



## Client Alert

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### **CMS Attempts to Clarify New Home Health Change of Ownership Regulations but Creates Confusion**

The Centers for Medicare and Medicaid Services (CMS) recently published the final rule implementing changes to the home health regulations under the Calendar Year (CY) 2010 Home Health Prospective Payment System. Among these changes is a new provision that addresses changes of ownership of Home Health Agencies (HHAs). According to CMS, this provision addresses "concerns about turn-key sales of new HHAs where there is no assurance that the buyer can maintain compliance with the conditions of participation."

The amended regulations, published November 10, 2009, state that "[i]f an owner of a home health agency sells (including asset sales or stock transfers), transfers or relinquishes ownership of the HHA within 36 months after the effective date of the HHA's enrollment in Medicare, the provider agreement and Medicare billing privileges do not convey to the new owner. The prospective provider/owner of the HHA must instead: (i) Enroll in the Medicare program as a new HHA under the provisions of §424.510, and (ii) Obtain a State survey or an accreditation from an approved accreditation organization." 42 C.F.R. §424.550(b)(1).

In an effort to clarify this new regulation, CMS issued *Transmittal 318* (the Transmittal) on December 18, 2009, amending the Medicare Program Integrity Manual (the Manual). The Manual now provides that for all "applications for an ownership change" that are pending on, or are received on or after January 1, 2010, an HHA may not undergo a change of ownership (CHOW) pursuant to 42 CFR §489.18 if the ownership change occurs within 36 months after:

- The effective date of the provider's enrollment in Medicare, or
- The effective date of the most recent ownership change for the provider.

The Manual further states that for purposes of this section, an "ownership change" includes any of the following:

- CHOW
- Acquisition/merger
- Consolidation
- Change request reporting a 5 percent or greater ownership change (e.g., stock transfer, asset sale)
- Change request reporting a change in partners, regardless of the percentage of ownership involved

There is confusion as to whether the change of ownership limitations established by 42 C.F.R. §424.550(b) (1) creates a 36 month prohibition following only the enrollment of a new HHA or also following a change of ownership of an existing HHA. The new regulation appears to create a limitation only with respect to providers who were initially enrolled in Medicare in the previous 36 months, rather than to providers who purchased an already enrolled HHA in the previous 36 months; however, according to the Manual, this limitation applies to both categories of providers.

The language in the Manual also contains an inconsistency which has created confusion. The Manual provides that an HHA “may not undergo a CHOW pursuant to 42 C.F.R. §489.18, if the ownership change occurs within 36 months...” The use of the term “CHOW” creates the confusion because under 42 C.F.R. §489.18, a merger or transfer of stock does not constitute a CHOW. However, the regulations and additional language in the Manual go on to contemplate that any type of transfer, including CHOWs, stock transfers, and mergers, will impact the conveyance of a Medicare number. It appears that the Manual should instead state that an HHA “that undergoes an ownership change, as defined below, may not convey its provider agreement and Medicare billing privileges to the new owner, if the transaction occurs within 36 months...”

Even though there is inconsistency with the regulations and *Transmittal 318*, it is clear that the recent changes will continue to impact those HHAs contemplating a corporate change and care should be taken when such a change is made.

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