



Client Alert



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CMS Publishes Final Rule Modifying Home Health Agency "36 Month Rule"

The Centers for Medicare & Medicaid Services (CMS) issued a final rule implementing the calendar year (CY) 2011 Home Health Prospective Payment System (Final Rule), which includes modifications to the "36 Month Rule". The Final Rule was issued on November 2, 2010, and appears in the November 17, 2010, Federal Register.¹ We previously reported on the 36 Month Rule in our January² and July³ 2010 articles.

The original 36 Month Rule prohibited the transfer of a provider agreement to a new owner of a home health agency (HHA) if the change of ownership took place within 36 months of the HHA's initial enrollment in Medicare or within 36 months of a change of ownership. Following the implementation of the 36 Month Rule in early 2010, industry stakeholders voiced concerns that the rule would restrict bona fide HHA transactions. In an effort to clarify the application of the 36 Month Rule, CMS issued a transmittal that was subsequently rescinded.

In response to concerns and confusion regarding the impact of the 36 Month Rule, CMS issued a proposed rule on July 23, 2010, aimed at minimizing the rule's impact on bona fide transactions. In response to the proposed rule, providers and stakeholders continued to express concerns and the need to expand the proposed exceptions. In the Final Rule, CMS adopted the proposed rule with some revisions. CMS emphasized that the goal of the regulations is to prevent the "flipping" of HHA provider agreements and to ensure that purchasers of HHAs satisfy the Medicare Conditions of Participation.

The Final Rule clarifies that the 36 Month Rule applies to situations in which there is a "change in majority ownership" within 36 months of initial Medicare enrollment, or within 36 months following a change in majority ownership. The term change in majority ownership is defined as an individual or organization acquiring "more than a 50 percent direct ownership interest in an HHA during the 36 months following the HHA's initial enrollment into the Medicare program or the 36 months following the HHA's most recent change in majority ownership (including asset sale, stock transfer, merger, or consolidation)."

1 <http://www.gpoaccess.gov/fr/>

2 http://www.agg.com/media/interior/publications/Rubinger_Grozine-CMS_Home_Health_Change.pdf

3 http://www.agg.com/media/interior/publications/Rubinger_Grozine-CMSPropose-sChangesTo%20HHA36MonthCHOWRule.pdf

CMS will look to the cumulative effect of transactions within the applicable 36 month period to determine whether a change in majority interest has occurred. CMS also clarified that the 36 Month Rule applies only to changes of direct ownership interests and not to changes of indirect ownership interests.

In the Final Rule, CMS responded to commenters and expanded some of the proposed exceptions to the 36 Month Rule. The exceptions now provide that the 36 Month Rule does not apply to the following situations:

- The existing HHA has submitted two consecutive years of full cost reports following initial enrollment in Medicare or within 36 months after the HHA's most recent change in majority ownership (low utilization or no utilization cost reports do not qualify for the exception);
- The HHA's parent company is undergoing an internal corporate restructuring, such as a merger or consolidation;
- The owners of the existing HHA are changing the HHA's existing business structure, such as from a corporation to a limited liability company, and the owners remain the same; or
- An individual owner of a home health agency dies.

Although the Final Rule alleviates some of the impact the 36 Month Rule will have on bona fide HHA transactions, concerns remain among HHA stakeholders that the regulations will have a chilling effect on the industry.

The Final Rule is effective January 1, 2011. CMS indicated that it will continue to monitor and analyze certain aspects of the rule.

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