

California Updates Proposed Regulations for Health Care Entity Pre-Transaction Notices

Insights

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On October 9, 2023, the [California Office of Health Care Affordability](#) ("OHCA") released revised proposed regulations (the "[Revised Regulations](#)"), which require health care entities to notify OHCA 90 days before entering into certain material transactions involving a health care entity. You can find the Revised Regulations [here](#). **Public comments to the Revised Regulations are being accepted by OHCA until 5:00 PM PST on Tuesday, October 17, 2023.**

The Revised Regulations, which relate to implementation of part of the [California Health Care Quality and Affordability Act](#), address some of the public comments to the regulations initially proposed by OHCA on July 31, 2023 (the "**Initial Regulations**"). You can find our client alert analyzing the Initial Regulations [here](#).

The Revised Regulations make a number of changes to the Initial Regulations, including to the types of entities that must give notice to OHCA, the types of transactions that require notice, and the obligations of health care entities required to submit to OHCA.

Here are some of the key changes made by the Revised Regulations:

- **Changes to the Definition of a "Health Care Entity."** The Revised Regulations make several changes to the definition of a "health care entity" that is subject to OHCA's notice and review process. In particular, OHCA removed language expressly stating that a management service organization ("**MSO**") is a "health care entity." Additionally, the Initial Regulations broadly included all affiliates, subsidiaries, or other entities that control, govern, or are financially responsible for a health care entity (or that are subject to a health care entity's control, governance, or financial control) within the definition of "health care entity." The Revised Regulations expand the definition of "health care entity" to expressly include parent entities, but clarifies that if the parent, affiliate, subsidiary or other entity does not "perform the functions of a health care entity," they would not be subject to the notice and review process. The phrase "functions of a health care entity," however, is not further defined by the Revised Regulations, and therefore, it is possible that certain MSOs could still be viewed as a health care entity subject to the notice and review process.
- **Changes to the Types of Transactions That Require Notice .** The Revised Regulations modify a number of the types of transactions that

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constitute a material change transaction subject to OHCA notice and review. For example, the Revised Regulations clarify that material change transaction dollar thresholds are based largely on a health care entity's California-derived revenue or assets (as opposed to revenue or assets derived from operations in other states), and narrows types of changes in control, responsibility, or governance of a health care entity requiring notice to OHCA. Additionally, the Revised Regulations modify the standard for material change transactions involving parties that have transacted with one another in the past 10 years, but also adds transactions involving the acquisition of a health care entity, where the acquiring entity has consummated similar transactions in the last 10 years with other health care entities that provide the same or related health care services as the acquired entity. Notably, the Revised Regulations also exempt transactions in the "usual and regular course of business of the health care entity, meaning those that are typical in the day-to-day operations of a health care entity." However, it's not fully clear what types of transactions would be in the usual and regular course of business, or whether a transaction could be both in the usual and regular course of business, but otherwise fall into one of the categories constituting a material change transaction, and whether notice to OHCA is required in such instance.

- **Notice of a Transaction Must be 90 Days Before the Closing Date** : The Revised Regulations clarify that a health care entity must submit notice to OHCA at least 90 days before the closing date of a material change transaction (for those transactions expected to close on or after April 1, 2024).
- **Expedited Review**: Submitters would now be permitted to request an expedited review by OHCA to notify submitters whether it will conduct a more detailed, comprehensive cost and market review of the noticed transaction. To qualify for expedited review, the submitter must demonstrate that (1) either of the following conditions exist: (a) there is a grave risk of immediate business failure and the substantial likelihood any party to the transaction (or entity affected by the transaction) will have to file for bankruptcy absent waiver of a cost and market review, and that the transaction is necessary to ensure continued health care access in relevant markets; or (b) there is a significant reduction in the provision of critical health care services within a geographic region or regions, and (2) the material change transaction is immediately required to mitigate such condition(s). However, the Revised Regulations give no timeline by which OHCA must grant or deny expedited review, or if granted, no timeframe by which OHCA must complete its expedited review.
- **Additional Factors That Could Trigger a Cost and Market Impact Review** : The Revised Regulations also add additional factors for which a noticed transaction will trigger a more comprehensive cost and market review by OHCA. These factors include transactions that "may lessen competition for workers or may negatively impact the labor market." Additionally, the Revised Regulations make clear that OHCA may conduct a cost and market review where the noticed transaction is part of a series of similar transactions, furthers a trend toward consolidation, or where the transaction may entrench or extend a health care entity's dominant market position, including into related markets through vertical or cross-market mergers.

In addition to accepting comments on the Revised Regulations until 5:00 PM PST on Tuesday, October 17, 2023, OHCA has indicated that it plans to submit the final proposed regulations to the Office of Administrative Law ("OAL") by the end of October or early November as part of its emergency regulation process, and that it expects the proposed regulations to be final by the end of November or December. A timeline for finalizing the proposed regulations from OHCA's Board Meeting held on September 19, 2023, can be found [here](#).

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