



ALERTS

CMS Extends 36-Month Rule To Hospice Transactions

November 6, 2023

Highlights

The Centers for Medicare & Medicaid Services finalized its decision to apply the 36-month rule to hospice providers, according to its final 2024 home health rule

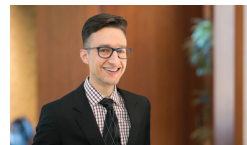
Absent the availability of a limited exception, the rule prohibits changes in majority ownership of hospice providers within 36 months of initial enrollment or the most recent change in ownership

This rule expansion is expected to complicate hospice transactions and will be a critical element of due diligence review

The U.S. Centers for Medicare & Medicaid Services (CMS) has finalized its [2024 home health rule](#), which amends the long-standing “36-month” rule to include hospice providers.

Effective Jan. 1, 2024, CMS will prohibit any change in majority ownership of a hospice provider during the 36 months after the hospice’s initial Medicare enrollment or most recent change in majority ownership. For the purposes of the rule, a “change in majority ownership” occurs when a transaction (whether asset sale, stock transfer, consolidation or merger)

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has the aggregate effect of changing 50 percent or more of the direct ownership of the hospice entity.

This change originated with a proposed rule in July 2023 in which CMS expressed concern about an increase in hospice changes of ownership occurring within the applicable three-year timeframe. As a result, the 36-month rule is intended to strengthen the integrity of the Medicare hospice enrollment process and prevent providers from circumventing the survey process by “flipping” hospices (i.e., enrolling in Medicare exclusively to sell the hospice rather than to provide services to beneficiaries). The rule also aims to increase scrutiny on new owners of hospice providers, including compliance with hospice Conditions of Participation in order to ensure quality of care.

When the 36-month rule prohibition applies to a hospice transaction, the buyer will be unable to take assignment of the seller’s existing Medicare provider agreement, resulting in a loss of billing privileges upon the closing of the acquisition. The buyer will instead be required to undergo the initial Medicare enrollment and credentialing process, including a state survey or accreditation. The full enrollment process can take 12 months or more, thereby causing a considerable delay in operations and billing.

CMS has confirmed that the existing exceptions to the 36-month rule available to home health agencies will also be applicable to hospice transactions. These include change in ownership due to the death of an owner or a corporate restructuring or change of organizational type. Additionally, the 36-month rule will not bar a transfer if the hospice has submitted two consecutive years of cost reports since the initial enrollment or previous change in majority ownership. Notably, under the language of the 36-month rule, a change solely in the indirect ownership of a hospice will not implicate the 36-month rule’s prohibition on transfer.

These exceptions are narrow and technical and, as such, likely will not be available to many potential sellers. Accordingly, expansion of the 36-month rule is expected to curtail – or at least complicate – hospice transactions for the foreseeable future. All proposed hospice transactions will need to be reviewed for 36-month rule compliance as soon as possible during the preliminary diligence phase to avoid potential pitfalls and to navigate an appropriate transaction structure, where possible.

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