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Office of Health Care Affordability Appears to Both Limit and Expand Scope of Health Care Transaction Notice Requirements in Latest Draft Regulations

California's Office of Health Care Affordability ("OHCA") published updated draft regulations implementing SB 184's pre-transaction notice requirements. Although subject to further change, the latest draft regulations would somewhat limit the scope of transactions subject to the notice requirement and clarify the procedures by which OHCA conducts its review of transactions. However, certain changes create greater confusion about their applicability to certain types of transactions and entities.

As described in an earlier article, SB 184 requires health care entities to provide OHCA with at least 90 days' notice of certain transactions occurring on or after April 1, 2024 and prevents those transactions from closing until OHCA completes its review of the notices and (1) conducts an in-depth Cost and Market Impact Review ("CMIR") or (2) declines to conduct a CMIR. OHCA spent the summer drafting regulations and taking public comments with the goal of finalizing the regulations by January 1, 2024. The initial draft regulations, published in late July, detailed many important aspects of the notice requirements, including the types of entities and transactions that would require notice as well as the standards by which OHCA would determine whether to conduct a CMIR. However, industry groups and members of the Health Care Affordability Board expressed concern that the notice requirements would apply to an overinclusive set of transactions, risking undue disruption to health care operations and strain on OHCA's ability to review the transactions.

This week's updated draft appears to respond to several of the concerns raised in response to the July draft regulations. Here are some of the most significant changes to the regulations:

- Health care entities may now request that OHCA conduct an expedited review of the noticed transactions based on a demonstration of (1) severe financial distress of one or more of the parties to the transaction, or (2) any significant reduction in the provision of critical health care services within a geographic region or regions.
- "Health care entity" is no longer defined to expressly include management services organizations. However, a health care entity can now include "an organization that acts as an agent of a provider(s) in contracting with payers, negotiating for rates, or development networks." Many management services organizations provide assistance with respect to payor negotiations with their respective managed providers. As a result, while the draft regulations would exclude management services organizations from the per se definition of "health care entity," the regulations may effectively include those same management services organizations depending upon the role they may play in payor contract negotiations.
- "Material change transaction" now has an exception for "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." This change appears to resolve concerns that the notice

requirements would apply to relatively minor transactions for health care entities that met the regulations' asset and revenue thresholds, such as hospitals with over $25 million in California assets.

- The timing of the notice requirement is now explicitly tied to the closing date of a transaction, resolving confusion over the timing applicable to the notice requirements.
- Health care entities must provide notice if the transaction is part of a series of related transactions for the same or related health care services occurring over the past ten years involving the same health care entities or entities affiliated with the same entities. Similarly, health care entities must provide notice if the transaction involves the acquisition of a health care entity and the acquiring entity has consummated a similar transaction with a health care entity providing the same or related services in the last ten years. The proposed and related transactions will constitute a single transaction for purposes of determining the reporting thresholds for the transaction. This change potentially significantly expands the scope of health care transactions that are subject to the new notice and review requirements. We are uncertain whether this is really what OHCA intended. If OHCA really means to take into account all "similar" health care transactions over a 10 year period, including those between different parties, it appears to render the minimum dollar and property thresholds largely meaningless. It would be helpful, and likely make the scope of transactions that OHCA has to review more manageable and practical if further clarification were included in the final regulations and/or other guidance to make clear that all "similar transactions" over ten years with a health care entity (even if unrelated to the current transaction) for the "same" or "related" health care services will not constitute a "single transaction" for purposes of determining applicable revenue or property thresholds. At a minimum, it would be helpful to clarify and narrow what OHCA would consider to be a "similar transaction," involving the "same" or "related" health care services.
- In deciding whether to conduct a CMIR, OHCA will also consider (1) whether the transaction may lessen compensation for workers or negatively impact the labor market, (2) whether the transaction is part of a series of similar transactions by the health care entity or entities or furthers a trend towards consolidation, and (3) whether the transaction may entrench or extend a dominant market position of any health care entity in the transaction, including through vertical or cross-market mergers. This change also appears to potentially significantly broaden the scope of health care deals that may be subject to a CMIR. Further guidance that institutes some guardrails to better define and limit the scope may be helpful to keeping the volume of health care deals that may be subject to a CMIR more narrow, manageable and practical.

Other changes in the latest draft include adjustments to the thresholds for the size of certain types of transactions to require notice, the types of materials and information that must be included in the notices and which of the parties to a transaction must provide notice to OHCA.

OHCA will accept public comment on the latest draft regulations until 5:00 p.m. on October 17, 2023 and plans to submit the final regulations to the Office of Administrative Law ("OAL") by the end of the month. The draft regulations are subject to further change until finalized by OAL. Members of the California health care industry should continue to monitor changes to the regulations and anticipate how the regulations may impact transactions and operations beginning in 2024.