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HEALTH LAW CLIENT ALERT

CHAPTER 224 HEALTH CARE COST CONTAINMENT UPDATE #8:

HEALTH POLICY COMMISSION RELEASES PROPOSED MATERIAL CHANGE NOTICE REGULATIONS; PUBLIC COMMENTS DUE OCTOBER 31, 2014

The Health Policy Commission (the “HPC”) issued proposed regulations on September 4, 2014 governing material change notices (“MCNs”) and cost and market impact reviews (“CMIRs”) (the “[Draft Regulations](#)”). These Draft Regulations, to be codified at 958 CMR 7.00, will supersede the HPC’s previous MCN and CMIR guidance contained in Bulletin 2013-01 and Policy 2013-01. The HPC concurrently released a [Technical Bulletin](#) to accompany the Draft Regulations which provides specific instructions for calculating several items included in the defined terms of the Draft Regulations. The HPC has not proposed a new MCN reporting form at this time. A public comment period has commenced, and a public hearing at which testimony may be presented has been scheduled for October 1, 2014.

Overall, the Draft Regulations expand the HPC’s scope of authority as previously set forth in the 2013 Bulletin and Policy, adding some clarity to the process which is likely to result in providers submitting MCNs in cases where they previously may have thought no MCN was required.

The definitions section of the Draft Regulations, 958 CMR 7.02, contains several important changes. Of note, the definitions of Acquisition, Clinical Affiliation, Contracting Affiliation, Corporate Affiliation, and Material Change encompass a broad range of transactions between health care providers for which HPC notice is required:

- A “Material Change” includes any of the following types of changes:
 1. A Merger or affiliation with, or Acquisition of or by, a Carrier;
 2. A Merger with, or Acquisition of or by, a Hospital or hospital system;
 3. Any other Acquisition, Merger, or affiliation (such as a Corporate Affiliation, Contracting Affiliation, or employment) of, by, or with another Provider, Providers (such as multiple Health Care Professionals from the same

Provider/Provider Organization), or Provider Organization that would result in an increase in annual Net Patient Service Revenue of the Provider or Provider Organization of \$10 million or more, or in the Provider or Provider Organization having a near-majority of market share in a given service or region;

- It is important to note that this subcategory of Material Change now requires an analysis of whether a transaction will result in a near-majority of market share, whereas it previously considered only a \$10 million impact.
 - We also note that this category now includes affiliations between a physician group and a Provider/Provider Organization.
4. Any Clinical Affiliation between two or more Providers or Provider Organizations, each of which had annual Net Patient Service Revenue of \$25 million or more in the preceding fiscal year; and
 5. Any formation of a partnership, joint venture, accountable care organization, parent corporation, or other organization created for the purpose of contracting on behalf of one or more Providers or Provider Organizations.

At the HPC's September board meeting, Commissioner Sudders indicated that the proposed definition of "Material Change" set forth above should be further broadened to encompass the closing down of covered health care providers and of specific service lines, such as behavioral health services. The Department of Public Health ("DPH") had indicated to the HPC during the drafting process that DPH already has significant oversight over closings through the Determination of Need and essential services processes. Because DPH's oversight does not cover certain hospital and non-hospital services, we expect testimony to be submitted in this area.

- An "Acquisition" includes a license substitution, standard asset purchase, or troubled asset purchase, but does not include the employment of an individual health care professional. It is unclear if certain situations could fall within the scope of an Acquisition (such as the expansion of services by a provider to replace services previously offered by a closed facility or provider, perhaps including a limited asset purchase by the active provider).

- “Clinical Affiliation” incorporates any relationship between a Provider/Provider Organization and another organization for the purpose of increasing the level of collaboration in the provision of health care services.
 - The examples provided include: sharing of physician resources in hospital or ambulatory settings; co-branding; expedited transfers to advanced care settings; provision of inpatient consultation coverage or call coverage; enhanced electronic access and communication; co-located services; provision of capital for service site development; joint training programs; video technology to increase access to expert resources; and sharing of hospitalists or intensivists. It would be helpful to obtain clarification of what falls outside of the scope of this broad definition.
- “Contracting Affiliation” covers arrangements for the purposes of establishing contracts with a carrier or third-party administrator for the payment of health care services, including payment rates, incentives, and operating terms.
- “Corporate Affiliation” includes both partial and complete controlling interests or common control.
- “Non-Material Change” functions as a short catch-all that includes changes not considered a Material Change. As an example, changes to a provider’s board of directors would seem to qualify as a Non-Material Change.
 - The definitions of Dominant Market Share, Materially Higher Price, and Materially Higher Health Status Adjusted Total Medical Expenses now contain additional detail on how each item is calculated. This change is relevant to which transactions the HPC is (and is not) required to report to the Attorney General. Exact calculation formulas are contained in the Technical Bulletin; how the process will work or who will be responsible for such calculations, e.g., if experts will need to be employed by the HPC and/or providers, is not yet clear.
 - The definitions of Dispersed Service Area and Primary Service Area have been revised to illuminate how the HPC will gauge market share and a transaction’s impact generally.

In addition, the Draft Regulations contain a provision allowing the HPC to require information from other providers or payers not involved in the transaction under review. Information from competing providers is likely to significantly impact both the substance and the timeframe of the HPC’s review of a transaction. Furthermore, the Draft Regulations make explicit the HPC’s

right in its discretion to forward a final CMIR to the Attorney General, even if the HPC is not required to do so pursuant to M.G.L. c. 6D, § 13(f).

Public comments on the Draft Regulations are due by October 31, 2014.

If you have any questions about the Draft Regulations and their potential impact, please contact Attorneys Jennifer Gallop (jgallop@kb-law.com), Robert Griffin (rgriffin@kb-law.com), or Emily Kretchmer (ekretchmer@kb-law.com). We would also be happy to assist in submitting public comments on your behalf.