

CMS Proposes Clarification to Home Health Agency Thirty-Six Month Rule (But It's Not As Helpful As You'd Think)

The past year has not been an easy one for Home Health Agencies ("HHAs"). Several states issued licensure moratoriums, and the lucky HHAs who passed those hurdles were soon confronted with another obstacle from the Centers for Medicare and Medicaid Services ("CMS") – The 36 Month Rule (the "Rule"). In July 2010, CMS proposed regulations aimed at taming the broad regulation, and while the new rules do ease some restrictions on HHA transactions, they leave in place overbroad preamble language and accompanying confusion for providers.

On January 1, 2010, CMS adopted the now notorious 36 Month Rule, prohibiting the transfer of a Medicare provider agreement and corresponding provider number to a new HHA owner (whether that owner acquired the HHA by asset or by stock purchase), when the change of ownership ("CHOW") takes place within 36 months of the HHA's enrollment in Medicare. Under the Rule, if the requisite 36-month waiting period has not lapsed at the time of the CHOW, the new owner is required to proceed as if its acquisition is a new Medicare enrollee – completing all initial enrollment paperwork, undergoing a new state survey or accreditation, and

executing a new provider agreement prior to billing Medicare.

The 36 Month Rule began with a noble purpose -- to halt the progress of "certificate mills" (HHAs which enrolled in Medicare only to create an inducement for their quick sale, and not for the purpose of ever treating Medicare beneficiaries). But then, the agency took the rule one step further, with the issuance of (now rescinded) Transmittal 318. Aimed at "clarifying" the 36 Month Rule, the Transmittal instead expanded its grasp. It included an arguably overbroad definition of CHOW that extended to changes in ownership of only 5% or greater, and all changes in partnership. HHAs who complained for, and received, quick rescission of Transmittal 318, hoped that the new set of proposed rules (published in the [Federal Register](#) on July 23, 2010) would prove more narrowly tailored to CMS' goal of stopping certificate mills, and less restrictive of legitimate HHA transactions. They got their wish, partially.

First, the good news:

- The new rules propose that 42 C.F.R. § 424.550(b)(1) will apply only to changes in an HHA's majority ownership during the 36 months following the HHA's

enrollment in Medicare. The definition of "change in majority ownership" would be limited to acquisitions of more than a 50 percent interest in an HHA via asset sales, stock transfers, mergers, or consolidations. (CMS commentary confirms that the 50%-or-more threshold may be reached cumulatively during the 36-month window; through, for example, multiple smaller acquisitions.)

- The proposed rule also exempts the following bona fide HHA transactions from the 36 Month Rule:
 - ◊ Where a publicly-traded company acquires another HHA, and both entities have submitted cost reports to Medicare for the previous five years.
 - ◊ Where an HHA parent company undergoes an internal corporate restructuring, such as a merger or consolidation, and the HHA has submitted a cost report to Medicare for the previous five years.
 - ◊ Where the owners of an existing HHA decide to change the existing business structure (e.g., from a partnership to a limited liability company), the

individual owners remain the same, and there is no change in ownership of 50% or more.

- ◇ Where an owner dies, who owns 49 percent or less (where several individuals and/or organizations are co-owners of an HHA and one of the owners dies) interest in an HHA.

Now, the bad (or, at least, the “unclear”). The Rule’s true breadth, and ability to limit bona fide business transactions, is still somewhat unresolved by the proposed changes. For example,

the proposed rule’s preamble language applies the 36 month waiting period to both initial Medicare enrollees, *and* to enrollees undergoing a change of ownership. HHAs in either situation would have to wait three years to transact business involving changes in majority ownership, or start the enrollment process anew each and every time a change occurred. The absence of this broad application in the actual regulation, though, begs the question as to whether CMS intends the Rule, in practice, to be this severe.

The proposed rule changes were published in the Federal Register on July 23, 2010. CMS will accept comments until September 14, 2010.

If you would like more information on the implications of the 36 Month Rule, or guidance on navigating the growing regulatory maze surrounding HHAs, please contact Emily Towey (etowey@hdjn.com) or Elizabeth Trende (etrende@hdjn.com) at 804-967-9604, or visit our website at www.hdjn.com.

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