

NEWSSTAND

Healthcare Update - Healthcare News from Capitol Hill and The Department of Health and Human Services

August 9, 2010

[Leslie J. Levinson](#), [Edward Eynon](#)

CMS PROPOSES CHANGES TO “36 MONTH RULE” FOR HOME HEALTH:

In late July, the Centers for Medicare and Medicaid Services (CMS) published a proposed rule for the Medicare Home Health Prospective Payment System (HH PPS) Rate Update for Calendar Year 2011. As anticipated, the proposed rule promulgates changes to the so-called “36 month rule” for home health agencies (HHAs) that went into effect in January 2010.

CMS implemented the 36 month rule as part of its home health program integrity efforts, in order to put a stop to the “certificate mill” practice in which a party receives Medicare certification for a new HHA, undergoes a survey, and then promptly sells the new HHA before ever seeing one patient or hiring one provider. Under the rule the provider agreement and Medicare billing privileges do not convey to a new owner if an HHA owner sells, transfers or relinquishes ownership within 36 months after the effective date of Medicare enrollment.

However, while responding to this problematic practice, the 36 month rule has had the unintended consequence of harming the business of legitimate HHAs and potentially affecting financing to the industry. In its recently-released proposed rule, CMS acknowledges that it has received “a number” of comments regarding the impact of the 36 month rule on legitimate business transactions, and consequently puts forth a list of exemptions to the provision for certain HHA transactions. As taken from the 2011 HH PPS proposed rule, such exemptions are:

- A publicly-traded company is acquiring another HHA and both entities have submitted cost reports to Medicare for the previous five (5) years;
- An HHA parent company is undergoing an internal corporate restructuring, such as a merger or consolidation, and the HHA has submitted a cost report to Medicare for the previous five (5) years;
- The owners of an existing HHA decide to change the existing business structure (e.g., partnership to a limited liability corporation or sole proprietorship to subchapter S corporation), the individual owners remain the same, and there is no change in majority ownership (i.e., 50 percent or more ownership in the HHA); and

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

The HH PPS proposed rule for 2011 also defines “change in majority ownership” as follows: “Change in majority ownership occurs when an individual or organization 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 includes an individual or organization that acquires majority ownership in an HHA through the cumulative effect of asset sales, stock transfers, consolidations, and/or mergers during a 36 month period.”

While the proposed changes to the 36 month rule in the 2011 HH PPS proposed rule are intended by CMS to address the negative impact the provision has on certain legitimate HHA transactions, the proposed language does not specifically address situations such as change in majority ownership transactions that may be pending when the rule is finalized and the exercise of commercially recognized remedies by lenders and investors. Further, some industry observers have questioned whether the proposed language requires the 36 month period to start anew following a change in ownership subsequent to the expiration of the 36 month period following initial enrollment in the Medicare program.

Application of the proposed rule as currently written could have an unwanted chilling effect on bona fide financing, lending and M&A transactions. In order to rectify this situation, CMS can in the final rule clarify its application while still addressing the concern the rule was originally intended to treat.

The 2011 HH PPS proposed rule was published in the Federal Register on July 23, 2010. Comments on the proposal are due to CMS by September 14, 2010.

NEXT STEPS:

We will continue to monitor Congress, CMS and other relevant federal agencies as the implementation of healthcare reform progresses, as new information becomes available on the 36 month rule, and as other healthcare matters arise. We will also continue to provide updates as these developments occur.

Edwards Angell Palmer & Dodge LLP is pleased to provide regular updates on issues affecting the Healthcare Industry. Our lawyers not only provide sophisticated legal services to a broad array of clients in the healthcare industry, we also monitor and analyze federal and state legislative and regulatory processes to ensure that our clients are informed of government actions and initiatives.

Should you have questions on the content of this advisory, or wish to discuss any other healthcare related issue, please contact those listed below or call the Edwards Angell Palmer & Dodge LLP attorney responsible for your affairs.

Les Levinson, Partner, Chair, Healthcare Practice 212.912.2772
Teddy Eynon, Partner, Public Policy & Government Relations 202.478.7379

llevinson@eapdlaw.com

teynon@eapdlaw.com