



June 20, 2024

Megan Brubaker
Department of Health Care Access and Information
Office of Health Care Affordability
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Sacramento, CA 95833
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**SUBJECT: Proposed revisions to cost and market impact review regulations
(Material Change Transactions and Pre-Transaction Review, Article 1 of Chapter 11.5
of Division 7 of Title 22, California Code of Regulations)**

Dear Ms. Brubaker:

On behalf of more than 400 hospital and health system members, the California Hospital Association (CHA) thanks the Office of Health Care Affordability (OHCA) for the opportunity to comment on the proposed changes to the cost and market impact review (CMIR) regulations. Hospitals applaud OHCA's proposal to make much-needed changes to the regulation's confidentiality requirements. However, CHA remains concerned that too many transactions would be swept up in OHCA's CMIR review process and CMIR determinations would inappropriately exclude the potential positive impacts of transactions. To fix these and other issues, CHA continues to seek changes outlined in prior comment letters (attached).

Changes to Notice Requirements Are Ambiguous and Overly Broad

Current regulations require a health care entity that is party to a material change transaction to notify OHCA. The proposed revisions add that a health care entity that is a "subject of" such a transaction must similarly file notice, along with a proposed definition for "subject of." However, the proposed definition is imprecise by failing to make clear that a health care entity that is a subject of a transaction is **transferring (or receiving)** assets, control, responsibility, governance, or operations. Instead, the current draft would capture all transactions that "concern" the entity's assets, control, etc. What "concern" means is unclear and would reach beyond OCHA's statutory authority (Health and Safety Code Section 127507), which applies only to transactions that involve an actual transfer/receipt of assets, control, etc.

CHA proposes the following change to section 97435(b) to rectify this overly broad and ambiguous definition:

Being a subject of a transaction means the transaction, as defined in section 97431(p), concerns **the transfer of** a health care entity's assets, control, responsibility, governance, or operations, in whole or in part.

The above change would also serve to prevent OHCA from being swamped with reviewing transactions beyond the scope and intent of the law. This risk was made clear by the first material change transaction notice OHCA received, which involved a short-term lease extension that was essential for a nursing home to stay open. Filing and receiving a waiver on this notice, for a routine transaction that was no more than a temporary extension of operations, likely cost the submitter thousands of dollars, diverted resources from clinical care and long-term planning, and utilized scarce OHCA resources at a time when the state is in a \$45 billion deficit. As requested in letters responding to prior CMIR rulemaking, **CHA asks OHCA to reevaluate its notice requirements and make changes to avoid filings on transactions with only minor impacts.**

Criteria for Conducting a CMIR Lack Balance and Are Inappropriately Expansive

The proposed revisions direct OHCA, when determining whether to conduct a full CMIR, to consider whether a transaction would impact the ability to meet a spending target. While hospitals do not object to this change on its own, CHA is concerned that it reintroduces and reinforces existing serious shortcomings in the overall regulatory section. First, the section directs OHCA to only consider negative impacts from an intended transaction — for example, on access, costs, or potential spending targets — when making its CMIR determination. As a result, prospective benefits such as preventing the closure of a financial distressed entity, broadening access, integrating clinical functions across disparate providers, achieving economies of scale that result in real savings, and fostering collaboration in training new generations of health care providers could all be disregarded in OCHA's determination. **OHCA must consider the full range of prospective impacts when determining whether to conduct a CMIR and should enumerate these and other potential benefits alongside the factors currently specified, as is directed in state law (specifically, in paragraph (a)(2) of Health and Safety Code Section 127507.2).**

Additionally, the existing regulations establish no practical standard for OHCA to determine whether a transaction in fact would have the anticipated impacts. Rather, the regulations authorize OHCA to conduct a CMIR if a transaction “may” result in an enumerated negative impact. Given that “may” only implies mere possibility, the regulations effectively place no constraints on OHCA discretion, placing health care entities at risk for potentially arbitrary decisions. **To address this deficiency, OHCA should amend subparagraphs (A) through (I) of paragraph (a)(1) of section 97441 to state that OHCA shall base its decision on whether a transaction “is likely to result in” the impact enumerated, consistent with the construction of statute (Health and Safety Code 127507.2).**

Opportunity to Withdraw Confidential Information Is Essential

OHCA proposes to amend the regulations to allow health care entities to withdraw information for which they requested confidentiality, but were ultimately denied. This change is essential for ensuring trust in the process and that information will not be released publicly without the consent of the interested parties. Hospitals are grateful to OHCA for incorporating this change.

Conclusion

The California Hospital Association thanks OHCA for the opportunity to comment on the proposed revisions to the CMIR regulations. Hospitals look forward to continued partnership with the office as regulations are finalized.

Sincerely,



Ben Johnson
Vice President, Policy

cc: Vishaal Pegany, Deputy Director, Office of Health Care Affordability
Members of the Health Care Affordability Board:

David M. Carlisle, MD, PhD
Secretary Dr. Mark Ghaly
Dr. Sandra Hernández
Dr. Richard Kronick
Ian Lewis
Elizabeth Mitchell
Donald B. Moulds, Ph.D.
Dr. Richard Pan

Attachments:

California Hospital Association comment letters to HCAI dated October 17, 2023, and December 11, 2023