I. What Is CHOW?

CHOW is an acronym frequently used by those in the health care industry to describe the regulatory process that often must be followed when a licensed or certified health care provider undergoes a “change of ownership.” Many businesses that operate a health care facility, provide a health care service, or manufacture, distribute, or sell a health care product will have at least one and maybe multiple “permits” or “provider numbers” issued by a governmental body. The underlying goals of licensure and certification in the health care industry are to protect the public interest by ensuring that only properly qualified businesses or individuals obtain authorization to provide health care services or products. As a result, the CHOW process applicable to most, if not all, health care permits, licenses, certifications, and provider numbers is heavily regulated to ensure that any new owners
satisfy the same or similar regulatory requirements that the “seller” met when it originally obtained the permit.

Various types of transactions—including asset transfers, mergers, corporate restructurings, or stock/membership transfers—can CHOW requirements. These requirements may include advance notice or approval by a governmental body, filing of new application forms, and issuance of new licenses, permits, approvals, or provider numbers. In contrast, some transactions that involve indirect or partial ownership changes may simply require a disclosure notice of new owners, a process that may be referred to as a CHOI, or “change of ownership information.” Nevertheless, analysis of the CHOW and CHOI implications of a transaction is a critical step in planning and structuring an acquisition. Failure to identify CHOW requirements relating to a health care business’s permits or provider numbers could adversely affect the new owner’s ability to seamlessly operate and receive payment from governmental payors after closing. Furthermore, the CHOW process may drive certain decisions regarding how to structure the overall transaction. Counsel for both buyer and seller involved in a transaction in which the “seller” holds permits should be aware of the change-of-ownership regulatory process requirements, timing to complete pre-closing and/or post-closing filing requirements, and the general nature of what must be accomplished with the relevant governmental bodies prior to consummating the transaction.

This book is designed to give practitioners a general understanding of the CHOW process for operating licensure, certificate of need, and Medicare and Medicaid provider numbers. The following three chapters describe some general and specific elements of what can be, and in some cases is, required in a change of ownership process in these different contexts.

II. Operating Licensure and Certificate of Need

Chapter 1 discusses CHOWs relating to operating licenses and certificates of need. As mentioned earlier, most business providing health care services or manufacturing, distributing, or selling a health care
product will be required to hold a primary operating license. Many hold multiple licenses that may be issued by a local, state, or federal governmental body.

As examples, state health care agencies generally require licenses for businesses that operate hospitals, ambulatory surgery centers, nursing facilities, pharmacies, home health agencies, substance abuse treatment centers, or intermediate care facilities. Some states require licenses to operate an outpatient clinic setting or a laboratory. Pharmaceutical distributors and manufacturers must typically hold some type of state and/or federal permit. Federal agencies may also require health care providers to obtain various federal registrations or permits, such as Drug Enforcement Agency (DEA) registrations and Clinical Laboratory Improvement Amendments (CLIA) certificates. Local governments often require business and occupational licenses and various building and facility permits. When any business holding a license undergoes a transaction that will change some or all of its ownership, or sells its assets, CHOW is an issue that must be analyzed in the context of the transaction. Similarly, in a state that imposes certificate-of-need requirements, those requirements must also be vetted and met.

A certificate of need (CON) is a particular type of permit that most often is issued to institutional, bricks-and-mortar, health care providers (such as hospitals, nursing homes, and ambulatory surgery centers) when they are developing/building a new institution. However, in some circumstances a CON can be issued in relation to a particular type of service; for instance, a hospital that wants to purchase and operate a new CT scanner. A CON is a permit that is provided to a health care business once that business has essentially proven to a regulatory body that there is a “need” for its health care services in a particular geographic area. The CON review process is often cumbersome and lengthy. When required for a CHOW, the CON approval may determine the final closing date for a transaction, as CON approval is typically required before closing can occur. The general public policy underlying certificate-of-need programs is to manage health care cost and the use of health care resources for
defined populations in a geographic area. Not all states have CON processes and among those states that do, the processes can differ significantly as to what types of providers require a CON and how the CON process applies to CHOWs. As a general rule, counsel in a transaction that involves institutional services or acquisition of expensive medical equipment should determine whether the “seller” holds a CON and in turn what CHOW process might apply.

Understanding what must happen with respect to a CHOW process, whether licensure or CON, as early as possible in a transaction process is extremely important. Often parties can enter into a letter of intent that obligates them to close a transaction within 30 days—only to discover on the 25th day that the CHOW process is going to take 60 days to complete from when an application is filed, and the transaction cannot close without the affirmative approval of the regulator.

Chapter 1 provides an overview of how the CHOW process for licensure and CON can work, outlining the major issues to understand in most processes as well as how the timing of the process can affect the transaction dynamics. A thorough discussion of each state’s regulatory process for every type of permit relating to every service or product manufacturer or seller is well beyond the scope of this book; however, Chapter 2 provides a general understanding of where similarities and differences are and identifies the most important issues to consider.

### III. Medicare

Chapter 2 discusses CHOW as it relates to health care providers and suppliers that hold a provider number to participate in the federal Medicare program. According to the 2016 National Health Care Expenditure data from the U.S. Centers for Medicare and Medicaid Services (CMS), Medicare spending represents a 20 percent share of total U.S. health care spending. With Medicare and Medicaid combined, the federal government represents the largest health care
IV. Medicaid

Chapter 3 discusses CHOW as it relates to health care providers and suppliers that hold a provider number to participate in the federal/state Medicaid programs. According to the 2016 National Health Care Expenditure data from the CMS, Medicaid spending represents a 17 percent share of total U.S. health care spending. With Medicare (as discussed earlier in Section III) and Medicaid, the federal government represents the largest health care payor overall. As a result of the size of the federal government’s market share, most health care providers and suppliers participate in the Medicare and Medicaid programs.

As a result, it is important to understand the role the various states play in the Medicaid program. Unlike Medicare, which is specifically administered and operated by the federal government through CMS, Medicaid programs are partially funded by the federal
government but administered and operated by the various states. Although the states must follow certain federal rules to ensure the program integrity of their Medicaid programs, the states are free to impose additional requirements in the provider enrollment process. Thus, Medicaid CHOW procedures and requirements may vary dramatically by state.

As mentioned, to ensure the integrity of the Medicaid program, CMS, in conjunction with the OIG, has significant regulatory requirements that govern a change of ownership of a provider that holds a Medicaid provider number. These requirements, as well as state-specific requirements, govern the CHOW process in several ways and generally affect a change of equity ownership or an asset sale where the new owner assumes the old provider number. State and federal Medicaid regulations, similar to state licensure or CON regulations, specifically define what CHOW for Medicaid purposes is and what specific types of filings and disclosures must be made.

Chapter 3 provides a general overview of how Medicaid CHOW processes can work, detailing the major issues to understand as well as how the timing of the process can affect the transaction dynamics. A thorough discussion of each state’s regulatory process for a Medicaid CHOW is well beyond the scope of this book; however, Chapter 3 provides a general understanding of where similarities and differences appear and the most important issues to consider.

V. Appendix: CHOW/CHOI Tracking Matrix

To illustrate the concepts discussed in this book, the appendix provides a sample CHOW/CHOI tracking matrix that may be used in a health care transaction; it can be adapted for various provider types. This particular sample illustrates how a matrix may be used to track various types of federal, state, and local licenses and contracts held by a hospital and the CHOW/CHOI requirements applicable to a hospital acquisition.