

Medicare Managed Care Manual

Chapter 12 - Effect of Change of Ownership

Table of Contents *(Rev. 113, 05-17-13)*

Transmittals for Chapter 12

10 - Introduction

10.1 - Definition of a Change of Ownership

10.2 - Examples of Ownership Transactions

20 - Notification Requirements

20.1 - Notification Requirements Prior to an Anticipated Change of Ownership

20.2 - Content of Notice for Changes of Ownership

20.3 - Other Notifications When a Circumstance Is Not Deemed a Change of Ownership

20.4 - Address for Sending Notifications to CMS

20.5 - Effect of Failure to Notify CMS of a Change in Ownership

20.6 - Marketing Requirements Post Change of Ownership

30 - Novation Agreement

30.1 - When a Novation Agreement is Required

30.2 - The Novation Agreement Provisions

30.3 - Acceptable Novation Agreements

30.4 - CMS Process for Review of Novation Agreements

Exhibits

Exhibit 1 - Model Novation Agreement

10 - Introduction

(Rev. 113, Issued: 05-17-13, Effective: 05-17-13, Implementation: 05-17-13)

42 CFR422.550

This chapter describes the regulatory guidance in Subpart L of 42 CFR 422.550, “Effect of Change of Ownership or Leasing of Facilities During Term of Contract.”

Please note, although this chapter formulates its guidance as applying to MA organizations, all guidance also applies to Medicare 1876 Cost plans.

This chapter:

- Defines change of ownership (§10.1, §10.2);
- Describes the notification requirements associated with a change of ownership (§20.1, §20.2);
- Outlines the requirements for novation agreements (§30.1-§30.4); and
- Describes the process for submitting documentation necessary for CMS review (§20.4, §30.4).

If a legal entity that contracts with CMS has a change of ownership, the new entity may not necessarily qualify to continue the same Medicare contract with CMS. Organizations should contact their Regional Office Account Manager (AM) for more information about change of ownership requirements.

10.1 - Definition of a Change of Ownership

(Rev. 113, Issued: 05-17-13, Effective: 05-17-13, Implementation: 05-17-13)

The following situations typically constitute a change of ownership:

- Asset sale or transfer: The sale or transfer of title and property to another party (that party can be a related, affiliated, subsidiary entity or a non-related entity);
- Partnership: The removal, addition, or substitution of a partner (unless the partners expressly agree otherwise as permitted by applicable State law); or
- Corporation: The merger of a corporate entity that holds a Medicare contract into another corporate entity, or the consolidation of a corporate entity that holds a Medicare contract with one or more other corporations, resulting in a new corporate body.

NOTE: In any type of change of ownership transaction (even those involving a parent corporation and a subsidiary or two affiliated entities), when the surviving entity of a

merger or corporate reorganization or the transferee of an asset sale or transfer is an entity that is not an MA organization, that entity should contact its Account Manager as early as possible to determine if the surviving entity needs to submit a modified initial or service area expansion (SAE) application to be deemed an eligible MA organization prior to the transaction/novation.

The transfer of corporate stock or the merger of another corporation into the corporation that holds a contract with CMS does not ordinarily constitute a change of ownership.

10.2 - Examples of Ownership Transactions

(Rev.113, Issued: 05-17-13, Effective: 05-17-13, Implementation: 05-17-13)

In the following situation, the ownership transaction does not ordinarily result in a change of ownership:

- If Corporation X maintains a contract with CMS and subsequently purchases the stock of Corporation Y, the ownership of Corporation X has not ordinarily changed.

In the following situations, the ownership transaction ordinarily results in a change of ownership as defined in §10.1 above.

- If Corporation A, Corporation B, and Corporation C, all subsidiaries of Corporation P (a holding company), consolidate into Corporation ABC (a new legal entity), and Corporation A, B, and C are fully dissolved, this constitutes a change in ownership in all Corporations A, B, and C.
- If Corporation A sells or transfers portions of its operations, including operations related to its MA contract to Corporation B, then:
 - If Corporation B has already been deemed an eligible MA entity by CMS, then this constitutes a change in ownership of the MA contract to Corporation B.
 - If Corporation B is not already deemed an eligible MA organization, it must submit an application for eligibility to CMS as provided in Chapter 11, "Application Procedures and Contract Requirements," of this manual.
- If Corporation A, a Medicare Advantage Organization, merges with its parent, Corporation B, an eligible MA organization, and Corporation A does not survive the merger, this constitutes a change in ownership for Corporation A.

The following example illustrates how the same transaction may have different effects of change of ownership on different corporations.

- If Corporation X maintains a contract with CMS and subsequently acquires Corporation Z, resulting in a merger then:
 - If Corporation X survives, the ownership of Corporation X has not changed.
 - If Corporation Z survives, this constitutes a change in ownership of Corporation X.

20 - Notification Requirements

(Rev. 113, Issued: 05-17-13, Effective: 05-17-13, Implementation: 05-17-13)

20.1 - Notification Requirements Prior to an Anticipated Change of Ownership

(Rev. 113, Issued: 05-17-13, Effective: 05-17-13, Implementation: 05-17-13)

All MA organizations considering a change of ownership must notify CMS at least 60 days prior to the anticipated effective date of change.

20.2 - Content of Notice for Changes of Ownership

(Rev. 113, Issued: 05-17-13, Effective: 05-17-13, Implementation: 05-17-13)

The organization's notice to CMS regarding a change of ownership, as defined in §10.1 above, must contain the information listed below. This information is reviewed by CMS to determine whether the new ownership continues to meet legislative and regulatory requirements for operating a Medicare managed care plan.

- Updated financial information, including the most recent quarterly and annual financial statements, and pro forma balance and income statements following the change of ownership. This must include an explanation of long-term loans and a narrative discussion of the impact of the change of ownership on the financial health and solvency of the surviving legal entity.
- A detailed listing of the significant steps necessary to complete the transaction, including the timeframes for submitting required information to CMS.
- In the case of large or publically-traded organizations, documentation of any contact with, including evaluations conducted by, the Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC) with respect to the impact of the proposed merger.
- The acquisition agreement and closing documents.
- The proposed by-laws and articles of incorporation for the newly-formed legal entity.

- The proposed organization chart for the surviving entity, including the names and titles of key management staff.
- The certificate of authority from the State for the new legal entity and the State MA certification form.
- A brief, written summary of the health care delivery system(s) for each acquired plan.
- Novation agreements, where necessary, from contracted providers of health care (as outlined in §30 below).
- The financial plan, that is, balance sheets and revenue and expense statements on a quarterly basis, for the new legal entity for a minimum of one year beyond the anticipated date of break-even.
- A listing of available financing to support accumulated deficits, if necessary.
- The Annual Notice of Change/Evidence of Coverage (ANOC/EOC).
- Assurances that any outstanding compliance issues will be fully resolved.
- Assignment of leases for facilities and equipment if the facilities and/or equipment are necessary to provide services under the contract with CMS.
- Any other relevant documentation requested by CMS.

20.3 - Other Notifications When a Circumstance Is Not Deemed a Change of Ownership

(Rev. 113, Issued: 05-17-13, Effective: 05-17-13, Implementation: 05-17-13)

All corporate entities holding a contract with CMS must notify CMS within 60 days from when the entity either acquires the stock of, or obtains the assets and/or liabilities of, another legal entity, even if the transaction is not considered a change in ownership as defined in §10.1 above. This notification should include pro-forma financial statements to reflect the continued financial viability of the MA Organization following any legal transactions.

20.4 - Address for Sending Notifications to CMS

(Rev. 113, Issued: 05-17-13, Effective: 05-17-13, Implementation: 05-17-13)

All required notifications to CMS described in §20.1, §20.3, and §30.1 of this chapter should be mailed to:

Division of Medicare Advantage Operations

Medicare Drug & Health Plan Contract Administration Group
Centers for Medicare and Medicaid Services
Mail Stop C4-21-26
7500 Security Boulevard
Baltimore, MD 21244-1850

Scanned copies of the notification should be simultaneously e-mailed to the organization's Account Manager.

20.5 - Effect of Failure to Notify CMS of a Change in Ownership

(Rev. 113, Issued: 05-17-13, Effective: 05-17-13, Implementation: 05-17-13)

If an MA organization fails to notify CMS of a change in ownership within the required timeframes, the original contracting entity will be liable for all capitation payments made by CMS to the original contracting entity for services following the legal change of ownership.

20.6 – Marketing Requirements Post Change of Ownership

(Rev. 113, Issued: 05-17-13, Effective: 05-17-13, Implementation: 05-17-13)

When a change of ownership situation occurs, plans must work with their respective CMS Account Manager to determine what marketing action, if any, will be required by the MA Organization. This includes, but is not limited to: beneficiary notifications, removing/updating marketing materials, and distributing sheets describing errata in for previous communications. Please note CMS can determine that a mailing describing the change of ownership is appropriate and may therefore direct the MA Organization to conduct such a mailing.

30 - Novation Agreement

(Rev. 113, Issued: 05-17-13, Effective: 05-17-13, Implementation: 05-17-13)

30.1 - When a Novation Agreement is Required

(Rev. 113, Issued: 05-17-13, Effective: 05-17-13, Implementation: 05-17-13)

Novation agreements are only required when there has been a change of ownership (as defined in §10.1 above). A novation agreement is required to transfer the rights and obligations under a Medicare contract from one entity to another entity eligible to contract with Medicare. When a novation agreement is required, the new entity or organization may be required to file a new application, demonstrate eligibility, and be determined an eligible entity, in order to contract with CMS.

CMS recommends that organizations anticipating a change in ownership submit a novation agreement to CMS at least 60 days prior to the expected effective date of change of ownership. Organizations must submit such an agreement no later than 30 days prior to the effective date of change of ownership. Organizations must also submit

three (3) copies of the novation agreement with the additional information requested in §20.2 above.

Organizations must receive CMS approval of the novation agreement prior to the effective date of change in ownership in order for the new entity to assume an existing contract with CMS. If a novation agreement is not completed before the effective date of the change of ownership, then the following will occur:

- The Medicare contract will be terminated as of that date;
- Enrollees in the terminated contract will be disenrolled and provided notice of their remaining Medicare coverage options in accordance with existing statute, regulations, and policies; and
- As indicated in §20.5 above, the MA organization continues to be liable for capitation payments that CMS makes to it on behalf of Medicare enrollees after the date of change of ownership.

30.2 - The Novation Agreement Provisions

(Rev. 113, Issued: 05-17-13, Effective: 05-17-13, Implementation: 05-17-13)

Exhibit 1 contains a Model novation agreement. This agreement is intended to serve only as a guide in preparing a draft novation agreement. MA organizations may need to revise the model, as necessary or appropriate, to conform to the circumstances of a particular transaction involving a change of ownership.

Any novation agreement shall contain the following provisions:

- Assumption of contract obligations. The new owner must assume the transferor's entire Medicare book of business and all obligations under the contract.
- Waiver of right to reimbursement. The previous owner must waive its rights to reimbursement for covered services furnished during the rest of the current contract period.
- Guarantee of performance. The previous owner must guarantee for the remainder of the current contract year and, if the bid has already been submitted by the original owner entity, for the upcoming contract year, that the new owner will carry out all terms of the contract.
- Records access. The previous owner must agree to make its books and records and other necessary information available to the new owner and to CMS to permit an accurate determination of costs for the final settlement of the contract period.

30.3 - Acceptable Novation Agreements

(Rev. 113, Issued: 05-17-13, Effective: 05-17-13, Implementation: 05-17-13)

The purpose of CMS' review of a novation agreement is to ascertain that the arrangements in place under the proposed new ownership ensure continued compliance with legal, regulatory, and contractual requirements.

In general, CMS considers a proposed novation agreement acceptable if:

- The MA organization submits to CMS:
 - The materials specified in §20.2 above in accordance with CMS requirements;
 - At least 30 days before the proposed change of ownership date, three(3) signed copies of the novation agreement containing all required provisions specified above in §30.1, and one copy of other relevant documents required by CMS, as specified in §30.1 above.
- CMS review results in a determination that:
 - The proposed new owner is in fact, the successor in interest or title of the transferor's entire Medicare book of business and there is recognition that the new owner, as successor in interest, is in the best interests of the Medicare program;
 - The successor in interest qualifies as an eligible entity and maintains arrangements to comply with the legal, regulatory, and other requirements necessary to perform the contract; and
 - Any performance bond posted is found acceptable.

30.4 – CMS Process for Review of Novation Agreements

(Rev. 113, Issued: 05-17-13, Effective: 05-17-13, Implementation: 05-17-13)

As described in §20.4, the entity with a Medicare contract must submit the proposed or pending change of ownership transaction to CMS and work with CMS through the review and novation agreement acceptance process.

Based on the MA organization's proposed transaction, CMS will inform the MA organization if a novation will be required. If a novation is required, CMS will notify the MA organization currently holding the Medicare contract(s) about the required documents, information and/or State approvals it must submit to CMS. The organization must also submit a draft novation agreement, detailing any proposed modifications to the Model Novation agreement.

If, as indicated in CMS guidance found in Chapter 11 of the Managed Care Manual, "Medicare Advantage Application Procedures and Contract Requirements," a Service Area Expansion or initial application is required on the part of the transferee entity prior

to the approval of the novation of the contract(s), the RO Account Manager will inform the transferee as well as the transferor.

Exhibit 1 - Model Novation Agreement

(Rev. 113, Issued: 05-17-13)

(Name of Medicare Managed Care Plan or Medicare Advantage Organization being transferred) (Transferor), d.b.a. (Where applicable, the d.b.a. name), a corporation, partnership, sole proprietorship, etc., duly organized and existing under the laws of the State of (indicate the State under which the Transferor is formed or organized to operate) with its principal office in (City and State where principal office is located); (Name of new owner) (Transferee), a corporation, partnership, sole proprietorship, etc. duly organized and existing under the laws of the state of (State), with its principal office in (City and State where principal office is located) and the Centers for Medicare & Medicaid Services (CMS) enter into this Agreement:

(A) RECITALS:

(1) CMS has entered into certain contract(s) with the Transferor, namely:

(Indicate Medicare Managed Care Plan and Medicare Advantage Organization contract type, as well as Medicare contract number (H#(s)) The term "the contract(s)" as used in this Agreement, means the above contract(s) including all modifications, made between CMS and the Transferor before the effective date of this Agreement (whether or not performance and payment have been completed) and releases executed if CMS or the Transferor has any remaining rights, duties, or obligations under these contract(s). Included in the term "the contract(s)" are also all modifications made under the terms and conditions of these contract(s) between CMS and the Transferee, on or after the effective date of this Agreement.

(2) As of (effective date of ownership change), the Transferor has transferred to the Transferee all the assets of the Transferor by virtue of a (indicate the type of transfer, i.e., a merger, corporate reorganization, or an agreement and purchase of the sale of assets) between the Transferor and the Transferee.

(3) The Transferee has assumed all the assets of the Transferor by virtue of the above transfer.

(4) The Transferee has assumed all the obligations of the Transferor under the contract(s) by virtue of the above transfer.

(5) The Transferee has indicated a desire to assume the obligations of the Transferor under the contract(s) and to fully perform all obligations that may exist under the contract(s).

(B) IN CONSIDERATION OF THESE FACTS THE PARTIES AGREE AS FOLLOWS:

(1) The Transferor confirms the transfer of the contract to the Transferee, and waives any claims and rights against CMS that it now has or may have in the future in connection with the contract(s).

(2) As of the effective date of the change of ownership in § (A)(2), above, the Transferee agrees to be bound by and to perform all the duties and responsibilities of Transferor in each contract in accordance with the conditions contained in the contract(s). The Transferee also assumes all obligations and liabilities of, and all claims against the Transferor under the contract(s).

(3) The Transferee ratifies all previous actions taken by the Transferor with respect to the contract(s) with the same force and effect as if the action had been taken by the Transferee.

(4) CMS recognizes the Transferee as the Transferor's successor in interest in and to the contracts. As of the effective date of the change of ownership the Transferee by this Agreement becomes entitled to all rights, title, and interests of the Transferor in and to the contract(s). Following the effective date of this Agreement, the terms "Organization" and "Contractor" as used in the contract(s) shall refer to the Transferee.

(5) Except as expressly provided in this Agreement, nothing in it shall be construed as a waiver of any rights of CMS against the Transferor. Notwithstanding any other provision of this Agreement, the Transferor remains liable for all acts constituting a breach of the contract(s) occurring or arising before the effective date of the change of ownership, to the fullest extent of applicable laws and regulations.

(6) All payments and reimbursements previously made by CMS to the Transferor shall be considered to have discharged CMS's obligations under the contract(s). All payments and reimbursements made by CMS after the effective date of this Agreement in the name of or to the Transferee, shall have the same force and effect as if made to the Transferor, and shall constitute a complete discharge of CMS's obligations under the contract(s) to the extent of the amounts paid or reimbursed.

(7) The Transferor and the Transferee agree that CMS is not obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes, or other expenses, or any related increases, directly or indirectly arising out of or resulting from this Agreement other than those that CMS in the absence of this Agreement would have been obligated to pay or reimburse under the terms of the contract(s).

(8) The contract(s) shall remain in full force and effect except as modified by this Agreement. Each party has executed this Agreement, which is effective as of the date signed below by the Centers for Medicare & Medicaid Services.

(9) Each party certifies and warrants that it has full power and authority to enter into this Agreement.

(10) Each person executing this Agreement on behalf of a party certifies and warrants that he or she is authorized to enter into this Agreement on behalf of such party.

Centers for Medicare & Medicaid Services By _____ Date _____

(Name of Transferee) _____ Date _____

Title _____

(Name of Transferor) By _____ Date _____

Title _____

Transmittals Issued for this Chapter

| Rev # | Issue Date | Subject | Impl Date | CR# |
|-------------------------|-------------------|---|------------------|------------|
| R113MCM | 05/17/2013 | Chapter 12, Effect of Change of Ownership | 05/17/2013 | N/A |
| R84MCM | 04/25/2007 | Revisions to Chapter 12, Effect of Change of Ownership | 04/25/2007 | N/A |
| R69MCM | 09/02/2005 | Revisions to Chapter 12, "Effect of Change of Ownership," and Chapter 14, "Contract Determination and Appeals | N/A | N/A |
| R01MCM | 07/02/2001 | Initial Issuance of Chapter | N/A | N/A |