

# Title 10 MARYLAND DEPARTMENT OF HEALTH

## Subtitle 25 MARYLAND HEALTH CARE COMMISSION

### Chapter 19 State Recognition of an Electronic Advance Directives Service

Authority: Health-General Article, §§4-302.2, 5-602, 5-622, 19-103(c)(2)(i) and (ii), and 19-144, Annotated Code of Maryland

#### .01 Scope.

This chapter applies to the State Recognition of an electronic advance directives service. Only an electronic advance directives service that is awarded State Recognition status by the Maryland Health Care Commission pursuant to this chapter may represent itself as a State-Recognized electronic advance directives service that is authorized to connect to the State-Designated Health Information Exchange.

#### .02 Definitions.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) *“Advance Care Planning” means a process through which an individual considers and documents in a formal manner the individual’s preferences for the receipt of health care, including through the use of an advance directive.*

(2) *“Advance directive” has the meaning stated in Health-General Article, Title 5 Subtitle 6, Annotated Code of Maryland.* [means:

(a) A witnessed written or electronic document, voluntarily executed by the declarant in accordance with the requirements of Health General Article, Title 5 Subtitle 6, Annotated Code of Maryland;

(b) A witnessed oral statement, made by the declarant in accordance with the provisions of Health General Article, Title 5 Subtitle 6, Annotated Code of Maryland; or

(c) An unwitnessed electronic document in which the declarant’s identity is authenticated in accordance with the National Institute of Standards and Technology Special Publication 800–63–2: Electronic Authentication Guideline or subsequent replacement publications to 800-63.]

(2) [3] *“Commission” means the Maryland Health Care Commission.*

(3) [4] *“Declarant” means a competent individual who makes an advance directive while capable of making and communicating an informed decision.*

(4) [5] *“Electronic advance directives service” or “service” means a corporation, firm, association, or other entity that offers electronic advance directives services by way of a web-based application using cloud-based technology.*

(5) [6] *“Executive Director” means the Executive Director of the Commission.*

(6) [7] *“Health care agent” means an individual appointed by a declarant under an advance directive to make health care decisions on behalf of a declarant.*

(7) [8] *“State-Designated HIE” means an entity designated by the Maryland Health Care Commission and the Health Services Cost Review Commission pursuant to the statutory authority set forth under Health-General Article, §19-143, Annotated Code of Maryland.*

(8) [9] *“State Recognition” or “State-Recognized” means the status awarded by the Commission to an approved electronic advance directives service that has met State Recognition criteria.*

(9) [10] *“State Recognition criteria” or “criteria” means technology, security, privacy, and other standards established by the Commission in accordance with Regulation .03 of this chapter, [and for nonwitnessed advance directives, must meet National Institute of Standards and Technology Special Publication 800–63–2: Electronic Authentication Guideline or subsequent replacement publications to 800-63 to authenticate a declarant’s identity.]*

(11) *“Vendor” means an electronic advance directive service.*

#### .03 [Establishment of] Criteria for State Recognition of an Electronic Advance Directives Service.

A. The Commission will assess the application of an electronic advance directives service for State Recognition in accordance with criteria approved by the Commission in accordance with the process set forth in this Regulation.

B. Commission staff shall publish in the Maryland Register and on the Commission’s website a notice and draft criteria by which the Commission may consider an application [by] of an electronic advance directives service for State Recognition.

(1) The notice shall specify the date by which public comments are due.

(2) Commission staff shall analyze public comments received and recommend criteria for use by the Commission in determining whether the Commission will award State Recognition to an electronic advance directives service.

C. The Commission will consider the public comments and Commission staff's recommendation in establishing the applicable criteria.

D. The criteria approved by the Commission shall be published in the Maryland Register and in a dated posting on the Commission's website.

#### **.04 Procedure for Initial State Recognition.**

##### **A. Application.**

(1) An electronic advance directives service seeking State Recognition shall submit an application in the form and manner specified by the Commission.

(2) The application, and all information supplementing the application, shall be signed by at least one person authorized by the applicant, who shall sign a statement as follows: "I solemnly affirm under penalties of perjury that the contents of this application (or the supplementary information) are true to the best of my knowledge, information, and belief."

##### **B. An electronic advance directives service seeking State Recognition shall:**

(1) Demonstrate that it meets all State Recognition criteria in effect at the date of the Commission's receipt of the initial application;

(2) Affirm under penalties of perjury that, within the last 10 years, no current or former owner or senior manager of the service or a current or former owner or senior manager of any related or affiliated service has:

(a) Been convicted of a felony or pleaded guilty, nolo contendere, entered a best interest plea of guilty, or received a diversionary disposition regarding a felony;

(b) Received a determination of exclusion from participation in Medicare or State health care programs under 42 U.S.C. §1320a-7 in any case with respect to a criminal or civil charge of Medicare or Medicaid fraud or abuse; or

(c) Been found in violation of State or federal laws or regulations that govern the operation of, or relate in any way to, an electronic advance directives service;

(3) Affirm under penalties of perjury that the service or any related or affiliated service:

(a) Has no pending complaints, judgments, liens, or any final judgment or liens; or

(b) Is/Has not been the subject of an investigation by or order of any local, State, or federal governmental agency;

(4) Provide all required documentation;

(5) Timely provide additional information requested by Commission staff as needed to complete analysis of the application and make a recommendation to the Commission;

(6) Send written notice to the Commission of any change in information submitted in the initial application within ten business days after the change is effective; and

(7) Agree to comply with the requirements of this chapter.

##### **C. Review of Applications.**

(1) Commission staff shall:

(a) Review an application to determine its compliance with State Recognition criteria; and

(b) Prepare a recommendation to the Commission on the application, detailing the reasons for the recommendation.

(2) If Commission staff recommends denial of an application for State Recognition:

(a) An applicant has ten days after electronic delivery of the Commission staff's recommended denial in which to make a written filing taking exceptions to the staff's recommendation; and

(b) Each applicant that timely submits a written filing may present oral argument on its written exceptions to the Commission, not to exceed 10 minutes per applicant unless time is extended by the Chair of the Commission.

(3) The Commission may award State Recognition to each electronic advance directives service that meets all State Recognition criteria unless the Commission:

(a) Determines that it is in the public interest to award State Recognition to fewer than all the electronic advance directives services that meet the qualifications for State Recognition; and

(b) Details the bases for its decision.

##### **D. Duration of State Recognition.**

(1) State Recognition is valid for 3~~three~~ years from its issuance, unless suspended or revoked by the Commission.

(2) An electronic advance directives service to which the Commission grants State Recognition shall acknowledge the status in writing and agree to comply with the terms and conditions of the award of State Recognition status.

#### **.05 Procedure for Renewal of State Recognition.**

##### **A. An electronic advance directives service seeking renewal of its State Recognition status shall:**

(1) At least 45 days prior to the expiration of State Recognition status, file a complete application for renewal in a form and manner specified by the Commission; and

(2) Demonstrate compliance with the State Recognition criteria in effect at the date of the Commission's receipt of the application for renewal.

B. Commission staff shall review a renewal application and make a recommendation to the Commission regarding:

- (1) The applicant's compliance with the State Recognition criteria;
- (2) The applicant's compliance with terms and conditions of the prior recognition; and
- (3) Its assessment of the quality of the service provided by the electronic advance directives service.

C. The Commission shall approve an application for renewal of State Recognition status by an electronic advance directives service that:

- (1) Continues to meet all State Recognition criteria;
- (2) Has complied with the terms and condition of its previous award of State Recognition status; and
- (3) Has provided high quality service to persons who utilize its electronic advance directives service.

D. If Commission staff recommends denial of a renewal application, the procedure in Regulation .04C(2) of this chapter applies.

#### **.06 Nontransferability of State Recognition.**

State Recognition issued pursuant to this chapter may not be sold, assigned, leased, or transferred in any way, except as provided in Regulation .07 of this chapter.

#### **.07 Closure, Sale, Merger, Lease, Assignment, or Transfer of All or Part of a State-Recognized Electronic Advance Directives Service.**

A. At least 90 days before a State-Recognized electronic advance directives service closes on a sale, merger, lease, assignment, or transfer of all or part of a State-Recognized electronic advance directives service, the State-Recognized electronic advance directives service shall:

(1) Submit in writing to the Commission information requested by Commission staff about the desired change and a plan that assures the proposed transaction:

(a) Results in the secure transfer [either] to another State-Recognized electronic advance directives service;

(b) Provides notice of the proposed transaction to the Commission, to the *Maryland* Department of Health, to the State-Designated Health Information Exchange, and to the Consumer Protection Division of the Office of the Maryland Attorney General; and

(c) Provides notice of the proposed transaction electronically and on the *vendor's* website to each declarant who prepared an electronic advance directive through the service and health care agent named in an electronic advance directive, which at a minimum, includes:

(i) Information about the transfer of the declarant's advanced directive[s] to another State-Recognized entity;

(ii) The name, contact information and web address of the State-Recognized receiving entity;

(iii) The date the transfer will occur; and

(iv) Specific instructions about how the transfer of an advance directive impacts the declarant and the health care agent.

(2) Not proceed with the proposed transaction until it receives written determination from the Executive Director [of the Commission] that State Recognition status may be transferred as a result of the proposed sale, merger, lease, assignment, or transfer of all or part of a State-Recognized electronic advance directives service.

(3) The provisions of §A(1) of this regulation do not apply to a State-Recognized electronic advance directives service that seeks to sell, merge, lease, assign, or transfer all or part of a State-Recognized electronic advance directives service to:

(a) A person who was identified as a majority owner of the electronic advance directives service at the time of the most recent State Recognition by the Commission; or

(b) To an entity identified as the majority owner of the electronic advance directives service at the time of the most recent State Recognition by the Commission and whose membership or ownership, and percentage of ownership remain substantially the same as identified at the time of the most recent State Recognition by the Commission.

B. As soon as a State-Recognized electronic advance directives service has information that sets forth a reasonable basis to believe that its ability to continue to operate as a State-Recognized electronic advance directives service will be materially affected, and no fewer than [three months]90 days prior to an anticipated closure, it shall submit complete written information to the Commission, along with a plan [including]that includes provisions [that assure]assuring the following:

(1) The secure transfer of electronic advance directives to another State-Recognized electronic advance directives service to the extent that such transfer is consistent with State and federal law;

(2) Submission of any reporting required under an existing State or federal grant;

(3) Plans for the continuation of electronic advance directives services during a period of transition and for a mutually agreed timeframe prior to the transfer of electronic advance directives to another State-Recognized electronic advance directives service or until the Commission awards State Recognition to a new electronic advance directives service to whom the existing service shall transfer existing advance directives;

(4) Plans for such transition services to a successor State-Recognized electronic advance directives service as are reasonably feasible given the circumstances of the closure; and

(5) A minimum of 45 days advance notice of the full or partial closure to each declarant who prepared an electronic advance directive through the service and health care agent named in an electronic advance directive in accordance with §A(1)(c) of this regulation, to the Commission, to the Maryland Department of Health, to the State-Designated Health Information Exchange, and the Consumer Protection Division of the Office of the Maryland Attorney General.

**.08 Commission Oversight of State-Recognized Electronic Advance Directives Services.**

A. Commission staff may, on its own initiative or in response to information provided to the Commission, investigate any State-Recognized electronic advance directives service.

B. Failure ~~by~~of a State-Recognized electronic advance directives service to provide full information requested by Commission staff in a timely and complete manner is grounds for suspension or revocation of State Recognition status.

C. Following Commission staff's investigation, the Executive Director may issue a notice of proposed action, which may include the following:

(1) A time-limited opportunity to correct deficiencies identified by the investigation;

(2) Suspension of the State Recognition of an electronic advance directives service for a definite period of time after which, depending upon the circumstances of the case and completion of appropriate corrective actions, the ~~v~~vendor may seek reinstatement of its State Recognition; or

(3) Revocation of State Recognition.

D. An electronic advance directives service that receives a notice of proposed action from the Executive Director may request an opportunity to show cause why the proposed action should not be implemented. A written request to show cause shall be filed with the Commission within 20 days of the issuance of the notice of proposed action and shall:

(1) State with particularity the grounds and factual basis for the electronic advance directives service's disagreement with the proposed action;

(2) Include each fact upon which the electronic advance directives service relies to show cause why the proposed action should not be taken; and

(3) Be supported by relevant documentation and affidavits.

E. The Commission shall determine whether to impose the proposed action or a different action under the exceptions procedure provided in Regulation .04C(2) of this chapter.

F. In the event that State Recognition status is not renewed, or the Commission suspends or revokes State Recognition status, the electronic advance directives service must notify each declarant who prepared an electronic advance directive through the service and health care agent named in an electronic advance directive about the impact of the action on accessibility of the advance directive.

Administrative History

Effective date: March 12, 2018 (45:5 Md. R. 285)