

Healthcare Transactions & Medicare's Change of Ownership (CHOW) Rules

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Why are CHOWs Important?

- Impacts Your Provider Agreement
 - Automatic Assignment
 - Successor Liability v. New Enrollment
- Impacts Your Medicare Certification
 - May require a new survey
 - Requires a filing of final cost report
- Potentially Impacts Medicare Payment
 - May affect both seller and owner's reimbursement (i.e., cost report issues)
 - May affect new owner's future payment—excluded units, costs to charge ratios, etc.

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One Deal-Multiple CHOW Determinations

- CHOW for Medicare purposes
 - Main Provider
 - Sub-Providers
- CHOW for state licensure purposes
 - Often includes stock deals (or change of control)
- CHOW for CON purposes
 - If CHOW, may require a CON
 - Even if not a CHOW, may require a determination that not a CON event
- CHOW for State Medicaid purpose
 - Often ill defined by state law
 - May or may not follow Medicare

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What Do We Mean By A CHOW?

- Basic Principle: If the person/entity with ultimate responsibility for the provider changes, typically a CHOW results
- General Rules set forth at 42 C.F.R. §489.18 and at SOM, Chapter 3, § 3210.1-3210.5.
- Medicare CHOW determinations generally require
 - An examination of the nature of the transaction; and
 - An examination of the nature of the provider.

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What Do We Mean By a CHOW?

- Look at the nature of the transaction to determine if a CHOW occurs:
 - **Partnership:** Will the transaction result in the dissolution of the partnership? If so, a CHOW.
 - **Sole Proprietorship:** Is the sole proprietorship selling the enterprise to another? If so, a CHOW.

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What Do We Mean By A CHOW?

- Corporations
 - Will the corporate entity that owns the provider stay in existence post-closing of the transaction and remain responsible for the provider? If so, a CHOW.
 - Stock transactions: Not a CHOW because the same corporate entity is responsible for the provider both before and after the closing. If the transaction is simply changing shareholders, then no CHOW. Note: Uncertainty regarding HHA's and stock transfers.
 - Asset sales: Although not specifically mentioned in the regulations, asset sales always result in a CHOW because the responsible entity changes. Addressed in SOM and case law.
 - Mergers: It depends. Will the corporate entity that owns the provider stay in existence?

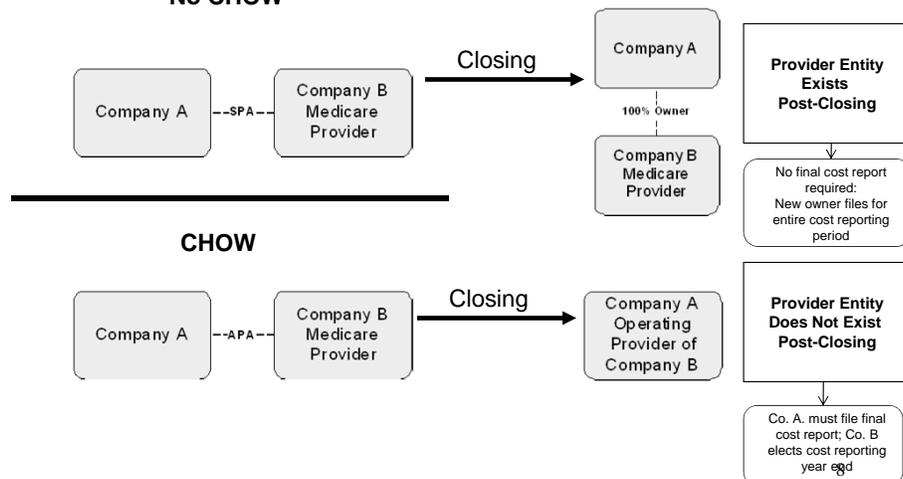
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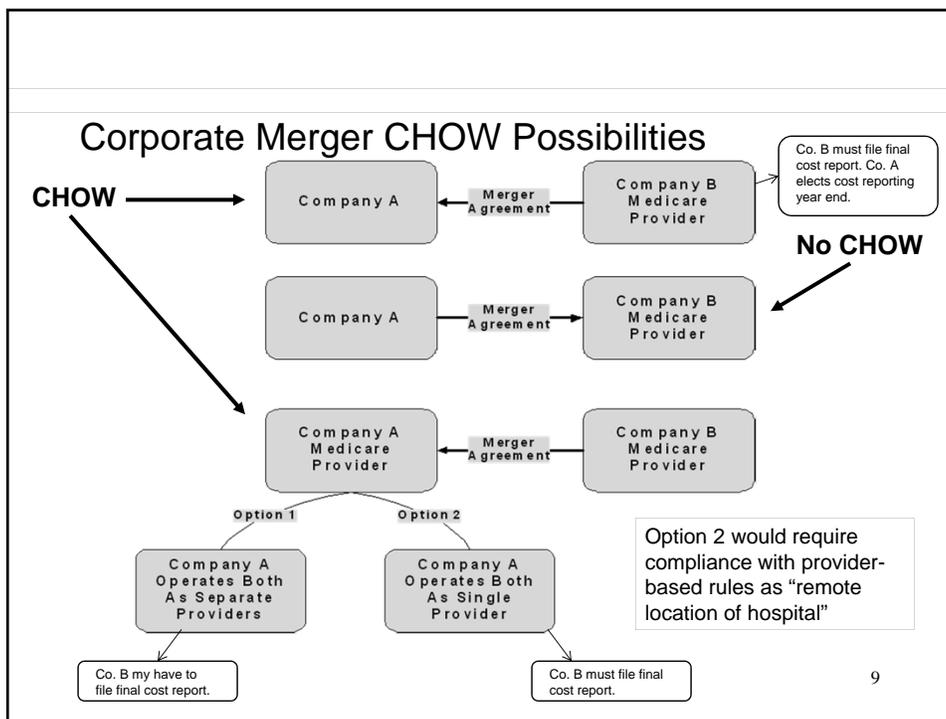
Quasi-Transactions

- Lease Agreements
 - Typically, not a CHOW
 - However, if change in party with operational responsibility can result in a CHOW to lessee
 - If landlord shares operational responsibility, may be treated as a partnership or a management agreement
- Management Agreements
 - Typically, not a CHOW so long as owner retains ability to approve operational authority
 - Will result in a CHOW “when the owner has relinquished all authority and responsibility for the provider organization.”
- Cessation of Operations

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CHOWs of Corporations





- ### Broader CHOW Definition for HHA's
- **36-Month Rule (42 C.F.R. § 424.550(b)(1)) :**
 If majority ownership of a HHA changes by sale (*including stock transfers, mergers, consolidations, transfers, etc.*), within 36 months of the HHA's Medicare enrollment or prior change of majority ownership, the provider agreement and Medicare billing privileges will not be conveyed to the new owner.
 - The new owner must re-enroll as a new HHA, obtaining a new survey or accreditation.
 - CMS does recognize exceptions in the following situation:
 - HHA's parent organization is undergoing an internal corporate restructuring;
 - HHA has submitted two consecutive years of full cost reports;
 - Existing owners changing business structure; or
 - Individual owner of HHA dies.
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The Difference Between Suppliers & Providers

- “**Provider of services**” generally means a hospital, CAH, SNF, CORF, HHA, or hospice.
- “**Supplier**” means physician, practitioner or facility that furnishes items or services reimbursable by Medicare Part B.
- **Importance:** 42 C.F.R. § 489.18 only applies to providers.
- The problem of suppliers subject to survey or certification.
 - 855B requires hospitals, ASCs and portable x-ray suppliers to submit
 - Enrollment rules tend to divide the world into providers and suppliers covered by 42 C.F.R., part 489 and other suppliers.

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Importance of Designation

- Provider
 - Company A purchases Hospital B through an asset purchase
 - CHOW for Medicare purposes
 - Auto assignment of provider agreement
- Supplier (Not Certified)
 - Company A purchases Imaging Center B through asset purchase
 - Not a CHOW for Medicare purposes
 - New Owner submits 885B for initial enrollment—effective as of the date Owner can show in compliance with coverage criteria (CMS has indicated that later of date of application or above standard)
- Certified Supplier
 - Company A purchases ASC B through asset purchase
 - File 855B for CHOW
 - New provider number
 - New provider agreement?

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Distinguishing between Provider Agreement and Provider Number

- Provider Number now a CCN (CMS Certification Number)
- Generally used interchangeably
- There are, however, situations where the Medicare agreement can be assigned but a new provider number issued
 - ASCs
 - ESRD clinic that changes status (hospital based to freestanding) as a result of a CHOW
- CMS (and especially its contractors) have not been very good about clarifying the distinctions or clearly stating the effect of such distinction
- *Query:* If CMS has not clearly stated that successor liability arises and new owner is given new provider number, should new owner have successor liability?

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Lessons Learned

- Make sure operational people understand whether a CHOW or not
- Use “before and after” diagrams in dealing with regulators
- If a sub-unit has its own Medicare agreement, then you must submit a separate 855
- Distinguish between changing provider types (requires initial enrollment) and provider sub-types (can be part of a CHOW)
- Tax Identification Numbers should not always control the determination but they often do
- A word of caution about NPIs
- New Issues – impact on participation in ACOs, impact on meaningful use dollars, etc.

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CHOW Process-New Owner's Perspective

- Give notice of a transaction as early as possible so that discussions can be had with CMS RO, FI and SA regarding the effect of the transaction.
 - If not accepting automatic assignment, must give 45 day notice.
- Submit "new owner" 855 as soon as possible
 - Range: 30-90 days pre-closing (depending on provider/supplier) to 30 days post-closing
- Submit "old owner" 855 as soon as possible
 - Should be within 14 days of each other
- FI reviews and makes recommendation to Regional Office
- RO makes final determination

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Be Aware of the Enrollment Rules

- Medicare enrollment rules-42 C.F.R. § 424.500 et seq.
- Provisions affecting CHOWs:
 - Reporting requirements (424.520(b)): change of information (90 days); "change of ownership or control" (30 days)
 - Query: Is a stock transaction a change of information or control?
 - Failure to comply: deactivation or revocation
 - Prohibits the sale or transfer of billing privileges (424.550)
 - Requires both the current owner and the new owner to submit 855s
 - Failure of current owner to do so can result in penalties post-closing of the CHOW
 - Failure of the new owner to do so can result in deactivation of the Medicare billing numbers
 - Clarification of Effective Date for Reimbursement Purposes (424.510(b))
 - Providers & suppliers that require survey, certification or accreditation - 42 C.F.R. § 489.13
 - Non-surveyed, certified or accredited suppliers--42 C.F.R. § § 424.5 & 424.44)
 - DMEPOS suppliers-42 C.F.R. § 424.57

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Automatic Assignment: Lost Revenue v. Successor Liability

How Much Are You Willing to Pay for a Clean Slate?

The Downside of Auto-Assignment

- New Owner becomes liable for the Old Owner's
 - Plans of Correction
 - Health and Safety Standards
 - Ownership and Financial Disclosure Requirements
 - Compliance with Civil Rights Requirements
- CMS asserts
 - New Owner liable for all Medicare sanctions and penalties
 - Except for “fraud” by prior owner—unless corporate fraud & stock deal
- Courts have held:
 - Medicare Overpayments of Old Owner—Vernon Home Health & Triad
 - CMP of Old Owner—Deerbrook Pavilion (8th Cir.) & Loess Nursing Home
- Settlements:
 - St. Francis (2004): Settled \$9.5 million based upon billing & documentation errors found by the purchaser and self-reported
 - Fresenius (2000): Settled \$468 regarding lab billing problems associated with NMC, which Fresenius acquired through merger

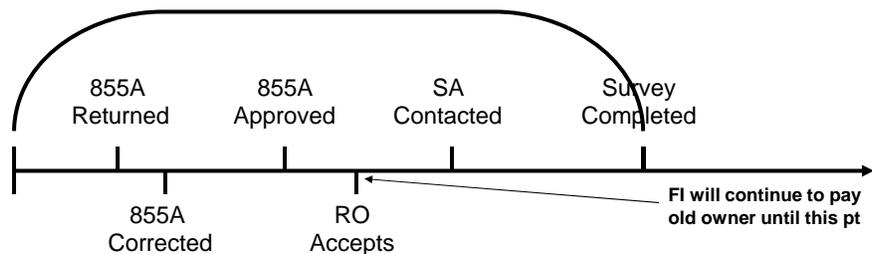
Can I Avoid Auto-Assignment?

- Yes, but you need to plan ahead.
 - State Operations Manual, Chapter 3, § 3210.5.
 - Refusal must be in writing by the new owner and forwarded to the Regional Office at least 45 days prior to the CHOW date
 - Suggests that can be done post-closing
 - From an enrollment perspective, the old owner voluntarily terminates as of the closing and the new owner enroll as an initial enrollment
 - Earliest date of enrollment of new owner: date that the RO determines all Federal requirements are satisfied
 - Enroll with the FI (855)
 - Undergo OCR clearance
 - Initial survey
- Impact of Accreditation

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The Benefit of Auto-Assignment

- New Owner becomes eligible for Medicare payment upon the closing of the CHOW event—payment delay
- If New Owner refuses automatic assignment, New Owner will typically not become eligible for Medicare reimbursement until after a survey



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Finding a Balance

- Can you approximate the overall risk in due diligence?
 - Surveys, denied claims, recoupment and set-offs, documentation review, previously filed cost settlements, etc.
- Can you allocate risk via the Purchase Agreement?
 - Escrow, indemnification, etc.
- Can you coordinate with CMS RO, FI, and SA to reduce the amount of time for initial survey?
- Can you withstand the lost revenue?
- My experience is that most parties end up taking automatic assignment.

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The Consequences of a CHOW

Final Cost Report

- Per PRM-I § 1502, Old owner must file a final cost report within 45 days of termination date
- Per PRM-II § 104, cost reports are due no later than five months following the effective date of termination of a provider agreement or change of ownership. These changes supersede the PRM-I § 1502 guidelines.

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Final Cost Report

- Terminating date must be consistent on 855 and cost report
- Costs to consider:
 - Gains/losses on disposals
 - Depreciation
 - Start-up and organizational costs
 - Self Insurance
 - Administrative costs post provider termination
 - Medicare Bad Debts (Kindred vs. WPS)
- Terminating cost report will not be tentatively settled

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New Owner Cost Report

- New owner selects reporting year end
 - Can file on no less than 1 month, no more than 13 months of data
- Cost report due five months after reporting year end
- Costs to consider:
 - Depreciable assets
 - Start-up and organization costs that were purchased from previous owner and unamortized
- Can generally change prior statistic elections, however must notify FI/MAC prior to effect
- Assignment of FI/MAC

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Payment Issues Associated with CHOW

- Medicare will continue to pay the old owner until the RO approves the CHOW (i.e., tie-in notice)
- This will typically be several weeks (months) after the closing date so that the parties need to make determinations as to AR (reassignment issues)
- Will not typically redirect payments during processing of CHOW
- The regulations provide for payment for capital and related costs of inpatient hospital services, including outlier payments, are made to the legal owner on the date of discharge.
 - Be aware of the transfer/discharge issue relevant to straddle patients
- Other payments for cost-reimbursed capital payments, direct medical education, certain anesthesia services, organ acquisitions and bad debt are made to the owner of the provider at the time the service is provided.

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Is it a CHOW for reimbursement purposes?

- Keep in mind: This is a separate determination than the certification determination.
- For most CHOWs, this is less of an issue today than in the past.
- However, even today, CHOWs can have unintended consequences on payment/reimbursement so need to consider the issues.
- Also, need to look at the reimbursement effect on both the seller and the new owner.

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Payment Implications of CHOWs

Avoiding Surprises in the CHOW Context

Payment Implications of CHOWs

- Merger/Acquisitions & Consolidations may impact the following payments to Hospitals:
 - Direct GME (note change in treatment as of 10-1-06)
 - Indirect Medical Education Adjustment
 - DSH
 - Capital PPS
 - Geographic Reclassification
- In addition, if payment is in transition, a CHOW may speed up the transition.

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Avoiding Surprises in CHOWs

- Excluded Units (IPF and IRFs)
 - Can only change status to excluded/increase square footage or number of beds at beginning of cost reporting period
 - Revised Aug. 5, 2011. Can now expand bed size or square footage at any time during the cost reporting period.
 - Can only have one of each type of excluded unit

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