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*Understanding the Unique Considerations, Special
Regulations (and Potential Pitfalls), and Resources
Available in Lending or Developing A Health Care Facility*

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I. **Introduction**

There are a multitude of Federal and state statutes and regulations that govern health care facilities that lenders to health care providers should be cognizant of to preserve their investment. Generally, these laws concern licensing, Medicare and Medicaid certification and fraud and abuse. This paper will focus on long term care facilities (i.e. nursing home and long term care facilities) due to the anticipated growth of the industry and intrinsic value of the facilities. This paper will also briefly address fraud and abuse laws that are relevant to health care providers that utilize office space in buildings such as medical and dental practices and labs.

As of April 2015, there were 1,224 nursing facilities and 1,771 assisted living facilities in Texas.¹ In the last four (4) years, the number of nursing facilities increased 2.4% and the number of assisted living facilities increased 9.7%. Growth in the number of facilities is anticipated to increase due to the aging population.

Nursing facilities are home to approximately 95,000 Texans. They provide a variety of services their elderly and/or dependent residents, which include room and board, nursing care and supervision, social services, assistance with daily living, activities, administration of medication, and physical, occupational and speech therapy services. Medicare and Medicaid are the primary payors of services provided to the nursing facility residents.

Assisted living facilities are home to approximately 40,000 Texas. The services they provide to residents include room and board and assistance with bathing, dressing, toileting and administration or supervision of medication. There are three (3) different types of assisting living facilities, which are differentiated by the ability of their residents to evacuate in an emergency and their need for attendance during evening hours. No resident of an assisted living facility may be bedfast. With very few exceptions, neither Medicaid nor Medicare pay for assisted living facility services.

II. **Disclosure Requirements**

All nursing facilities and assisted living facilities must be licensed to operate by the Texas Department of Aging and Disability Services (“TDADS”) and follow state licensing regulations. Nursing facilities that participate in the Medicaid and Medicare programs must also follow federal regulations. During the licensure and certification process, full disclosure of certain information is mandatory. The amount of information required to be provided to TDADS in the licensing and certification process likely exceeds that required by most lenders. TDADS requires full disclosure of the following:

¹ Texas Department of Aging and Disability Services, Senate Bill 190 Annual Report (April 2015), which can be found at <http://www.dads.state.tx.us/providers/reports/sb190/FY2014/RS-AnnualReport-FY14.pdf>.

- Ownership of applicant
 - Controlling persons/entities of applicant
 - Management company and its owners/controlling parties
 - Real Estate information
 - Financial information
 - Ownership/operations of facilities outside Texas and their compliance histories
 - Criminal history checks and fingerprints of applicant's owners.
- a. Ownership – An applicant for a long-term care facility license must disclose all levels of ownership interest of 5% or more in the applicant entity, and is required to disclose all entities and all individuals at each level of ownership, from the ownership of the applicant entity to the ownership of each successive ownership entity. For each level of ownership, the following must be disclosed:
- i. Names
 - ii. Dates of birth
 - iii. Drivers' license numbers
 - iv. Social security numbers
 - v. % of ownership
 - vi. Title (if any)
 - vii. Start date of association

“Entities” include partnerships and corporations. If the entity is publicly traded or is an investment fund, no further disclosures are required.

- b. Controlling persons or entities – All controlling persons must be disclosed. A “controlling person” is defined as a person who has the ability, acting alone or in concert with others, to directly or indirectly influence, direct or cause the direction of the management, expenditure of money, or policies of an institution or other person.² Thus, a controlling person includes:
- i. Management company, landlord or other business entity that operates or contracts with others for the operation of an institution;
 - ii. any person who is a controlling person of a management company or other business entity that operates an institution or that contracts with another person for the operation of an institution; and
 - iii. any other individual who, because of a personal, familial or other relationship with the owner, manager, landlord, tenant or provider of an institution, is in a position of actual control or authority with respect to the institution, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor or employee of the facility.

² Tex. Health & Safety Code §§242.0021 & 247.005

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