Published on *The National Law Review* https://natlawreview.com

OHCA Published Near-Final Draft of Regulations Requiring Notice and Review of Material Healthcare Transactions in 2024

Article By:

Jordan E. Grushkin

Kirstin R. Smith

Kendall Kohlmeyer

In the final days of November, the Office of Health Care Affordability (OHCA) published three updates related to its proposed regulations regarding the review of certain healthcare transactions in California:

1. the finding of emergency, which details OHCA's justification for finding emergency regulations necessary to carry out its statutory obligation to evaluate consolidation and market power via cost and market impact reviews (CMIR) involving certain health care entities (HCEs);
2. the notification of proposed emergency regulatory action, pursuant to the requirement that an adopting agency provides notice at least 5 working days prior to submission of the proposed action to the Office of Administrative Law (OAL); and
3. revised, near-final, text of the proposed regulations, "Material Change Transactions and Pre-Transaction Review."

Our earlier blog articles from August, September, and October track the developments of these regulations as OHCA prepares to publish its final rule. This article summarizes the key tweaks to the proposed regulations since the last version published in October.

Notable Revisions in this Draft

The most noteworthy revisions clarify which parties and transactions fall within the scope of the CMIR process.

- ***Scope of Regulated Parties***

OHCA subtly modified language in several sections of the proposed regulations, seemingly to address critiques from some stakeholders that earlier drafts contained ambiguity related to the scope of regulated entities. For example, in the previous draft of the regulations, HCEs included affiliates of other HCEs that "perform the functions of a health care entity" – that language was replaced by "act as an agent in California on behalf of a payer, provider, fully integrated delivery system, or pharmacy benefit manager". Additionally, HCEs with $10 million in California-derived assets or revenue (but less than $25 million) are only required to file notice pursuant to the regulations if they are an official "party to a transaction" with a $25 million HCE, as opposed to just being "involved in" such a transaction.

OHCA also clarified the definition of revenue for purposes of determining whether the $25 million or $10 million threshold has been met. Revenue is now defined to mean the total average annual California-derived revenue received for all health care services by the submitter and all affiliates over the three most recent fiscal years, as reported to the applicable regulating agencies for plans, health insurers, hospitals, long-term care

facilities, and risk-bearing organizations. Under the definition, revenue for pharmacy benefit managers and providers or provider organizations not listed is determined based on the payment received from services “as it was generated or occurred in California rather than when revenue is booked, accrued, or taxed”.

- ***Scope of Transactions***

Notably, the draft regulations narrowed what constitutes a “material change transaction” to no longer include transactions that solely involve change to the form of ownership of an HCE, such as a change from physician-owned to private equity-owned.

In a similar vein, the transfer of 25% of the California-derived assets of any HCE in a transaction would have triggered the need to file in the previous draft of the regulations. This new draft narrows the language to require filing if the transaction involves the transfer of 25% or more of the total California assets of the “submitters(s).”

Additionally, OHCA removed from the list of material change transactions those transactions that involve an HCE “joining, merging, or affiliating with another [HCE], affiliation, partnership, joint venture, or parent corporation related to the provision of health care services where any [HCE] has at least $10 million in annual California-derived revenue”.

- ***Timing Considerations***

OHCA appears to have made small but important tweaks that could impact the timeline of OHCA’s review and the ability of entities to consummate transactions.

Under Timing of Review of Notice, OHCA added a provision that if

it elects not to conduct a CMIR, OHCA will notify submitters within 45 days after the complete notice was filed.

After OHCA decides to complete a CMIR for a transaction, the regulations provide that it will complete the CMIR within 90 days of its decision to conduct the review. However, it may extend the 90-period if it needs additional time. Earlier drafts of the rule provided for up to one 45-day extension.

In this revision, OHCA shortened the length of time it may extend the CMIR review period to 30 days. In addition, this version of the regulations provides that OHCA will issue its final report within 15 days after the comment period closes, whereas the last draft allowed 30 days. This timeline is still subject to extension if good cause is shown.

Looking Ahead

If the OAL approves OHCA's submission of the proposed rules, these regulations will become effective January 1, 2024. The emergency regulations will remain in effect for up to five years while OHCA considers establishing permanent rules to continue after the emergency period expires. We will provide further updates when OAL's decision drops and the long-anticipated final regulations are published.

Copyright © 2024, Sheppard Mullin Richter & Hampton LLP.

National Law Review, Volumess XIII, Number 340

Source URL:https://natlawreview.com/article/ohca-published-near-final-draft-regulations-requiring-notice-and-review-material