

California's Office of Health Care Affordability Finalizes Health Care Transaction Notice Regulations

January 12, 2024

New California regulations went live on January 1, 2024, requiring notice in connection with health care transactions, and effectively establishing pre-closing waiting periods of up to 38 weeks. California's Office of Health Care Affordability ("OHCA" or the "Office") has begun its mandate to (i) collect and report data informative to the legislature and the public regarding health care expenditures and cost trends in the state and (ii) develop data-informed policies and enforceable cost targets to improve health care services. After multiple rounds of draft regulations and solicitation of public feedback from interested stakeholders, the California Office of Administrative Law approved [OHCA's regulations](#) (the "final regulations") on December 18, 2023. The final regulations require "health care entities" to notify OHCA of "material change transactions" at least 90 days before closing; OHCA began receiving transaction notices on January 1, 2024, for transactions closing on or after April 1, 2024. Below, we summarize key provisions of the final regulations.

Regulated "Health Care Entities". The final regulations expand the definition of "health care entity" to include the statutorily prescribed "payers," "providers" and "fully integrated delivery systems," as well as pharmacy benefit managers. Further, the definition includes parents, affiliates or subsidiaries that act in California on behalf of a payer and (i) control, govern or are financially responsible for the health care entity, (ii) are subject to the control, governance, or financial control of the health care entity or (iii) in the case of a subsidiary, are a subsidiary acting on behalf of another subsidiary—an important departure from the prior draft emergency regulations, which captured parents, affiliates, subsidiaries, and *any other entities* that act on behalf of a payer or a provider. Notably, following objections from several commentators, OHCA removed management services organizations ("MSOs") from the final definition of "health care entity." In the December 19, 2023, [Health Care Affordability Board Meeting](#), Assistant Deputy Director Sheila Tatayon confirmed that while MSOs are not

considered “health care entities,” information from such entities may be captured to the extent they are parties to transactions with health care entities that would otherwise trigger notice obligations.

Notice of “Material Change Transactions”. The final regulations implement a two-part test to determine whether a transaction involving a health care entity requires notice to OHCA. First, the health care entity must meet a materiality threshold, defined as a health care entity that:

- has annual revenue or controls California assets of at least \$25 million;
- has annual revenue or controls California assets of at least \$10 million and is a party to a transaction with another health care entity with at least \$25 million in revenue or California assets; or
- is located in a designated primary care health professional shortage area in California.¹

Second, the transaction must meet a materiality threshold, defined as a transaction that:

- has a fair market value of \$25M or more;
- is likely to increase annual California-derived revenue of a health care entity party to the transaction by at least \$10M or 20% of annual California-derived revenue;
- will result in an entity contracting with payers on behalf of consolidated providers and is likely to increase annual California-derived revenue of any providers in the transaction by at least \$10M or 20% of annual California-derived revenue;
- involves the sale, transfer or other disposition of 25% or more of the total California assets of the submitting health care entity;
- involves a transfer of 25% or more voting power or governance of the submitting health care entity;

¹ The regulations refer to the definition of “health professional shortage area” (“HPSA”) at 42 C.F.R. 5.1, *et seq.*, which areas are determined annually by the Department of Health and Human Services. A current list HPSAs is available [here](#).

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- involves the formation of a new entity for the provision of health care services in California that is projected to have at least \$25M in California-derived annual revenue or transfer the control of \$25M or more California assets;
 - is part of a series of related transactions for the same or related health care services occurring over the past 10 years involving the same or affiliated health care entities; or
 - involves the acquisition of a health care entity by another entity, and the acquiring entity has consummated similar transactions in the last 10 years with entities that provide related health care services.

If both thresholds are met, the submitting health care entity must include with its notice to OHCA (i) detailed information regarding the transaction (e.g., description of the parties and health care services provided, the anticipated impact of the transaction on the provision of health care services), as well as (ii) supporting documentation (e.g., transaction agreements, valuation documents, balance sheets, certified financial statements, organizational charts, documentation related to the mitigation of adverse transaction impacts and, if applicable, a copy of any Hart-Scott-Rodino filing). The notice, submitted information and documentation are generally deemed to be public record unless the Office approves a request for confidential treatment.² If multiple health care entities are a party to the same transaction, each must independently file a notice to OHCA.

Notice and Review Timeline. A health care entity that meets the above criteria must submit notice of the material change transaction to OHCA at least 90 days before the closing of the transaction. Upon receipt of the complete notice, OHCA will review and make an initial determination as to whether to conduct a Cost and Market Impact Review (“CMIR”).

If OHCA does *not* intend to conduct a CMIR, it will provide the submitting health care entity with a written waiver within 45 days; if all health care entities to a transaction receive such a waiver, the transaction may close without further delay.³

² Certain documents are automatically deemed confidential, such as valuation documents, compensation documents, contract rates and marked-confidential versions of stock purchase agreements.

³ OHCA has also implemented an expedited review process in the final regulations, which is generally limited to circumstances where the submitter can demonstrate that it is in financial distress or that the review will cause a potential significant reduction in health

If OHCA *does* intend to conduct a CMIR, the Office will notify the parties within 60 days, and the transaction shall be barred from closing until OHCA's CMIR is finalized. The following timelines apply to the CMIR process:

- **Preliminary Report:** Following OHCA's notice to the parties of its intent to conduct a CMIR, the Office has 90 days to complete its review and issue a preliminary report, with the option to extend this period once by an additional 30 days. (Total: 150-180 days)
- **Public Comment:** Following the issuance of the preliminary report, the parties to the transaction and interested members of the public will have 10 business days to submit written comments concerning the transaction. (Total: 160-190 days)
- **Final Report:** After the close of the comment period, OHCA will have an additional 15 days to issue its final report, which it can extend for good cause. (Total: 175-205 days)
- **Post-Review Closing Prohibition:** After the issuance of the final report, a transaction is barred from closing for an additional 60 days. (Total: 235-265 days)

OHCA reserves the right to toll the above time periods while it has requested and is awaiting additional information from the transacting parties or while the transaction is under review by other regulatory bodies (e.g., state agencies, federal agencies or courts), meaning that while OHCA's review is "capped" at 265 days, it can "pause" the clock on such review for potentially months at a time, without restriction, while it waits for other regulatory bodies to complete their respective reviews of the transaction. Such delays may impose significant costs on transacting parties, which are required to reimburse OHCA for all actual, reasonable and direct costs related to its review.

Key Takeaways. The complexity of filing such notices and the potential lengthy review timeline is likely to impact health care transactions. Moreover, OHCA's decision not to implement a cap on reimbursable expenses the Office is authorized by statute to collect could have an outsized impact on smaller transactions and health care entities. Parties should anticipate significant delays to closing timelines that could potentially chill health care dealmaking in the state and, to an extent, nationwide. In order to prepare for

care services. The final regulations do not provide a clear timeline for the expedited review process.

OHCA's potential review of health care transactions, health care entities and parties contemplating transacting with health care entities should:

- Closely review the final regulations, including the level of detail required when filing a notice, and begin gathering the required documentation in advance of the prescribed timelines to avoid additional requests for information and unnecessary delays to OHCA's review.
- Collaborate with other transacting entities to facilitate the timely collection of the information and documentation needed for a notice, particularly where a transaction contemplates multiple health care entities.
- Ensure deal documents and financing arrangements effectively address potential transaction delays.
- Carefully review any additional clarifying guidance issued by OHCA, particularly as the Office begins to test the limits of the final regulations.

Because the final regulations were implemented through emergency rulemaking, they are effective for a maximum of five years. In that time, OHCA must proceed with the regular rulemaking process to make such regulations permanent; this provides additional opportunities for stakeholders to give feedback to OHCA on the impact of the current iteration of the notice and review process. Given how responsive OHCA was to public feedback in shaping the final regulations, such advocacy will be especially important to further refine OHCA's regulatory review process.

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We will continue to monitor SB 184 notification requirements and related health care transaction oversight developments within California and nationwide. Please do not hesitate to reach out with any questions.

For more information, see our [Debevoise Update from August 19, 2022](#), and our [Debevoise Update from August 29, 2023](#).

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Please do not hesitate to contact us with any questions.



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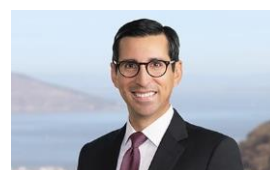
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