

PPS Q&A 2011 36 Month Rule

Question: What exceptions are there for 100% ownership change? Or where can they be found?

A: For ownership changes in 2010, the 100% change of ownership standard applies in contrast to the “majority ownership” standard that applies starting in 2011. The 100% ownership change standard applies to ownership changes of stock or assets and any change that constitutes a CHOW under 42 CFR 489.18. The 100% standard does not have any exceptions.

That standard is based on the current 2010 version of the actual rule, 42 CFR 424.550(b). Also, it is based on an email from CMS on June 7, 2010. That email stated:

ANSWER: The Medicare contractor will apply the provisions of 42 CFR § 424.550(b)(1) when an owner is selling 100 percent interest in an home health agency by asset sale, stock transfer, or the transaction falls under the definition of “change of ownership” (CHOW) identified in 42 CFR § 489.18 within 36 months of the HHA’s initial enrollment in Medicare or a subsequent asset sale, stock transfer, or CHOW.

Note that while the 100% standard applies to changes in 2010, the new majority ownership standard with exceptions will “look back” to 2010 and earlier for any ownership changes that occur in 2011. For example, if there is a majority ownership change in June 2011, under the new rule any non-excepted majority ownership change that occurred within 36 months of the June 2011 change would affect whether the 2011 rule blocks a transfer of the provider agreement. That means an ownership change of less than 100% in 2010 could implicate the rule in 2011.

Question: Does CMS intend to look back into 2010 with the new 36 month sale provisions?

ANSWER: The new rule would look back 36 months prior to the current transaction in issue. For example, if a majority ownership change is occurring on July 1 2011, CMS would look 36 months back (July 1, 2008) to see if there was a previous applicable change in majority ownership not subject to an exception.

Question: Does a change of ownership between related parties constitute a sale?

ANSWER. Yes, unless the exception for internal corporate reorganizations or change of business structure applies. To determine a more specific answer, more facts regarding the relationship between the parties and the nature of the change of ownership would need to be known.

Question: Please explain the difference between direct and indirect for change of ownership.

ANSWER: A “direct” ownership change occurs if Party A acquires from Party B the ownership of a corporation that holds the Medicare provider agreement. An “indirect” ownership change occurs if Party A acquires from Party B the ownership of Corporation X that owns Corporation Y that owns Corporation Z that holds the Medicare provider

agreement. In this illustration, the ownership of the corporation that holds the Medicare agreement does not change. It is still owned by Corporation Y.

There are other variations on this theme that would qualify as an “indirect” ownership change. Essentially, it is “indirect” whenever the ownership of the entity that holds the Medicare agreement does not directly change.

Question: If a family member gives ownership to another family member, after January 1, 2011, will the HHA have to reapply for Medicare and undergo a survey? (Our specific case, the CEO/CFO are husband-wife and in 2011 were planning on transferring ownership to daughter).

ANSWER: If the family members have owned the HHA for 36 months without any alteration in ownership or if they owned it for two consecutive cost reporting periods and filed a full cost report for each, the planned 2011 ownership transfer will not require reapplying to Medicare or a survey. If the 36 month standard or the two cost report exception is not met, then I need to know more about the ownership history of the HHA over the previous 36 months.

Assuming that either the 36 month ownership standard or the 2 year cost reporting standard is met, the daughter can take majority ownership without implicating the rule. However, if she seeks to transfer/sell majority ownership thereafter she would need to meet the 36 month test or the two cost report exception (or some other exception).