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CMS Proposes New Rule for Home Health Agency Change of Ownership

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On July 23, the Centers for Medicare & Medicaid Services (CMS) issued a proposed rule that would establish new exceptions to a regulatory provision (promulgated by CMS in 2009) that had expanded restrictions on the transfer of Medicare billing privileges and changes of ownership (CHOW) for home health agencies (HHAs). This has been an area of considerable flux for the home health sector since December 2009, when CMS issued—then in May 2010 rescinded—a transmittal that had further expanded what constitutes a CHOW for home health transactions. With this proposed rule, CMS appears poised once again to significantly restrict home health transactions in an effort, CMS asserts, to stem potentially abusive "flipping" of ownership interests in HHAs.

Background

Under the longstanding regulatory framework established in Medicare regulation (42 C.F.R. § 489.18), which applies to all Medicare Part A provider types, a transaction is not regarded as a CHOW unless there has been an asset purchase, merger, consolidation, or transfer of title or property, or for a partnership, a change in partnership composition. The regulation specifically excludes transactions by corporations in which the corporate entity remains intact, for example, a stock transfer that results in a change in shareholders, but not a change in the responsible corporate entity.

Change of Ownership Rules for HHAs

Until 2009, the CHOW definition in 42 C.F.R. § 489.18 also applied to HHAs. However, in August 2009, CMS issued a rule to expand the restriction on transfer of Medicare billing privileges for HHAs, noting in regulatory preamble discussions that changes were needed due to the proliferation of "turnkey" transactions in the home health sector, which encouraged the circumvention of Medicare enrollment and state survey requirements and resulted in a lack of compliance with HHA conditions of participation.

The final rule, adopted in November 2009, amended 42 C.F.R. § 424.550(b) to provide that if an owner of an HHA sells (including asset sales or stock transfers), transfers, or relinquishes ownership within 36 months after the HHA's Medicare enrollment, the provider agreement and Medicare billing privileges do not convey to the new owner (HHA CHOW Rule). Under this approach, the prospective provider/owner would need to enroll as a new HHA in the Medicare program and obtain a state survey or an accreditation from an approved accrediting body. Medicare payments for home health services could not be made until after such approvals had occurred.

On December 18, 2009, CMS issued Transmittal 318, interpreting the HHA CHOW Rule to prohibit an HHA from undergoing a CHOW if the ownership change occurred within 36 months after (1) the effective date of the provider's enrollment in Medicare or (2) the effective date of the most recent ownership change for the provider.

CMS further provided that, for purposes of the HHA CHOW Rule, an "ownership change" meant any of the following: (1) a CHOW, (2) an acquisition/merger, (3) a consolidation, (4) a change request reporting a 5% or greater ownership change (for example, stock transfer, asset sale), or (5) a change request reporting a change in partners, regardless of the percentage of ownership involved. Transmittal 318, as well as the HHA CHOW Rule, raised significant concerns in the home health industry. As a result, following the expression of significant industry concern, on May 5, 2010, CMS rescinded Transmittal 318 but did not withdraw the HHA CHOW Rule.

Proposed Amendment to the HHA CHOW Rules

On July 23, 2010, CMS proposed to (1) amend the HHA CHOW Rule, (2) exempt certain "bona fide ownership transactions" from the amended HHA CHOW Rule, and (3) define a "change in majority ownership." Although these proposals may be helpful to certain sectors of the HHA industry, they also have the potential to generate continuing confusion and raise additional challenges for the industry.

CMS is proposing to amend the HHA CHOW Rule to provide that unless an exception applies, "if there is a change in *majority* ownership of a home health agency by sale (including asset sales, stock transfers, mergers, consolidations) 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" (emphasis added).

Notably, CMS resurrects elements of Transmittal 318 by stating in the preamble that "any change in majority control and/or ownership during the first 36 months of when the HHA is initially conveyed Medicare billing privileges *or* the last change of ownership (including asset sale, stock transfer, merger or consolidation) would trigger the provisions of [the amended HHA CHOW Rule]" (emphasis added).

Relief from the rescinded Transmittal 318 approach is provided, however, inasmuch as the billing privilege transfer prohibition would not be triggered by transfers of ownership of more than 5% if they did not constitute a change in majority ownership. CMS proposes to define a "change in majority ownership" to mean "an individual or organization that acquires more than 50 percent interest in an HHA during the 36 [months] following the initial enrollment into the Medicare program or a change of ownership (including asset sale, stock transfer, merger, or consolidation)." This definition includes individuals or companies that acquire majority ownership in an HHA through the cumulative effect of asset sales, stock transfers, consolidations, and/or mergers during the 36-month period.

While there are many unanswered questions related to the proposed rule, chief among them may be whether stock transfers occurring at a parent-level organization will trigger this definition and thus a restriction on transfer of billing privileges.

Further, CMS proposes to exempt the following transactions from the HHA CHOW Rule billing privilege transfer restriction:

1. A publicly traded company acquiring another HHA when both entities have submitted cost reports to Medicare for the previous five years.
2. An HHA parent company undergoing an internal corporate restructuring, such as a merger or consolidation, when the HHA has submitted a cost report to Medicare for the previous five years.
3. The owners of an existing HHA changing the existing business structure (for example, partnership to a limited liability corporation, or sole proprietorship to subchapter S corporation) when the individual owners remain the same, and there is no change in majority ownership (i.e., 50% or more ownership in the HHA).
4. The death of an owner who owns 49% or less of the entity (where several individuals and/or organizations are co-owners of an HHA).

Impact

Home health program integrity remains a high-priority area for CMS. However, in attempting to use a broad-brush approach to police so-called "certificate mills," the proposed rule may chill a significant number of legitimate HHA transactions involving both equity and debt investments. Further, CMS does not explain how it arrived at the four proposed "bona fide ownership transactions" to the exclusion of other legitimate ownership changes. The industry should take advantage of the opportunity to weigh in on these proposed rules and submit additional exceptions for legitimate transactions. Public comments are due by **September 14, 2010**.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact its authors, **Howard J. Young** (202.739.5461; hyoung@morganlewis.com) and **Kashmira Makwana** (202.739.5884; kmakwana@morganlewis.com), or any of the following Morgan Lewis attorneys:

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