attacks in recent years, and any question on the Form CMS 855A regarding the storage of electronic medical records ought to be narrowly tailored to keep the request as

³ 67 Fed. Reg. 49982, 50,084-88 (Aug. 1, 2002) (finalizing 42 C.F.R. 413.65(b)(3)).

⁴ 42. C.F.R. § 413.65(b)(3)

targeted as possible and minimize the creation of new risks. To this end, it would not appear that there is a need to solicit any details regarding the location of electronically stored patient medical records on the Form CMS 855A. Rather, the FAH believes CMS's interests could be met by a question that asks whether or not the provider has a record retention policy that addresses electronically stored patient medical records. Such a question would be similar to current question 3 in Section 2A regarding the hospital compliance plan.

Lastly, we note that the proposed wording of the instructions for this question would create uncertainty among providers. It is unclear whether the question is soliciting information regarding the location of the electronic data (*e.g.*, local servers, the cloud) or the software platform used to store the data, and how a provider would complete this question if the "where" and "how" involve different vendors and in-house solutions. And it is also unclear how a hospital would complete this question if it has multiple storage sites for these records. In any case, because disclosure of even limited information regarding the storage of these electronic records may pose a security risk (and imposes an undue burden if a provider would be required to update its enrollment with every change to a URL), the FAH urges CMS to eliminate the request for information regarding "where/how these records are stored" and instead focus on a targeted question confirming the existence of a record retention policy that addresses these records.

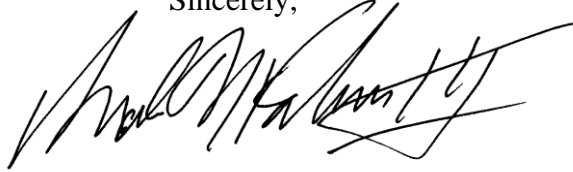
Sections 5A & 6A—The FAH opposes the proposed addition of the "Yes/No" question on ownership of each entity with an ownership role. The proposed question asks, "Is this organization itself owned by any other organization or by any individual?" The FAH is concerned that Form CMS 855A is being expanded with questions that do little or nothing to improve the gatekeeping functions of the provider enrollment process, creating unwarranted administrative burdens for providers.

Sections 5B & 6B—Private Equity and REITs. Lastly, the FAH is concerned that the justification presented for adding private equity and REITs to Section 5 (organizational ownership) and Section 6 (individual ownership) inappropriately disparages private equity owners. The supporting justification for this change states: "[t]he data collection provides greater transparency regarding the owners and managers for Part A facilities, given concerns about the credentials and commitment to high-quality patient care of certain types of nursing home ownership, including private equity firms." This sweeping statement impugns the credibility and commitment of certain owner types, without providing any supporting basis or rationale for the accusation. It is particularly important to use considered judgment when adding to sections 5 and 6 of the Form CMS 855A because information reported in these sections are made public, including through the PECOS ownership dataset. Any concerns regarding nursing home ownership do not support additional reporting requirements and public disclosures for the many other Part A providers that are required to complete Form CMS 855A. The FAH therefore urges CMS to decline to adopt these proposed changes. The FAH is particularly concerned that this justification prioritizes transparency regarding private equity and REIT ownership at the same time that transparency is being eroded for POHs despite the statutory mandate for annual reporting on POH ownership and investment.

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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,

A handwritten signature in black ink, appearing to be "Andrew R. [unclear]", written in a cursive style.