EPSTEIN
BECKER
GREEN

Recent CMS Announcement Sunsets Home Health Agency Provider Enrollment Moratoria, but the Industry Should Act Quickly to Enroll or Expand

By *Emily E. Bajcsi*, *Francesca R. Ozinal*, and *Kathleen M. Premo*

CMS recently announced an end to its long-standing home health agency ("HHA") provider enrollment moratoria effective January 30, 2019. This is undoubtedly welcome news to the HHA industry in Florida, Illinois, Michigan, and Texas, however uncertainty remains with regard to the finality of this agency action and whether any moratoria are likely to be reimposed in the near term. As a result, HHA providers desiring growth should take action soon to initiate a new enrollment or expand an HHA's footprint in a state through enrollment of a branch location.

Background

In 2013, CMS imposed temporary moratoria on newly enrolling Medicare HHA providers in select geographic regions in Florida, Illinois, Michigan, and Texas due to the significant potential for fraud, waste, and abuse in those particular geographic regions.[1] Not only did the moratoria prevent new HHA Medicare enrollment, but it also limited the ability of existing enrolled HHAs to expand, because the addition of sub-units and branches under an existing HHA's Medicare provider number was subject to the moratoria to the same extent as a newly enrolling HHA.[2] CMS continuously extended the moratoria in six-month increments through 2018, and ultimately expanded geographic reach of the moratoria to prohibit enrollment or expansion of HHAs statewide in Florida, Illinois, Michigan, and Texas.[3] In each of the notices announcing the HHA moratorium extension, CMS explained that it consulted with HHS-OIG and determined the significant potential for fraud, waste, and abuse continued to exist regarding HHAs in these particular geographic areas. CMS stated that it needed to renew each moratoria so that it could continue with administrative actions to combat fraud and abuse, such as payment suspension and revocations of provider numbers, because providers might otherwise avoid sanctions, recoupment efforts or other debt obligations owed to the Medicare program by simply re-enrolling in Medicare through a new business entity.[4]

Implications of CMS Announcement Ending Moratorium

[1] 78 Fed. Reg. 46339 (July 31, 2013).
[2] CMS has since phased out subunits. *See* https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-18-03.pdf
[3] 82 Fed. Reg. 2363 (Jan. 9, 2017), 82 Fed. Reg. 35122 (July 28, 2017), 83 Fed. Reg. 01783 (Jan. 29, 2018), and 83 Fed. Reg. 42037 (Aug. 20, 2018).
[4] 82 Fed. Reg. 2363 (Jan. 9, 2017).

CMS announced the end of the moratoria through a very short statement on its website stating only that, "there are no active Medicare Provider Enrollment Moratoria in any State or U.S. territories." CMS effectively allowed the HHA enrollment moratoria to expire. It is noteworthy that CMS did not publish a formal notice in the Federal Register announcing the expiration of the HHA moratoria given that pursuant to 42 C.F.R. § 424.570(d), CMS is supposed to publish a document in the Federal Register when it lifts a moratorium and CMS had published each of its moratoria extensions in the Federal Register. CMS also did not provide any explanation as to why it decided against extending the moratoria. The brief announcement did not identify whether CMS and HHS-OIG have seen a reduction in the significant fraud and abuse risks posed by new HHA enrollment in FL, TX, IL, and MI or whether there is another rationale why CMS believes the moratoria is no longer needed. Through feedback sought by the National Association for Home Care & Hospice, CMS explained that the moratoria were intended to be a temporary tool, and that additional and new safeguards that have been implemented since the moratoria were initially imposed will continue the work to protect Medicare resources from fraud, waste and abuse. This feedback suggests that CMS has no immediate plans to reinstate any moratoria. However, the lack of formal publication lifting the moratoria, coupled with no official explanation for its lifting, leaves the HHA industry with uncertainty regarding the permanence of this announcement and whether CMS is likely to take additional action to re-initiate the moratoria again at any time.

Call to Action

Providers that want to expand their HHA footprint in FL, TX, IL, and MI would be wise to move quickly to submit their enrollment applications into their Medicare Administrative Contractor ("MAC"). If CMS decides to re-initiate a temporary moratorium in any of these states, providers who have submitted enrollment applications to CMS and received approval by Medicare contractors, but have not yet entered PECOS, will be exempt from the moratorium.[5]

HHAs have two options for expanding their Medicare business: 1) submit an initial enrollment application for a parent HHA; or 2) submit a change of information application for a branch associated with a parent HHA. Obtaining Medicare certification for a parent HHA is more burdensome than applying for a branch, as it requires an initial enrollment application. The Medicare enrollment process for HHAs is more involved than some other provider types because CMS has imposed special enrollment requirements on HHAs such as capitalization requirements. Accordingly, the time it takes to process and approve an initial HHA application can be lengthy. In addition, CMS also recently announced it would place some newly enrolled HHAs into a provisional period of enhanced oversight effective February 15, 2019.[6] The provisional period will include a suppression of all Request for Anticipated Payment ("RAP") payments for 30 days to 1 year. Existing providers may instead want to add a branch location to an existing enrollment. A branch is a location that services patients in the same geographic area as the parent, but the HHA must meet certain proximity and integration requirements in order to demonstrate that it shares administration with the parent on a daily basis. Branches do not need to enroll separately,

[5] 42 C.F.R. § 424.570(a)(iv).

[6] *See* CMS MLN SE19005, "What New Home Health Agencies (HHAs) Need to Know About Being Placed in a Provisional Period of Enhanced Oversight" (Feb. 15, 2019), https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/downloads/SE19005.pdf.

thus allowing CMS to process and approve the application faster than an initial enrollment application.

The question of whether a particular location qualifies as a branch requires careful consideration. Providers must also consider whether it is best from an operational and billing standpoint for locations to bill separately or together with the parent HHA. Importantly for both enrollment options, prior to initiating Medicare enrollment the provider must have a valid lease for the location in place and ensure that the HHA has an active state license to operate.

CMS' announcement ending the moratoria creates a significant opportunity to expand a home health provider's footprint in several states with high Medicare enrollee populations, but is not without potential risks. Providers should both act quickly to take advantage of this new regulatory landscape before CMS imposes another moratorium but also act carefully to submit an enrollment application that meets all of the Medicare requirements. This may be a one-time opportunity so it is important to submit a comprehensive, accurate, and operationally feasible application. Application errors or errors in regulatory interpretations will result in delays in processing, create a survey risk, and impede Medicare approval. Furthermore, while pending applications may be processed if the moratoria is resurrected, this only applies to perfect applications submitted before the imposition of a moratorium. Incomplete or inaccurate applications will not be grandfathered in. Finally, as the application requires an executed lease, we also recommend obtaining legal guidance with a sophisticated approach to lease contracting in the event the HHA cannot obtain regulatory approval to enroll in Medicare. EBG is available to provide "rapid response" assistance with the regulatory strategy, lease negotiation, and the production of all the necessary elements of a viable enrollment application.

*This article was authored by attorneys by **Emily E. Bajcsi**, **Francesca R. Ozinal**, and **Kathleen M. Premo** of Epstein Becker Green. The article has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.*

EMILY E. BAJCSI is a Member of the Firm in the Health Care and Life Sciences practice, in the firm's Boston and Washington, DC, offices. She was named to the *Massachusetts Rising Stars* list (2016, 2017) in the area of Health Care.

FRANCESCA R. OZINAL is an Associate in the Health Care and Life Sciences practice, in the Washington, DC, office of Epstein Becker Green. She focuses her practice on such areas as fraud and abuse, telehealth, federal and state regulatory and compliance issues affecting a broad range of health care stakeholders, litigation, government investigations, and due diligence.

KATHLEEN M. PREMO is a Member of the Firm in the Health Care and Life Sciences practice, in the St. Petersburg office of Epstein Becker Green. For more than 20 years, she has served as a legal and strategic advisor for a diverse range of health care and business clients, including Fortune 500 companies, hospital and health systems, Medicare Advantage provider groups, and entrepreneurial privately held companies. Ms. Premo's clients appreciate her sophisticated business acumen and insightful, real-world legal counseling, honed while serving as a legal advisor, strategist, and health care executive during her years as General Counsel and Chief Legal Officer for various health care clients.