

STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower

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Albany, New York 12237

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Executive Deputy Commissioner

October 8, 2003

Philip J. Sgarlata, Esq. O'Connell and Aronowitz 54 State Street Albany, New York 12207-2501

> DOH GC Opinion No. 03-05 New Operators for Purposes of Nursing Home Rate Rebasing

Dear Mr. Sgarlata:

This responds to your letter of December 19, 2002 which requested an opinion on behalf of unnamed client-owner-operators of residential health care facilities ("RHCFs" or nursing homes) concerning the application of the Department's regulation governing RHCF reimbursement rate setting and rebasing, codified at 10 NYCRR § 86-2.10(k).

Before an amendment of the rebasing regulation, effective on March 12, 2002, the regulation generally required and permitted rate rebasing, using updated cost reports, upon the transfer of all ownership interests in the entities operating the RHCFs to new owners established by the approval of the Department of Health's Public Health Council. However, rebasing was prohibited in certain circumstances, including when a principal stockholder, officer, director, sole proprietor, partner or receiver of the new operator was a child of a principal stockholder, etc. of the prior operator or receiver. After the amendment, rebasing which would otherwise be triggered by a complete transfer of ownership of a proprietary RHCF is not prohibited solely by reason of the fact that a stockholder, etc. of the new operator or receiver is a child of a stockholder, etc. of the prior operator or receiver.

Some of your clients, prior to the amendment, made transfers to their children of minority ownership interests in the entities operating the RHCFs. Pursuant to the regulation as it then existed, such transfers triggered no rebasing. Now some of your clients contemplate complete divestiture of their ownership interests by transfer to their children who, by virtue of the prior transactions, are current owners. You ask whether a single transfer from parent to child of the remaining parental interest would be sufficient to trigger rebasing or whether instead two transfers would be required, the first from the child to the parent of the child's minority interest, thereby restoring to the parent complete ownership, and the second from the parent to the child of complete ownership.

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For the reasons set forth below, under the circumstance you describe neither a single transfer nor two transfers would trigger rebasing.

The reimbursement rate setting and rebasing regulation sets forth a method for the calculation of the rate for each RHCF based on various component costs as reported in the first 12-month period during which the facility has had an overall average utilization of at least 90 percent of bed capacity. The appointment of a receiver or the establishment of a new operator of an ongoing facility requires such receiver or new operator to file new cost reports on which the reimbursement rate will be rebased. See paragraph (1) of § 86-2.10(k). However, certain receivers and new operators who are linked, including by a filial relationship, to the prior receiver or operator of an ongoing RHCF are excluded from the definition of a receiver or new operator whose appointment or establishment would trigger rebasing. See paragraph (5) of § 86-2.10(k). Notwithstanding the other provisions of subdivision (k), the appointment of a receiver or the establishment of a new operator of a proprietary RHCF who is linked by certain filial relationships to the prior receiver or operator can trigger rebasing under certain circumstances. See subparagraph (i) of § 86-2.10(k)(7).

Paragraphs (1), (5) and (7) of § 86-2.10(k) provide:

§ 86-2.10(k) Receiverships and new operators.

(1) The appointment of a receiver or the establishment of a new operator of an ongoing facility shall require such receiver or operator to file a cost report for the first 12-month period of operation in accordance with section 86-2.2(e) of this Subpart. This report shall be filed and properly certified within 60 days following the end of the 12-month period covered by the report. Failure to comply with this subdivision shall result in application of the provisions of section 86-2.2(c) of this Subpart.

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- (5) (i) For purposes of this subdivision, and except as identified in paragraph (7) of this subdivision, the terms new operator and receiver shall not include any operator or receiver approved to operate a facility when:
 - (a) a stockholder, officer, director, sole proprietor or partner of such operator or receiver was also a stockholder, officer, director, sole proprietor or partner of the prior operator or receiver of such facility;
 - (b) the approved operator was the prior receiver of the facility;
 - (c) any prior corporate operator or receiver is a corporate member of the approved operator or receiver, is otherwise affiliated with the approved

operator or receiver through direct or indirect sponsorship or control or when the approved operator or receiver and prior operator or receiver are subsidiaries of a common corporate parent; or

(d) a principal stockholder (owning 10 percent or more of the stock), officer, director, sole proprietor or partner of an approved proprietary operator or receiver is the spouse or child of a principal stockholder, officer, director, sole proprietor or partner of the prior operator or receiver of such facility, regardless of whether such relationship arises by reasons of birth, marriage or adoption.

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- (7) (i) Notwithstanding the provisions of this subdivision, when a receiver of a proprietary nursing facility is appointed or a new operator of a previously established proprietary nursing facility is established and a stockholder, sole proprietor, partner or limited liability company member of such receiver or new operator is the child of a stockholder, sole proprietor, partner or member of the limited liability company of the prior operator or receiver of the facility, such receiver or new operator shall receive rates of reimbursement adjusted pursuant to paragraphs (1)-(4) and (6) of this subdivision. For purposes of this paragraph, *child* shall mean a child or stepchild by birth, adoption, or marriage. Rates of reimbursement for any subsequent operator of such facility who is established within 10 years of the date of appointment or establishment of such child or stepchild shall not be subject to adjustment under this subdivision.
 - (ii) For purposes of this paragraph, the terms new operator and receiver shall not include any operator or receiver with a stockholder, sole proprietor, partner, or limited liability company member who was a stockholder, sole proprietor, partner or limited liability company member of the prior operator or receiver of such facility.
 - (iii) For purposes of this paragraph, *new operator* shall also mean an established operator which has undergone a total change in owners, stockholders, partners or limited liability company members.
 - (iv) This paragraph shall apply to appointments of receivers and/or the establishment of a new operator on or after the effective date of this paragraph.

For simplicity, I will henceforth use the terms owner and operator without referring to stockholders, sole proprietors, partners or limited liability company members and receivers.

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Under the circumstances you describe, a single transfer of the remaining parental interest to a child who is already an owner would not qualify for rebasing under of § 86-2.10(k) because the child has an ownership interest in the current operator of the facility (see 10 NYCRR § 86-2.10(k)(5)(i)(a)) and the contemplated transfer would not result in a total change in owners as required by § 86-2.10(k)(7)(iii). Two transfers, as you describe, would not qualify for rebasing because owners can not circumvent § 86-2.10(k) by transferring ownership to another and then immediately regaining ownership by a second transaction.

Based on the foregoing, under the circumstances you describe neither a single transfer nor two transfers would qualify for rebasing.

This conclusion is based on the facts stated herein and any change in those facts might result in a change of the conclusion.

Very truly yours,

Donald P. Berens, Jr. General Counsel

cc: Wayne M. Osten