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# Medicare Provider Agreement Assignment Following Change of Ownership: Evaluating Automatic Assignment vs. Rejection

Identifying When a CHOW Occurs, Navigating Medicare Rules, Weighing Benefits  
and Risks for Buyers and Sellers

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TUESDAY, SEPTEMBER 8, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

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September 8, 2020

## Change of Ownership:

- Overview of Healthcare Transactions
- Implications for Skilled Nursing Facilities

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Presented by Hedy Rubinger, Esq.

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# Overview: What constitutes a CHOW?

- Structure of transaction
  - Change of control v. change of operator
  - Asset sale v. Stock transfer
  - Mergers
  - Other transactions
- Medicare
- State Licensure
- Certificate of Need
- Medicaid

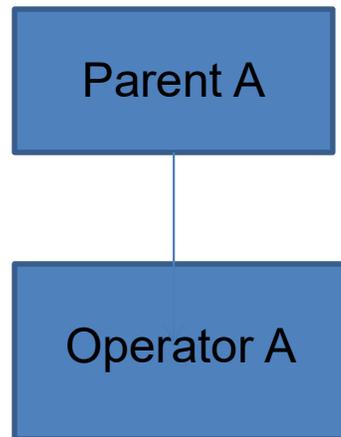
# What constitutes a CHOW?

- Definitions of a CHOW do not always contemplate certain common transactions (e.g., internal reorganizations, real estate sales, stock sales of distant parent)
- Regulatory focus is often on the actual operating entity
  - If that entity (i.e., the entity that holds the license and provider numbers) is changing, then there most likely will be a full CHOW
  - If the transaction is removed from the operating level, certain agencies may not require full CHOW filings and may only require certain abbreviated filings, or no filings at all

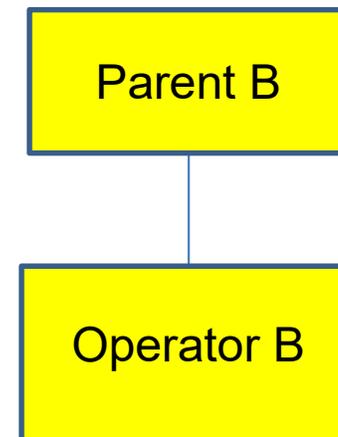
# Diagram #1: What constitutes a CHOW?

- Change in operator (Traditional CHOW)

*Before*



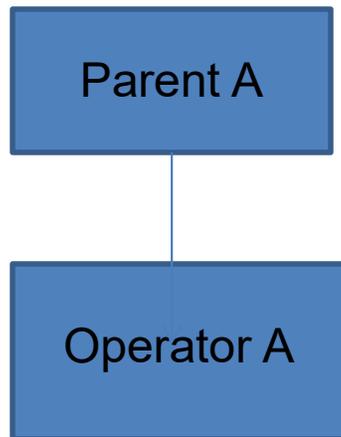
*After*



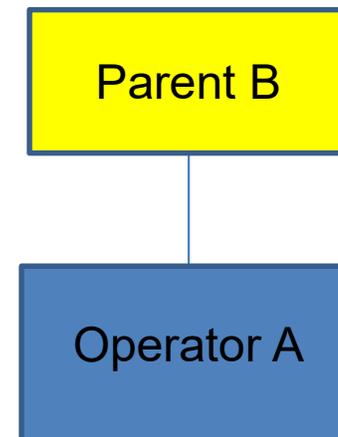
# Diagram #2: What constitutes a CHOW?

- Change in immediate parent (often considered a CHOW)

*Before*

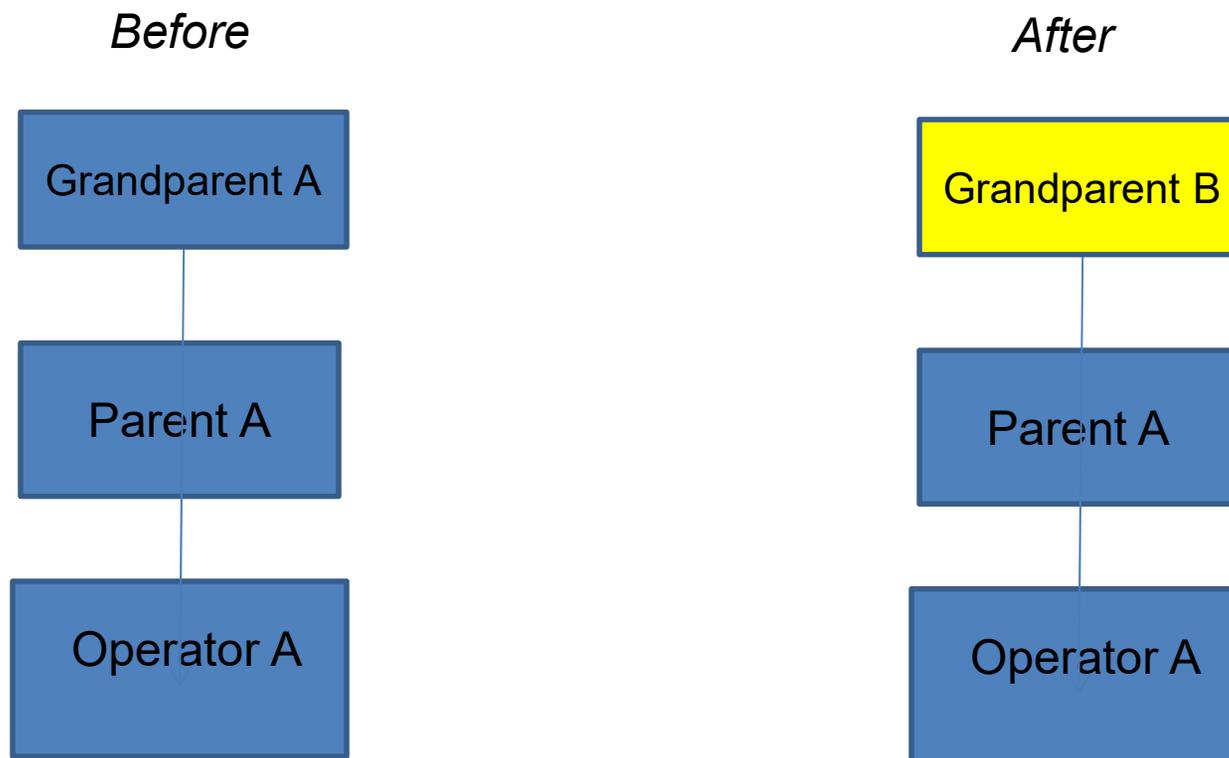


*After*



# Diagram #3: What constitutes a CHOW?

- Change in grandparent (sometimes considered a CHOW)



# What constitutes a CHOW for Medicare purposes?

## (a) *What constitutes change of ownership—*

- (1) *Partnership*. In the case of a partnership, the removal, addition, or substitution of a partner, unless the partners expressly agree otherwise, as permitted by applicable State law, constitutes change of ownership.
- (2) *Unincorporated sole proprietorship*. Transfer of title and property to another party constitutes change of ownership.
- (3) *Corporation*. The merger of the provider corporation into another corporation, or the consolidation of two or more corporations, resulting in the creation of a new corporation constitutes change of ownership.  
**Transfer of corporate stock or the merger of another corporation into the provider corporation does not constitute change of ownership.**
- (4) *Leasing*. The lease of all or part of a provider facility constitutes change of ownership of the leased portion. 42 CFR 489.18

# What constitutes a CHOW from a state perspective?

- State licensure, CON, and Medicaid agencies vary in their positions with respect to whether a transaction constitutes a CHOW and whether any filings are required for various transactions
  - State licensure agencies typically look to whether there is a change in the entity or individuals that control the operations
  - Medicaid agencies often defer to whether there is a change in Tax ID or NPI
  - Certificate of Need agencies vary, and may defer to licensure in their determination

# Skilled Nursing Facilities: Medicare CHOW Process

## CHOW Process

- New Owner/Purchaser must submit a “buyer” CMS-855A no later than 30 days post-closing (can be submitted pre-closing)
- Former Owner/Buyer must submit a “seller” CMS-855A no later than 30 days post-closing.
- The Bill of Sale or equivalent transaction document is required to complete processing
- Medicare Administrative Contractor will make a recommendation to the Regional Office, which may be done through the state survey agency.
- State Certification – must submit certification materials for providers and certified suppliers and prepare for potential compliance surveys
- Once certification is complete, CMS will provide tie-in notice indicating New Owner/Purchaser is enrolled as a Medicare provider

# Skilled Nursing Facilities: Medicare Change of Information Process

- A CMS-855A change of information filing must be submitted no later than 90 days following the change
  - Changes to the authorized or delegated officials must be submitted within 30 days
  - The provider should receive a letter from the MAC confirming that PECOS has been updated to reflect the change of information

# Skilled Nursing Facilities: Medicare 855-A

- Enrollment Initiatives Under the Affordable Care Act
  - Overhaul of CMS-855A enrollment form
    - Expanded Ownership Interest and/or Managerial Control Information – Section 5 (organizations) and Section 6 (individuals)
      - Disclosure of lenders, trusts, holding companies
      - Organizational structure diagram
      - Identification of management entity
      - Individual owners' titles and birth places
      - Percentage of ownership
      - Identification of holding companies
    - Permission for MAC to request documents not listed on the 855

# Skilled Nursing Facilities: What constitutes a CHOW for State licensure purposes?

- CHOW analysis and filing requirements vary state by state.
- **Colorado:** “The Department shall consider the following criteria in determining whether there is a change of ownership of a health care entity that requires a new license: . . .
  - (D) Limited Liability Companies:
    - (1) The transfer of at least 50 percent of the direct or indirect ownership interest in the company shall be considered a change of ownership.
    - (2) The termination or dissolution of the company and the conversion thereof into any other entity shall be considered a change of ownership if the conversion also includes a transfer of at least 50 percent of the direct or indirect ownership to one or more new owners.
    - (3) Change of ownership does not include transfers of ownership interest between existing members if the transaction does not involve the acquisition of ownership interest by a new member. For the purposes of this subsection, "member" means a person or entity with an ownership interest in the limited liability company.” 6 CCR 1011-1, Chapter II, Part 2.7.3.
  - A change of control typically requires an abbreviated filing.

# Skilled Nursing Facilities: What constitutes a CHOW for State licensure purposes?

- **Pennsylvania:** “(a) A health care facility shall notify the Department in writing at least 30 days prior to transfer involving 5% or more of the stock or equity of the health care facility. (b) A health care facility shall notify the Department in writing at least 30 days prior to a change in ownership or a change in the form of ownership or name of the facility. A change of ownership shall mean any transfer of the controlling interest in a health care facility. (c) A health care facility shall notify the Department in writing within 30 days after a change of management of a health care facility. A change in management occurs when the person responsible for the day to day operation of the health care facility changes.” 28 Pa. Code § 51.4
  - The agency reviews transactions on a case by case basis, which may require an initial filing detailing the transaction (10 questions).

# Skilled Nursing Facilities: What constitutes a CHOW for State licensure purposes?

- **Maryland:** “Transfer or Assignment of License. If the sale, transfer, assignment, or lease of a facility causes a change in the person or persons who control or operate the facility, the facility shall be considered a "new facility" and the licensee shall conform to all regulations applicable at the time of transfer of operations. The transfer of any stock which results in a change of the person or persons who control the facility, or a 25 percent or greater change in any form of ownership interest, constitutes a sale.” COMAR 10.07.02.03B(5)
  - The licensure agency typically considers only a change of the operator to be a CHOW.

# Skilled Nursing Facilities: What constitutes a CHOW for State Medicaid purposes?

## Medicaid Enrollment

- States have varying approaches with respect to Medicaid enrollment
  - Some look to Medicare or other state agencies for direction with respect to CHOWs
- If a CHOW, must file Enrollment Application with state Medicaid agency (or state's contracted entity (e.g., ACS))
- Some states require providers to be enrolled with Medicare in order to participate in Medicaid
- Some states impose successor liability whether or not providers choose to accept or reject the provider agreement

# Skilled Nursing Facilities: What constitutes a CHOW for State Medicaid purposes?

- **Massachusetts:** If there is a change in indirect ownership, without a change in NPI, EIN, etc., an updated ownership disclosure is required following the transaction.
- **New Jersey:** If licensure considers a transaction to be a change of ownership (even though no change in operator, NPI, EIN, etc.), Medicaid typically requires new enrollment applications.

# Skilled Nursing Facilities: CON CHOW Process

## Certificate of Need (CON)

- Notice and filing requirements vary among states with CON laws
- Some states require simple notification which may entail minimal review
- Others may have more detailed notice requirements, possibly including public notice requirements, and detailed application review

# Skilled Nursing Facilities: What Constitutes a CHOW for CON Purposes?

- **West Virginia:** “Acquire a Health Care Facility’ means to obtain by purchase, donation, lease, stock transfer or comparable arrangement a health care facility’s assets used in the provision of health services or a majority of stock, including the transfer of a health care facility from a subsidiary corporation to its parent corporation or vice versa or including a change or transfer of the licensee of the health care facility.” See W. Va. Code St. R. § 65-32-2.1
- **Georgia:** “Any person who acquires a health care facility [including a nursing home] by stock or asset purchase, merger, consolidation, or other lawful means shall notify the [Department of Community Health] of such acquisition, the date thereof, and the name and address of the acquiring person.” See O.C.G.A. § 31-6-40.1(a)

# Skilled Nursing Facilities: Other CHOW Requirements

- **Other facility-specific permits and authorizations may be required, including, but not limited to:**
  - Food Service
  - Pharmacy Permits
  - Accreditation
  - Certificate of Occupancy
  - General business license
  - Fictitious name registration
  - Beautician/barber permit
  - Radioactive materials permit
  - Solid waste handling permit
  - Passenger elevator operating permits
  - Boiler permits

## Skilled Nursing Facilities: CHOW Implications if Landlord Must Terminate Relationship With Operator

- Landlord cannot bring in a new Operator without regulatory approval
- If Operator refuses to vacate, a court order may be necessary for regulators to approve replacement Operator
- Regulators may expedite review process so that resident care is not impacted
- Exiting Operator Cost Reports
- Transaction documents evidencing transfer

# Skilled Nursing Facilities: CHOW Implications for Internal Reorganizations

## Internal Reorganizations

- Example – presuming that the operating entity is Corp A, its parent is Corp B, the grandparent is Corp C, and the great-grandparent is Corp D, which is owned by individuals, and both Corp A and Corp B are transferred to a related entity owned by Corp D, regulators tend to view this as not constituting a CHOW, as the direct parent of the operating entity is not changing
- Nonetheless, because certain previously disclosed information is changing, states may require an update filing to its application, most likely the submission of a new ownership disclosure

# Skilled Nursing Facilities: CHOW Implications for Sale of Real Estate

## Sale of Real Estate

- Common for operations and real estate to be held by unrelated entities
- In the event of a sale of the real estate (i.e., bricks and mortar), there may be filing requirements.
- Usually the state CON agency is the agency most concerned with sale of real estate and may consider it a CHOW under the CON regulations
  - CON is often tied to the land, and the owner of the real estate may hold the CON and leases the right to the property as well as the right to operate to the operator
  - Often formal notification / request for exemption from CON review will be required
- State licensure often views these transactions as not triggering CHOWs. However, they may require formal notification and submission of transaction documents (i.e., bill of sale, new lease agreements)
- Medicare and Medicaid typically require little to no action under these circumstances

# Skilled Nursing Facilities: CHOW Implications for Change of Manager

## Management Agreements

- Some states explicitly regulate the management entity for the facility and subject this entity to the same review process as the operating entity
- Accordingly, when such management entity changes, some states may require CHOW filings similar to that seen for operating entities
- If Operator relinquishes all operational authority, change in manager could trigger a CHOW
- For example: If the governing body of a health care facility does not retain the "immediate authority and jurisdiction" to do the following, Rhode Island considers there to be a "change in operator"—
  - Hire or fire the chief executive officer of the health care facility;
  - Maintain and control the books and records of the health care facility;
  - Dispose of assets and incur liabilities on behalf of the health care facility;
  - Adopt and enforce policies regarding operation of the health care facility.



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## Change of Ownership: Home Health Agencies and Hospice Providers

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Presented by Lanchi Bombalier, Esq.

*Sponsored by the Legal Publishing Group of Strafford*

# HHH & Hospice: Overview

- **Structuring the Transaction**
  - To CHOW or Not to CHOW
- **State-specific requirements**
  - Licensure
  - Certificate of Need
  - Medicaid
- **Medicare rules and considerations**
  - 36 Month Rule for Home Health Agencies
  - Conditions of Participation

# HHA & Hospice: To CHOW or Not to CHOW

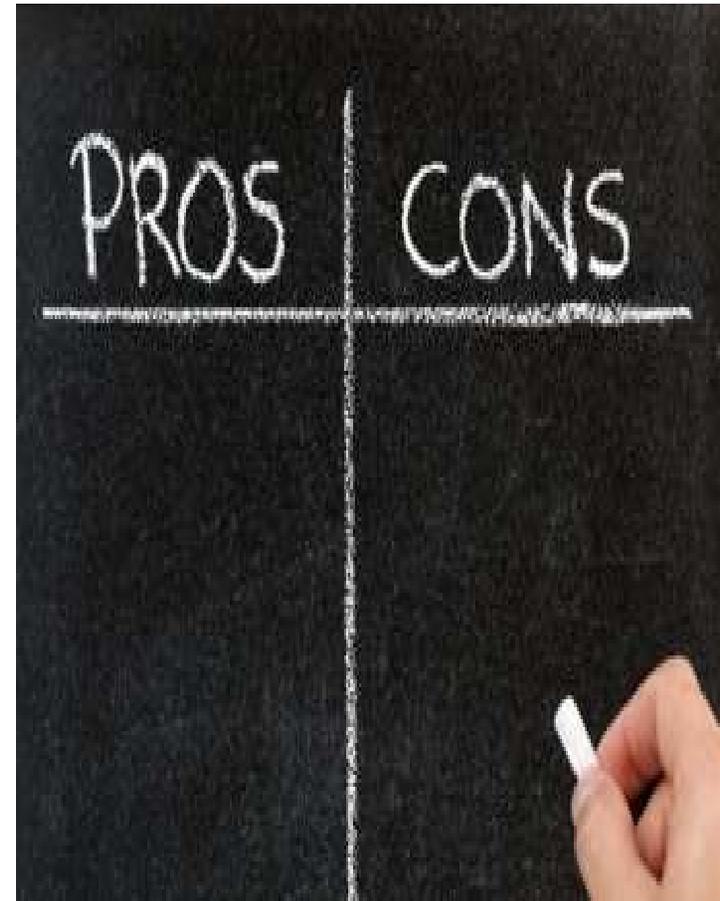
- **Deal Structure will impact timing and requirements for regulatory filings**
  - Change of Ownership vs. Change of Control
  - True asset purchase (for existing providers)
- **Consider short-term/long-term goals**
  - Consolidation of existing providers
  - Adding branch or multiple location to existing provider



# HHA & Hospice: To CHOW or Not to CHOW

## ■ Other considerations

- Successor liability
- Multiple vs. single provider numbers
- Other contracts
  - Vendors
  - SNF/NF/ALF
  - Commercial payors



# HHH & Hospice: State Licensure

- **State licensure requirements vary widely**
  - Certain states license each location separately
  - Proximity of locations (supervision and administrative control)
  - Service area requirements (i.e., contiguous counties)
  - Limitations on the number of IPUs per licensee (hospice)

# HHA & Hospice: Certificate of Need

- **Check for CON “outliers”**
  - Formal (written) exemption from CON
  - In-home vs. inpatient programs (hospice)
  - Timing of CHOW in relation to date of initial licensure

- **Who “holds” the CON?**



# HHA & Hospice: Medicaid

- **42 C.F.R. 455.104** - ownership and control disclosures are due “[w]ithin 35 days after any change in ownership of the disclosing entity.”
  - State Medicaid program may adopt a different (earlier) time deadline
- **Who needs to be notified?**
  - Fiscal agent/intermediary
  - State agency (i.e., community services contracts)
  - Medicaid Managed Care Organizations

# HHA: Navigating the Medicare 36-Month Rule

- **42 C.F.R. 424.550(b)(1)**
  - To prevent “flipping” of HHA provider agreements
  - To ensure that “new owners” can satisfy the Medicare CoPs
- **Background History**
  - Initial introduction in 2010 with subsequent revisions
  - Final Rule went into effect on January 1, 2011
  - CMS maintains that it will continue to monitor the rule

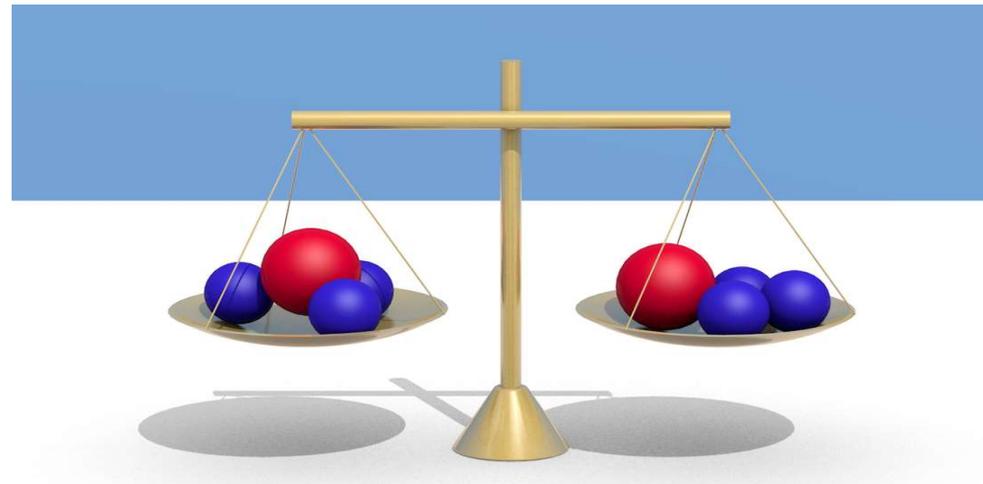
# HHA: “Change in Majority Ownership”

- **What Constitutes a “Change in Majority Ownership”?**
  - An individual or organization acquires more than a 50 percent direct ownership interest
  - Includes asset sale, stock transfer, merger, or consolidation
  - CMS considers the cumulative effect of transactions within the applicable 36-month period

# HHA: Navigating the 36-Month Rule

- “More than 50%” means:

*If a 50 percent owner were to acquire an additional .001 percent ownership stake, he or she becomes a majority owner and the transaction involves a change in majority ownership.*



# HHA: Exceptions to the 36-Month Rule

## ■ **Exceptions:**

- “Indirect” ownership changes
- 2 consecutive years of full cost reports (low utilization or no utilization cost reports do not qualify)
- Parent company undergoes an internal corporate restructuring (i.e., merger or consolidation)
- Owners remain the same and existing business structure is changing (e.g., corporation to a limited liability company)
- Individual owner of HHA dies

# HHA: Planning for the 36-Month Rule

- **Planning for HHA Transactions**
  - Assess short and long-term goals from the outset
  - Consider organizational structure (current and proposed)
  - Address timing and risk in the transactional documents



# HHA & Hospice: Medicare CoPs

- **Ensure CoPs are met at every “step” in multi-step transactions**
  - Hospice: Medicare provider must employ key hospice personnel to provide “core services”
- **Ensure CoPs are met at all times during corporate integration**
  - “Drop sites” or charting stations may be allowed or regulated under state or local law

September 8, 2020

## Change of Ownership:

- Rejecting a Seller's Medicare Provider Agreement
- COVID-19 CHOW implications
- CHOW Best Practices

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Presented by Jessica Grozine, Esq.

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# Analyzing Reimbursement and Cash Flow Implications: Medicare Automatic Assignment

- Buyer must affirmatively reject automatic assignment to avoid it.
- Unless the automatic assignment of the Medicare agreement is rejected, buyer is responsible for successor liability.
- Most buyers accept automatic assignment in order to avoid gap in Medicare reimbursement.

# Rejecting a Medicare Provider Agreement

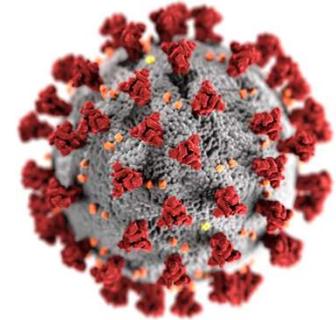
- New owners have the option to reject automatic assignment, resulting in the termination of the prior Medicare provider agreement.
- If the new owner rejects assignment, the new provider is treated as an initial applicant and will experience a period of time without Medicare payments.
- Generally, rejecting assignment precludes the new owner from having successor liability for Medicare overpayments.
- Purchaser must affirmatively reject the assignment of the provider agreement by notifying the Regional Office in writing at least 45 days in advance of the CHOW's effective date.

# September 2013 CMS Memorandum

- On September 6, 2013, CMS issued a policy memorandum to State Survey Agency (SA) Directors regarding the CHOW process and the assignment of Medicare provider agreements to new owners. The memorandum emphasized policies meant to encourage automatic assignment of the prior Medicare agreement.
- CMS focused on survey timing in particular, stating that if an initial survey of an applicant that rejected assignment is conducted shortly after the CHOW date, it raises significant doubts that the survey was unannounced.
- CMS also stated that SAs must not conduct initial surveys until they are able to complete their higher priority workload. Also, CMS clarified that the last day of an initial Medicare survey conducted by the SA or accreditation organization will not necessarily be the effective date of the new Medicare provider agreement.

# COVID-19 CHOW Implications

- Waiver of certain screening requirements:



- Application Fee (to the extent applicable)
- Criminal background checks associated with fingerprint-based criminal background checks (FCBC) (to the extent applicable)
- Site visits (to the extent applicable)
- Expedite new applications from providers
  - All clean web applications will be processed within 7 business days and all clean paper applications in 14 business days

# CHOW Best Practices

- Consider a variety of structures in planning an acquisition or sale
- Contact state agencies to discuss implications of each transaction and the filing requirements
- Consider liabilities that may be assumed in each transaction and whether they can or should be avoided.
- Be mindful of deadlines for reporting CHOWs and changes of information
- Understand cash flow implications of transaction

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