I. Introduction

As the structure, function, and business of health care have evolved, so has the regulatory framework in which state governments, and in some instances the federal government, oversee the provision of services and the sale and delivery of products from health care providers and suppliers. Primarily motivated by a general need to protect the public health and a specific interest in regulating the provision of services and products, state governments license health care providers and suppliers in their respective subsectors of the health care industry.

State-issued licensure is most often necessary for institutional providers, such as hospitals, inpatient psychiatric facilities, and nursing homes. However, it also exists for a wide variety of providers that provide home- and community-based services, such as home care agencies, hospices, and adult day health care providers, and for outpatient or ambulatory clinics that may provide primary care or a specialized service like radiology or ambulatory surgery.

Additionally, depending on the state regulatory framework, some types of providers may be subject to a separate certificate-of-need (CON) process. Approximately
35 states still have some type of CON process. In a smaller subset of those states, the CON and licensure processes are combined into one process. In states that have CON requirements, those requirements most often apply to institutional health care providers, such as hospitals and nursing homes. However, they can also apply to specific services, such as a hospital wanting to add ambulatory surgery suites or purchase or operate a new MRI machine. As discussed in the introduction, CON programs are designed to manage health care cost and the use of health care resources for defined populations in a geographic area. States can and do differ significantly in the how, when, where and why of their specific CON programs. It is safe to assume that if the transaction you are working on involves some type of institutional, bricks-and-mortar health care services, you should be thinking about whether or not in addition to any operating licensure CHOW requirements and processes, you may have CON CHOW requirements and processes as well.

The types of health care providers and suppliers that are subject to state-issued or CON licensure varies by state. The variation can be as simple as the term used for a particular type of licensure; for example, one state may license an “assisted living facility” whereas another licenses an “assisted living residence”. The form and function of the business obtaining that licensure is essentially the same. The variation in the licensure scheme can also be substantive and technical. For example, whereas different states may license “ambulatory surgery centers,” the structure of the surgery center and the types of surgical procedures that a particular state allows to be performed may be significantly different. There are also variations in the types of health care providers and suppliers that require licensure: one state may require a license to operate a durable medical equipment retail business, but another may not. Additionally, one state may require a CON process for hospitals but not for surgery centers.

Throughout this chapter, we refer to the type of state-issued licensure that is the primary license a health care provider or supplier needs to carry out its business as operating licensure or an operating license. Obtaining operating licensure is generally a form-intensive
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and disclosure-intensive process that takes time to complete. Timing to complete the process can range from as little as 30 days to as long as 18 months, depending on the state process, scheme, and rules involved. How states define what a CHOW is, how operating licensure or CON is affected by a CHOW, and what type of process might be involved if a CHOW occurs, are discussed in more depth in Section II of this chapter.

In addition to the primary state-issued operating licensure that health care providers and suppliers are required to obtain in order to operate their respective businesses, there are additional licenses, permits, certifications, and/or approvals that they may need to obtain in specific circumstances. Throughout this chapter, we refer to these additional licenses, permits, certifications, or approvals as ancillary permits. Ancillary permits may be issued by a federal, state, or local regulatory agency. Examples of ancillary permits include:

- A permit issued by a municipal environmental authority to a hospital to allow it to maintain large liquefied oxygen tanks on its property.
- A kitchen permit issued by a county public health or consumer affairs agency to a nursing home to operate a commercial or communal kitchen.
- A federal Drug Enforcement Agency (DEA) registration to permit a home health agency to dispense controlled substances to patients.
- A state-issued radiologic registration for a linear accelerator used to treat cancer patients.
- A county-issued elevator permit for a multistory ambulatory surgery center.

As a general rule, obtaining an ancillary permit likely does not involve the same form-intensive and disclosure-intensive process that is involved in obtaining operating licensure or a CON. How different jurisdictions define what a CHOW is for an ancillary permit, how an ancillary permit is affected by a CHOW, and what type of
process might be involved if a CHOW occurs, are discussed in more
depth in Section III of this chapter.

II. Operating Licensure and CON

A. Change of Ownership
An operating licensure or CON change of ownership often occurs
when the business entity or individual¹ who is the holder of the oper-
ating license or CON (the Licensee) changes through some form of
commercial transaction. The Licensee may: (i) be selling its operat-
ing assets to another business that intends to continue operating
the same or similar provider or supplier type; (ii) sell or transfer
equity interests (stock or membership units) in the Licensee to a
third party that was not previously an owner of equity in the busi-
ness; or (iii) in the case of a not-for-profit entity, undergo a change
of sponsor or member or a certain percentage change in the board
of directors. Each of these three transactions is, in practically every
circumstance, considered a CHOW for regulatory purposes and
thus requires some type of application filing with the state agency
responsible for the licensure of that type of provider or for issuing
CONs. If the transaction is not considered a CHOW under a specific
regulatory scheme, at the very least there is likely some required
disclosure notification process involving the regulatory agency that
issued the operating permit.

In addition to these three basic scenarios, many states define
what they consider to be a CHOW in additional and specific ways.
For example, some states may define a CHOW by a change in corpo-
rate governance or control. Further, some states treat the application
that must be filed when a CHOW occurs as a new application to the
regulatory agency (this often happens where the business will have

¹. This chapter focuses on business entities that hold operating licenses. It is rare for
an individual to hold a health care provider operating license today (distinguished from
a professional license), given the business and liability concerns of most providers.
a new federal tax identification going forward), whereas others have a specific CHOW application that must be filed in such a situation. Alabama’s nursing home operating licensure scheme provides a good example of some of the nuances of how states approach what a CHOW is and what type of application must be filed if a CHOW has occurred or will occur. When a CHOW occurs in Alabama for a nursing home Licensee, the Licensee’s application is considered an application for new licensure.\(^2\) The potential Licensee must submit a new application to the regulatory agency at least 30 days prior to the expected CHOW. Alabama regulations generally recognize a CHOW when there is a change in the legal form under which the controlling entity (i.e., Licensee) is organized.\(^3\) Specifically, some of the transactions that Alabama considers a CHOW include:\(^4\)

- The sale or donation of the Licensee’s legal title
- The lease of the entirety of the Licensee’s real and personal property
- A sole proprietor becoming a member of a partnership or a corporation that succeeds the proprietor as the new Licensee
- A partnership dissolves, or undergoes a change in partnership through addition or subtraction of a partner
- A limited partnership becomes a general partnership, or vice versa
- Two or more corporations merge and the existing Licensee does not survive
- A corporate consolidation
- A change in status of the Licensee from a nonprofit to a general corporation, or vice versa
- A nursing home is transferred between levels of government.

Not necessarily in contrast, but to provide another example, it is helpful to look at how Washington State defines a CHOW for a

nursing facility. Washington broadly defines a change of ownership as a “substitution, elimination, or withdrawal of the licensee or a substitution of control of the licensee.” It further defines the term “control” as “the possession, directly or indirectly, of the power to direct the management, operation, and policies of the licensee, whether through ownership, voting control, by agreement, by contract or otherwise.” Many states have a regulatory framework that takes a broad view of whether or not control of the Licensee has in some way been affected by a transaction to define whether or not a CHOW has occurred. In addition, the regulatory framework may also list specific events or circumstances that are considered CHOWs per se. Washington takes this approach by also providing that certain events will constitute a CHOW and outlining events that, without some other factors, will not constitute a CHOW.

The Washington regulatory framework provides that the following types of events will constitute a CHOW:

- The form of legal organization of the Licensee is changed (e.g., a sole proprietor forms a partnership or corporation)
- Ownership of the business enterprise is transferred from the Licensee to another party, regardless of whether ownership of some or all of the real property and/or personal property assets of the facility is also transferred
- Dissolution or consolidation of the Licensee entity
- A merger, unless the Licensee survives the merger and there is not a change in control of the licensee
- If, during any continuous 24-month period, 50 percent or more of the Licensee entity is transferred, whether by a single transaction or multiple transactions, to: (i) a different party, or (ii) an individual or entity that had less than a 5 percent ownership interest in the Licensee at the time of the first transaction

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- Any other event or combination of events that the Washington State Department of Health determines results in a: (i) substitution, elimination, or withdrawal of the Licensee; or (ii) substitution of control of the Licensee responsible for the daily operational decisions of the business.

The Washington regulatory framework also provides that following types of events will not constitute a CHOW without some other event occurring:

- The Licensee contracts with another party to manage the nursing home business in accordance with the management contract requirements\(^8\) found in the Washington Administrative Code; or
- The real property or personal property assets of the Licensee are sold or leased, or a lease of the real property or personal property assets is terminated, as long as there is not a substitution or substitution of control of the Licensee.

These examples show how the states of Alabama and Washington define a CHOW with respect to a nursing home or nursing facility Licensee, but you will find similar or even identical regulatory frameworks that define CHOWs for hospitals, inpatient rehabilitation facilities, clinics, home health agencies, hospices, and more in practically any state’s health care-related statutes and regulations. However, not all states may be as specific about actions or events that constitute a CHOW.

Like many states, Kansas law provides that a license for a home health agency is not transferrable or assignable.\(^9\) Kansas defines a CHOW for a home health agency broadly and provides that “[w]hen a home health agency is sold or ownership or management is transferred, or the corporate legal organization status is substantially changed, the license of the agency shall be voided and a new license