

Approved: California Regulations for the Pre-Closing Review of Health Care Transactions Finalized

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California's new Office of Health Care Affordability (OHCA) is set to start pre-closing regulatory review of certain health care transactions on **January 1, 2024**. As further explained in our previous [post](#), subject to certain exceptions, a broad range of health care entities (collectively, Health Care Entities) soon will be subject to potential pre-closing transaction review. On December 8, 2023, OHCA submitted its cost and market impact review (CMIR) notice and review process regulations to the California Office of Administrative Law (OAL) for approval. The regulations submitted by OHCA are available [here](#). On December 18, 2023, the OAL published the final emergency regulations, containing several notable changes to the regulations submitted by OHCA for approval. The final regulations (CMIR Regulations), which went into effect on December 18, 2023, are available [here](#). Currently, it is anticipated that OHCA's e-Filing Portal will be ready to accept notice filings on January 1, 2024.

Do the CMIR Regulations Include Changes to the Notice Filing Requirements?

Yes, the CMIR Regulations include changes that are relevant to the multi-step analysis set forth below, which can be used as a helpful start in determining whether notice is required for a particular health care transaction. We describe the most impactful changes below.

Step 1: What Transactions are Potentially Subject to Notice and Review Under the CMIR Regulations?

Certain health care transactions closing on or after April 1, 2024, are potentially subject to 90 days' prior written notice to OHCA and OHCA CMIR (pre-closing review) as described in our previous [post](#). Notably, the CMIR Regulations made clarifying changes to the definition of "transaction." During the California Department of Health Care Access and Information (HCAI) Health Care Affordability Board Meeting held on December 19, 2023 (HCAI Board Meeting), the Assistant Deputy Director explained that the definition of "transaction" was amended to clarify that (a) transactions are between a Health Care Entity and one or more entities, (b) out-of-state transactions may be subject to filing

requirements, and (c) OHCA will review transactions that transfer a material amount of control, responsibility, or governance of the assets or operations of the Health Care Entity to one or more entities. The CMIR Regulations define a “transaction” as including “mergers, acquisitions, affiliations, and agreements impacting the provision of health care services in California that involve a transfer (sale, lease, exchange, option, encumbrance, conveyance, or disposition) of assets or a transfer of control, responsibility, or governance of the assets or operations, in whole or in part, of any health care entity to one or more entities.”

The types of transactions that are excluded from notice and CMIR requirements remain the same, and include:

- collaboration on clinical trials, graduate medical education programs, health professions training programs, health sciences training programs, or other education and research programs;
- 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 the Health Care Entity; and
- situations in which the Health Care Entity directly, or indirectly through one or more intermediaries, already controls, is controlled by, or is under common control with, all other parties to the transaction, such as a corporate restructuring.

Step 2: What Entities May Be Subject to the CMIR Regulations?

As further discussed in our previous [post](#), the law applies to Health Care Entities, which include certain health care providers and payers. The CMIR Regulations include changes to when parents, affiliates, and subsidiaries of payers and providers are subject to notice. The version of the regulations submitted to the OAL defined Health Care Entities in a way that could capture management services organizations that service health care providers. Under the CMIR Regulations, this is not the case. Health Care Entity is defined to include: any parents, affiliates, or subsidiaries that act in California on behalf of a **payer** and:

- control, govern, or are financially responsible for the Health Care Entity or are subject to the control, governance, or financial control of the Health Care Entity, or
- in the case of a subsidiary, are a subsidiary acting on behalf of another subsidiary.

The key difference in the CMIR Regulations’ definition of Health Care Entity is that it is limited to parents, affiliates, or subsidiaries that act in California on behalf of a payer, whereas the previous version of the regulations included acting on behalf of either a payer or provider, which could have implicated a much broader array of entities, including management service organizations.

Step 3: What Entities are Subject to Notice Requirements?

Health Care Entities that are parties to a transaction are subject to notice requirements under the CMIR Regulations if they meet one or more of the following thresholds:

- annual revenue of at least \$25 million or that owns or controls California assets of at least \$25 million;
- annual revenue of at least \$10 million or that owns or controls California assets of at least \$10 million and is a party to a transaction with any Health Care Entity that meets the above \$25 million threshold; or
- located in a designated primary care health professional shortage area (HPSA) in California.

The CMIR Regulations do not include any changes to the revenue thresholds or what qualifies as revenue, which is generally defined to be 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, but the specifics vary by Health Care Entity type.

The CMIR Regulations removed the mental health HPSA from the HPSA location threshold, but did not make any other changes narrowing its scope.

Step 4: Does the Transaction Itself Require Notice?

Under the CMIR Regulations, the following eight types of transactions are subject to notice requirements:

1. involves the provision of health care services and has a fair market value of at least \$25 million;
2. is more likely than not to increase annual California-derived revenue of any Health Care Entity party by either \$10 million or more or 20% or more of California-derived annual revenue at normal or stabilized levels of utilization or operation;
3. involves the sale, transfer, lease, exchange, option, encumbrance, or other disposition of 25% or more of the total California assets of any Health Care Entity in the transaction;
4. involves a transfer (directly or indirectly) of control, responsibility, or governance of the Health Care Entity in whole or in part (as defined by CMIR Regulations);
5. results in an entity contracting with payers on behalf of consolidated or combined providers and is more likely than not to increase the annual California-derived revenue of any providers in the transaction by either \$10 million or more or 20% or more of annual California-derived revenue at normal or stabilized levels of utilization or operation;
6. involves the formation of a new Health Care Entity, affiliation, partnership, joint venture, or parent corporation for the provision of health care services in California that is projected to have at least \$25 million in annual California-derived revenue at normal or stabilized levels of utilization or operation, or transfers control of California assets related to the provision of health care services valued at \$25 million or more;
7. 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 Health Care Entities or entities affiliated with the same Health Care Entities (which will be analyzed as a single transaction); and
8. involves acquisition of a Health Care Entity by another entity where the acquirer has consummated similar transactions within the past 10 years, with a Health Care Entity that provides the same or related health care services (which will be analyzed as a single transaction).

These transaction categories have not changed from the regulations submitted to the OAL. However, the CMIR Regulations revised the meaning of a transfer of control, which no longer includes a transaction that would result in “the transfer of 25% or more of the governance of the management and policies of at least one Health Care Entity party to the transaction.” The reasoning given at the HCAI Board Meeting for the removal of this provision was that it would be hard to quantify. A transfer of control, responsibility, or governance under the CMIR Regulations only requires notice if the transaction would directly or indirectly:

- result in the transfer of 25% or more of the voting power of the members of the governing body of a Health Care Entity, such as by adding one or more members, substituting one or

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- more members, or through any other type of arrangement, written or oral; or
 - vest voting rights significant enough to constitute a change in control such as supermajority rights, veto rights, and similar provisions even if ownership shares or representation on a governing body are less than 25%.

Have the CMIR Review Factors Changed?

Yes. Health care cost targets, which have not yet been established by OHCA, will not be considered as a factor under the CMIR Regulations. However, it is anticipated that the regulations will be amended once the cost targets are established.

Did the CMIR Regulations Make Any Material Changes to Notice and Review Timelines?

No additional improvements were made to the process timelines. The shortened time periods described in our previous [post](#) have not changed.

Instead, the CMIR Regulations made clarifications relevant to the extension of timelines. Under the CMIR Regulations, tolling of time periods for OHCA's notification to submitters regarding whether a CMIR will be conducted are required during any time period:

- in which OHCA has requested and is awaiting further information from the parties to a material change transaction necessary to complete its review; and
- in which review of the transaction by another state agency, federal regulatory agency, or court may impact OHCA's determination.

Next Steps

A Health Care Entity contemplating closing a transaction on or after April 1, 2024, should review the CMIR Regulations carefully and assess whether a pre-closing notice to OHCA is required.

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